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# A RIGHT TO A LAWYER? MOMENTUM GROWS



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# Maryland's Strategy for Securing a Right to Counsel in Civil Cases: *Frase v. Barnhart* and Beyond

By John Nethercut

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**John Nethercut**  
Executive Director

Public Justice Center  
500 E. Lexington St.  
Baltimore, MD 21202  
410.625.9409  
nethercutj@publicjustice.org

[**Editor's Note:** Debra Gardner updated this case study, based on John Nethercut's "*This Issue Will Not Go Away...*": *Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REVIEW 481 (Nov.-Dec. 2004). Gardner, legal director of the Public Justice Center, Baltimore, Md., was one of the attorneys who represented the plaintiff in *Frase v. Barnhart*. She is also the coordinator of the National Coalition for a Civil Right to Counsel. Contact her at [gardnerd@publicjustice.org](mailto:gardnerd@publicjustice.org) for information about the coalition.]

In late 2003 the question of whether a poor person has the right to appointed counsel in a civil case under Maryland's state constitution came before Maryland's highest appellate court.<sup>1</sup> In *Frase v. Barnhart* the court narrowly avoided ruling on the right to counsel in a 4-to-3 decision, but three judges stated in the concurring opinion that the court should have reached—and recognized—a constitutional right to counsel in certain civil cases. Correctly foreseeing advocates' continuing efforts to establish such a right, the concurring judges stated that "this issue will not go away.... So long as the Court declines to resolve it, the advocates for the poor will continue to seek judicial relief .... The poor need a yes or a no."<sup>2</sup>

Maryland's right-to-counsel project, also known as the civil Gideon campaign, began in 2000, when the Public Justice Center launched its Appellate Advocacy Project to influence the development of civil rights and poverty law before state and federal appellate courts.<sup>3</sup> Public Justice Center attorneys were cocounsel for Deborah Frase in her appellate case. In this article we review from the practitioner's viewpoint some of the strategic decisions and tactical considerations that have shaped Maryland's effort to establish a right to counsel in civil cases; we hope that Maryland's experience will inform and inspire others.

## I. Strategic Decisions

The team of attorneys at Maryland's right-to-counsel project considered several key issues in deciding which strategy to use to seek recognition of a civil right to counsel.

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<sup>1</sup>The Court of Appeals is Maryland's highest court; the state's intermediate appellate court is called the Court of Special Appeals.

<sup>2</sup>*Frase v. Barnhart*, 840 A.2d 114, 138 (Md. 2003) (Cathell, J., concurring) (Clearinghouse No. 55,347).

<sup>3</sup>Stephen H. Sachs, former attorney general and U.S. attorney for Maryland, serves as a mentor to Appellate Advocacy Project staff and brought with him the considerable resources of Wilmer, Cutler and Pickering (now Wilmer Cutler Pickering Hale and Dorr LLC), whose attorneys have donated so far well over \$1 million in pro bono services on the civil Gideon campaign.

### A. Is Reaching for a Federal Constitutional Right Feasible Now?

Most lay people harbor the mistaken belief that if they must go to court and cannot afford a lawyer, the court will appoint one for them. People's belief in American justice exceeds the reality. *Gideon v. Wainwright* established a broad right to appointed counsel in criminal cases.<sup>4</sup> The logic of *Gideon* applies with equal force to many civil legal proceedings that jeopardize any family, and certainly poor families, as much as would a jail term. For example, any parent would prefer thirty days in jail to losing custody of a child, yet the state will appoint a lawyer to defend against the criminal charge but not against the loss of the child. Other basic needs that are subject to legal proceedings also portend as much cost to the family and society as a criminal conviction: losing one's home, one's job, or one's medical benefits or insurance are examples. Certainly no person who could afford counsel would ever go unassisted into the courtroom if the outcome of the case could result in the loss of a home or the removal of a child from the family. The most insurmountable barrier to equal access to justice is the unavailability of counsel for persons who cannot afford to pay a lawyer to represent them in a civil matter.

Despite the obvious need for counsel, subsequent U.S. Supreme Court decisions narrowly applied the logic of *Gideon* to civil cases. *Lassiter v. Department of Social Services* held in a 5-to-4 decision that there was no Fourteenth Amendment due process right to counsel for an indigent in a proceeding brought by a state to terminate her parental rights.<sup>5</sup> The *Lassiter* case did establish a test to balance state and litigant interests to determine on a case-by-case basis if a court might appoint counsel.<sup>6</sup> Although

the *Lassiter* balancing test has not proven to be a workable vehicle to provide counsel on any meaningful scale, it does tacitly recognize the importance of counsel.

We decided that challenging *Lassiter* on federal constitutional grounds would not likely succeed because, among other reasons, we are located in the Fourth Circuit, which continues to nose out other contenders for the title of most conservative of the federal circuit courts. Nor was there, when we were developing our legal theories in Maryland in 2000–2001—nor is there now—a groundswell of support around the country for a head-on challenge to *Lassiter*. For reasons made clear in other articles in this issue, we are still a long way from a reversal of *Lassiter*, but, as those articles also help show, there may be a strategy to get us there.<sup>7</sup> In the meantime, our research did indicate that we might ultimately succeed on state constitutional grounds (as discussed in *infra* I.D).

### B. Would Our Legislature Heed the Call?

In theory, a constitutional right to counsel would not be necessary if we could convince the public and legislatures at federal and state levels to fund legal aid adequately. Indeed, Maryland is among the “richer” states when it comes to total funding for civil legal aid, thanks in large part to IOLTA (Interest on Lawyer Trust Accounts), filing fee surcharges, and successful private fund-raising by, for example, the Maryland Legal Aid Bureau's Equal Justice Council.<sup>8</sup> Yet the needs of Maryland's poor for actual attorney representation when they need it—as distinguished from *pro se* assistance, limited advice, and other so-called unbundled legal services—still go largely unmet. The legislature could, by statute, provide for a broad right to counsel in critical civil cases. A few other states have done so.<sup>9</sup>

<sup>4</sup>*Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>5</sup>*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (Clearinghouse No. 29,118).

<sup>6</sup>*Id.* at 27.

<sup>7</sup>See, e.g., Clare Pastore, *Life after Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, in this issue; Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, also in this issue.

<sup>8</sup>See Maryland Legal Aid Bureau, Equal Justice Council, [www.mdlab.org/Equal%20Justice%20Council](http://www.mdlab.org/Equal%20Justice%20Council) (last visited April 14, 2006).

<sup>9</sup>See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, in this issue.

After much discussion and consultation, we did not believe that Maryland's General Assembly would either provide a statutory right or appropriate sufficient funds for legal aid for poor people unless it had to. A judicially recognized constitutional right, enforced by the court that recognizes the right, seemed the more likely motivator for increased funding from the legislature.

We are mindful, however, that, even if the courts recognize a constitutional right to counsel, the legislature (guided by court decisions and perhaps by court rules) ultimately will have to fund that right. The Maryland strategy was always intended to have two phases: first, recognition of the right by the courts; second, funding by the legislature. The arguments made to convince the court are primarily legal, whereas the arguments to convince the legislature will be primarily based on public policy and a cost-benefit analysis. The cost-benefit analysis will show the effect of failing to provide counsel on the individual litigant's outcome, on the system of judicial administration, and on society as a whole compared to providing counsel in cases in which poor litigants cannot get access to justice without counsel.

### C. How Far Should We Reach?

A fundamental strategic choice that advocates face is whether to (1) seek to establish a broad constitutional right to counsel in civil cases, with the right covering the range of cases in which the poor typically need counsel to have a fair proceeding, (2) focus on establishing a right to counsel for a particular type of case or a particular category of litigant and hope to expand later the right to cover more types of cases and categories of litigants, or (3) argue that the particular litigant in the test case is entitled to counsel. In reality, even if an advocate chooses to pursue the broad right, the outcome is probably beyond the advocate's control.

In *Frase* we chose to seek a broad right primarily because we believed that we had good legal arguments in Maryland to do so, as discussed below, and because

this strategy would have the greatest impact. In seeking a test case, however, we sought a client involved in a disputed child custody matter—a type of case that involved a recognized fundamental interest. Our hope was and is that our court's decision, if it recognizes the right to counsel, will explicate that right in such a way that we may know the kinds of cases in which it will apply the right. The court's decision could be narrow and apply only to child custody cases or only to the individual appellant involved. Nonetheless, our strategy is to urge the court to cover as much ground as it sees fit and approach the matter with judicial efficiency among its goals.

Even in deciding to argue for a broad right, the right we seek is actually much narrower than might be supposed. We do not suggest that the poor are entitled to a lawyer in every civil case. We are not arguing, for example, that the court should appoint a lawyer in small financial disputes or where private market forces will provide one. We focus on categories of cases involving fundamental interests and basic human needs because we believe that these are the cases in which a lawyer is critical to a fair outcome. Such needs would include life-affecting matters such as child custody, the potential loss of housing, access to health care, and employment matters that determine the litigant's ability to earn a living.

### D. Does the Maryland Declaration of Rights Support a Broad Right to Counsel in Civil Cases?

In Maryland, we believe that the answer to the question, Does the Maryland Declaration of Rights support a broad right to counsel in civil cases?, is yes it does, even if the U.S. Constitution does not. Our arguments rest on four articles of the Maryland Declaration of Rights—a document that, we argued (in oral argument in the *Frase* case), is an older and better instrument of government than the federal one later created in Philadelphia. This statement is more than mere hubris or boosterism: Maryland's governing document has two Magna Carta-based articles that were not replicated in the federal

constitution and that directly affect the right to counsel. For that and other reasons, Maryland courts have not been afraid to interpret Maryland's constitution differently from how federal courts have interpreted the federal constitution. We urge other advocates to consider whether similar arguments apply in their states.

### 1. Article 19: Equal Access to the Courts

Article 19 of the Maryland Declaration of Rights is similar to and derived from Magna Carta language that is not replicated in the federal constitution:

That every man, for any injury done to him in his person or property, ought to have remedy for the course of the Law of the land, and ought to have justice and right, *freely without sale, fully without any denial*, and speedily without delay, according to the law of the land.<sup>10</sup>

Article 19 serves as an open courts and equal access provision that means, at least, that in cases of consequence, in which the “guiding hand of counsel” is indispensable, failure to afford counsel to an indigent effectively slams shut the courthouse door and denies that constitutional right of access.<sup>11</sup>

### 2. Article 5: Adoption of the English Right to Counsel

Article 5 of Maryland's Declaration of Rights is another critical provision that did not make it into the U.S. Constitution. As one writer noted, “[n]o sooner had the colonial upstarts thrown off the imperial yolk than they set about asserting their rights as ‘Englishmen.’”<sup>12</sup> Article 5 asserts that all English laws that existed on July 4, 1776, apply to Marylanders:

That the inhabitants of Maryland are entitled to the Common Law of England ... and to the benefit of such English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six, and which by experience have been found applicable to their local and other circumstances, and have been introduced, used, and practiced by the Courts of law and equity ... subject nevertheless to the revision of, and amendment or repeal by, the legislature of this State.

The particular law relevant to the civil Gideon movement is a Tudor statute that established the right to appointed counsel for indigent civil plaintiffs with meritorious causes of action. This statute commands that “indifferent justice to be had ... as well to the poor as to the Rich” and that the Justices of the King's bench “shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same....”<sup>13</sup> The statutory test of indigency was met if the person swore to the chancellor that he was worth less than five pounds and the clothes on his back.<sup>14</sup>

In 1809 the Maryland General Assembly asked William Kilty, then chancellor of Maryland, to inform it of which English statutes should be incorporated into Maryland law. Kilty's report included the very Henry VII statute that provided a right to counsel and concluded that it had been introduced, used, and practiced in the Maryland colony.<sup>15</sup> The Maryland Court of Appeals frequently has relied on Kilty's report and has never rejected his finding that a particular statute had survived the crossing to the

<sup>10</sup>MD. DEC. OF RIGHTS, art. 19 (emphasis added to show the portion of Article 19 on which we relied for Ms. Frase's claim).

<sup>11</sup>*Gideon*, 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

<sup>12</sup>Lawrence Hurley, *Sounding the Civil Trumpet*, DAILY RECORD, July 11, 2003, at 1B.

<sup>13</sup>11 Henry 7 c. 12.

<sup>14</sup>*Id.*

<sup>15</sup>William Kilty, A Report of All Such English Statutes as Existed at the Time of the First Emigration of the People of Maryland, and Which by Experience Have Been Found Applicable to Their Local and Other Circumstances (1811), [www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000143/html/am143—1.html](http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000143/html/am143—1.html).

new world. Moreover, the Maryland General Assembly has never revised, amended, or repealed the Henry VII statute. We determined to ask the Maryland court to enforce this right.

### 3. Article 24: Due Process

Article 24 of Maryland's Declaration of Rights contains Maryland's equivalent of the due process clause. The question was whether the Maryland courts would follow *Lassiter* and interpret Maryland's due process clause to be as narrow as the due process clause in the federal constitution. Maryland courts have shown a historical independence when it comes to interpreting Maryland's constitution. The court of appeals holds that

simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart. Furthermore, cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision.<sup>16</sup>

Thus we determined to ask our court to reject *Lassiter*.

### 4. Article 8: The Separation of Powers and the Court's Duty to Administer the Adversary Process

A fourth argument brings the separation of powers to bear on the question of the role of the courts and the legal profession in providing counsel to indigents in our adversary system of justice. Maryland joins other states and the federal government in recognizing that, under separation-of-powers provisions in their constitutions, an inherent right and obligation of the judiciary is the administration of the adversary process. Judicial administration includes the

"regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct ...."<sup>17</sup> But properly supervising the adversary process is more than merely admitting and disciplining attorneys. The Maryland Court of Appeals recognizes that

[t]he statements of this and other courts announcing the obligation of the judicial branch to monitor and manage its own house are not hollow proclamations of power, for the placement of this responsibility with the judiciary represents a recognition of the special, and to a degree, unique relationship that has evolved over the years between the legal profession and the tribunals of justice it serves.... [The adversary system,] whereby truth is garnered from the articulation of opposing points of view, [is] the pre-eminent tool through which fairness is achieved in the administration of justice in the country.<sup>18</sup>

We argued in the *Frase* case that the court must fulfill its duty to "monitor ... its own house" by recognizing that attorneys are essential to the adversary process and that the court itself must ensure that counsel are available or appointed when necessary to administer justice fairly. The right to counsel in civil cases should be a matter of proper administration of the courts and should be required by the courts, whether or not other branches of government have addressed that right.

Reading these four articles of the Declaration of Rights together, we concluded that Marylanders enjoy a right to counsel in civil cases. We resolved to ask the Maryland courts to recognize that

<sup>16</sup>*Dua v. Comcast Cable of Maryland*, 805 A.2d 1061, 1071 (Md. 2002) (Clearinghouse No. 54,713).

<sup>17</sup>*Attorney General of Maryland v. Waldron*, 426 A.2d 929, 934 (Md. 1981).

<sup>18</sup>*Id.* at 936.



right, take the right from its colonial roots, and apply it to the needs of the poor in today's world.<sup>19</sup>

## II. Tactical Considerations in Developing a Civil Right-to-Counsel Case

In addition to developing our legal strategy and arguments, we faced numerous tactical considerations. We needed to find a compelling test case, overcome procedural hurdles, and develop allies in Maryland's legal community to impress on the court the importance of the civil right-to-counsel issue.

### A. Outreach to Find Appropriate Test Cases

Although nothing is unique about our approach to developing a test case, the importance of thorough preparation cannot be overemphasized. First, we, along with our pro bono counsel, conducted extensive research to develop the legal arguments described above. Development of the legal strategy was the precursor to defining the case that we would seek, but the legal research never ended: throughout the briefing of our first case, we continued to refine these arguments, and we continue to develop new ones to this day.

As we developed our legal arguments, we also began searching for appropriate cases to bring to test the law. We decided that contested child custody issues were the best factual scenarios to advance the arguments and then conducted extensive outreach to start a stream of intake calls. We visited many of Maryland's other legal aid providers, including the Legal Aid Bureau, domestic violence clinics, the Women's Law Center, *pro se* family law assistance projects housed at the courthouses, and lawyer referral services. We received press coverage about the outreach efforts and launched the outreach project at a statewide legal aid conference.

The outreach efforts yielded a stream of calls and referrals, which Public Justice

Center staff attorneys, clerks, and volunteers developed for consideration. Developing the legal arguments for the case was easy compared to the effort involved in finding the right cases to present the issue to the court.

The case of Deborah Frase in Caroline County came to our attention when she saw one of our flyers and called us. A couple unrelated to Ms. Frase briefly took care of Ms. Frase's youngest child while Ms. Frase was in jail on an old marijuana charge. The couple, represented by counsel, sued Ms. Frase for custody. Ms. Frase tried valiantly to find counsel to help her, but she could not afford to hire a lawyer and was turned away from Legal Aid and pro bono legal programs because no lawyers were available. She defended herself to the best of her ability in the hearing before a judicial master, but she obviously was unable to present her case as a lawyer could. In the end the trial court found that she was a fit parent and did not remove her child from her custody, but the court did impose certain conditions: she was ordered to present her son to the plaintiffs for visitations, move out of her mother's home, and move into a homeless shelter. Ms. Frase objected to these stringent, and even impossible, conditions on custody and filed an appeal on her own.

### B. Procedural Hurdles

We learned much from the *Frase* case. Two significant procedural challenges immediately presented themselves and were ultimately overcome, but the third prevented us from reaching our goal with her case.

The first procedural hurdle was to have Maryland's highest court decide this issue of first impression quickly so that the case did not spend what might be another year or more in the intermediate appellate court. We filed a petition for a writ of certiorari with the Maryland Court of Appeals. On April 9, 2003, the court granted certiorari and agreed to

<sup>19</sup>For more detailed legal arguments, see Brief of Appellant Deborah Frase, *Frase*, 840 A.2d 144 (No. 6), available at [www.publicjustice.org/pdf/050122BFRAS.pdf](http://www.publicjustice.org/pdf/050122BFRAS.pdf).

hear the case directly because of the significance of the issues presented.<sup>20</sup>

The second procedural hurdle was the significant question of whether the case was even appealable because the court had not entered a final order or judgment. The court ultimately concluded that this was itself a serious problem that impinged on Ms. Frase's rights as a parent and allowed the appeal.<sup>21</sup>

The third procedural difficulty, and the case's ultimate downfall, was mootness. This illustrates the problem of having a client whose test case is too good. Two of the three issues of first impression that the case presented in Maryland are (1) the right of a fit mother to determine her child's best interests, including where her family will live and with whom her child may visit, without interference from unrelated third parties and the state; and (2) whether indigent civil litigants in contested custody matters have the right to appointed counsel under the Maryland Declaration of Rights. In its decision, the court gave Ms. Frase a clear victory on the first issue, which, in the court's view, mooted the rest of the case, including the right-to-counsel issue. Because the court reversed the trial court orders that imposed conditions on Ms. Frase's custody of her son, the case was over without need for a remand, and Ms. Frase did not need a lawyer for any further proceedings. Although obviously the need for a lawyer is "capable of repetition" for Ms. Frase and millions of others, the court, in a 4-to-3 decision, decided that it did not have to reach the right-to-counsel issue.<sup>22</sup> In the next phase of Maryland's civil right-to-counsel effort, now under way, we are working to identify a test case that will survive this form of mootness and require the Court of Appeals to decide whether Marylanders have a civil right to counsel.

### C. Recruiting Allies

In test cases, as in any struggle, one generally does not want to go it alone. We

were fortunate to have had widespread support from Maryland's legal community on this very important case. The University of Baltimore Law School Family Law Clinic and the Women's Law Center filed an amicus brief on the first-impression family law issue. Other amicus briefs came from the Legal Aid Bureau and other legal aid organizations and from the Maryland Legal Services Corporation (Maryland's IOLTA administrator) on the unmet need for civil legal services. And the Maryland State Bar Association filed an unprecedented amicus brief on the importance of having a lawyer in contested cases involving fundamental rights.

■ ■ ■

Our journey is far from over. The *Frase* case is an important first step in an ongoing campaign in Maryland. We continue to work with our allies to identify the appropriate case to return to the Maryland Court of Appeals.

Thus far the court has not spoken, but, as three of its judges made clear, it must speak. If we succeed in persuading the court to recognize a civil right to counsel, then the hard work really begins: We must secure adequate funding, and we must devise appropriate implementation and administration mechanisms. These are no small challenges, but, as noted earlier, we have been mindful since the outset of our work to secure a civil right to counsel that we will need to meet them. We are fortunate now to work with many thoughtful colleagues around the country, colleagues who are helping us strategize on our continuing effort to establish a right to counsel in Maryland. Success will require the collective effort of all our allies in the private bar and the legal aid community, as well as the court, its administrative agencies, and the legislature.

<sup>20</sup>*Frase*, 821 A.2d 370 (Md. 2003).

<sup>21</sup>*Frase*, 840 A.2d at 119–25.

<sup>22</sup>*Id.* 129–31.