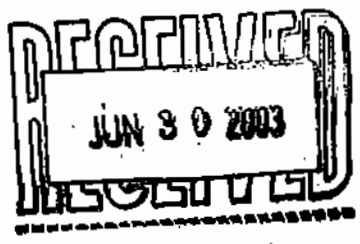


**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2003

No. 6



DEBORAH FRASE,

Appellant

v.

CYNTHIA BARNHART, et al.,

Appellees

On Appeal from the Circuit Court for Caroline County
(Hon. Karen A. Murphy Jensen)

BRIEF OF APPELLEES, CURTIS AND CYNTHIA BARNHART

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STATEMENT OF THE CASE

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

On June 14, 2002, 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.) An exceptions hearing was held before the Circuit Court for Caroline County on September 16, 2002, affirming the master's recommendations but modified the Order by establishing visitation between the siblings and not between the minor child in this matter and the Barnharts.

On October 23, 2002, Ms. Frase filed an Emergency Motion requesting many things including a request that the review hearing be postponed due to her late-term pregnancy. (E. 436-37.) The Circuit Court for Caroline County ruled on the Emergency Motion on November 1, 2002 and expressly addressed the request for postponement, which was denied. (E. 443-44.) The court did not address the other requests in Ms. Frase's Emergency Motion. On November 26, 2002, Ms. Frase filed a Notice of Appeal on the Order dated November 1, 2002, which only denied Ms. Frase's request for postponement. Ms. Frase filed a Petition for a Writ of Certiorari to the Court of Appeals of Maryland, which was granted on April 9, 2003.

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 impose third party visitation?
3. Was it error for the court to deny Ms. Frase's request for a court appointed counsel in a contested custody matter?
4. Should appellant's appeal be dismissed as not allowed by law?

STATEMENT OF FACTS

Ms. Frase is a parent of a three year old son, Brett Michael. (E. 257.) In November 2001, Ms. Frase placed Brett Michael in the temporary care and custody of family friends from her church when she was incarcerated for possession with intent to distribute marijuana. (E. 50-51.) A few weeks after Ms. Frase was incarcerated, Ms. Frase's mother placed Justin, Ms. Frase's older son, and Brett Michael with the Barnharts, and placed Ms. Frase's daughter with another family. (E. 50.)

Ms. Frase pled guilty to possession with intent to distribute marijuana on January 15, 2002 and received a time served sentence. (E. 457.) Ms. Frase picked up her children from the Barnharts on January 19, 2002. (E. 52.) Three days later, the Barnharts filed a complaint for custody of Brett Michael. (E. 367-77.) Ms. Frase filed an answer and counter-claim for custody. (E. 385-391.) Ms.

Frase represented herself throughout the entire proceeding at the Circuit Court for Caroline County.

ARGUMENT

I. The Circuit Court did not err in failing to recuse Master Asparagus.

The first time the court became aware of the issue of recusal was when Ms. Frase filed her Emergency Motion on October 23, 2002. As of today, the court has not ruled on Ms. Frase's request to recuse Master Asparagus or has it had any other hearings in which Master Asparagus would be presiding. The appellees believe this issue is premature and not ready for review by the Court of Appeals of Maryland.

II. The Circuit Court did not err by imposing visitation between siblings?

Although the appellant questions the power of the court to order third party visitation, no third party visitation was ordered. Visitation between siblings was ordered by the court. The appellate courts in Maryland have not addressed the standard for awarding sibling visitation. "The state's interest in all custody, adoption and visitation disputes is to protect the best interests of the child caught in the middle of the fight." *Wolinski v. Browneller*, 115 Md.App. 285, 301, 693 A.2d 30 (1997). "The Court of Appeals has often reaffirmed that this interest takes precedence over the fundamental right of a parent to raise his or her child." *In re Adoption No. 10941*, 335 Md. 99, 113, 642 A.2d 201 (1994). The appellees

believe that the best interest of the child standard applies in the case at hand and that the Circuit Court for Caroline County was not in error to order visitation between siblings.

III. The Circuit Court did not err by denying Ms. Frase's request for court appointed counsel in this matter.

Although the Supreme Court's decision in *Gideon v. Wainwright* states a need for attorneys for indigent defendants, the case only applies to criminal defendants in state courts. 372 U.S. 335 (1963). The case that is controlling in this matter is *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), which has been cited by this court in *Zetty v. Piatt*, 365 Md. 141, 776 A.2d 631 (2001). *Lassiter* held that the rule in *Gideon* was not automatically applicable in civil cases. *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 is at stake; 2) the government's interest; and 3) the risk that the procedures used will lead to erroneous decisions.

In this matter, Ms. Frase's personal freedom is not at risk. Maryland courts have never recognized that a person's freedom is at risk in civil cases unless the party is facing possible incarceration. As to the risk that the procedures used will

lead to erroneous decisions, Ms. Frase in this case proved that a person representing themselves can do it effectively. In the case at hand, the appellees asked the court for full custody of Ms. Frase's son but Ms. Frase representing herself was able to defend the complaint and able to keep custody of her son. The appellees believe that *Lassiter* is controlling in this matter and that the Circuit Court did not err by not appointing counsel for Ms. Frase.

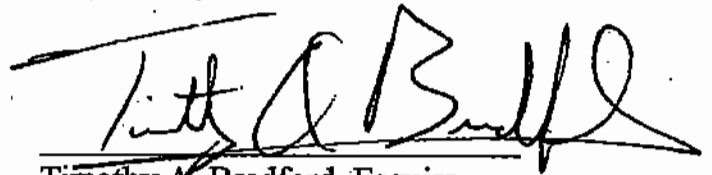
IV. Should appellant's appeal be dismissed as not allowed by law?

Notwithstanding this court granting certiorari in this matter on April 9, 2003, the appellees believe that the appellant's appeal should be dismissed as not allowed by law. Ms. Frase filed a Notice of Appeal on November 25, 2002. The Notice of Appeal only addressed the Order of the Circuit Court of Caroline County dated November 1, 2002. That Order denied the appellant's request for postponement and is an interlocutory order. Appellant's counsel stated in her Prehearing Information Report filed in the Court of Special Appeals of Maryland that this is an appealable interlocutory order under Md. Code Ann., Cts. & Jud. Proc., Section 12-303(3)(x). Section 12-303(3)(x) allows an appeal of any order "...depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order." The above-mentioned Order does not address custody and currently the appellant has physical custody of her child, Brett Michael. The appellees believe the appellant's appeal should be dismissed as not allowed by law.

CONCLUSION

For the reasons set forth above, the appellees ask that the appellant's appeal be dismissed as not allowed by law or in the alternative, affirm the decision of the Circuit Court for Caroline County.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Timothy A. Bradford", written over a horizontal line.

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June 27, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2003, copies of the foregoing Brief of the Appellees, Cynthia and Curtis Barnhart were mailed first class, postage prepaid to:

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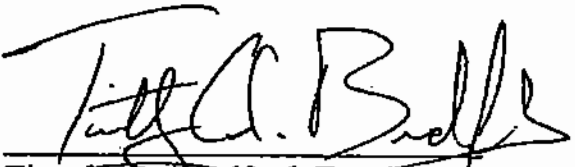
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Pursuant to Maryland Rule 8-504(a)(8), this brief has been prepared with proportionally spaced type: Times New Roman, 13 point.