

WISCONSIN COURT OF APPEALS
DISTRICT 4

In re the Paternity of K.J.P.:

Jerome E. Parrish,

Appeal No.
2006AP000243

Petitioner-Respondent,

Circuit Court Case
No. 1992PA000011A

v.

Diana Romfeldt–Mendoza,

Respondent-Appellant.

APPEAL FROM CIRCUIT COURT FOR RICHLAND COUNTY
HONORABLE EDWARD E. LEINWEBER, PRESIDING
BRIEF OF NONPARTY
NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL

Ness Flores
State Bar # 1011658

523 North Grand Avenue
PO Box 2167
Waukesha, WI 53187
262-544-1202

Paul Marvy
Northwest Justice Project
401 Second Avenue South, Suite 610
Seattle, WA 98104
206-464-1519

Debra Gardner
Public Justice Center
500 East Lexington Street
Baltimore, MD 21202
410-625-9409

Counsel for NCCRC

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I. STATEMENT OF INTEREST AND INTRODUCTION

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association which seeks to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs. Over one-hundred-thirty members from more than thirty-five states comprise the coalition, including civil legal services advocates, supporters from public interest law firms, the private bar, academy, state and local bar associations, access to justice commissions, national organizations, and others. NCCRC has an interest in this appeal because it presents the question of whether there is a right to counsel in civil cases under the Wisconsin Constitution.

NCCRC's brief will summarize the body of research which demonstrates the dramatic extent to which having a lawyer matters. It will then trace the renaissance in recent years of efforts to establish a right to counsel in certain civil cases, including the type of case before this Court.¹

II. ARGUMENT

A. HAVING A LAWYER IS CRITICAL

In her brief, Diana Mendoza, now represented by counsel, has made clear a number of ways in which a lawyer likely could have saved her from the outcome of this case below. It is particularly noteworthy that her fate was determined by a series of purely procedural determinations. She never even succeeded in getting

¹ Ms. Mendoza and others filing briefs in her support have made legal arguments and brought forth other information relevant to the decision the Court must make in this case. NCCRC will not belabor any of those points.

the trial court to address her claims on their merits.

Her experience is consistent with the results of numerous studies which have examined the question of whether having a lawyer affects the outcomes of civil cases. One researcher found, after examining the results of fourteen studies involving over 14,000 civil cases, that having a lawyer increases a party's chances of a positive outcome by seventy-two percent. Rebecca Sandefur, *Effects of Representation on Trial and Hearing Outcomes in Two Common Law Countries* 15 (July 7, 2005) (unpublished manuscript available at <http://www.reds.msh-paris.fr/colloque/sandefur.pdf>) (last visited July 5, 2006). For many, this general statement is accepted intuitively, with the precise percentage perhaps adding scientific credibility. It is the more specific results of a number of studies that better help to tell Ms. Mendoza's story.

First, parties without lawyers are far more likely to fall prey to procedure. In fact, the advantage of having a lawyer is strongly associated with procedural complexity (accounting for almost a third of the total advantage gained). *Id.* at 18. This is ironic because modern procedural reform was intended to foster resolution of cases on their merits rather than on technicalities. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 447 (1991). There was also a clear intent to close the gap between poor litigants and others. Kathleen L. Blaner et al., *Federal Discovery: Crown Jewel or Curse?*, 24 No. 4 Litig. 8, 8 (1998). While procedural reforms may have resulted in better correspondence of outcome and merit for those with the legal expertise to

use them, studies continue to show that unrepresented litigants find outcomes based on merit difficult to achieve because of those same procedures.

For instance, at the most basic level, unrepresented parties have much higher rates of default. Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419, 427 (2001) (only 6% of represented parties default versus 28% of unrepresented); Steve Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 413 (1995) (default rate of 0% for parties with lawyers, 19% for those without). While it is unclear whether the occasion for dismissal of Ms. Mendoza's claims was, in the lower court's eyes, a default per se, she failed to respond as the court expected and her claims were dismissed as a result. It is fairly obvious that a lawyer representing her could have prevented that.

Furthermore, during contested proceedings, parties with lawyers make much greater use of procedural mechanisms that are key to success in civil litigation than do parties without. Those with lawyers are, for example, more likely than those without to file motions (78% compared to 3%), request discovery (62% compared to 0%), and receive continuances (35% compared to 3%). Gunn at 411 (motions); Russell Engler and Craig Bloomgarden, *Summary Process Actions In The Boston Housing Court: An Empirical Study and Recommendations For Reform* 17 (May 20, 1983) (unpublished manuscript on file) (discovery); Anthony Fusco, et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*,

17 Urb. L. Ann. 93, 115 (1979) (continuances). In her brief, Ms. Mendoza identified the circumstances where a lawyer might well have availed her of each of these tools.

Next, a party who is unrepresented but faces a lawyer on the other side is at a significant disadvantage. Her chances of prevailing drop by approximately half. Robert Mnookin, et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating? In Divorce Reform At The Crossroads* 64 (New Haven: Yale University Press, 1999). See also Jane Ellis, *Plans, Protections, And Professional Intervention: Innovations In Divorce Custody Reform And The Role Of Legal Professionals*, 24 U. Mich. J.L. Reform 65, 132 (1990); Engler and Bloomgarden at 53-58. This imbalance can only be compounded where, as here, Ms. Mendoza faced two lawyers who employed every available maneuver against her.

Moreover, and perhaps obviously, lawyers' knowledge of and ability to raise substantive claims and defenses has also been found substantially to improve outcomes for their clients. First, represented litigants far more frequently raise such issues. Marilyn Mosier and Richard Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. Mich. J.L. Reform 8, 115 (1973) (83% of represented litigants raised available defenses compared to 30% of unrepresented); Engler and Bloomgarden at 18-19 (80% versus 2%). Second, raising substantive claims and defenses, as would be expected, greatly increases represented litigants' chances of achieving

outcomes that reflect the underlying merits of their cases. Gunn at 413-414. As noted, Ms. Mendoza never got the chance to raise such issues.

Representation can also ease the burden on the courts. Parties with lawyers are much more likely to achieve settlement than those without. Seron, et. al., at 427 (31% with lawyers settled favorably compared to 2% without); Engler and Bloomgarden at 23-25) (32% versus 5%); Mosier and Soble, at 47 (17% versus 0%). Here, without counsel, Ms. Mendoza was unable to memorialize an agreement concerning summer visitation.

Availability of representation can play a particularly significant role in custody disputes for many of these same reasons. In such cases, early motions practice, particularly for temporary orders, can be critical if not dispositive. The cases require presentation of timely, relevant and focused evidence, much of which may only be available through discovery. There are also ample opportunities for negotiated settlements. For these and related reasons, represented parties fare much better in custody contests than unrepresented litigants, and the finding is much stronger when one party is represented and the other is not. Ellis at 124-135; Mnookin, et al. at 61-65. Moreover, although this case is not a proceeding for an order of protection from domestic violence, Ms. Mendoza did attempt to raise allegations that her daughter was being abused in connection with her request for change of custody. It is therefore instructive that, in seeking such protective orders, applicants with lawyers succeed eighty-three percent of the time, while only thirty-two percent of applicants without lawyers

obtain such orders. Jane Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U.J. Gender Soc. Pol’y & L. 499, 511-512 (2003).

Thus, it is clear that Diana Mendoza needed a lawyer in this case if she were to have access to justice.

B. THE TIME HAS COME FOR A CIVIL RIGHT TO COUNSEL

A renewed exploration for the right to counsel for poor litigants in certain civil cases has recently begun in earnest. This is no doubt in response to the avalanche of research showing, as noted above, that having a lawyer is critical to the ability of a poor litigant to gain access to justice, and, as explained in other briefs, that the civil legal needs of the poor continue to go largely unmet because of inadequate funding. But this recent foray is by no means the first: modern scholars have written about a civil right to counsel since the early twentieth century. *See, e.g.*, Maguire, John, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 366 (1923).

The U. S. Supreme Court in *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18 (1981), authorized trial courts to declare parents entitled to counsel in individual termination of parental rights cases but stopped short of holding that parents in all such cases are categorically entitled to counsel. A body of literature soon developed critiquing the *Lassiter* decision. *See, e.g.*, Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988). In recent years,

this criticism has intensified, and the exploration has broadened. *See, e.g.,* Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel For Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363 (2005); Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000); Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998).

Among today's most passionate voices in support of a right to counsel in critical civil cases is that of Michael Greco, the President of the American Bar Association. He has said that "it is a source of shame and simply unacceptable that in the wealthiest nation on earth, we failed to make good on the promise of equal justice and equal access to justice for all." Michael S. Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time Has Come*, A.B.A. J., Dec. 2005, at 6. Noting that this nation has for decades guaranteed the right to counsel in criminal cases involving the threat of even brief incarceration, he continued:

No one in our nation should have to go to court unassisted when facing a problem that could result in loss of shelter, family dissolution or serious adverse health consequences. Americans should not be subject to grievous harm at the hands of a legal system that they cannot navigate or even understand on their own...

The importance of ensuring access to legal services and to justice for the most vulnerable in a democratic society cannot be overstated. The ability of an individual to address civil legal needs with the help of a lawyer can make the difference between stability and poverty, between hope and despair.

Id. For these reasons, President Greco appointed a Task Force on Access to Civil Justice and charged it with the responsibility of considering the defined right to counsel in certain serious civil matters. That Task Force has submitted to the ABA House of Delegates, for consideration at its August 2006 Annual Meeting, a proposed ABA Policy Resolution as follows:

RESOLVED, that the American Bar Association urges federal, state and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

A.B.A. Task Force on Access to Civil Justice, 2006 Report to House of Delegates 1, (available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc>) (last visited July 6, 2006).

Fueled by the widespread inability of poor litigants to find counsel in such cases, and the devastating consequences thereof, advocates for the poor are pursuing the civil right to counsel in the courts. And courts are increasingly recognizing constitutional rights to the appointment of counsel in certain types of civil cases.

In New York, mothers who faced removal of their children from their custody because they had been victims of domestic violence sought an injunction requiring the state to pay rates sufficient to ensure that their government-appointed lawyers could represent them adequately. Based on its determination that the plaintiffs had a constitutional right to counsel in these proceedings, the court

granted their request. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 237-241 (E.D.N.Y. 2002). In Georgia, in a case challenging among other things the failure of the government to provide a sufficient number of lawyers to represent children effectively in abuse and neglect proceedings, foster children won recognition under the Georgia constitution of the right to government-funded counsel in such cases. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005). *See also In re K.L.J.*, 813 P.2d 276 (Alaska 1991) (state constitution provides right to counsel in termination of parental rights); *In re Jay*, 197 Cal. Rptr. 672 (Cal. App. 1983) (same in contested adoptions).

In Washington, state courts have faced two cases in which the right was sought in contexts beyond termination of parental rights on state constitutional grounds. In *Kenneth Smith v. City of Moses Lake*, , No. 21783-3-III, slip op. (Wash. Ct. App. May 21, 2003), an elder gentleman surviving on a very low fixed income faced the loss of his home of fifty years in proceedings brought by the city to demolish it. Summary judgment had been granted to the city in the trial court where Mr. Smith had no lawyer. While his appeal was pending, in which he argued, through appellate counsel, that he had a state constitutional right to a court-appointed lawyer in the trial court, Mr. Smith died and the appellate court did not reach this central issue. Then, in *In re custody of Halls*, 109 P.3d 15 (Wash. App. 2005), a low-income mother involved in a custody dispute replete with procedural entanglements like those Ms. Mendoza faced, argued on appeal that she had a state constitutional right to a court-appointed lawyer. Once again,

the intermediate court in Washington failed to reach this issue, holding instead that the mother was entitled to counsel on statutory grounds related to the procedural posture of the case (civil contempt). *Id.* at 22.

Another recent case illuminates the status of judicial debate on this issue. In *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), Maryland's highest court decided an appeal brought by an indigent mother facing a claim for custody of her toddler by unrelated third parties. She raised on appeal the claim that she had a right to a lawyer. The court granted her an undeniable victory, throwing the custody claim against her out of court entirely, but in so doing it failed to reach the question of her right to a lawyer. 840 A.2d at 129. However, three of the seven judges of that court filed a concurring opinion in which they indicated they would have reached the issue and recognized the right to counsel, under the Maryland Declaration of Rights, in custody disputes like the one presented. *Id.* at 138 (Cathell, J., concurring). The author of that concurrence stated, in part:

I think it can be agreed that the quality of justice received, even in our system, arguably the best system of justice ever conceived, is impacted by the presence or absence, and the quality of, legal representation of the respective parties. I readily understand that it may well be beyond our power to create a perfectly equal system, but, that acknowledged, there is no acceptable reason to avoid doing what we can do, even if it is perceived that what we do may not be well received by other governmental entities that will have to address the impact of our rulings.

Id. at 133.

While I certainly cannot speak for the individual judges of this Court, it is my belief that there is no judge on this Court that believes in his or her heart or mind, that justice is equal between the poor and

the rich--even in the tradition hallowed halls of our appellate courts. Each of us knows, I believe, that an unrepresented parent involved in the appellate process in respect to custody, visitation, or parental termination issues, when opposed by competent counsel for the opposing party (sometimes opposed by an organ of the State with its legions of lawyers), is normally not afforded the equal protection of the laws, *i.e.*, an equal access to justice to which all citizens are entitled--in spite of the efforts of this Court to afford that equality. With the constraints of the adversarial court system, and the prohibitions it (and our cases) place upon judges not to assist either side, the poor, unrepresented parent faced with experienced counsel on the other side is at a great, system-built-in, disadvantage.

Id. at 134.

We should also be realistic. We can decline to address many problems. But, unlike many cases of a lesser nature, this issue will not go away... This issue will keep coming back... until four judges of this Court vote to resolve it one way or the other.

Id. at 138.

The right to counsel in civil cases involving basic human needs and fundamental interests is essential to justice in a democratic society. Poor litigants like Diana Mendoza continue daily to suffer the ravages of a legal system that visits devastating consequences without affording meaningful access to justice. The time for a civil right to counsel has come.

II. CONCLUSION

For the foregoing reasons, the National Coalition for a Civil Right to Counsel urges this Court to grant the relief requested by Diana Mendoza.

Respectfully submitted,

Ness Flores
State Bar # 1011658

523 North Grand Avenue
PO Box 2167
Waukesha, WI 53187
262-544-1202

Debra Gardner
Public Justice Center
500 East Lexington Street
Baltimore, MD 21202
410-625-9409

Paul Marvy
Northwest Justice Project
401 Second Avenue South, Suite 610
Seattle, WA 98104
206-464-1519

Counsel for NCCRC

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the requirements contained in Supreme Court Rule 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is eleven pages and consists of 2,987 words, as determined by the word-count function provided by Microsoft Word.

Respectfully signed this ____ day of July, 2006.

Ness Flores
State Bar # 1011658

523 North Grand Avenue
PO Box 2167
Waukesha, WI 53187
262-544-1202