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)

Reply Brief of Appellant Deborah Frase

Stephen H. Sachs
Of Counsel
Wilmer, Cutler & Pickering
100 Light Street
Baltimore, Maryland 21202
(410) 986-2800

Debra Gardner
Wendy N. Hess
Catherine Woolley
Public Justice Center
500 East Lexington Street
Baltimore, Maryland 21202
(410) 625-9409

Deborah Thompson Eisenberg
Brown, Goldstein & Levy, LLP
120 East Baltimore Street
Suite 1700
Baltimore, Maryland 21202
(410) 962-1030

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

INTRODUCTION

As appellant demonstrated in her opening brief, the circuit court's November 1 Order violated her fundamental right to make decisions concerning the care and custody of her child, deprived her of her right to counsel and forced her to appear before a master who was subject to mandatory recusal. Appellees present nothing to defeat those claims.

ARGUMENT

I. THE NOVEMBER 1, 2002 ORDER IS APPEALABLE.

A. The November 1 Order Denied More than a Postponement.

Appellees assert that the November 1, 2002 Order is not appealable because it denied only Ms. Frase's request for postponement of a scheduled review hearing before Master Asparagus. (Appellees' Brief at 5.) That is incorrect. The November 1 Order denied much more than a postponement.

Ms. Frase's Emergency Motion made several requests. Ms. Frase asked that Master Asparagus be recused; but the court required Ms. Frase to appear again before Master Asparagus on November 4. Ms. Frase asked that counsel be appointed to represent her; but the court sent her back, unrepresented, before the master. Ms. Frase sought removal of the conditions on her custody or dismissal of the case; but the court returned her to the master for the first in a series of review hearings, all of which were predicated on the unconstitutional conditional custody and visitation regime imposed by the court on September 16.

In short, although the court did not expressly address these central and substantive requests in Ms. Frase's Emergency Motion, as a practical matter they were necessarily

and inescapably denied.[1] That the Order was not limited to a mere denial of postponement was certainly the understanding of the master and the parties. At the November 4, 2002 review hearing, counsel for appellees asked if the Emergency Motion that raised "lots of issues" was "still outstanding." (E. 349.) The master replied that the November 1 Order "den[ied] the relief requested." *Id.*

B. The November 1 Order Constitutes an Appealable Interlocutory Order Under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x).

The November 1 Order is an appealable interlocutory order under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x), which permits appeals of interlocutory orders "depriving a parent, grandparent, or natural guardian of the care and custody of [her]

[1] The Court of Special Appeals has recognized in other contexts that a court's failure to address a motion may be construed as implicit denial of the motion given other actions by the court. *See RTKL Assocs., Inc. v. Baltimore County*, 147 Md. App. 647, 652-53, 810 A.2d 512, 515 (2002) (noting that although court did not explicitly rule on statute of limitations defense, it had tacitly denied the motion to dismiss on that basis), *abrogated on other grounds by Deibler v. State*, 365 Md. 185, 776 A.2d 657 (2001); *Hawes v. Carberry*, 103 Md. App. 214, 216, 653 A.2d 479, 480 (1995) ("The trial judge did not explicitly rule on [defendant's] Motion for Judgment, but, as a practical matter, his ruling in favor of the [plaintiffs] amounted to a denial of that motion."); *Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 226, 640 A.2d 743, 734 (1994) (noting that: (1) although circuit court did not address issue of whether appellees waived the contract contingency requirement, it was implicit that the court found no such waiver when it denied the appellant's claim for specific performance; and (2) "by granting the new trial, the court implicitly, and necessarily, denied" the Judgment NOV "aspect of the motion"); *Gregory W. Dallas, P.C. v. Envtl. Health Assocs., Ltd.*, 77 Md. App. 350, 356-57, 550 A.2d 422, 425 (1988) ("although there is no explicit ruling in the record denying appellee's motion, we think that such a ruling is implicit in the court's transfer of the case"); *Parker v. State*, 66 Md. App. 1, 13, 502 A.2d 510, 516 (1986) ("We believe . . . the trial judge implicitly ruled on the issue, and therefore it is properly before us for appellate review."). *Cf. Cooks v. Rodenbeck*, 711 So. 2d 444, 448 (La. Ct. App. 1998) ("Generally, when a judgment is silent on a demand at issue under the pleadings, such silence constitutes an absolute rejection of the demand.")

child, or changing the terms of such an order." The November 1 Order deprived Ms. Frase of the right to the care and custody of her child, or changed the terms of her custody.

First, as shown above, the Order effectively denied Ms. Frase's request that the conditions on her custody be removed, and that this case be dismissed. It thereby perpetuated the regime imposed in the September 16 orders of enforced visitation and unorthodox endless review hearings.[2] As a practical matter, the November 1 Order is the functional equivalent of the order that the court contemplated it would enter, but never entered, after the mediation. (E. 433.) The November 1 Order's implicit denial of Ms. Frase's requests made it absolutely clear that she now had to comply with the conditions placed on her custody, and that she could not seek any further relief from the trial court.

Moreover, this Court has recognized that an order need not actually deprive a parent of physical custody of a child to be an appealable interlocutory order under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x), so long as it has the effect of depriving a parent of custody or changing the terms of a custody order. In *In re Damon M.*, 362 Md. 429, 765 A.2d 624 (2001), the Court held that an order amending a permanency plan

[2] The September 16 orders were interlocutory orders because the court had ordered the parties, and appellant's mother, Diane Frase Keys, to attend a mediation session to work out visitation details, had scheduled a subsequent review hearing and had indicated an intention to enter a further order upon completion of the mediation. (E. 430-33.) However, the court never entered the contemplated final order after the mediation, and thus, there has never been a "final" judgment issued in this case. In addition to compromising Ms. Frase's access to appeal, this failure also had the effect, as appellant argues in her opening brief, of depriving Ms. Frase of the benefit of the higher "material change in circumstances" standard that should have applied to any subsequent efforts by appellees to obtain custody of her son. *See* Appellant's Brief at 28.

from reunification to foster care or adoption is immediately appealable under § 12-303(3)(x) because it was a change in the terms of a custody order. Similarly here, the court's failure to remove the conditions on Ms. Frase's custody or enter a final judgment placed her continued custody of Brett Michael at great peril.

The November 1 Order made clear to Ms. Frase that the circuit court was denying her pleas to have the conditions on her custody removed and that she would have to comply with the court-imposed visitation.[3] It was also clear that Ms. Frase's continued custody of Brett Michael remained at risk. She would be forced to relitigate the custody and visitation issues at subsequent review hearings – unrepresented by counsel and before a master who was prohibited by law from hearing her case – at which her actions as a parent would be closely scrutinized and the custody of her son be perpetually endangered.

Section 12-303(3)(x) provides a remedy for Ms. Frase's dilemma. It was enacted to address the "'irreparable harm that may be done to one party if he had to await final judgment before entering an appeal.'" *Della Ratta v. Dixon*, 47 Md. App. 270, 284, 422 A.2d 409, 416 (1980) (quoting *Flower World of America, Inc. v. Whittington*, 39 Md. App. 187, 192, 385 A.2d 85, 88 (1978)).

In sum, the November 1 Order, by denying Ms. Frase's request that the conditions on her custody or this case be dismissed, and requiring her to continually relitigate this

[3] This Court has recognized that "visitation is considered to be a form of temporary custody." *Beckman v. Boggs*, 337 Md. 688, 703 n.7, 655 A.2d 901, 909 n.7 (1995). *Cf. Magness v. Magness*, 79 Md. App. 668, 671, 558 A.2d 807, 808 (1989) (holding *ex parte* award of custody to mother pending a *pendente lite* hearing is appealable interlocutory order under section 12-303(3)(x) because parent is deprived, however, briefly, of the care and custody of his children).

matter after she was found to be fit, deprived her of the right to the care and custody of her child, or at the very least, changed the terms of her custody. This significant deprivation constitutes irreparable harm and gives her the right to an immediate interlocutory appeal under Md. Code Ann., Cts. & Jud. Proc. § 12-303(3)(x).

C. The Denial of the Motion to Recuse is Appealable Because a Trial on the Merits Has Occurred.

Without any supporting authority or argument, appellees assert that the issue of recusal is "premature." (Appellees' Brief at 3.) That is incorrect. The November 1 Order required Ms. Frase to continue to appear before the very master whose recusal she sought. Such a hearing occurred on November 4. (E. 348-57.) And at that hearing Master Asparagus scheduled yet another review hearing for February 24, 2003, which would have occurred if Ms. Frase had not filed this appeal and obtained a stay of further proceedings below. (E. 356.)

The unique procedural posture of this case makes the recusal issue reviewable at this time. Although a denial of a motion to recuse made before or during trial is not typically an appealable interlocutory order, *Breuer v. Flynn*, 64 Md. App. 409, 496 A.2d 695 (1985), Ms. Frase did not discover or raise the grounds for recusal until after a trial on the merits had occurred. In this unique, post-trial situation, there is nothing else for the court to do other than monitor compliance with the custody order. Given this procedural posture, the denial of the recusal motion should, for all practical purposes, be considered a final appealable order.

Maryland courts have not addressed a recusal motion made *post-trial* in a civil or custody case. Several federal courts have held that where a trial on the merits has occurred and judgment entered, the denial of a motion to recuse is immediately appealable. In *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991), the court held that denial of a recusal motion was immediately appealable where a judgment on the merits had occurred at the time of the recusal motion, and the case was in a remedial monitoring phase. *See also United States v. Bloomer*, 150 F.3d 146, 149 (2d Cir. 1998) (holding denial of post-judgment recusal motion to be an appealable final order). Similarly, the Third Circuit held that an order denying a motion to disqualify counsel in a civil case was appealable where it followed a trial and entry of judgment. *Ohntrup v. Firearms Ctr.*, 802 F.2d 676 (3rd Cir. 1986). These decisions reflect the idea that "[i]t is sometimes appropriate that the requirement of finality be given a practical rather than a technical construction." *Id.* at 678 (internal quotations omitted). "Were the rule otherwise, an aggrieved party would for all practical purposes be denied meaningful review of such trial court orders." *Id.*

The same principle applies here. The master has already presided over the trial on the merits in this case, so there is nothing left for the circuit court to do other than monitor compliance with its existing orders and issue a final judgment. But, given the posture of the case, there is no indication when that judgment will come. There is no just reason for delaying appellate review of the recusal issue. Indeed, the need for immediate review is especially strong here because recusal was mandatory, and the visitation and housing conditions and subsequent review hearings in this case implicate Ms. Frase's

fundamental rights to the care and custody of her child under *Troxel v. Granville*, 530 U.S. 57 (2000).[4]

II. *TROXEL V. GRANVILLE* CONTROLS THIS CASE.

Appellees' argument in support of the court's visitation order completely ignores the controlling Supreme Court precedent of *Troxel v. Granville.* As appellant has shown in her opening brief, *Troxel* establishes that the circuit court's order unconstitutionally interfered with Ms. Frase's rights as a fit parent whether or not the visitation order is construed as sibling visitation. (Appellant's Brief at 20-26.)

III. APPELLEES FAIL TO ADDRESS MS. FRASE'S RELIANCE ON MARYLAND'S DECLARATION OF RIGHTS.

Appellees argue that *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), controls, and defeats, Ms. Frase's right to counsel. They make no attempt to address the heart of Ms. Frase's argument – that she has a right to court-appointed counsel under Articles 5, 19 and 24 of the Maryland Declaration of Rights. Furthermore, as Ms. Frase has demonstrated in her opening brief, *Lassiter* does not control Ms. Frase's right to counsel under Maryland law. (Appellant's Brief at 53-55.) And, even if the *Lassiter* test is applied here, the court is required to appoint counsel for Ms. Frase. (Appellant's Brief at 55-57.)

[4] This Court also has discretion under Rule 8-131 to decide an issue "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Rule 8-131(a). The Court should therefore address the recusal and right to counsel issues.

Appellees' contention that the determination of whether an unrepresented party is entitled to counsel should depend on the outcome of the litigation and that Ms. Frase represented herself "effectively" is especially misguided. (Appellees' Brief at 5.) First, the right to counsel, if it is to be meaningful at all, must attach when a litigant's fundamental interests are first put in jeopardy in the judicial system. Second, a backward-looking test would impose an impossible, and wholly inefficient, administrative burden on the courts. Finally, while Ms. Frase did not lose full custody to the Barnharts, she remains subject to unconstitutional conditions on the continued custody of her child, including visitation that conflicts with her determination as a fit parent as to her child's best interests, as well as indefinite review hearings. Critically, she remains subject to the ongoing risk that at some such future review hearing the custody decision itself might be reversed. Ms. Frase therefore has a continuing right to counsel in the trial court.

CONCLUSION

For the reasons set forth above and in Ms. Frase's opening brief, appellant respectfully requests that this Court remove the conditions placed on Ms. Frase's continued custody of her son and dismiss the case.

Respectfully submitted,

Deborah Thompson Eisenberg
Brown, Goldstein & Levy, LLP
120 East Baltimore Street
Suite 1700
Baltimore, Maryland 21202
(410) 962-1030

Debra Gardner
Wendy N. Hess
Catherine Woolley
Public Justice Center
500 East Lexington Street
Baltimore, Maryland 21202
(410) 625-9409

Stephen H. Sachs
Of Counsel
Wilmer, Cutler & Pickering
100 Light Street
Baltimore, Maryland 21202
(410) 986-2800

Dated: July 17, 2003
Times New Roman, 13-pt.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2003, two copies of the Reply Brief of Appellant Deborah Frase were mailed first class, postage prepaid to:

Timothy A. Bradford, Esq.
Kent, Cizek & Treff
109 South Second Street
Denton, Maryland 21629
Counsel for Appellees

Jane C. Murphy
Claire A. Smearman
Cheri Wyron Levin
University of Baltimore Family Law Clinic
5 West Chase Street
Baltimore, MD 21201
Counsel for Amici Curiae University of Baltimore Family Law Clinic & The Women's Law Center of Maryland

Tracy Brown
The Women's Law Center of Maryland
305 West Chesapeake Avenue, Suite 201
Towson, MD 21204
Counsel for Amici Curiae University of Baltimore Family Law Clinic & The Women's Law Center of Maryland

Hannah M. Lieberman
Rhonda B. Lipkin
Jessica L.C. Rae
Legal Aid Bureau, Inc.
500 East Lexington Street
Baltimore, MD 21202
Counsel for Amici Curiae Legal Services Providers

James Shea
Mitchell Mirviss
John B. Howard, Jr.
Venable, Baetjer and Howard, LLP
1800 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza Baltimore, MD 21201
Counsel for Amicus Curiae Maryland State Bar Association, Inc.

Robert J. Rhudy
Maryland Legal Services Corporation
15 Charles Plaza, Suite 102
Baltimore, MD 21201
Counsel for Amicus Curiae Maryland Legal Services Corporation

_____
Wendy N. Hess