
IN THE
COURT OF APPEALS OF MARYLAND

No. 6
September Term, 2003

DEBORAH FRASE, et al.,
Appellant,

v.

CYNTHIA BARNHART, et al.,
Appellees.

On Writ of Certiorari to the Court of Special Appeals
(On Appeal from the Circuit Court for Caroline County)

**Brief of Amicus Curiae
Maryland State Bar Association, Inc.**

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Interest of the Amicus

The charter of the Maryland State Bar Association, Inc. ("MSBA") charges the organization with, among other things, facilitating the administration of justice. Through the MSBA's Delivery of Legal Services Section, MSBA works to "promote the administration of justice in the State of Maryland by providing and encouraging others to provide legal services in those areas of law practice in which legal representation is not adequately and routinely available...[which] may include, for example, legal services for the indigent"

In addition to the stated mission of the MSBA and its Delivery of Legal Services Section, the MSBA has a long and proud tradition of supporting access to justice for all citizens, and of carrying out the legal profession's responsibility to promote public respect for the rule of law. The ideal of equal access to justice remains unfulfilled when a high percentage of requests for urgent legal assistance made by indigent Maryland citizens cannot be met by the best efforts of existing civil legal aid resources and pro bono services. In addition, public respect for the rule of law depends critically on the legal system's ability to mirror the public's perception that justice is administered evenhandedly. Studies have shown, however, that as much as 80% of the American public believes, mistakenly, that in urgent civil matters a lawyer will be provided for persons who cannot afford one. This gap between public perception and reality threatens respect for the rule of law.

The necessity of supplementing the efforts of legal aid organizations to provide legal representation to indigent persons whose fundamental rights are at stake entails costs that must be borne by all of society, and should not rest exclusively on the shoulders of the private bar.

Questions Presented

Appellant poses three questions. They are:

1. Was it error for the court not to recuse a master who, in a closely related custody case against the appellant while the master was a private attorney, had represented a key fact witness in the present case?
2. Was it error for the court to: a) impose conditions on a fit parent's custody of her child, and b) force that parent to continue to litigate a third-party custody matter when there was no finding of unfitness or exceptional circumstances?
3. Was it error for the court to deny, or repeatedly fail to rule on, an indigent mother's request for court-appointed counsel in a contested custody matter?

This brief addresses only issues related to the right to appointed counsel raised by Question 3.

Summary of Argument

A person's ability to assert fundamental rights should not be a function of one's financial status. An indigent person's inability to obtain legal representation

can imperil fundamental rights and can undermine confidence in the equal administration of justice. To function fairly, the adversarial system of justice depends on the essential role of lawyers as advocates. The notion that lawyers make a difference in ensuring just outcomes is borne out by a number of empirical studies. Society as a whole benefits when legal representation is available to citizens to assert fundamental rights, without regard to their financial condition.

Access to justice is not solely the province of lawyers and should not be solely the responsibility of the private bar. The State of Maryland, and the Maryland bar, have a proud tradition of extending legal representation to those in need. In reality, there are still many of Maryland's disadvantaged citizens who have fundamental legal needs which go unmet. Recognition of a right to counsel in certain limited civil cases involving fundamental legal rights for indigents will address some of the unmet need, and will reemphasize the obligation of society to craft responses to meet that need. If the Court extends *Gideon*-type rights, the burden for provision of such must be borne by all Marylanders, not just those in the legal profession.

Argument

I. A Citizen's Ability To Safeguard Fundamental Rights Should Not Be A Function Of One's Financial Resources In A Society That Values Equal Administration Of Justice

An indigent Maryland citizen may be exposed to a grave risk of deprivation of fundamental rights when he or she is forced to defend those rights in an

adversary proceeding without the aid of counsel. The record in this case shows that Ms. Frase qualified for legal aid, but was unable to obtain assistance because of the severe limitations on available resources. As a result, she was required to use her best efforts to represent herself in a proceeding involving the possible loss of custody of her three-year-old son to a family that was unrelated to her and had only a limited connection to her son.

Ms. Frase's financial constraints, and her inability to obtain counsel, directly imperiled her fundamental right as a parent "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000)(holding that a non-parental visitation statute unconstitutionally infringed a parent's fundamental right to make decisions concerning her children). Under the Supreme Court's recent decision in *Troxel*, Ms. Frase should never have been subjected to the spectre of a loss of custodial rights to the Barnhart family. But, as a direct result of her financial condition and her own lack of legal training, Ms. Frase was unable to effectively assert compelling arguments available to her to protect her fundamental rights as a parent under *Troxel*. In addition, had Ms. Frase been able to obtain counsel, counsel would undoubtedly have discovered that the Master who presided over the hearing on the merits had previously, as a private attorney, represented Ms. Frase's mother, a key witness in the hearing, in a custody proceeding in 1993 involving Ms. Frase's oldest child. Without counsel to assist her in obtaining the file from the earlier proceeding and to investigate the

grounds for recusing the Master, Ms. Frase was tried before a Master who had personal knowledge of disputed evidentiary facts, a circumstance which the Master failed to disclose.

When the legal system fails to protect the fundamental rights of a citizen as a direct consequence of that person's inability to pay for or be appointed counsel, a long shadow is cast over the ability of "the courts [to] maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law." Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 503 (1998). The Brief of Appellant presents a compelling argument that a right to counsel is guaranteed to indigent Maryland citizens in at least some civil contexts. The recognition of such a right would be consistent with widely held notions of the basic fairness in our civil justice system. According to a poll conducted in 1991, 79% of Americans believe that there already exists a constitutional right to free counsel for indigent citizens in civil cases. Sweet, *supra*, at 504. This mistaken impression likely grows from the broad understanding and acceptance of the rationale for providing counsel in criminal cases: the notion that our adversary system requires a rough balance of ability to present the opposing sides of a case. See Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 Am. Crim. L. Rev. 35, 49 (1991)(footnotes omitted). In this regard, it is noteworthy that *Gideon v. Wainwright* is considered one of the most legitimate, and popular, constitutional

decisions of the Supreme Court. *See Garcia, supra. Gideon's* legitimacy rests substantially on the notion that the case "affirmed a right that is now fundamentally accepted in our society." Krash & Lewis, *The History of Gideon v. Wainwright*, 10 Pace L. Rev. 379, 382 (1990). Conversely, the reality that counsel is often not available to indigent persons in civil cases whose fundamental rights are at stake is at odds with society's basic understanding of equal justice.

II. Lawyers Play An Indispensable Role In Ensuring Fairness And Just Outcomes In Our Adversarial System Of Justice

The Supreme Court has long understood the "obvious truth" that the services that an attorney performs on behalf of a client—at least in a criminal case—are more than merely helpful to the presentation of the case, but are in fact *necessary* to providing a fair trial, and due process. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963)(Sixth Amendment right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.") (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)). As the Court observed in its landmark *Gideon* decision:

In our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crimes That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

Id. at 344.

Although the Supreme Court's right to counsel cases discuss the essential role of an attorney in the context of criminal cases, it is the nature of our adversarial system, rather than any particular features of the criminal process, that makes the role of counsel indispensable to fairness. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court reasoned that due process required appointed counsel for indigent defendants in state capital cases, explaining the need for an attorney in terms that apply equally to the need of an indigent person in a civil case:

If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.

Id. at 64. See also *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our *adversary system* of criminal justice is that *partisan advocacy on both sides of a case* will best promote the ultimate objective that the guilty be convicted and the innocent go free.") (emphasis added); *United States v. Ash*, 413 U.S. 300, 309 (1973) (an indigent defendant must confront "the intricacies of the law and the advocacy of the public prosecutor"); see, e.g., *Douglas v. California*, 372 U.S. 353, 358 (1963) (noting the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf"). Without an attorney, the legal system can appear to a layperson "intricate,

complex, and mysterious.” *Johnson v. Zerbst*, 304 U.S. 458 (1938).

As the Supreme Court’s cases suggest, the aspiration of the judicial system, and indeed of the legal profession itself, to deliver equal justice requires the advocacy of attorneys for both parties to a case. In civil cases as in criminal cases, attorneys are uniquely qualified by training and experience to undertake and supervise the intensive factual investigation and analysis necessary before a case is ready to proceed to trial. Laypersons unaided by attorneys cannot be expected to understand the procedures, or identify the substantive grounds, for disposing of a case before trial by dismissal or summary judgment. At trial, the effective presentation of meritorious claims and defenses depends on the attorney’s skills and knowledge of rules and procedures. Without the guiding hand of counsel, an unrepresented party’s inability to present a case can create the impression that “no lawyer could have saved the defendant anyway and thus the lack of counsel often serves as a justification for the lack of counsel.” Kamisar, *Gideon v. Wainwright A Quarter Century Later*, 10 Pace L. Rev. 330, 343 (1990).

The absence of counsel for a party also imposes burdens and challenges on the decisionmaker. Sweet, *supra*, at 505 (“As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective assistance of counsel.”). Indeed, surveys of trial judges reveal that many judges believe the legal system as a whole is undermined because indigent pro se litigants are unable to assert their rights effectively, while litigants who can afford

counsel are generally able to do so. Laura K. Abel, David S. Udell, *If You Gag the Lawyers, Do you Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 Fordham Urb. L.J. 873, 895 (2002). A national survey conducted by the American Judicature Society and the Justice Management Institute found that many judges are concerned about the challenges presented to the adversary system when one party is pro se. Jona Goldschmidt, *How Are the Courts Handling Pro Se Litigants?* 82 Judicature 13 (1998). One judge cited as problematic “my own discomfort when it appears a different legal result could (likely would) occur if the pro se party took appropriate action.” *Id.* at 17-18. Another judge stated: “The principal problem is the unfairness of a pro se party who is not familiar with the law facing an adversary situation against an attorney.” *Id.* at 18.

Ms. Frase was manifestly disadvantaged in the adversary proceeding against her as a result of her inability to obtain counsel, as set forth in detail in the Brief of Appellant. Ms. Frase conducted no pretrial discovery. Untrained in the rules of procedure and evidence, she was unable to effectively counter opposing counsel’s efforts to cast doubt on her parenting abilities, or to challenge the suitability of the Barnhart family for custody of her child. She was forced to cross-examine her own mother, with whom her relationship was exceedingly strained, resulting in an emotional and argumentative exchange rather than an effective examination. Her own direct testimony was driven by questions from the

Master, and opposing counsel's cross-examination was conducted without the aid of counsel to object and limit the questioning. Throughout the hearing, Ms. Frase rarely objected to irrelevant, hearsay or otherwise inadmissible testimony. And, most fundamentally, she was effectively unable to present the compelling constitutional defense available to her (a parent's fundamental rights) or to assert the meritorious grounds for the recusal of the Master presiding over her hearing.

III. Empirical Studies Show That Legal Representation Increases A Party's Opportunity To Receive A Favorable Outcome And Benefits Society As A Whole

A number of studies and surveys confirm what the practicing lawyer knows from experience and observation: parties represented by counsel obtain better results in the judicial process than unrepresented parties. For example, a recent study of bail hearings involving 4000 lower-income defendants represented by the Baltimore City Lawyers at Bail Project over an eighteen-month period compared the outcomes of represented and unrepresented defendants in bail proceedings. The study found represented defendants were more than two and a half times more likely than unrepresented defendants to receive release on recognizance from pretrial custody. Colbert, Paternoster, and Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 *Cardozo L. Rev.* 1719 (2002). The study also found that, compared to unrepresented defendants, two and one half times more represented defendants obtained a reduction of bail to an affordable amount. *Id.* Moreover, the study found that the

most important factor determining which nonviolent defendants received lengthy pretrial incarceration was the appearance of counsel before the pretrial release determination. *Id.*

The Maryland Legal Services Corporation's *Action Plan for Legal Services to Maryland's Poor* (1988) cited a comparable effect from the assistance of counsel in the ability of claimants in contested administrative agency hearings to succeed in reversing an agency's denial of public benefits. The *Action Plan* reported that Medical Assistance claimants before the Maryland Department of Health and Mental Hygiene were represented by counsel in 21% of hearings. When benefits were denied, claimants who were represented by counsel succeeded in reversing the denial of benefits in 76% of cases, compared to a reversal rate of 46% when the claimants were not represented. *Action Plan* at 12. Similarly, the Maryland Department of Human Resources estimated that counsel, usually a Legal Aid attorney or paralegal, was present at about 15% of hearings contesting a denial of benefits. Claimants represented by counsel were able to get the agency's decision reversed in 70-80% of cases, compared to a reversal rate of 40-45% when claimants were not represented by counsel. *Id.* A comparable differential was noted in contested Social Security Administration claims, where claimants were represented by counsel in 49.5% of cases. Represented claimants won reversals of denials in 60% of cases, while unrepresented claimants succeeded in 36% of challenges. *Id.*

The results of a experiment testing the effects of legal representation in New York City's Housing Court, where virtually all landlords are represented, and--absent the legal assistance provided in the experiment--few of the low-income tenants are represented, found that the availability of counsel dramatically affected outcomes in litigation. Seron, Van Ryzin, Frankel & Kovac, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Society Rev. 419 (2001). The study found that "low income tenants with legal representation experience significantly more beneficial outcomes than their counterparts who do not have legal representation, independent of the merits of the case." *Id.* at 420. The randomized experiment offered legal representation to qualifying tenants waiting in line at the clerk's office in the Manhattan Housing Court, and compared the outcomes for the represented tenants against a control group of unrepresented tenants. Where a tenant was represented, a final judgment was entered against him or her in 21.5% of cases, compared with final judgments in 50.6% of cases against unrepresented tenants. *Id.* at 428. Similarly large differences showing favorable results for represented tenants were reported with respect to other procedural outcomes: warrants of eviction (10% of represented tenants, 44.1% of unrepresented tenants); stipulations requiring rent abatement (31.3% of represented tenants, 2.3% of unrepresented tenants); and stipulations requiring repairs (63.8% of represented tenants, 25.4% of unrepresented tenants). *Id.*

The effect of representation has also been demonstrated in the family law context. A very recent Maryland study has found that battered women represented by counsel succeeded in obtaining a protective order in 83% of cases, compared to 32% of women who sought an order without legal representation. See Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U. J. Gender L. & Soc. Pol'y 101 (2002). Another study found that, after controlling for gender, represented parents in custody proceedings were more likely to be awarded physical custody than unrepresented parents. Nancy ver Steegh, *Yes, No, and Maybe: Informed Decisionmaking about Divorce Mediation in the Presence of Domestic Violence*, 9 Wm. & Mary J. Women & L. 145, 167 (2003)(citing Eleanor E. Maccoby & Robert J. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 110 (1997)).

Beyond the direct benefit to the represented party who obtains appointed counsel, a number of less obvious but no less real societal benefits accrue from the broad availability of legal counsel to indigent persons. For example, a recent study has found that the availability of legal services to victims of domestic violence in a particular community was a leading variable in the level of domestic violence in the community. See Farmer & Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, at 11 (Dec. 2002)(on file with the Brennan Center for Justice). A report of the New York Department of Social Services found that

providing attorneys to indigent defendants in eviction proceedings saved \$4.00 for every \$1.00 in legal costs. *Funding Legal Services to the Poor*, Report to the Chief Judge, N.Y. Legal Services Project, at 7-8 (May 1998). A California Commission on Access to Justice draft report noted that a modest legal services project to assist unemployed persons in having their driver's licenses reinstated had the aggregate effect of generating approximately \$3 million in annual wages by enabling the persons to drive to available construction work. California Commission on Access to Justice, *The Cost Effectiveness of Legal Aid and The Societal Benefits of the Services Provided* (May 31, 2001 draft report).

In summary, the nature of the adversarial system of justice, and the evidence that the provision of counsel has measurable positive effects on the ability of indigent persons to obtain justice, suggest that the assistance of counsel is necessary to the protection of fundamental rights in our adversary system. As discussed below, the availability of counsel at least in certain civil contexts (i.e., matters involving fundamental rights) should not depend solely on the ability of the legal services community and the bar to provide free legal assistance.

IV. The State Of Maryland, The Bar, And Legal Aid Organizations Have A Long And Continuing Tradition Of Providing Free Legal Services, But Such Assistance Is Still Insufficient To Meet The Legal Needs Of Indigent Maryland Citizens.

Maryland has a venerable and justly admired tradition of progressively extending the availability of civil legal assistance to its indigent citizens. See Robert J. Rhudy, "MLSC Continues a Tradition of Aid to the State Poor,"

Maryland Daily Record, May 1, 1988. Founded in 1911 and incorporated in 1929, Baltimore's Legal Aid Bureau adopted as its purpose providing "legal aid gratuitously, if necessary, to all who may appear worthy thereof and who are unable to procure assistance elsewhere, and to promote measures for their protection." In 1940, the private bar formed a joint committee with the Legal Aid Bureau to coordinate pro bono referral cases involving Bureau clients. Public support for legal aid was scant until the mid-1960s, when federal funding became available through the Office of Economic Opportunity ("OEO") Legal Services Program, whose first director was Maryland attorney and law professor E. Clinton Bamberger. In 1975, the OEO program was replaced by the federal Legal Services Corporation ("LSC"), which experienced substantial budget growth from 1975 to 1981.

Under pressure from the Reagan administration to eliminate the LSC, Congress in 1982 cut the LSC's budget by 25%. The Maryland General Assembly, acting in response to the urging of the MSBA and local bar associations, enacted the Maryland Legal Services Corporation Act, which created the nation's first legislated state institution to oversee the provision of civil legal services for indigent persons. The preface of the Act stated: "There is a need to provide equal access to the system of justice for individuals who seek redress of grievances. The availability of legal services reaffirms faith in our government of laws. The funding of legal assistance programs for those who are unable to afford

legal counsel will serve the ends of justice and the general welfare of all Maryland citizens.” The Act empowers the MLSC Board to raise funds and make grants to non-profit legal aid programs, such as the Legal Aid Bureau, Maryland Volunteer Lawyers Service, Maryland Disability Law Center, and others, to “continue and expand legal assistance to those who would otherwise be unable to afford adequate legal counsel.” Also in 1982, the General Assembly enacted a voluntary interest on lawyer trust account (IOLTA) program to provide initial funding for MLSC's activities. In 1983, MLSC-funded legal services programs were providing legal assistance in approximately 30,000 cases annually, a number which expanded to approximately 110,000 cases annually by 2001. *Rhudy, supra.*

In 1989, the MSBA launched an ambitious, statewide “People’s Pro Bono Campaign” to encourage attorneys to volunteer for pro bono service. As part of the campaign, the MSBA compiled the results of a survey of attorneys’ pro bono contributions, and in 1990 created the People’s Pro Bono Action Center (later renamed the Pro Bono Resource Center) to serve as statewide coordinator for the provision of pro bono legal services to indigent clients with civil legal needs, among other things.

Notwithstanding the best efforts of the Maryland Legal Services Corporation, the state’s network of civil legal services organizations, and the pro bono contribution of the bar, the unmet need for civil legal assistance is substantial. A 1988 study conducted under the auspices of the Maryland Legal

Services Corporation showed that free legal services were provided to only 20% of Maryland residents who had a specific legal need and whose income rendered them eligible under MLSC to receive free legal services. *Action Plan for Legal Services to Maryland's Poor*, A Report of the Advisory Council of the Maryland Legal Services Corporation at ix (1988). Similar findings were reported in a broad-based, nationwide study in 1994 commissioned by the American Bar Association: approximately half of low-to-moderate income households had a demonstrable need for civil legal assistance each year, but 71% of low income households, and 61% of moderate income households, did not gain access to the court system to address those needs. *Legal Needs and Civil Justice, A Survey of Americans: Major Findings of the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public Interest, American Bar Association, at 23 (1994).

The available evidence suggests that the unmet needs for civil legal assistance in Maryland continues at an unacceptable level. In its 1998 Fiscal Year, the Maryland Legal Services Corporation grantees received an estimated 160,000 telephone calls requesting legal services. *Maryland Judicial Commission on Pro Bono: Report and Recommendations*, at 3. The experience of the Legal Aid Bureau, a leading MLSC grantee, suggests that despite the efforts of legal aid organizations, only a small percentage of these requests can be met. The Legal Aid Bureau estimates that it receives 60,000-65,000 requests for legal assistance per year, of which about 12,000 result in legal representation. *Id.*

V. The Costs Of Providing Measures To Ensure Equal Justice Must Be Shared By All Marylanders

As an organization of attorneys, MSBA has a special responsibility to advocate for the equal administration of justice. As set forth above, a right to counsel in civil cases involving fundamental rights is a critical component of the provision of equal justice. That attorneys have a unique role in bringing the ideal of equal justice into being, and in advocating for effective measures to ensure equal justice, does not mean that attorneys must bear the entire cost of providing this societal need. As Judge Robert Sweet, formerly of the United States District Court for the District of New York, so aptly described the matter, the costs of a fair and functioning judicial system is one that must properly be borne by society at large:

[S]ociety's paramount interest must be in a just determination of a person's fundamental rights and privileges. While there will undoubtedly be a cost to providing counsel to impoverished litigants, erosion of faith in the judicial system would exact an even higher price. To put it simply, denial of representation constitutes denial of access to real justice.

As for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm.

Sweet, *supra*, at 506. Equal administration of justice is a core value of the MSBA; it is the right, as well as the responsibility of all Marylanders.

Conclusion

Appellant urges this Court to recognize the right to counsel in matters involving fundamental rights. Amicus MSBA respectfully submits that lawyers

are important in preserving the rights of litigants. If this Court recognizes the right to counsel as urged by Appellant, MSBA submits that the Court should recognize that the financial burden arising from the right is one that should not be borne by the bar alone, but by society as a whole.

Respectfully submitted,



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I hereby certify that on July 9, 2003, a copy of the foregoing Brief of Amicus Curiae Maryland State Bar Association, Inc. was mailed by first-class mail, postage prepaid to:

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