IN THE
COURT OF APPEALS OF MARYLAND

No. 6
September Term, 2003

DEBORAH FRASE,

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 Appellant Deborah Frase

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INTRODUCTION

Appellees Curtis and Cynthia Barnhart have sued for custody of Deborah Frase's three-year-old son, Brett Michael. The Barnharts are unrelated to Brett Michael. Their only relationship with him was during a six-week period more than a year ago when he was wrongfully placed in their home by Ms. Frase's mother. The court below has denied the Barnharts' claim for custody – so far – but has imposed conditions on Ms. Frase's continued custody of her young son. Three major errors marked the proceedings below.

First, recusal of the judicial master who presided at trial was required pursuant to Rule 16-814, Canons 3C(1)(a) and (b). Master Jo Ann Asparagus had represented Ms. Frase's mother, Diane Frase Keys, in a custody proceeding in 1993 in which Ms. Keys obtained custody of Ms. Frase's eldest child. As a result, Master Asparagus had "personal knowledge of disputed evidentiary facts concerning the proceeding" that requires recusal. Canon 3C(1)(a). The master's prior representation of Ms. Keys, a central witness adverse to Ms. Frase, also taints this case with an appearance of partiality that requires recusal pursuant to Canon 3C(1).

Second, the court below violated Ms. Frase's fundamental due process rights as a parent. Although the court did not – and could not – find Ms. Frase unfit, it nonetheless imposed conditions on her continued custody of her son. The court's decisions tear at the fabric of a family on the mend.

Finally, the court's denial of Ms. Frase's right to appointed counsel seriously damaged her case. Her right to counsel is based on provisions of the Declaration of Rights. These provisions have deep roots in Maryland's constitutional soil. They

recognize that – at least in cases that touch fundamental rights and basic human needs – an indigent Maryland litigant requires "the guiding hand of counsel." Here, the Barnharts were represented by experienced counsel. Ms. Frase could neither afford counsel nor get help from legal services organizations. Yet the court below turned a deaf ear to her repeated pleas for appointed counsel. The result was a parody of the adversary process.

STATEMENT OF THE CASE

A merits hearing in this contested custody matter was held before Master Jo Ann Asparagus on May 20 and 28, 2002. (E. 14, 186.) On June 3, 2002, the master issued a Report and Recommendations permitting Ms. Frase to retain custody of her son so long as she applied to St. Martin's House (a homeless shelter), complied with third-party visitation, and appeared for further review hearings. (E. 398-99.)

On June 14, 2002, acting pro se, Ms. Frase filed a Notice of Exceptions, which was dismissed on technical grounds. (E. 400-15.) She filed a Motion for Reconsideration. (E. 416-20.) A short exceptions hearing was held before the Circuit Court for Caroline County on September 13, 2002. (E. 320-47.) The circuit court issued several orders on September 16, affirming the master's recommendations with certain modifications. (E. 430-33.)

Shortly before the first review hearing, on October 4, 2002, Ms. Frase discovered that Master Asparagus had been the lawyer for her mother – Diane Frase Keys – in obtaining legal custody of Ms. Frase's oldest child, Justin, in 1993. (E. 435.) Ms. Frase immediately filed an Emergency Motion requesting, in light of this undisclosed conflict, that the conditions on her custody be removed and the case be dismissed; or that Master

Asparagus be recused and counsel be appointed to represent Ms. Frase. (E. 434-40.) Ms. Frase also requested that the review hearing be postponed due to her late-term pregnancy. (E. 436-37.)

The circuit court ruled on the Emergency Motion on November 1, 2002. (E. 443.) The court expressly addressed only the request for postponement, which it denied. Ms. Frase filed a timely notice of appeal on November 26, 2002. (E. 444.)

QUESTIONS PRESENTED

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, including unwarranted third-party visitation; 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?

STATEMENT OF FACTS

Background. Deborah Frase is a thirty-two-year-old mother of twelve-year-old Justin, nine-year-old Tara, three-year-old Brett Michael and six-month-old Harley. (E. 257.)[1] In November 2001, Ms. Frase was living with all of her children at the home of her mother, Diane Frase Keys. (E. 59, 81.) Ms. Keys has had legal custody of Justin since 1993. Because Ms. Keys was planning to work out-of-state, she had requested that Ms. Frase come to live at her house to take care of Justin. (E. 80, 136.)

[1] During the proceedings below, Ms. Frase was pregnant with Harley.

In November 2001, Ms. Frase was arrested on a year-old bench warrant for possession with intent to distribute three ounces of marijuana. (E. 51.) Ms. Frase arranged for Tara and Brett Michael to stay together with a family from her church while she was in jail awaiting trial. (E. 50.) However, Ms. Keys, whose relationship with her daughter was contentious (E. 72, 79, 80, 81, 128, 269), split up the children without Ms. Frase's knowledge or consent. (E. 50, 156-57, 272.) A few weeks after Ms. Frase was incarcerated, Ms. Keys placed Justin and Brett Michael with the Barnharts, and placed Tara with another family, the Eskows. (E. 50.) The only relationship that the Barnharts had with the Frase family was that Curtis Barnhart was the leader of Justin's boy scout troop. (E. 160, 199-200, 204, 209, 216.) While Ms. Frase was in jail, the Barnharts did not permit her to communicate with her sons. (E. 71, 219.)

Ms. Frase pled guilty to the marijuana charge on January 15, 2002. (E. 457.) Judge William S. Horne sentenced her to eighteen months but suspended all but the eight weeks she had already served. (E. 51.) Ms. Frase was released that same day, and immediately attempted to retrieve Tara and Brett Michael. (E. 52.) Because Ms. Keys has legal custody of Justin and had placed him with the Barnharts, Ms. Frase did not believe she had the legal right to take him back. (E. 52.) She was reunited with Tara without incident. (E. 52.) But Ms. Frase did not know where the Barnharts lived, and Ms. Keys refused to take her to the Barnharts until Ms. Frase told her she would call the police for assistance. (E. 52.) Ms. Frase was reunited with Brett Michael on January 19. (E. 52.)

The Litigation. Three days later, the Barnharts filed a complaint for custody of Brett Michael. (E. 367-77.) They made no claim that Ms. Frase was unfit to care for her daughter Tara, and did not seek custody of Tara.[2] Ms. Frase filed a pro se answer and a counterclaim for custody of Brett Michael. (E. 385-91.)

Despite an exhaustive search for counsel, Ms. Frase could not find a lawyer to represent her. (E. 4, 163, 172.) Although she was financially eligible for representation by the Legal Aid Bureau and other legal services programs, Ms. Frase was told they could not represent her because they were "understaffed and over worked." (E. 4.) According to the scheduling conference transcript, Ms. Frase requested that Master Asparagus appoint counsel for Brett Michael, and informed the master that she had been unable to find legal assistance for herself. (E. 3, 4.) Counsel for the Barnharts stated that his "client's position would be she probably does need an attorney in this matter." (E. 3.) Nevertheless, Master Asparagus did not appoint counsel for the minor child or Ms. Frase. (E. 6.) Instead, the master instructed Ms. Frase "[i]f you need help with preparing your case come to the Pro Se Clinic because you should always find out what your witnesses are going to say before you call them to the stand."[3] (E. 9-10.)

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[2] But at the trial on the merits, counsel for the Barnharts stated that they might seek custody of Ms. Frase's new baby after the child was born. (E. 318.)

[3] Although the scheduling conference transcript does not reflect that Ms. Frase explicitly requested counsel to represent herself, the record is clear that both Ms. Frase and the Barnharts' counsel understood Ms. Frase's comments as a request for counsel to represent her. (E. 3, 4, 400, 441.) Ms. Frase renewed her request for counsel in her exceptions (E. 405), motion for reconsideration (E. 419), motion to stay (E. 423) and emergency motion (E. 437). These requests were ignored, and thus effectively denied, by the circuit court.

Ms. Frase struggled to represent herself at a two-day merits trial. (E. 14-319.) She spent countless hours attempting to prepare her case, including seeking help from pro se legal assistance projects. (E. 71, 100, 170-72, 266, 302.) But, as cataloged below, her pro se status damaged her case. *See infra* Part III(A). She succeeded, however, in bringing witnesses to testify on her behalf, including several workers from the Department of Social Services and Family Support Center. They testified that Ms. Frase was a good mother to Brett Michael (E. 103-04, 164, 230, 234, 247) and that the two-bedroom trailer home in which she was living, although crowded, was a clean, safe and loving environment. (E. 168, 169, 230, 247.) Even the plaintiffs' witnesses stated that a strong bond existed between Brett Michael and Ms. Frase. (E. 43, 45-46.) The Barnharts focused heavily on Ms. Frase's past alcohol and drug use and criminal charges. (E. 59-61, 180.) The evidence showed, however, that Ms. Frase had completed an addictions program several years before (E. 60, 281-82), and had voluntarily sought the assistance of the Family Support Center and Department of Social Services to keep her family together and assist her with her continued rehabilitation efforts. (E. 99-100, 105, 163, 170.)

Ms. Frase's mother, Diane Keys, testified on behalf of the Barnharts. (E. 126-60.) Her testimony disparaged her daughter's character and scorned her parenting ability, although she conceded that Ms. Frase was not "completely unfit." (E. 147.) She focused largely on Ms. Frase's teenage problems and alleged failings with respect to Justin nine years earlier, which led Ms. Keys "to seek the advice of a lawyer and . . . [go] after

custody of [Justin]."[4] (E. 126-31.) Ms. Keys did not reveal that her lawyer in the Justin case was the judicial officer sitting before her. Nor did Master Asparagus.

In a "home study" report filed in the 1993 Justin custody case, Ms. Keys alleged that Ms. Frase was mentally and emotionally unstable, abused drugs and alcohol and was an irresponsible parent to Justin. *See* App. I.[5] Ms. Keys repeated those same allegations in this case. (E. 126-31.)

During the merits hearing, Master Asparagus addressed Ms. Frase reprovingly, particularly with respect to Ms. Frase's relationship with Ms. Keys and Justin. When Ms. Frase attempted to show on cross-examination that Ms. Keys had little knowledge about Ms. Frase's actions as a parent to Brett Michael because Ms. Keys was not around them very much, Master Asparagus cut her off and said: "Let me explain something to you. Your mother has no obligation to do anything in terms of employment or whatever to take care of your children." (E. 152.) When Ms. Frase attempted to explain that she felt more like an aunt to Justin because her mother raised Justin and limited Ms. Frase's contact with him, the master asked: "Well, Ms. Frase I mean you know, pardon me, but

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[4] Ms. Keys testified that Ms. Frase's father repeatedly assaulted Ms. Frase during a six-month period before he committed suicide, an experience that contributed to Ms. Frase's teenage problems. (E. 154-55.)

[5] When Ms. Frase obtained the Justin case file and discovered that Master Asparagus had represented her mother, she filed a motion seeking to have Master Asparagus recused. She attached to the motion only Ms. Asparagus' cover letter to the clerk, and the signature page of the custody complaint. (E. 438-39.) She did not attach the full complaint or the "home study" report. This court, however, may take judicial notice of the entire court file, including the "home study" report, as public court records, pursuant to Rule 5-201. Judicial notice is proper not to prove or disprove any of the statements made therein, but simply to show that the statements were made. *See Irby v. State*, 66 Md. App. 580, 505 A.2d 552 (1986).

on the one hand you say that your mother cut you off and then on the other hand you say that you don't feel like a mother. I mean what is it?" (E. 81.) When Ms. Frase attempted to explain that her mother cut her off from contact with Justin, the master questioned, "And you think that all of this is your mother's fault?" (E. 81.) When Ms. Frase tried to distinguish her unpreparedness to be a mother when she gave birth to Justin as a teenager from her demonstrated ability to be a mother to Brett Michael, the master asked: "And you think you are now ready to be a mother except that you're not ready to be a mother to Justin?" (*Id.*)

The Master's Report. On June 4, 2002, the master issued a Report and Recommendations that further manifested her distrust of Ms. Frase because of Ms. Frase's past. (E. 398-99.) After stating that the Barnharts are "fine people," the master noted that the Barnharts believe Ms. Frase to be "an unfit mother who has in fact at one time or another abandoned all three of her children." (E. 398.) "They fear," she wrote, "that her interest in Brett Michael is a passing fancy and that she will ultimately leave him wondering why she doesn't want him." (*Id.*) The master continued:

> This Court does not disagree with the Barnharts. In fact if the decision of this or any other Court could be based solely on ones [sic] past, speculation and gut feelings then the Barnharts would emerge as the custodians of Brett Michael. A sinister view of Ms. Frase's recent turnabout would chalk it up to a colossal bilking of the system. Further one could speculate that she is not sincere and has inexplicable motives, which will ultimately result in her leaving her young son high and dry. Finally, her decisions regarding other aspects of her life specifically, her decision to have a fourth child could cause one to feel in their gut that this is just not the right place for Brett Michael.

(E. 398.)

The master stated that she could not award custody to the Barnharts because "[t]he law in this state and most states require third parties seeking custody of a minor child from the natural parents to prove that the parent is unfit or that they are the psychological parents of the child in question." (*Id.*) Under that standard, the master found that the "current situation" was "that Ms. Frase has since she retrieved her son developed a network to assist her with getting her life on track and appears to be cooperating with them in every respect. They appeared and testified on her behalf indicating that at the moment Brett Michael is fine, attached to his mother and a happy child." (*Id.*)

Unable to find Ms. Frase unfit, the master awarded Ms. Frase custody of Brett Michael, provided, however, that she "immediately apply for and obtain housing at St. Martin[']s House," a transitional homeless shelter for women. (E. 399.) She also required Ms. Frase to allow Brett Michael to spend every other weekend with the Barnharts so long as Justin was in their home. (*Id.*) And she recommended that "a review hearing" be held within ninety days. (*Id.*)

Ms. Frase filed timely exceptions. (E. 400.) She explained that the St. Martin's House requirement would cause her to move away from the father of her unborn child and her church, and possibly force her to lose her job, day care provider, and current support network. (E. 402-04.) She also argued that there was no reason to make her move because the testimony at trial showed that the home was "clean and safe for Brett Michael with plenty of love as well as food, clothing, toys, and a yard to play in." (E. 404.) Ms. Frase also objected to the requirement that Brett Michael spend every other weekend with the Barnharts because their "<u>only</u> connection to Brett Michael [was] the 6

weeks he was wrongly placed in their home." (E. 401.) (emphasis in original.) She agreed that all of her children, including Tara, should visit together as a family, but she wanted to determine such arrangements herself. (E. 401-02.)

The Circuit Court's Review. The circuit court initially dismissed the exceptions on technical grounds.[6] (E. 415.) Ms. Frase filed a Motion for Reconsideration. (E. 416.) The court scheduled a one-hour exceptions hearing limited to the St. Martin's House and visitation conditions. (E. 429.)

The circuit court gave Ms. Frase's exceptions short shrift. The court took no evidence at the hearing nor does it appear that the court did anything other than read the master's report. "There's no way that I'm going to listen to two days worth of a tape," the judge declared.[7] (E. 341.) The court's impatience with Ms. Frase was evident. When Ms. Frase made an apparent reference to her tangled family relationships, the court observed: "Well, I hope that you see that this is a situation of your own creation Ms.

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[6] Ms. Frase requested a waiver of the transcript requirement under Rule 9-208(g), which permits the court to use an electronic recording of the proceedings. (E. 406-09.) Although that request was granted, the court also ordered Ms. Frase to "identify in writing and file with this Court, that testimony which Defendant asserts is relevant to support her exceptions." (E. 412.) Ms. Frase did not understand this order and did not comply, and, upon motion from the Barnharts' counsel, the court dismissed the exceptions. (E. 413-20.)

[7] The circuit court neglected its critical obligation under Maryland law to review the findings of fact made by the master and exercise its independent judgment about the case. *See Domingues v. Johnson*, 323 Md. 486, 490, 593 A.2d 1133, 1134-35 (1991); *Miller v. Bosley*, 113 Md. App. 381, 688 A.2d 45 (1997); *Ellis v. Ellis*, 19 Md. App. 361, 366-67, 311 A.2d 428, 431 (1973) ("parties in child custody cases are entitled to have the carefully and intelligently exercised judgment of the Chancellor, as distinguished from that of the Master's [sic], alone."). The circuit court's uncritical acceptance of the master's findings is even more troubling here given the recusal issues raised by the case. *See infra* Part I.

Frase. I hope you see that." (E. 328.) The court dismissed Ms. Frase's concerns that the Barnharts were strangers to her and Brett Michael, stating she was "[v]ery fortunate to have the Barnharts . . . [I am] thankful that these people in the community were there as a safety net for your family." (E. 329, 342.) The court effectively placed the burden on Ms. Frase to discredit the character of the Barnharts, stating: "unless you can tell me something about the Barnharts that would suggest that they wouldn't be adequate supervisors it's falling on deaf ears." (E. 342.)

The court also rejected Ms. Frase's plea that her home was a suitable place for children and that as a fit parent she should determine the best visitation arrangements for her children. (E. 321, 327-38.) The court accepted the master's recommendation that Ms. Frase apply to St. Martin's House, stating: "you are to apply because there was evidence that she [the master] heard that suggested that you needed structure and you needed help and . . . that would be a good place for you to start." (E. 323.) The court concluded by telling Ms. Frase: "What has happened here is the Court is becoming the case manager of a family situation Ms. Frase that really ought to be at Social Services." (E. 343.)

The court issued a series of orders dated September 16, 2002, affirming the master's recommendation of conditional custody, with two changes. (E. 430-33.) The court ordered Ms. Frase simply to apply to Saint Martin's House and provide evidence of her application at the next "review hearing." (E. 324, 431.) The court also recast the

visitation as sibling visitation between Brett Michael and Justin,[8] but rejected Ms. Frase's request that the visits occur at her home and include Tara. She ordered that the visitation occur every other weekend either at the home of Diane Keys (with whom Ms. Frase was barely on speaking terms (E. 334)), or at the home of the Barnharts. (E. 430-31.) The court ordered the parties and Ms. Keys to attend one mediation session for the purpose of scheduling these visits, and required the parties to appear again before the master for a review hearing on November 4, 2002. (E. 430-32.) The mediation occurred on October 11. (E. 350.) Although one of the September 16 orders contemplated that the court would enter a final order after the mediation, the court never did so. (E. 433.) Thus, no final judgment has been entered in this case.

Emergency Motion. Upon learning of the master's undisclosed prior adverse relationship, Ms. Frase promptly filed an Emergency Motion requesting, in light of this conflict, that the court remove the conditions placed on her custody and dismiss the case. (E. 434-37.) She asserted that the conditions violated her fundamental right as a fit parent to raise and direct the care and upbringing of her child without undue governmental interference. (E. 434-35.) She requested that the court recuse Master Asparagus if it did not dismiss the case. (E. 437.) The motion also renewed Ms. Frase's request for appointed counsel, stating she needed a lawyer "now more than ever." (E. 437.) Ms. Frase also asked for a postponement of the review hearing because she was

[8] The court stated, "[T]he way the Master worded the recommendations it almost – it sounded almost more like the visitations were between Brett Michael and the Barnharts, but I don't think that was the intent. . . It was to establish and maintain a relationship between two siblings is really what the purpose is." (E. 325.)

nine months pregnant and having labor contractions, and did not have an attorney to represent her. (E. 436-37.) Counsel for the Barnharts opposed the Emergency Motion. (E. 441.)

The court issued an order on November 1, 2002, stating that "upon consideration of the motion and answer," the request for continuance was denied. (E. 443.) The court did not expressly address the motion's other requests, but effectively denied them by sending Ms. Frase back – unrepresented – for the review hearing before the same master.

The Review Hearing. At the November 4 review hearing, in response to a question from the Barnharts' counsel about whether any issues in Ms. Frase's motion remained outstanding, the master noted without qualification that the November 1 Order denied "the relief requested." (E. 349.) The master said nothing whatever about her prior representation of Ms. Keys or Ms. Frase's request for recusal. She predicted that Ms. Frase was "gonna really self destruct" because she had not moved to St. Martin's House. She stated: "the financial issues that exist here and the kind of support that Ms. Frase is gonna need to maintain a home for her children would only . . . exist . . . at St. Martin's Barn." (E. 355.) The master mentioned the possibility of an "escalation of visitation" and scheduled yet another review hearing for February 24, 2003, to see "what's going on" after Ms. Frase gave birth. (E. 356.) The master did not issue a written report as required by Rule 9-208(1). Ms. Frase filed a timely notice of appeal on November 26, 2002.[9] (E. 444.)

[9] The November 1 Order constitutes an appealable interlocutory order under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x), which permits immediate appeals of

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO RECUSE MASTER ASPARAGUS.

As a judicial appointee, Master Asparagus' conduct is governed by Rule 16-814, a code of conduct designed to preserve the "integrity and independence" of the judiciary. Rule 16-814, Canon 1.

A. Recusal Was Mandatory Under Rule 16-814, Canon 3C(1)(a) and (b).

Canon 3C(1) provides:

> (1) A judicial appointee should not participate in a proceeding in which the judicial appointee's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judicial appointee has a personal bias or prejudice concerning a party, ***or*** personal knowledge of disputed evidentiary facts concerning the proceeding; [or]
>
> (b) the judicial appointee served as lawyer in the matter in controversy.

(Emphasis added.) Recusal is mandatory under these provisions. *See Sharp v. Howard County*, 327 Md. 17, 25, 607 A.2d 545, 548 (1992); *see also Surratt v. Prince George's County*, 320 Md. 439, 464-65, 578 A.2d 745, 757 (1990).

1. Master Asparagus had extrajudicial, personal knowledge.

Canon 3C(1)(a) required the recusal of Master Asparagus because she had

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interlocutory orders "depriving a parent, grandparent, or natural guardian of the care and custody of [her] child, or changing the terms of such an order." The denial of her request that the master be recused is also appealable because a trial on the merits has already occurred. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991). Finally, this Court has discretion to enter the visitation order of the court as a final judgment pursuant to Rule 8-602(e)(1)(C) and proceed with this appeal.

"personal knowledge of disputed evidentiary facts concerning the proceeding." In 1993, Diane Frase Keys retained Jo Ann Asparagus to sue Deborah Frase for custody of Justin. In the Justin case, Ms. Keys alleged that Ms. Frase was emotionally unstable, abused drugs and alcohol and was an irresponsible parent. *See* App. I. Ms. Keys repeated those same allegations here. (E. 126-31.) In this case Ms. Frase attempted to dispute those allegations, in particular their relevance to her ability to parent Brett Michael.[10] (E. 149, 151, 152-53, 191, 212.) Master Asparagus, who could not have been unaware of Ms. Keys' prior claims, was now called upon to assess the credibility of her former client and weigh it against the credibility of Ms. Frase, notwithstanding she had "personal knowledge of disputed evidentiary facts." Possession of such "knowledge acquired from an extrajudicial source" calls into question the basis of her decision. *Boyd v. State,* 321 Md. 69, 76, 581 A.2d 1, 4 (1990). Recusal was therefore required under Canon 3C(1)(a).

2. This case was the same "matter in controversy."

Canon 3C(1)(b) requires recusal where "the judicial appointee served as lawyer in the matter in controversy." Rule 16-814, Canon 3C(1)(b). "What constitutes the 'matter in controversy' . . . necessarily depends on the facts," and encompasses any determination regarding the same or closely related issues. *Sharp v. Howard County*, 327 Md. 17, 26-27, 607 A.2d 545, 549-50 (1992). *Sharp* makes clear that the connection of Master Asparagus with this case requires recusal under Rule 16-814, Canon 3C(1)(b).

[10] Although Ms. Frase settled the Justin custody matter by signing a consent to custody, there is no evidence that the then nineteen-year-old Ms. Frase ever saw the "home study" report or agreed with her mother's characterizations.

In *Sharp*, several property owners wanted to build a private airstrip and consulted an attorney to draft the relevant documents. Fourteen years later the attorney presided as judge over a case in which the property owners sought a special exemption from the zoning laws for their airstrip. *Id.* at 22-23, 607 A.2d at 546-47. Neither the existence nor the interpretation of the documents previously drafted by the judge was germane to the zoning issue before the court. Nonetheless, this Court held that the underlying goal was the same and recusal was required "to avoid any reasonable question concerning impartiality in the minds of the litigants and of the public in all cases." *Id*. at 31, 607 A.2d at 551. Even though the prior representation was non-adversarial, recusal was mandatory because "the underlying purpose of the advice or work was to achieve the goal that is at issue in the later proceeding before the judge."[11] *Id.* at 30, 607 A.2d at 551.

The Justin and Brett Michael cases are more closely related than those at issue in *Sharp*. Both cases involve the same mother facing allegations of unfitness by third parties. Both cases involve Ms. Keys as a principal opponent to Ms. Frase's continued custody. Both cases involve the ultimate issue of whether Ms. Frase is a fit parent and may retain custody. And, most important, the Barnharts' allegations, Ms. Keys' testimony, and the master's questions and recommendations all focused heavily on Deborah Frase as she had been nine years before and on her earliest actions as a parent to Justin. Central to the case against Ms. Frase, and a crucial element in the master's

[11] Although the Justin custody case was settled when Ms. Frase signed a consent to transfer custody of Justin to Ms. Keys, it was more adversarial than the purely transactional work at issue in *Sharp* that did not involve a court proceeding.

decision to impose conditions on Ms. Frase's custody, was the premise that because Ms. Frase had not been a good mother to Justin, she cannot be a good mother to Brett Michael. In all material respects, the Brett Michael case was Justin *redux*.

B. Recusal Was Required Because Master Asparagus's Impartiality Might Reasonably Be Questioned.

Rule 16-814, Canon 3C(1) provides that a master "should not participate in a proceeding in which [her] impartiality might reasonably be questioned." This Court has recognized that "courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government." *In re Turney*, 311 Md. 246, 253, 533 A.2d 916, 920 (1987) (internal quotations omitted). "A party has the right to trial by a judge who is not only impartial and disinterested, but also has the appearance of being impartial and disinterested." *Cason v. State*, 140 Md. App. 379, 399, 780 A.2d 466, 478 (2001); *see Jefferson-El v. State*, 330 Md. 99, 107, 622 A.2d 737, 741 (1993) (recognizing "the importance of the judicial process not only being fair, but appearing to be fair").

Recusal for the appearance of partiality does not require a finding of actual bias. The standard is "whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney*, 311 Md. at 253, 533 A.2d at 923. "Using an objective standard precludes the necessity of delving into the subjective mindset of the

challenged judge." *Surrat*, 320 Md. at 468, 578 A.2d at 759.[12]

Here, Master Asparagus not only assessed the credibility of a former client's testimony, but did so with respect to the very issue of parental fitness that was at the heart of the prior case. Cases in which a former client of a master is involved in a case before her "create a reasonable appearance of partiality because the judge may be associated with the former client's cause as an advocate." *Sharp*, 327 Md. at 30, 607 A.2d at 551. Although Maryland courts have not addressed this issue, other state courts have held that "a judge is precluded from presiding over a matter in which a former client is involved, especially where the current adversary is the party against whom the prior representation occurred" and that "any action taken by the judge as a result of the proceeding cannot be recognized as valid." *Rivers v. Cox-Rivers*, 788 A.2d 320, 421 (N.J. Super. Ct. 2002); *see also Murray v. Murray*, 73 A.D.2d 1015, 1016 (N.Y. 1980) (requiring recusal in a divorce case where one spouse had previously merely consulted, but not retained, a judge while the judge was a practitioner because "[n]o matter what the outcome of the case . . . the integrity of the court will be called into question . . ."). Here, an objective observer would seriously question whether Master Asparagus viewed this case through the lens of her prior representation of Ms. Keys, and whether that representation preconditioned her to circumscribe Ms. Frase's custody of her son.

[12] The burden is on the judicial appointee, not the litigant, to "come forth and recuse himself so as to avoid any appearance of impropriety." *Aetna Cas. & Surety Co. v. Berry*, 669 So. 2d 56, 75 (Miss. 1996). The opposing party also has a duty to disclose information that might disqualify a judge. *Rivers v. Cox-Rivers*, 788 A.2d 320, 423 (N.J. Super. Ct. 2002).

II. THE COURT ERRED BY IMPOSING CONDITIONS ON MS. FRASE'S CUSTODY OF BRETT MICHAEL.

The circuit court's actions in this case violated Ms. Frase's right as a fit parent to raise her child without undue interference by the court or unrelated third parties. The Supreme Court has repeatedly recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[13]

Maryland courts have repeatedly protected a parent's "liberty interest in raising his or her children as he or she sees fit, without undue interference by the State." *In re Yves*, 2003 Md. LEXIS 152, at *13, 819 A.2d 1030 (2003). *See also Shurupoff v. Vockroth*, 372 Md. 639, 650, 814 A.2d 543, 550 (2003); *In re Adoption/Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 669, 796 A.2d 778, 780 (2002) (holding that right to "child rearing, *i.e.*, parenting" is a constitutionally protected fundamental right); *Boswell v. Boswell*, 352 Md. 204, 217, 721 A.2d 662, 668 (1998) ("A parent has a

[13] *See also Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting "the interest of a parent in the companionship, care, custody, and management of his or her children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (acknowledging "liberty of parents and guardians to direct the upbringing and education of their children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing right of parents to "establish a home and bring up children").

fundamental right to the care and custody of his or her child."); *Gestl v. Frederick*, 133 Md. App. 216, 243, 754 A.2d 1087, 1102 (2000) (same).

A. The Visitation Order Imposed on Ms. Frase's Custody Violates Her Right to Raise Her Son Without Undue Interference.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court held that a non-parental visitation statute, as applied, was an unconstitutional infringement of a parent's fundamental right to make decisions concerning the care, custody, and control of her children. In *Troxel*, paternal grandparents petitioned for visitation with their grandchildren under a state statute that permitted a court to "order visitation rights for any person when visitation may serve the best interest of the child." Wash. Rev. Code § 26.10.160(3), *cited in Troxel*, 530 U.S. at 60. The custodial parent did not oppose visitation altogether but disagreed with the amount requested. The lower court ordered grandparent visitation more extensive than the mother preferred. 530 U.S. at 61-62.

The Court in *Troxel* found the lower court's visitation order improper because – like the circuit court here – the court had not found the parent to be unfit and – like the circuit court here – the court failed to give any weight to the parent's determination of the visitation that would serve her children's best interest. *Id.* at 68-69. The Court held that it was improper for a court to order more third-party visitation than a fit mother preferred merely because the court disagreed about what would serve the children's best interests.

The Court warned that extending third-party visitation rights places "a substantial burden on the traditional parent-child relationship."[14] *Id.* at 64.

1. The court's award of third-party visitation was improper.

The circuit court's order of third-party visitation in this case violates the teaching of *Troxel*. As in *Troxel*, there was no finding here to defeat the traditional "presumption that fit parents act in the best interests of their children." *Id.* at 68. "So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69.

It was improper for the circuit court to impose visitation on Ms. Frase over her objection when there was no finding that she was unfit or that other exceptional circumstances existed. *Cf. Shurupoff v. Vockroth*, 372 Md. 639, 662, 814 A.2d 543, 557 (2003) (holding that in custody dispute between parent and third party, it is presumed that

[14] *Troxel* was a plurality opinion, but six justices agreed that a fit parent's fundamental liberty interest in the care and upbringing of her child encompassed the right of the parent to be free from judicially-compelled visitation by any party at any time simply because a judge believed that a better decision than that of the objecting parent could be made. *See* 530 U.S. at 79 ("[i]t would be anomalous . . . to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.") (Souter, J., concurring). Justice Thomas also agreed "with the plurality that [the Supreme Court's] recognition of a fundamental right of parents to direct the upbringing of their children" resolved the case, and that strict scrutiny should be applied to any infringements on fundamental rights. *Id.* at 80. Even the dissenting opinions would not authorize a court award of third-party visitation with virtual strangers with whom a child does not have a substantial relationship.

the child's best interest lies with parental custody unless the parent is unfit or that exceptional circumstances exist). The court's interference here was especially improper because the Barnharts were virtual strangers to Brett Michael and Ms. Frase. A third party seeking visitation with one's child is not constitutionally entitled to or otherwise presumed to be allowed visitation. *See Maner v. Stephenson*, 342 Md. 461, 470, 677 A.2d 560, 564 (1996) ("courts may not apply a rebuttable presumption in favor of grandparent visitation"); *Britton v. Meier*, 148 Md. App. 419, 431, 812 A.2d 1082, 1089 (2002) (recognizing that a grandparent has no constitutionally protected relationship to his grandchild); *Brice v. Brice*, 133 Md. App. 302, 304, 754 A.2d 1132, 1133 (2000) (holding that the application of Maryland's grandparent visitation statute unconstitutionally infringed upon a mother's due process rights where she was not unfit).[15]

Troxel commands that courts afford "special weight to the parent's own determination" about the people permitted to associate with her child and the manner of any such visitation. 530 U.S. at 70. *See also Beckman v. Boggs*, 337 Md. 688, 702, 655

[15] To the extent that Maryland's pre-*Troxel* case law suggests that a "best interest of the child" standard alone is sufficient to award third-party visitation, *see Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121 (1993), that case law is inconsistent with the constitutional holding of the majority of justices in *Troxel*. *See Gestl v. Frederick*, 133 Md. App. 216, 245, 754 A.2d 1087, 1102 (2002). After *Troxel*, other states have rejected "the best interest of the child" standard as the sole appropriate basis for allowing non-parental visitation. *See, e.g.*, *Punsley v. Ho*, 105 Cal. Rptr. 2d 139 (Cal. Ct. App. 2001); *Roth v. Weston*, 789 A.2d 431, 444 (Conn. 2002); *Wickham v. Byrne*, 769 N.E.2d 1, 7-8 (Ill. 2002); *Santi v. Santi*, 633 N.W.2d 312, 321 (Iowa 2001); *Dep't of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962 (Kan. 2001); *Glidden v. Conley*, 820 A.2d 197, 204-05 (Vt. 2003).

A.2d 901, 908 (1995) ("it is vitally important to recognize the strong interest" of a parent "in deciding with whom" her child should interact). Like the lower court in *Troxel*, the circuit court here failed to give special weight to Ms. Frase's right, as a fit custodial parent, to make decisions about where and with whom Brett Michael should visit. Instead, the court placed the burden on Ms. Frase – a pro se indigent litigant – to disprove the fitness of the Barnharts. (E. 342.) *Cf. Troxel*, 530 U.S. at 69 (criticizing lower court for placing burden on parent to disprove that visitation would serve the best interest of her daughters); *Ross v. Hoffman*, 280 Md. 172, 178, 372 A.2d 582, 586-87 (1977) (holding that burden is on third party to rebut presumption that the best interest of the child is served by awarding custody to parent).

It makes no difference that the circuit court recast the master's recommendation as visitation between siblings. (E. 325.) Although the court purported to recharacterize its purpose, the visitation between Justin and Brett Michael at the Barnharts' home, or at the home of Ms. Keys (who was allied with the Barnharts and wanted them to have custody of Brett Michael) was effectively a grant of third-party visitation to the Barnharts. (E. 143.) The master's primary concern was that the Barnharts "continue with the, the contact" with Brett Michael, just in case Ms. Frase should, at some unknown point in the future, "self-destruct." (E. 355.) Judge Jensen also reminded Ms. Frase that she was "[v]ery fortunate to have the Barnharts." (E. 329.) In other words, a major effect of the visitation order was to keep the Barnharts involved in Brett Michael's life. (E. 342.)

It is certainly reasonable for a custodial parent to decide that her child should not visit with virtual strangers who took physical control of her child without her permission,

denied her contact with him, and aggressively sought to obtain custody of him. "Simply to ignore a parent's wishes regarding the time his or her child should spend outside the family home, and outside of his or her immediate care and custody, is to trample improperly on the parent's liberty interest in directing the upbringing of his or her child." *Wolinski v. Browneller*, 115 Md. App. 285, 319, 693 A.2d 30, 46 (1997).

2. Sibling visitation that conflicted with Ms. Frase's preferences for such visitation was improper.

Even in the absence of any ulterior purpose to the visitation order, court-imposed sibling visitation that conflicts with Ms. Frase's desires for the structure and schedule of such visitation was improper under *Troxel* and Maryland law. The trial court flatly rejected, without explanation, Ms. Frase's request that all of her children visit together at her home without the Barnharts. (E. 321-22, 331, 342.) The court stated that Tara could be included in the visitation only if the Barnharts agreed. (E. 332, 338.) The court also gave no weight to Ms. Frase's objection to sending Brett Michael to the Barnharts' home, and said her objection to the Barnharts as supervisors was "falling on deaf ears."[16] (E. 342.)

Although this Court has not addressed the standard for awarding sibling visitation post-*Troxel*, the Court of Special Appeals found that "*Troxel* compels the court to apply a rebuttable presumption in favor of parents who oppose a non-parent's petition for

[16] The court's authority to award sibling visitation in the context of a third-party custody matter is questionable. The Barnharts never sought sibling visitation. Neither Justin nor his legal custodian, Ms. Keys, was made a party to the case. *See Miller v. Bosley*, 113 Md. App. 381, 398, 688 A.2d 45, 53 (1997) (criticizing master's interjection of possibility of *pendente lite* custody award to aunt who was not a party).

visitation with their custodial children." *In re Tamara R.*, 136 Md. App. 236, 253, 764 A.2d 844, 853 (2002).[17] The court below did not give Ms. Frase the benefit of that presumption. In the absence of a showing of unfitness or harm to her children, Ms. Frase has the presumptive right under *Troxel*, and *Tamara R.*'s application of *Troxel*, to determine the terms of such sibling visitation. *Id.*

Tamara R. also instructs that the court must consider the impact that any court-ordered sibling visitation would have on *all* of the siblings in the family and their respective relationships with their parent.[18] *Id.* at 260, 764 A.2d at 857. Here, however, the court below gave little weight to Tara's interest in visiting with her brothers, Justin's interest in visiting with his mother and with Tara, Ms. Frase's interest in visiting with Justin, nor all three children's interest in visiting together with their mother as a family unit.[19] The court also failed to consider the potential harm to Brett Michael if forced to

[17] In *Tamara R.*, the court held that a juvenile court in a CINA case may award sibling visitation over the objections of a father who had allegedly sexually abused his daughter, if the evidence regarding the potential for harm if that child is cut off from visitation with her siblings is sufficient to overcome the presumption favoring the father's objection.

[18] In *Tamara R.*, the Court of Special Appeals was interpreting Md. Code Ann., Fam. Law, § 5-525.2, which applies to sibling visitation petitions in foster care, adoption, and CINA situations.

[19] Although Ms. Keys actually raised Justin and limited Ms. Frase's contact with him (E. 72, 80, 81, 269), Ms. Frase had lived with Justin at various times. (E. 59, 80, 81, 136.) In addition, Ms. Frase was attempting to reestablish a relationship with Justin, but Ms. Keys and the Barnharts restricted her contact with him. (E. 58, 73, 267.) Ms. Frase filed a separate action in February 2002 to obtain visitation with Justin. (E. 73, 267-68, 291, 327-28.) Ms. Frase testified that if her mother asked Ms. Frase to take Justin back, she "would take him and do the best that [she] could with him." (E. 81-82.)

leave his mother's presence and spend time with adults – Ms. Keys or the Barnharts – who have an adversarial relationship with his mother. *See Maner v. Stephenson*, 342 Md. 461, 677 A.2d 560 (1996) (upholding lower court's denial of grandparent visitation because visitation was stressful on the nuclear family); *Fairbanks*, 330 Md. at 50, 622 A.2d at 127 (holding that court should "be alert to the psychological toll the visitation dispute itself might exact on a child in the midst of contesting adults").

That Ms. Frase wanted *all* of her children to visit together as a family demonstrates that she, perhaps alone, was considering the best interests of her children. *See Troxel*, 530 U.S. at 71; *cf. Wolinski*, 115 Md. App. at 293, 315, 693 A.2d at 33, 44 (holding that court may only override parent's wishes if parent's schedule is detrimental to the child's best interests; *e.g.*, parent being "obstinate or unreasonable").

The court's mere disagreement with Ms. Frase about the visitation that would best serve her children is a far cry from a constitutionally adequate basis to infringe on the parent-child relationship with a visitation order, regardless of how that order is interpreted. The "Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73.[20]

Ms. Frase has always had custody of Tara. (E. 79.) During the time of the proceedings below, Tara continued to stay at the Eskows during the week so she could complete the school year at the same school. (E. 74, 259.)

[20] The circuit court also violated Ms. Frase's fundamental liberty interest to choose where her family should live by requiring her to apply to a homeless shelter, St. Martin's House. While the court recognized that it did not have the authority to require her to move there (E. 322-23), the master made clear that she considered Ms. Frase's failure to

B. The Court Erred in Forcing Ms. Frase to Continue to Litigate this Case After She Was Awarded Custody by the Court.

The court's requirement that Ms. Frase continue to litigate this case after she was awarded custody also contradicts *Troxel*. The entry of a court order awarding custody to a fit parent should not subject that parent to endless "review hearings" in a third-party custody dispute. This unorthodox scheduling of continued hearings, coupled with the failure of the court to enter a final judgment after the merits trial and mediation, leaves Ms. Frase in legal limbo about the status of her relationship with her son and her ability to make decisions on his behalf without being subject to State intervention. The lower court treated this case as if it were a CINA proceeding, rather than a third-party custody matter in which the parent was awarded custody.[21] (E. 343.)

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move to St. Martin's a significant factor that weighed against her long-term continued custody of Brett Michael. (E. 355-56.) The court made no findings that would warrant, in this third-party custody case, such a drastic intrusion on Ms. Frase's choice of a home for her family. *See Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (recognizing freedom of association, especially in family relationships, as "fundamental element of personal liberty"); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down on due process grounds an ordinance that prohibited homeowner from living with certain non-nuclear family members); *McClary v. Follett*, 226 Md. 436, 442, 174 A.2d 66, 69 (1961) (holding that "humble status and indigence" do not alone constitute unfitness).

[21] Review hearings are common in CINA proceedings, where the juvenile court is required to conduct periodic review hearings at least every six months. Md. Code Ann., Cts. & Jud. Proc. § 3-823(h)(i). Even in a CINA context, however, such proceedings take place *after* final judgments are entered at the adjudication and disposition phases of the case. *Id.* §§ 3-817 and 3-819. CINA cases are typically terminated and the review hearings end after the court grants custody and guardianship of the child to a relative or other individual. *Id.* § 3-823(h)(iii). But it is noteworthy that if this case had been a CINA proceeding, Ms. Frase would have had the assistance of counsel. *Id.* § 3-813.

The continued litigation requirement also subjected Ms. Frase to the psychologically draining and costly burden of having to continue to defend herself without the aid of counsel, diverting her time and attention from her children and other life goals, such as maintaining employment and finding housing for her family. (E. 163, 170-72, 301-02.) *Troxel* recognized the "burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." *Troxel*, 530 U.S. at 75 (internal quotations omitted). This Court has also recognized that "judicial supervision of familial relationships is disruptive to the lives of children." *Maner v. Stephenson*, 342 Md. 461, 470, 677 A.2d 560, 564 (1996).

The endless review hearings at which her award of custody can suddenly be changed by the court also deprived Ms. Frase of a final judgment and the benefit of the higher "material change in circumstances" standard for modification of custody awards. As this Court held in *McCready v. McCready*, 323 Md. 476, 481, 593 A.2d 1128, 1130 (1991), a custody order must be afforded some finality and can only be modified if there is a change in circumstances. *See also Knott v. Knott*, 146 Md. App. 232, 262, 806 A.2d 768, 785 (2002). Otherwise, the court would permit parties to "relitigate questions of custody endlessly upon the same facts." *McCready*, 323 Md. at 481, 593 A.2d at 1130.

In sum, the conditions that the circuit court imposed on Ms. Frase's custody of her son were improper, intrusive and unconstitutional and require reversal.

III. THE COURT ERRED IN FAILING TO APPOINT COUNSEL TO REPRESENT MS. FRASE.

Ms. Frase made a valiant effort to represent herself in these proceedings. She was unable to do so effectively. That she required the "guiding hand of counsel" is self-evident. As shown below in Part III(B), the fundamental law of Maryland gives her that right, especially in a case like this one where the stakes are so high.[22]

A. Ms. Frase Was Unable to Represent Herself Effectively.

Ms. Frase's case was badly compromised because she was forced to represent herself. She conducted no pre-trial discovery. Her efforts at research in the courthouse library and some general assistance from the pro se clinic gave her only a rudimentary grasp of Maryland's family law. She was resourceful in identifying witnesses to her parenting skills, but her unfamiliarity with courtroom procedures and the rules of evidence permitted opposing counsel to exaggerate her alleged shortcomings as a parent. Her trial skills were, inevitably, non-existent. Although she consented to a master's hearing, she did not know what one was. (E. 8.) She believed that a witness who was not

[22] Even if this Court finds that the violations of Ms. Frase's rights as a fit parent require the outright dismissal of this case with no remand, the court should still address the issue of whether Ms. Frase had a right to appointed counsel under the Maryland Declaration of Rights. Ms. Frase is likely to face this question again, given the Barnharts' stated intention to pursue custody of Justin, and possibly seek custody of Ms. Frase's new baby. (E. 318, 329.) Moreover, this issue of first impression and great public importance is faced by indigent pro se litigants in Maryland courts on a daily basis, but evades appellate review because they do not have the knowledge or ability to appeal the issue. This Court has broad discretion to decide issues "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Rule 8-131(a). *See also In re Don Mc.*, 344 Md. 194, 200, 686 A.2d 269, 272 (1996). Here, Ms. Frase raised the issue of the right to counsel below, and the issue is ripe for review by this Court.

subpoenaed could not testify. (E. 18.) She sometimes interrupted a witness' testimony with volunteered information and comment. (E. 25, 142.) She had no understanding of how to introduce evidence, (E. 226-28, 271, 276-77), or what expert testimony was. (E. 94-95.) She did not appreciate the difference between her testimony as a witness and her argument as an advocate. (E. 153, 263, 306-07.) Her stress was palpable. She frequently expressed her bewilderment and on occasion apologized for it. (E. 17, 18, 25, 94-95, 145-46, 149, 153, 160-61, 171, 220, 263, 306-07.) Examples of the effect of Ms. Frase's lack of counsel include the following:

- Throughout the proceedings below, Ms. Frase failed to bring to the attention of the master or the judge the important issues of constitutional and family law that this case implicates. It was not until Ms. Frase's Emergency Motion, filed *after* the exceptions hearing had ended and the court had ruled on the exceptions, that Ms. Frase even raised the constitutional issue, citing *Troxel*. (E. 434.) In short, this case was tried before the master and argued to the circuit court without a word of advocacy about the defining constitutional and family law issues. It is inconceivable that counsel would have permitted that to occur.

- The Barnharts successfully portrayed themselves as Good Samaritans who – in a mere six weeks – had developed a warm and loving relationship with Brett Michael. Ms. Frase never sought to interview or depose the Barnharts and to pursue other inquiries into their background, such as their motives, their relationship to Ms. Keys, the financial consequences of obtaining custody of Brett Michael, the living conditions in their home, the number of other unrelated children of whom the Barnharts

have sought custody or adopted as well as the depth of their bond with Brett Michael. The Barnharts' professed altruism begged for testing. Ms. Frase, however, was unable to challenge or limit their testimony; on the contrary they testified, at great length and without objection, to everything they had *heard* about Ms. Frase's alleged lack of parenting skills. (E. 190-224; *see especially* E. 194-95.)

- Ms. Frase did not obtain the file of the Justin custody case until after the trial and the exceptions hearing.

- Counsel for the Barnharts painted Ms. Frase as a homeless alcohol and drug abuser whose regard for her children was at best fitful. He did so by relying heavily on the hostile testimony of her mother, Ms. Keys, about her conduct as a teenager and her "abandonment," years earlier, of Justin. (*See, e.g.,* E. 127-31, 139-40, 156.) He made continued and unfounded insinuations concerning Ms. Frase's mental health (E. 131, 309), exaggerated the significance of her misdemeanor convictions (E. 109-10, 116), and relied on hearsay about other alleged improprieties on Ms. Frase's part. (E. 212-14.) Most important, he was able to suggest that these alleged failings were chronic and ongoing. (*See, e.g.*, E. 53, 59, 65-67, 89, 281-82, 288, 317.)

Ms. Frase acknowledged that she had made "some bad choices" in the past (E. 81, 268, 316), but asserted that now, in her thirties, she was more responsible and taking significant steps to improve the lives of her children. But her stumbling attempts to clarify the record and to put these past events in context were ineffective.

- Although Ms. Frase's efforts to show her fitness and her loving bond with Brett Michael were very moving, (*see, e.g.,* E. 268-69), she was never able to limit,

qualify or put in context the litany of allegations against her. For example, her "cross-examination" of her mother was merely an exchange of accusations. (E. 146-58.) Clearly frustrated, Ms. Frase cut short her line of questioning. (E. 153.) She rarely objected to irrelevant, hearsay or otherwise inadmissible testimony. The fact that her recent incarceration was on account of events that occurred nearly two years earlier was never driven home. Her direct testimony was unstructured and amounted to little more than responses to the master's questions. There was, of course, no one to object during the aggressive cross-examination of Ms. Frase by the Barnharts' counsel. Her final argument was heartfelt but failed to address much of the case against her. (E. 316-18.) In short, Ms. Frase's cause never achieved a coherent presentation distinguishing fact from supposition and demonstrating the change from her admittedly troubled past to her more responsible present.

B. Articles 5, 19 and 24 of the Maryland Declaration of Rights Require the Appointment of Counsel for Ms. Frase.

Ms. Frase's right to court-appointed counsel is founded on Articles 5, 19 and 24 of the Maryland Declaration of Rights. Article 5 entitles Marylanders to the benefits of English statutes and common law in effect on July 4, 1776, which afforded free counsel to paupers in civil cases. Article 19's promise of "justice and right, freely without sale, fully without any denial" has been interpreted as an "open courts" provision that guarantees equal access to justice. That constitutional commitment cannot be fulfilled without the assistance of counsel in litigation involving fundamental rights and basic needs like Ms. Frase's battle to keep custody of her child. Article 24's injunction that

"no man ought to be . . . deprived of his life, liberty or property, but . . . by the Law of the Land" also mandates appointment of counsel in the compelling circumstances presented by the ordeal of Deborah Frase.

These provisions reach back to Tudor England and, earlier still, to Magna Carta itself. Their history, described below, is a powerful guide to their interpretation. But they obviously require modern application. It is for this Court, of course, to define the full scope and parameters of the constitutional mandate. Part III(C) below offers for the Court's consideration some observations concerning the eligibility of civil litigants for court-appointed counsel.

1. Ms. Frase has the right to counsel under Article 5.

Article 5 of the Maryland Declaration of Rights guarantees to Maryland's inhabitants the rights provided by the body of English statutory and common law as it existed on July 4, 1776. "That the colonists carried with them the rights of Englishmen, when they crossed the Atlantic, is one of the axioms of our constitutional history." Bernard C. Steiner, *The Adoption of English Law in Maryland,* 8 Yale L.J. 353, 353 (1899). *See also State of Maryland v. Buchanan*, 5 H. & J. 317, 355-56 (1821) ("That our ancestors did bring with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony, cannot be seriously questioned.").

Article 5 of Maryland's Declaration of Rights provides:

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the 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 or Equity . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.

Among the "rights of Englishmen" that crossed the Atlantic with the colonists was the guarantee of free counsel for indigent litigants, expressed in the Tudor statute 11 Hen. 7, c. 12 and its common law equivalents. The Tudor statute and the English common law have been "practiced" and "found applicable" to circumstances in Maryland. The Maryland Legislature has neither revised, amended nor repealed the right. The right to counsel in civil cases has become part of *Maryland's* common law that is in force today. And this right is more relevant, and more necessary, than ever.

a. 11 Hen. 7, c. 12 guaranteed indigent civil plaintiffs a right to counsel.

11 Hen. 7, c. 12 established a right to counsel for indigent civil plaintiffs with meritorious causes of action. Parliament enacted the statute to ensure that indigent civil litigants had effective access to the King's courts. Although the English courts were theoretically open to all, the baroque writ system made it impossible for litigants to prosecute their claims without the assistance of counsel. The complexity of the common law and the hypertechnical requirements of the writ system made "expert assistance indispensable." J.H. Baker, *An Introduction to English Legal History* 134 (2d ed. 1979). Although the affluent could hire legal experts to plead their cases for them, the poor could not afford counsel and thus were effectively excluded from the King's courts. *See* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 366 (1923).

It was in response to this exclusion from the King's courts that Parliament enacted 11 Hen. 7, c. 12. The statute "was meant to carry the poor man through the ins and outs of an action at common law." Maguire, at 373. The statute provided, in pertinent part:

> [T]he Justices . . . *shall* assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in likewise the same Justices *shall* appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels, help and business in the same.

An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, 11 Hen. 7, c. 12 (1494), *reprinted in* 2 Statutes of the Realm 578 (1993) (spelling modernized) (emphasis added).

Under 11 Hen. 7, c. 12, the chancellor merely determined whether a party was indigent: *i.e.* if he would swear himself worth less than five pounds. 3 William Blackstone, *Commentaries* *400.[23] Once the chancellor determined that the party was indigent and therefore eligible to commence an action without fees, the statute *required* the court to appoint counsel. By permitting indigent parties to bring suit without fees and by appointing them counsel, the statute eliminated the major impediments that kept poor persons from seeking remedies in the King's courts. As Maguire notes, the statute "was an excellent bit of legislation and seems, so far as the common law courts were

[23] At a later time, the courts also required an applicant to make a preliminary showing of merit. Julian J. Alexander, *British Statutes in Force in Maryland According to the Report Thereof Made to the General Assembly by the Late Chancellor Kilty* 347 (2d ed. 1912) (revised and annotated to date by Ward Baldwin Coe) ("[I]f the Court see in his affidavit that he has no cause of action he will not be received so to sue." (citing *In re Cobbett,* 27 L.J. Exch. 199 (1845))).

concerned, to have opened a new era with regard to poor persons' suits." Maguire, *supra*, at 370.

Although the express terms of 11 Hen. 7, c. 12 gave the right to appointed counsel only to indigent plaintiffs in civil actions, the English courts, well before the American Revolution, explicitly extended the rationale of the statute to indigent civil defendants, as a matter of common law. *See, e.g.*, *Wait v. Farthing*, 84 Eng. Rep. 237, 237 (K.B. 1668); Alexander, *supra* note 23 (noting that while the statute "extends only to plaintiffs in civil action . . . the rule is different in Chancery" (citing 1 Daniell's Chanc'y Pr. 34)). Treatises at the time and Orders of the High Court of Chancery are to similar effect. *See* The Practical Register in Chancery 265-66 (London, J. Nutt 1714); 1 George William Sanders, Orders of the High Court of Chancery 122, 243, 296 (London, A. Maxwell & Son 1845).[24]

b. 11 Hen. 7, c. 12 was incorporated into Maryland law under Article 5.

In 1809, the General Assembly charged the Chancellor of Maryland, William Kilty, "to report all such parts of the English Statutes as were proper to be introduced and incorporated" into Maryland law. Alexander, *supra, Preface to the First Edition*, at vii. In his report, Kilty found that 11 Hen. 7, c. 12 was applicable to Maryland and was proper to be incorporated. William Kilty, *Introduction to A Report of All such English Statutes as Existed at the Time of the First Emigration of the People of Maryland, and*

[24] Cases that post-date the American Revolution also confirm that indigent defendants had a common law right to appointed counsel. *See, e.g.*, *Wallop v. Warburton*, 30 Eng. Rep. 189, 189 (Ch. 1795); *Philipe v. Baker*, 171 Eng. Rep. 1305, 1305 (Nisi Prius 1824). In this case, Ms. Frase was both a defendant and a counter-plaintiff.

which by Experience Have Been Found Applicable to Their Local and Other Circumstances 229 (Annapolis, Jehu Chandler 1811) [hereinafter Kilty's Report].[25]

Kilty noted that he had "found some instances of this statute being practiced under [in Maryland] in the years 1664 and 1672."[26] *Id.* He explained that "although cases of the kind do not frequently occur, there is no reason why it should not be continued." *Id* Kilty also cited Blackstone as evidence that the statute was used in England in the eighteenth century.[27] *See id.* (citing 3 William Blackstone, *Commentaries* *400

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[25] Chancellor Kilty did not undertake to identify specific aspects of the English common law that were incorporated through Article 5 independently of English statutory law. As this Court has recognized, however, Article 5 incorporated "the mass of the common law as it existed in England on [July 4, 1776] and as it prevailed in Maryland either practically or potentially, except such portions thereof as were inconsistent with the spirit of the Constitution and the nature of our new political institutions." *Gladden v. State of Maryland,* 273 Md. 383, 389, 330 A.2d 176, 180 (1974) (internal quotation marks omitted); *see Dashiell v. Attorney General,* 5 H. & J. 392, 401 (1822). As shown above, English common law not only recognized the right to appointed counsel but extended it to defendants. And as shown below, the English common law, like the Tudor statute itself, remains applicable and in force in Maryland today.

[26] There are other early Maryland cases in which the statute was applied besides those identified by Kilty. In 1721, the Court of Appeals of Maryland considered the petition of John and Mary Smith that "Council" be "assigned" to Mary's son William, a minor, in a contested estate matter. Proceedings of the Maryland Court of Appeals, 1695–1729, at 303 (Carroll T. Bond, ed. 1933). The Smiths stated that they were ready to swear that they were "not Worth in their estate to the Value of five pounds Sterling." *Id*. The Court assigned them counsel. *Id*. In 1724, John Bagby came before the Court and swore "that he [was] not worth five pounds Ster[ling] money his Wearing apparel Excepted." *Id*. at 433. On this basis, Bagby asked the Court to allow him to "prosecute an appeal in forma pauperis which is allowed him." *Id*. The report does not indicate whether the Court granted Bagby's request for counsel.

[27] Indeed, the statute was in effect in England for almost four centuries. *See* Maguire, *supra,* at 374 ("With [the enactment of 11 Hen. 7, c. 12], we enter upon a stretch of almost four centuries during which the legislative situation remains absolutely constant."). The statute was repealed by the Statute Law Revision and Civil Procedure Act, 46 & 47 Vict. c. 49 (1883). The act replaced 11 Hen. 7, c. 12 with a system of legal

("[P]aupers, that is, such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12, to have original writs and *subpoenas gratis*, and counsel and attorney assigned them without fee")).

Kilty's Report is the authoritative source for determining whether an English statute was incorporated into Maryland common law under Article 5.[28] Indeed, long ago this Court stated that "[t]he only evidence to be found on [the incorporation of English statutes] is furnished by *Kilty's* Report." *Dashiell v. Attorney General*, 5 H. & J. 392, 403 (1822); *see also id.* ("[Kilty's Report] was compiled, printed, and distributed, under the sanction of the state, for the use of its officers, and is a safe guide in exploring an otherwise very dubious path."). This Court has never disagreed with Kilty's determination that a statute was incorporated under Article 5.[29]

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aid, administered by the rules of court, which provided for the appointment of counsel. *See* Seton Pollock, *Legal Aid—The First 25 Years* 12 (1975). A new system of legal assistance was created by statute in 1929. John Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 St. Louis U. Pub. L. Rev. 223, 226 (1998). The statutory system has been modified over the years, but the English legal aid system has always provided indigent parties with a right to counsel in civil cases. *See generally* Mahoney, *supra*, at 226–29. Thus, the right to counsel for indigent civil litigants, created by 11 Hen. 7, c. 12 in 1494, has continued in England to this day.

[28] English statutes incorporated under Article 5 are part of Maryland's common law. *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 393 n.3, 535 A.2d 466, 469 n.3 (1988).

[29] *See, e.g., Brown v. Housing Opportunities Comm'n of Montgomery County*, 350 Md. 570, 579–80, 714 A.2d 197, 201 (1997); *Berrain v. Katzen*, 331 Md. 693, 702, 629 A.2d 707, 711 (1992); *Kramer*, 311 Md. at 393 n.3, 535 A.2d at 469 n.3; *Moxley v. Acker*, 294 Md. 47, 49–50 & 50 n.2, 447 A.2d 857, 858 & 859 n.2 (1982); *LaFontaine v. Wilson*, 185 Md. 673, 679, 45 A.2d 729, 732 (1946); *Consol. Real Est. & Fire Ins. Co. v. Cashow*, 41 Md. 59, 70 (1874); *Estep v. Morris*, 38 Md. 417, 425 (1873); *Deckard v.*

c. 11 Hen. 7, c. 12 is applicable to contemporary circumstances.

In following Kilty's Report, this Court has routinely recognized the incorporation of statutes of ancient vintage. For example, in *Berrain v. Katzen*, 331 Md. 693, 701-02, 629 A.2d 707, 711 (1992), the Court recognized the incorporation of 12 Edw. 1, c. 15, a statute enacted in 1285 that permits next friend suits on behalf of infants. Similarly, this Court has recognized the incorporation of 9 Anne, c. 14, an anti-gaming statute of 1710. *Kramer v. Bally's Park Place, Inc*., 311 Md. 387, 393 n.3, 535 A.2d 466, 469 n.3 (1988); *Gough v. Pratt*, 9 Md. 526, 533 (1856).

This Court will, however, determine whether an incorporated English statute is no longer "applicable to our situation today." *Moxley v. Acker*, 294 Md. 47, 51, 447 A.2d 857, 859 (1982). In *Moxley* the court held that incorporated English statutes that required, as a prerequisite to a landlord's action for forcible entry, that a trespasser take the land by force, were obsolete. The court concluded "[w]hatever may have been the reason for the requirement of force in the action of forcible detainer, that reason has long since disappeared." *Id.* at 52, 447 A.2d at 860. Thus, whether the rationale underlying a common law rule created by the incorporation of an English statute is still applicable to contemporary circumstances is the touchstone of the obsolescence inquiry.[30]

State of Maryland, 38 Md. 186, 201–02 (1873); *Crisfield v. Storr*, 36 Md. 129, 146 (1872); *Gough v. Pratt*, 9 Md. 526, 533 (1856).

[30] In *State of Maryland v. Buchanan*, 5 H. & J. 317, 366 (1821), Chief Judge Chase suggested that a common law rule could "become obsolete from *non-user* or other cause." But the Chief Judge's suggestion that non-use could make the common law obsolete was flatly inconsistent with the opinion of the court, which held that the common law did not become obsolete by non-use. *Id.* at 358. More recently, this Court

The rationale underlying 11 Hen. 7, c. 12 – and its English common law counterpart – remains very much applicable to current circumstances in Maryland. Indeed, in our modern litigious society, the need is even greater. The complexity of civil litigation is still well beyond the ken of the vast majority of pro se litigants. For the layperson, the formulaic writ system that gave rise to the Tudor statute has given way to an even more complex and impenetrable system, with ever-evolving rules and legal standards. Noting that a pro se "untrained, inexperienced litigant is generally at a great disadvantage," Judge Cathell, for the Court of Special Appeals, once observed:

> There are many rules of procedure, many rules of evidence, and many exceptions to the rules of evidence. There are rules relating to burdens of proof, persuasion, and production. There are numerous causes of action with a myriad of elements of the respective causes. There are almost as many defenses to those causes. There are rules of conduct and many other rules.

Tretick v. Layman, 95 Md. App. 62, 68-69, 619 A.2d 201, 204 (1993). And while the affluent continue to be able to hire attorneys to represent them in civil actions, unrepresented indigent civil litigants, like the Tudor poor, do not have effective access to

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has reaffirmed that non-use does not make a common law crime obsolete. *Pope v. State*, 284 Md. 309, 339-41, 396 A.2d 1054, 1072-73 (1979); *see also id*. at 342 n.24, 396 A.2d at 1073 n.24 (rejecting Chief Judge Chase's "non-user" dicta in *Buchanan*). The *Pope* Court noted, however, that while non-use is not sufficient to make a common law rule obsolete, it is relevant insofar as it speaks to whether the rationale underlying the rule is currently applicable. *Id.* at 343, 396 A.2d at 1074. Strictly speaking, the court's holding concerning non-use applies to Maryland common law created by the incorporation of English common law. However, the same rationale applies to Maryland law created by the incorporation of English statutes, since it, too, is Maryland's common law. *See Kramer*, 311 Md. at 393 n.3, 535 A.2d at 469 n.3.

the courts. The rationale that informs 11 Hen. 7, c. 12 continues to be sound in our modern circumstances.

d. 11 Hen. 7, c. 12 has not been revised, amended or repealed.

Article 5 provides that the statutory and common law rights it incorporates are subject to revision, amendment or repeal by the Legislature. The Legislature has not done so. It has merely enacted a number of limited statutes that provide a right to counsel in particular types of civil actions. *See, e.g.*, Md. Code Ann., Fam. Law § 5-323 (right to counsel in adoption or guardianship cases); Md. Code Ann., Est. & Trusts § 13-705(d) (right to counsel in guardianship cases); Md. Code Ann., Cts. & Jud. Proc. §§ 3-813, 3-821 (right to counsel in juvenile proceedings). The legislature has also passed the Maryland Legal Services Corporation Act, Md. Ann. Code, art. 10, § 45B "to further the desirable goal of" providing access to legal counsel by "establishing a non-profit organization to receive and distribute funds" to civil legal services organizations. *Porterfield v. Mascari II, Inc.*, No. 14, 2003 Md. LEXIS 245, *49 (Md. May 8, 2003). None of these statutes, however, expressly limits the right to counsel only to certain types of civil actions, nor can they fairly be interpreted as doing so. Furthermore, repeal by implication is not favored. "[A] statute, made in the affirmative without any negative expressed or implied, does not take away the common law." *State of Maryland v. North*, 356 Md. 308, 311-12, 739 A.2d 33, 34 (1999) (internal quotations omitted). As this Court made emphatically clear in *North*, repeal by implication is especially inappropriate where, as here, "by Article 5 of the Declaration of Rights, the common law is Constitutionally guaranteed to the inhabitants of the State. Although that common law

may be altered or repealed through statutes duly enacted by the General Assembly, given the Constitutional underpinning, its erosion is not lightly to be implied." *Id.* at 312, 739 A.2d at 35.[31]

The Maryland General Assembly's periodic strengthening of free legal services to the poor does not undercut the broader right to counsel incorporated through Article 5. On the contrary, these statutes confirm the importance of providing counsel. As the General Assembly declared in the preamble to the Maryland Legal Services Act: "There is a need to provide equal access to the system of justice for individuals who seek redress of grievances . . . There is a need to continue and expand legal assistance to those who would otherwise be unable to afford adequate legal counsel . . . [and] The availability of legal services reaffirms faith in our government of laws." Md. Ann. Code, art. 10, § 45B.

2. Ms. Frase has the right to counsel under Article 19.

Article 19 of the Declaration of Rights is an "open courts" provision that guarantees equal access to justice. It derives from Magna Carta and the definitive interpretations of that charter of liberties by Coke and Blackstone. Article 19's command that all persons be able to pursue remedies in the courts and have "justice and right, freely without sale, fully without any denial," requires that counsel be provided to Ms. Frase.

[31] There may be implied repeal when a statute deals with an entire subject matter or when a statute and the common law are in conflict. *North*, 356 Md. at 312, 739 A.2d at 34. Neither circumstance exists here. None of the statutes providing for limited rights of counsel "embrace[] a complete scheme of regulation for a given subject." *Hitchcock v. State of Maryland*, 213 Md. 273, 279, 131 A.2d 714, 716 (1957). To the extent that any of them is considered to conflict with the common law right created by 11 Hen. 7, c. 12, the common law right is modified only to the extent of the conflict. *See City of Baltimore v. Sitnick*, 254 Md. 303, 319, 255 A.2d 376, 383 (1969).

a. Article 19 derives from Magna Carta's broad guarantees of equal access to justice.

Article 19 provides:

> That every man, for any injury done to him in his person or property, ought to have remedy by 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.

"The words and content of [Article 19] are derived from the Magna Carta." *Sanner v. Trustees of the Sheppard & Enoch Pratt Hosp.*, 278 F. Supp. 138, 141 (D. Md. 1968). Chapter 40 of Magna Carta declared: "To no one will we sell, to no one will we refuse or delay, right or justice." It was "[w]ritten to reform the system of selling writs, practiced during the reign of Henry II and his son, King John." *Bryant v. Thompson*, 922 P.2d 1219, 1221 (Or. 1996). The writ system, as it existed before Magna Carta, damaged the integrity of the judiciary because it blocked access to the courts for those unable to pay and made "the price of the writ obtained by the would-be litigant a determinant of the quality of justice received." *Meech v. Hillhaven West, Inc*., 776 P.2d 488, 492 (Mont. 1989). *See Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 341-42 (Or. 2001) (discussing origins of "open courts" provisions, including Maryland's Article 19).

Chapter 40 articulated the principle "that justice is not something to be sold to the highest bidder but should be available on impartial terms to men of all ranks." A. E. Dick Howard, *Magna Carta: Text and Commentary* 15 (1964). "[I]t has been interpreted as a

universal guarantee of impartial justice to high and low." William S. McKechnie, *The Magna Carta: A Commentary on the Great Charter of King John* 398 (2d ed. 1914).[32]

The exposition of Magna Carta by Coke and Blackstone reaffirmed its promise of equal justice. In his *Second Institutes,* Edward Coke, the preeminent commentator on the purposes and meaning of Magna Carta, explained that chapter 29 (the successor to chapter 40)[33] of Magna Carta encompassed "complete justice" for all people, regardless of their status. He recognized that it embodied the notion "that all persons are entitled to the universal guarantee of impartial justice." McKechnie, at 398. *See Bryant*, 922 P.2d at 1222. Access to the courts was critical for providing such justice because, as Coke recognized, the courts and the common law were the "surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all." *Craftsman Builder's Suppy v. Butler Mfg. Co.*, 974 P.2d 1194, 1207 (Utah 1999). *See also Smothers,* 23 P.3d at 341-42. Coke declared that Chapter 29 meant that:

> every subject of this realme, for injury done to him . . . may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Edward Coke, *The Second Part of the Institutes of the Laws of England* 55-56 (photo. Reprint 1979) (1642).

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[32] *See also* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions,* 74 Or. L. Rev. 1279, 1285, 1312 (1995); Jack B. Harrison, *How Open Is Open? The Development of the Public Access Doctrine Under State Open Court Provisions,* 60 U. Cin. L. Rev. 1307, 1310 (1992).

[33] When Henry III reissued Magna Carta in 1225, he merged chapter 40 with chapter 39 (the guarantee of the "law of the land") into a new chapter 29. *See* A.E. Dick Howard, *Magna Carta: Text and Commentary* 284 (1964).

Similarly, writing a century later, Blackstone underscored that the rights of Englishmen would have "little value but for Magna Carta's guarantee of the right of access to the courts." 1 William Blackstone, *Commentaries* *141. *See Craftsman Builder's Supply, Inc.*, 974 P.2d at 1207. As Blackstone explained:

> A … right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. . . . [Thus] every subject . . . without any exception, may take his remedy by the course of law, and have justice and right for the injury done him, *freely without sale, fully without any denial*, and speedily without delay.

1 William Blackstone, *Commentaries* *141 (1765) (emphasis added).

The interpretation of Magna Carta by Coke and Blackstone became the template for Article 19. Coke's and Blackstone's "work had a far-reaching effect in the framing of American state constitutions." *Craftsman Builder's Supply, Inc.*, 974 P.2d at 1206. The "colonialists were familiar with the Magna Carta and the *Second Institutes* and, when it came time to write their own laws, they looked to those documents." *Bryant*, 922 P.2d at 1222. Blackstone's influence on our founding fathers was "immense," and "Coke's works were the most common law books owned by the colonists." Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 Brandeis L.J. 613, 629 (2000).[34]

[34] Maryland colonial Attorney General Daniel Dulany stated: "The 29th chapter is not long, and ought to be read by every Body, and (in my humble Opinion) taught to Children, with their first Rudiments." Howard at 63 (quoting Daniel Dulany, *The Right of Inhabitants of Maryland to the Benefit of the English Laws* 14 (1728)).

Neither Article 19 nor Magna Carta itself expressly addressed the right to appointed counsel as an essential ingredient of the promise of equal justice. As shown above in Part III(B)(1), however, by the time Coke wrote his *Second Institutes* and Blackstone wrote his *Commentaries*, the right of indigent civil litigants to free counsel in order to protect their right to meaningful access to equal justice was part of the fabric of English statutory and common law. Indeed, Blackstone expressly discussed the importance of 11 Hen. 7, c. 12 in his *Commentaries*. 3 William Blackstone, *Commentaries* at *400. And as McKechnie points out, Coke "read[] into Magna Carta the entire body of the common law of the seventeenth century, of which he was admittedly a master." McKechnie, at 178. The drafters of Article 19, furthermore, were also the drafters of Article 5, which incorporated the English statutory and common law that provided counsel to poor civil litigants. It was a right that was "used and practiced" by the colonial courts. *See supra* note 26 and accompanying text. The drafters of Article 19 had reason to understand that meaningful access to justice required counsel, and that the poor were entitled to appointed counsel.

b. Article 19's guarantee of equal access to justice is meaningless without the right to appointed counsel for the indigent.

This Court has held that Article 19 guarantees *inter alia* "a right of access to the courts." *Piselli v. 75th St. Med.*, 371 Md. 188, 205, 808 A.2d 508, 518 (2002).[35] Other

[35] Most of the Maryland cases that address Article 19 arise in the context of challenges to legislation that restricts remedies in some way. The court has upheld legislative restrictions so long as they are not "unreasonable." *See, e.g., Doe v. Doe*, 358 Md. 113, 747 A.2d 617 (2000); *Johnson v. Maryland State Police*, 331 Md. 285, 628 A.2d 162 (1993); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985); *Whiting-Turner*

states that have "open courts" provisions have also recognized that these clauses ensure equal justice,[36] but no state has yet addressed whether these provisions require the appointment of counsel for indigent civil litigants. This Court should do so here.

"Mere access to the courthouse door does not by itself assure a proper functioning of the adversary process." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). As a Maryland Judicial Commission found: "many of the State's poor *lack meaningful access to the civil justice system* because they cannot afford to hire a lawyer." *The Maryland Judicial Commission on Pro Bono: Report and Recommendations* (Mar. 2000) (emphasis added). Without counsel, the poor simply do not have "access to justice" at all. They merely have what Deborah Frase had here: the right to be physically present in the courtroom –

Contracting v. Coupurd, 304 Md. 340, 449 A.2d 178 (1985); *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57 (1978); *Gooslin v. Maryland*, 132 Md. App. 290, 752 A.2d 642 (2000).

[36] *See, e.g., Paro v. Longwood Hospital*, 369 N.E.2d 985, 991 (Mass. 1977) (provision guarantees "the availability of equal justice, 'that all litigants similarly situated may appeal to the courts both for relief and for defense under the conditions and with like protection and without discrimination.'"); *Kilmer v. Hui Chan Mun*, 17 S.W.3d 545, 548 (Mo. 2000) (open courts clause "applies against all impediments to fair judicial process"); *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 493 (Mont. 1989) (guarantee "means no more nor less than that, under the provisions of the Constitution and the laws constituting them, the courts must be accessible to all persons alike, without discrimination . . ."); *Williams v. The Village of Port Chester*, 72 A.D. 505, 510 (N.Y. 1902) (open courts clause "was to guarantee to every member of this State free access to the courts and a full opportunity to have a judicial determination of all controversies which might involve his rights"); *Bryant v. Thompson*, 922 P.2d 1219, 1222 (Or. 1996) (open courts provision based on concept of "free and equal justice"); *Brewer v. Dep't of Fish & Wildlife*, 2 P.3d 418 (Or. App. 2000) (provision was "intended to function as an 'open courts' clause, to guarantee that everyone will have access to the courts to seek whatever remedies the law may provide"); *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) ("[t]he right of access to the courts has been at the foundation of the American democratic experiment.").

an arena that had a labyrinth of rules, standards and practices that she did not understand and could barely navigate. As California Justice Earl Johnson, Jr. has described, to say that physical presence in the courtroom ensures equal access to justice in civil cases is "a little bit like saying the Christians had fair access to the arena where they were led without arms or armor into a Roman coliseum to face a pack of hungry lions." Earl Johnson, Jr., *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants*, Bar Leader (Sept./Oct. 1976), at 17.

In the civil justice system, "an untrained, inexperienced litigant is generally at a great disadvantage." *Tretick*, 95 Md. App. at 69, 619 A.2d at 204. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Mastery of the substantive and procedural law required to assert and vindicate one's rights can rarely be achieved by an indigent pro se litigant, especially when confronted by an experienced attorney.[37]

The Supreme Court's landmark decision forty years ago in *Gideon v. Wainwright* remains the most influential, and eloquent, statement of the need of the poor for counsel. 372 U.S. 335 (1963). *Gideon* held that the Due Process Clause of the federal

[37] Under Maryland law, pro se civil litigants must adhere to procedural, evidentiary, and other rules in the same manner as those represented by counsel. *Tretick*, 95 Md. App. at 68, 619 A.2d at 204 ("the principle of applying the rules equally to pro se litigants is so accepted that it is almost self-evident"). *See Pickett v. Noba, Inc.*, 122 Md. App. 566, 568, 714 A.2d 212, 213 (1998) ("While we recognize and sympathize with those whose economic means require self-representation, we also need to adhere to procedural rules in order to maintain consistency in the judicial system.").

Constitution's Fourteenth Amendment required the appointment of counsel for indigent criminal defendants in state courts. Justice Black's reasoning in *Gideon* and his invocation of Justice Sutherland's "moving words" in the notorious Scottsboro case ring true here:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Gideon, 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

Ms. Frase also has "small and sometimes no skill in the science of the law." Ms. Frase, too, was "unfamiliar with the rules of evidence." Faced with the challenges of assessing the legal and factual posture of her case; identifying and examining witnesses; advocating controlling legal and constitutional issues; assessing the relevance of facts; discrediting adverse testimony; and of making strategic judgments at trial, Ms. Frase was equally in need of "the guiding hand of counsel."

Gideon's recognition that the lack of counsel distorts the adversary process is no less true in the civil context, at least in cases such as Ms. Frase's that implicate fundamental rights or basic human needs. *Gideon*'s "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," applies with equal force to this case. *Gideon*, 372 U.S. at 344. Lawyers in civil matters such as this also "are necessities, not luxuries." *Id.* The stakes for the indigent civil litigant in Ms. Frase's position may be as great – or even

greater – than those of the criminal defendant. The loss of custody of one's child is a life-shattering event more profound than the prospect of thirty days in jail. The presence of lawyers in a civil case makes a substantial difference to the outcome of the proceedings. That is why those who can afford lawyers, hire them.[38]

As numerous commentators have urged, the reasoning of *Gideon* applies with equal force in civil cases and meaningful access to justice requires the appointment of counsel for indigent civil litigants. *See, e.g.,* Simran Bindra, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 Geo. J. on Poverty L. & Pol'y 1 (2003); Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000).[39] In

[38] The *amici curiae* briefs submitted in this case provide an overview of the substantial difference that lawyers make in civil cases, as well as the huge gap in the availability of legal services for the poor in Maryland. As the *amici* briefs show, empirical studies consistently confirm that the presence of counsel makes a significant difference in the outcome of civil proceedings. *See, e.g.*, Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U. J. Gender Soc. Pol'y & Law 101 (2002) (Maryland study found battered women who had an attorney were successful in getting a protective order from the court 83% of the time, while only 32% of battered women without an attorney obtained an order); 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 (2001) (low-income tenants represented by counsel are much less likely to have a final judgment and order of eviction issued against them, and more likely to benefit from a stipulation requiring a rent abatement or repair to the apartment); Maryland Legal Services Corporation, *Action Plan for Legal Services to Maryland's Poor* (Jan. 1987), at 12 (presence of counsel in contested administrative hearings nearly *doubled* the claimant's success in reversing an agency's denial of public benefits).

[39] *See also What Is Access to Justice? Identifying the Unmet Legal Needs of the Poor*, 24 Fordham Int'l L.J. 187 (2000); William L. Dick, Jr., *Note: The Right to Appointed Counsel for Indigent Civil Litigants: the Demands of Due Process*, 30 Wm. & Mary L. Rev. 627 (1989); Andrew Scherer, *Gideon's Shelter: The Need to Recognize a*

sum, as Justice Black, the author of *Gideon*, observed in the civil context: "there cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel." *Meltzer v. C. Buck LeCraw & Co. (Indigents' Cases)*, 402 U.S. 954, 959 (1971) (Black, J., concurring in denial of certiorari).

This Court should apply the logic of *Gideon* in order to fulfill Article 19's unredeemed promise of equal access to the courts. As federal judge Robert W. Sweet has put it, we need "an expanded constitutional right to counsel in civil cases." In short, he says, "we need a civil *Gideon*." Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 503 (1998).

3. Ms. Frase had a right to counsel under Article 24.

Ms. Frase is also entitled to counsel under Article 24 of the Maryland Declaration of Rights, which guarantees:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

a. Fundamental fairness requires the appointment of counsel for Ms. Frase.

Article 24 is Maryland's guarantee of due process, which ensures the right to a fair hearing. As repeatedly recognized by this Court, "[i]t is not merely the right to a hearing

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Right to Counsel for Indigent Defendants in Eviction Proceedings, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 Md. L. Rev. 18, 43-48 (1990). A bibliography of other articles about the need for and right to counsel for indigent civil litigants is attached as Appendix II.

which is guaranteed, but the fairness of that hearing as well." *State v. Berry*, 287 Md. 491, 499, 413 A.2d 557, 562 (1980). "The proceedings are to be tested by fundamental fairness – the touchstone of due process." *State v. Bryan*, 284 Md. 152, 159 n.6, 395 A.2d 475, 479 n.6 (1978).

Maryland courts have long recognized the importance of the assistance of counsel to ensure fundamental fairness, at least in criminal matters or in civil cases in which one's physical liberty is at stake. As early as 1942, this Court held "that counsel should have been appointed as an essential of due process of law" where a criminal defendant was "unaccustomed to court procedure and apparently incapable of taking an active part in his trials." *Coates v. State*, 180 Md. 502, 512, 25 A.2d 676, 680 (1942). In *State v. Renshaw*, 276 Md. 259, 265, 347 A.2d 219, 224 (1975), the court explained: "Central to the cases dealing with the right to counsel is the recognition that *the assistance of a lawyer is essential to assure a fair trial*." (Emphasis added.) In *Rutherford v. Rutherford*, 296 Md. 347, 358, 464 A.2d 228, 234 (1983), the court recognized that "[u]nder certain circumstances the requirements of due process include a right to counsel, with appointed counsel for indigents, in *civil* cases or other proceedings not constituting critical stages of criminal trials." (Emphasis added.) *See also Sites v. State*, 300 Md. 702, 716, 481 A.2d 192, 199 (1984) ("the due process clause of the Fourteenth Amendment has long been recognized as a source of a right to counsel independent of the Sixth Amendment *where critically important to the fairness of the proceedings*.") (emphasis added).

Article 24 protects more than physical liberty – it also protects one's "freehold, liberties or privileges" and "life, liberty or property." Md. Decl. Rts. art. 24. Limiting the due process right to counsel to protection only of physical liberty creates an artificial and illogical distinction. Here, Ms. Frase was haled into court by strangers to defend – uncounseled – her fundamental right to the custody of her child. The court below continued to force her to defend – uncounseled – her right to determine visitation and living conditions that serve the best interests of her children. Given what is at stake, the failure to provide Ms. Frase with counsel "offends a sense of justice that impairs the fundamental fairness of the proceeding."[40] *Sites,* 300 Md. at 717, 481 A.2d at 200.

b. *Lassiter v. Department of Social Services* does not control Ms. Frase's right to counsel under Article 24.

To date, this Court has relied on *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), to restrict the due process right to counsel under Article 24 to civil cases where one's physical liberty is at stake. *See Zetty v. Piatt,* 365 Md. 141, 155-59, 776 A.2d 631, 639-43 (2001); *Rutherford,* 296 Md. at 358-63, 464 A.2d at 234-37 and cases cited therein. In a 5-4 decision, *Lassiter* held that the rule in *Gideon* was not automatically

[40] Courts around the world have found that the principle of fundamental fairness – the same as our due process guarantee – requires the appointment of free counsel for indigent civil litigants. In *Airey v. Ireland*, 2 Eur. H.R. Rep. 305 (1979), for example, the European Court of Human Rights held that the requirement of "a fair and public hearing" – similar to the fair hearing required by Article 24's due process mandate – required that free counsel be appointed for an indigent woman who wished to obtain a decree of judicial separation from her husband. The court held that in order for the Convention's guarantee of a fair hearing to have "practical and effective meaning," counsel must be provided. *See* Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 Md. J. of Contemp. Legal Issues 199 (1994).

applicable in civil cases. Rather, *Lassiter* proclaimed that under the Fourteenth Amendment's Due Process Clause there is a presumption that an indigent litigant has a right to appointed counsel *only* when, if he loses, he may be deprived of his physical liberty. The Court announced a balancing test under which courts must weigh the presumption that the right to counsel arises only where the indigent's personal freedom is at risk, against the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): 1) the private interest at stake; 2) the government's interest; and 3) the risk that the procedures used will lead to erroneous decisions. Applying these factors, the *Lassiter* Court concluded that the indigent mother at issue did not have a right to counsel in a termination of parental rights proceeding.

Lassiter's balancing test suffers from deficiencies similar to the balancing test of *Betts v. Brady*, 316 U.S. 455 (1942), which *Gideon* overruled as an unworkable "anachronism" that departed from the sound wisdom in *Powell v. Alabama* that counsel is required to ensure a fair hearing. *Gideon*, 372 U.S. at 345. Moreover, *Lassiter*'s presumption that there is no broad due process right for the appointment of counsel for indigent civil litigants under the federal Due Process Clause does not control the interpretation of Ms. Frase's due process rights under Article 24. This Court has made clear 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." *Dua v. Comcast Cable*, 370 Md. 604,

621, 805 A.2d 1061, 1071 (2002) (emphasis in original). *See also Frankel v. Bd. of Regents*, 361 Md. 298, 313, 761 A.2d 324, 332 (2000); *Attorney General v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981).

Interpreting Article 24 to include the right to counsel for the poor in civil cases involving fundamental rights or basic needs, not simply physical liberty, draws additional support from its companion provisions in the Maryland Declaration of Rights, Articles 5 and 19, which have no counterparts in the federal Constitution. The provenance of these three provisions in Maryland's constitution is nearly identical. They unmistakably interrelate. They reflect the drafters' determination to ensure effective access to justice. They show that Maryland has heightened constitutional "due process" requirements for ensuring that the indigent have equal access to justice, including the provision of free counsel to protect their fundamental rights.

c. Even under *Lassiter*, Ms. Frase had the right to appointed counsel.

The court below erred in not, at the very least, examining whether Ms. Frase was entitled to appointed counsel under the *Lassiter* test. *Lassiter* itself does not preclude a finding of a broader right to counsel in certain civil cases. In fact, state courts have applied *Lassiter* to find a right to counsel in certain civil cases, including cases that do not involve physical liberty. As one state court has said, "under . . . *Lassiter* cases in which appointment of counsel is not required should be the exception." *South Carolina Dep't of Soc. Servs. v. Vanderhorst*, 340 S.E.2d 149, 153 (S.C. 1986) (holding indigent

mother had right to appointed counsel during proceedings to remove children from her custody and at termination of parental rights hearing).[41]

The *Lassiter* test requires the appointment of counsel for Ms. Frase. The private interest at stake – Ms. Frase's right to the care and custody of her child – is clearly fundamental. This Court recently stated that a parent's interest "in the companionship, care, custody, and management of his or her children . . . occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility." *In re Yves*, 2003 Md. LEXIS 152 at *16-17. Parental rights are "far more precious . . . than property rights." *Id.* (internal quotations and citations omitted).

The State likewise has a *parens patriae* interest in custody cases to ensure an outcome that protects "the health, safety, and welfare of its citizens," particularly the well-being of children like Brett Michael. *Boswell v. Boswell*, 352 Md. 204, 218, 721 A.2d 662, 669 (1998). The State also has an interest in promoting public confidence in the judiciary and a fair and efficient judicial system. Cases in which one party is unrepresented solely because of poverty take more time to litigate and place judges in the

[41] Other cases in which state courts have appointed counsel under the *Lassiter* due process test include: *Garramone v. Romo*, 94 F.3d 1446, 1449-50 (10th Cir. 1996) (child neglect); *Emilye v. Ebrahim*, 9 Cal. App. 4th 1965 (1992) (visitation rights); *Lavertue v. Niman*, 493 A.2d 213, 215-17 (Conn. 1985) (paternity); *Allen v. Div. of Child Support Enforcement*, 575 A.2d 1176, 1178-82 (Del. 1990) (paternity); *Bauer v. McClure*, 549 N.E.2d 392 (Ind. Ct. App. 1990) (termination of parental rights); *Kennedy v. Wood*, 439 N.E.2d 1367, 1372 (Ind. Ct. App. 1982) (paternity); *B.L.E. v. Elmore*, 723 S.W. 2d 917, 919, 921 (Mo. Ct. App. 1987) (termination of parental rights); *Carroll v. Moore*, 423 N.W.2d 757, 766-67 (Neb. 1988) (paternity); *Corra v. Coll*, 451 A.2d 480, 483, 486 (Pa. Super. Ct. 1982) (paternity); *Joni B. v. Wisconsin*, 549 N.W.2d 411, 416, 418 (Wis. 1996) (termination of parental rights).

uncomfortable and incompatible roles of impartial arbiter and advocate for the pro se party. *See supra* notes 38 and 39. And as found by the Maryland General Assembly, providing counsel to the poor is a "desirable goal" that "reaffirms faith in our government of laws." Md. Ann. Code, art. 10 § 45B.

Finally, as seen by Ms. Frase's experience in this case and the errors committed by the circuit court, the risk of error when an indigent parent is unrepresented against a represented adversary is especially high. *See Lassiter*, 452 U.S. at 27. As outlined above, empirical studies – not to mention the daily experience of the poor in Maryland's courtrooms – consistently confirm that pro se parties are substantially more likely to lose, even when the law is clearly on their side. *See supra* note 38. In short, the civil adversary system simply does not work when one side is unrepresented.

C. Conclusions and Considerations Regarding the Right to Counsel.

This lawsuit threatened Deborah Frase with the loss – perhaps forever – of custody of her son. She was unable to afford a lawyer and legal services organizations were unable to provide counsel. Under these circumstances, she was entitled to appointed counsel pursuant to Articles 5, 19 and 24 of Maryland's Declaration of Rights.[42]

A finding that these provisions require appointment of counsel for Ms. Frase does not require this Court to define the precise constitutional boundaries of the right or to

[42] The Court has the inherent power to appoint counsel to protect the fairness of the proceedings and counsel are bound to accept such appointments. Md. Code Ann, Cts. & Jud. Proc. § 1-501 (2000) provides that the circuit courts have "full common-law and equity powers" and "all the additional powers and jurisdiction conferred by the Constitution and the law." *See also* Md. Rule Prof. Conduct 6.2 (requiring attorneys to accept court appointments).

address the details of its implementation. However, since, whatever the scope of its ruling, the court will be required to give modern application to rights rooted in centuries-old authority, the following observations with respect to a civil litigant's eligibility for appointed counsel are respectfully offered for the court's consideration:

First, as under 11 Hen. 7, c. 12, a litigant must demonstrate that he or she is indigent. A modern definition of indigency is found in the eligibility guidelines in the Maryland Legal Services Corporation Act. Md Ann. Code, art. 10, § 45G(e). Second, the case must implicate the applicant's fundamental rights or basic human needs. Such needs would include (but not necessarily be limited to) life-affecting matters such as the child custody issues raised by this case, the potential loss of housing, health issues affecting access to health care, and employment matters that may determine the applicant's ability to earn a living. Third, a litigant must demonstrate that he or she has attempted unsuccessfully to secure counsel and that existing legal services organizations have been unable to provide representation. Fourth, a litigant must demonstrate that the case is not the type in which counsel can be secured by virtue of a contingency fee arrangement or a fee-shifting statute.

In addition to these tests, one additional observation, albeit beyond the immediate reach of judicial decision, is relevant to implementation of Maryland's constitutional right to counsel for indigent civil litigants. As the views expressed by *amici* make clear, reliance on case-by-case appointments of the private Bar cannot begin to address the pervasive need of the poor for counsel. Despite the commendable efforts of Maryland's private practitioners, greater reliance on their pro bono services, essential as they are, is

not efficient, effective or fair to either lawyer or client. It is the expertise of the legal service organizations that is required. But those services, already strapped financially and seriously overburdened, cannot possibly meet the need. Without funding increases that will enable these agencies to increase their resources substantially, adding to their responsibilities will measurably dilute their ability to represent their clients in a professionally responsible manner. Indeed, it is likely to make it impossible.

Increased funding for existing legal services agencies is obviously a matter for the executive and legislative branches of government. Discussion and debate about the details, and the costs, of a suitably enhanced Maryland program of legal services to the poor are subjects for another day in another place. They should be conducted, however, against a judicial finding that a right to counsel inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.

CONCLUSION

For the reasons set forth above, the conditions imposed on Ms. Frase's continued custody of her young son should be removed and this custody case dismissed.

Respectfully submitted,

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* Catherine Woolley of the Public Justice Center, whose official admission to the Maryland Bar is scheduled for June 2003, also contributed to this brief.

** The Court granted Appellant a page limit extension to 60 pages in an Order dated May 1, 2003.

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2003, two copies of the Brief of Appellant Deborah Frase and Joint Record Extract were mailed first class, postage prepaid to: Timothy A. Bradford, Esq., Kent, Cizek & Treff, 109 South Second Street, Denton, Maryland 21629, counsel for appellees.

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