
**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2003

No. 691

DEBORAH FRASE
Appellant,

v.

CYNTHIA BARNHART, *et al.*,
Appellee

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

**Brief of the Amicus Curiae
Maryland Legal Services Corporation**

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August 29, 2003

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STATEMENT OF THE CASE

Maryland Legal Services Corporation (MLSC) filed a motion for leave to participate in this case as *Amicus Curiae* in support of the Petitioner, Deborah Frase, in the Court of Appeals on July 3, 2003. The Court of Appeals granted MLSC's motion on July 8, 2003. MLSC hereby adopts and incorporates by reference the statement of the case as set forth in the Appellant's brief.

QUESTIONS PRESENTED

- I. Whether, despite the collective efforts to date by Maryland government, judiciary, bar, legal services providers, law schools, Maryland Legal Services Corporation, and others, inadequate resources exist to assure the provision of legal counsel to such persons as the Appellant in contested child custody cases and other critical litigated matters.
- II. Whether, given Maryland's current civil legal aid system, the State of Maryland can provide legal counsel in such cases in an efficient and effective manner with a reasonably affordable increase of public funding.

STATEMENT OF THE FACTS

MLSC hereby adopts and incorporates by reference the Statement of Facts as set forth in Appellant's brief. Appellant Deborah Frase is an indigent mother who was unable to obtain counsel when parties not in her family sought custody of her child. Ms. Frase sought legal counsel from the Legal Aid Bureau and other staff and pro bono legal services providers, but was denied assistance because of

their inadequate resources. She repeatedly asked the Circuit Court to appoint counsel for her, but her requests were ignored or denied. She sought to represent herself before the Master and Court, but was unable to adequately present testimony, challenge or exclude improper testimony, or protect herself against serious legal errors. As a result, her custodial and other parental rights have been seriously compromised. Unfortunately, Appellant's experience is similar to that of many other persons needing but not receiving legal counsel in contested child custody and other critical civil matters each year throughout Maryland.

MLSC was established by the Maryland General Assembly in 1982 to help fund, preserve, expand, develop and coordinate the provision of civil legal assistance to Maryland's low-income population. MD. CODE ANN., ART. 10, § 45 (2002). MLSC's charge includes "training, research, coordination with private attorneys and other activities necessary to insure the delivery of quality legal services." *Id.*, §45C(g). The MLSC Act directs the corporation to "insure that grants and contracts are made so as to provide the most stable, economical, and effective delivery of legal assistance and that eligible clients in all areas of the state shall have access to those services." *Id.* §45G(d). Pursuant to the MLSC Act, MLSC has the primary responsibility in our State to promote "equal access to the system of justice for individuals who seek redress of grievances." *Id.* §45B(a).

SUMMARY OF ARGUMENT

Our State's public leaders have acknowledged from the time of Maryland's creation the responsibility to provide equal access to justice for all. With their

roots in English notions of social contract, government, and common law, our founders also clearly understood the need to provide legal counsel to indigent persons to assure justice when serious conflicts arose requiring legal resolution. For nearly one hundred twenty-five years of Maryland history (with the brief exception of a federal program following the Civil War to represent former slaves), “legal aid” in such cases primarily consisted of pro bono or bartered attorney services and requests from the bench to a local attorney when an indigent litigant (and the court) needed help.

Beginning early in the Twentieth Century, Maryland’s evolving efforts to provide civil legal aid and access to justice for low-income persons can be divided into five major phases: (1) a charitable period, beginning with the creation of the Legal Aid Bureau in Baltimore in 1911; (2) federal funding for the Legal Aid Bureau beginning in 1966 from the U.S. Office of Economic Opportunity’s Legal Services Program; (3) state funding for civil legal aid beginning in 1974 for the Maryland Judicare Program; (4) increased state responsibility for legal aid with creation of the Maryland Legal Services Corporation and the interest on lawyers trust account program by the Maryland General Assembly in 1982; and (5) increasing judicial and bar involvement in promoting legal aid beginning in 1989 through pro bono, assisted pro se, and other activities.

Promoted by outstanding leaders of the bar, judiciary, General Assembly, legal aid programs, and legal academies, these efforts have substantially expanded civil legal aid for Maryland’s poor. Our State’s current legal aid system must still

be described as “Much Accomplished, Much to Be Done.” *See* Herbert J. Belgrad & Robert J. Rhudy, *Legal Services to Maryland’s Poor: Much Accomplished, Much to Be Done*, 20 MD. BAR J., February 1987, at 13. Maryland has constructed a house of justice, but many cannot enter. We have developed an effective and efficient civil legal aid system for those income-eligible persons fortunate enough to receive legal assistance from our legal aid staff, private pro bono attorneys, and assisted pro se and mediation programs; but our public and private resources are woefully inadequate to assure access to justice and legal representation to persons unable to afford legal counsel in contested child custody cases and other critical litigated matters. *See* Robert J. Rhudy, *Equal Access to Maryland’s System of Justice*, 36 MD. BAR J., March-April 2003, at 48.

In 1999 the Maryland Legal Services Corporation (MLSC) determined that contested child custody cases like Deborah Frase’s were the most critical underserved need for legal representation in civil matters in our State. In cooperation with the Administrative Office of the Courts, Legal Aid Bureau, local bar foundations, and others, MLSC established a Model Child Custody Representation project in October 1999 in Anne Arundel, Montgomery, and Prince George’s Counties to provide such services in those jurisdictions and assess the best manner of providing such services throughout Maryland. In FY 2002 the project provided legal representation to parents in 275 contested child custody cases in the three jurisdictions. In April 2003 the University of Baltimore Law School’s Center for Families, Children, and the Courts evaluated the project,

finding it a successful model for such services that received very favorable support from participating clients, attorneys, program managers, court personnel, and knowledgeable judges and masters. GLORIA DANZIGER, CENTER FOR FAMILIES, CHILDREN, AND THE COURTS, UNIVERSITY OF BALTIMORE SCHOOL OF LAW, MODEL CHILD CUSTODY REPRESENTATION PROJECT—EVALUATION REPORT (April 7, 2003).

MLSC estimates that it could operate a similar comprehensive program statewide for an additional \$2,000, 000 to \$3,000,000 annually. Implementing the legal aid system that has been developed in our State, MLSC further estimates that it could manage a reasonably comprehensive civil legal aid program to identify and provide legal representation in custody and other contested cases with legal merit concerning fundamental legal rights statewide for an additional \$12,000,000 to \$15,000,000 in public funding annually. *Supra Rhudy*,36 MD. BAR J. at 53.

While proclaiming “Equal Justice for All” for more than two hundred years, Maryland fails to provide adequate funding to provide legal representation when necessary for justice to work for persons who cannot afford an attorney. Numerous other states in the United States provide substantially higher levels of public funding for civil legal aid to indigents than Maryland. Many other developed countries contribute far more public funding for civil legal aid for their low to moderate-income residents, and are establishing an international norm of right to counsel by constitution, international convention, court decision, or

legislation in a broad range of civil legal matters. We can and should follow their examples.

ARGUMENT

A Brief History of Legal Aid in Maryland

Maryland's first organized legal aid program began in 1911 when Baltimore's Federated Charities created the Legal Aid Bureau, with Thomas Cadwalader as its first part-time general counsel.¹ Brennan Center for Justice, NYU School of Law, *Making the Case: Legal Services for the Poor—A Close Look Through the Lens of the Maryland Legal Aid Bureau* (1999) (available at http://www.brennancenter.org/resources/atj_series/Article1.pdf). *See also* Robert J. Rhudy, *MLSC Continues a Tradition of Aid to the State's Poor*, *The Daily Record*, May 2, 1988, at B12. The new program handled 234 cases in its first year. Operated as a program of Federated Charities during its first years, the Bureau became an independent private nonprofit corporation in 1929, with articles of incorporation declaring its purpose to “provide legal aid gratuitously, if necessary, to all who may appear worthy thereof and who are unable to procure assistance elsewhere, and to promote measures for their protection.” *Id.*²

¹A brief federal legal aid program was established at the close of the Civil War in 1865. Congress created the Freedman's Bureau within the War Department to help newly freed slaves in the former Confederate states and Maryland. Headed by General Oliver O. Howard (who later founded Howard University), the Freedman's Bureau recognized quickly that legal rights of former slaves were meaningless unless they could actually be enforced in court. The Bureau retained attorneys and appointed “friends of the court” to provide legal counsel and representation for the former slaves. Attorneys and agents of the Bureau represented freedmen without charge in real estate and wage claims, illegal and discriminatory state employment and voting law challenges, and criminal proceedings until the Bureau was eliminated in the post-Reconstruction era. *See*, Howard C. Westwood, *Getting Justice for the Freedman*, 16 *HOW. L. J.* 492 (1971).

Throughout its first fifty-five years, the Bureau primarily relied upon private donations and bar support for its limited operations (with some funding from Baltimore City beginning in the 1930s that allowed hiring its first full-time attorneys). In 1940 the Bureau formed a joint committee with bar representatives to determine what cases could be referred to the private bar; and in 1953 the City of Baltimore dedicated courthouse space in its new People's Court Building for the Bureau. *Id.*

Through the strong support of then-American Bar Association President Lewis Powell, in 1965 the new U.S. Office of Economic Opportunity under Sargent Shriver established the OEO Legal Services Program. Headed by former Piper & Marbury attorney Clinton Bamberger, the Legal Services Program made grants to establish and support existing legal aid programs throughout the United States. *See* Earl Johnson, Jr., *Justice and Reform: The Formative Years of the American Legal Services Program 39-184* (1978); John Dooley & Alan Houseman, *Legal Services History*, ch. 1 at 1-35 (1985). In 1966 Baltimore's Legal Aid Bureau began receiving OEO funds. With such assistance the Bureau's

²The German Society of New York created the nation's first independent legal services agency in 1876, the "Deutsche Reshsschutz Verin," to provide legal assistance to recent German immigrants who were victims of landlord or sales fraud and employer exploitation. The program expanded its mandate in 1890 to serve all poor persons in need of legal assistance, and in 1896 became the Legal Aid Society which continues today in New York City as the world's oldest and largest nonprofit legal aid program. Legal Aid Society was supported by charitable contributions of bar leaders and the general public, and became the model for the next seventy years for gradually expanding legal aid programs in major metropolitan areas in the U.S. In 1920 the American Bar Association created a Special Committee on Legal Aid with Charles Evans Hughes as its chair to promote the development of legal aid, continuing today as the "Standing Committee on Legal Aid and Indigent Defendants." *See* John Maguire, *The Lance of Justice* 238-245 (1928); Reginald Heber Smith, *Justice and the Poor* (1919); Emery Brownell, *Legal Aid in the United States* (1951); Earl Johnson, Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* 1-19 (1978).

budget expanded to \$481,000 annually by the end of the decade, allowing the program to open neighborhood offices around Baltimore and in Bel Air, Annapolis, and Westminster. *Supra*, Brennan Center for Justice; and Rhudy, *The Daily Record*, at B13.

Federal funding for the OEO Legal Services Program was frozen between 1970 and 1975 (the first of many such funding crises) over fights with the Nixon Administration and some members of Congress about legal aid activities in California, Florida, Texas and a few other states. *See* Walter Karabian, *Legal Services for the Poor: Some Political Observations*, 6 U.S.F. L. REV. 253 (1972); Jerome B. Falk & Stuart R. Pollack, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L. J. 231, 246-56 (1971); Deborah Stashower, *A Brief History of Legal Services: 10 on the Richter Scale*, 38 NLADA BRIEFCASE 18 (1981). In 1974 Congress established the U.S. Legal Services Corporation to succeed the OEO program. 42 U.S.C. §§ 2996-2996l (1983). LSC's annual budget between 1975 and 1981 grew from \$70,000,000 to \$321,500,000. *Supra* Dooley & Houseman, *Legal Services History* (1983), ch. 2 at 16-17. With increased federal support and under the leadership of Charles Dorsey, by 1980 the Bureau had established fourteen offices providing civil legal aid to indigents throughout Maryland. *Supra* Brennan Center for Justice.

The federal funding freeze in the early 70s stimulated the creation of Maryland's first state funding for civil legal aid. Pursuant to the leadership of J. Michael McWilliams, then chair of the Maryland State Bar Association's Section Council for Legal Services, in 1974 Maryland established a "Judicare" program administered by the Maryland Department of Human Resources. The Maryland Judicare Program paid private attorneys \$35 per hour to represent indigents in a wide range of civil matters. Income-eligible persons received Judicare vouchers from local departments of social services, and could select any private attorney who agreed to participate in the program. While a majority of Judicare services were for divorce, child custody, support, and related family matters, it also provided legal assistance in landlord-tenant, bankruptcy, consumer, employment, and other areas. In 1980, the Maryland Judicare Program served approximately 13,000 cases at a cost of \$2,500,000. *See* MARYLAND LEGAL SERVICES CORPORATION, ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR: A REPORT OF THE ADVISORY COUNCIL OF THE MARYLAND LEGAL SERVICES CORPORATION 14 (January 1988).

By the beginning of the 1980s, the combination of Legal Aid Bureau services and the Judicare Program was creating a reasonable effective legal aid system in our State. In 1981, however, Maryland's legal aid program suffered substantial losses in funding that undercut its ability to provide essential services.

Creation of the Maryland Legal Services Corporation

In 1981 the Reagan Administration initiated a campaign to eliminate the Legal Services Corporation and federal funding for civil legal aid. *See e.g.*, Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD J. CONTEMP. LEGAL ISSUES 223, 235 (1994). Even though LSC was preserved through strong bipartisan Congressional support, its budget was cut by twenty-five percent in 1982 and is currently half its 1981 level when adjusted for inflation. *Federal Funding Follies*, 1 LSC'S EQUAL JUSTICE MAGAZINE 18 (Summer 2002). The funding to preserve and expand legal aid since 1981 has depended upon state leadership, with great variance across the country.

Responding to a recession and declining public revenues, the Maryland General Assembly in 1981 also began cutting funds for the Maryland Judicare Program. By the mid-80s, Judicare's budget had been reduced to approximately \$500,000 annually, and the program was eliminated entirely during the State's next recession in 1991. *Supra* MARYLAND LEGAL SERVICES CORPORATION 14.

Primarily in response to reduced federal funding, the Maryland General Assembly in 1982 created the Maryland Legal Services Corporation, with House Speaker Benjamin L. Cardin and Senator J. Joseph Curran, Jr. as lead sponsors. The declaration of legislative intent and purpose to the Maryland Legal Services Corporation Act states:

There is a need to provide equal access to the system of justice for individuals who seek redress of grievances. Reduction of federal funds has diminished the legal services provided by the existing statewide legal services programs: the Legal Aid Bureau, Inc.; the Maryland Advocacy Unit for the Developmentally Disabled, Inc.; and the Maryland Volunteer Lawyers Service, Inc.; There is a need to continue and expand legal assistance to those who would otherwise be unable to afford adequate legal counsel. The availability of legal services reaffirms faith in our government of laws. The funding of legal assistance programs for those who are unable to afford legal counsel will serve the ends of justice and the general welfare of all Maryland citizens; and attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility and the high standards of the legal profession. MD. ANN. CODE, ART. 10, §45B.

The Act created MLSC as a nonprofit corporation, governed by a nine-member Board of Directors (five attorneys and four non-attorneys) appointed by the Governor and confirmed by the Senate. §45E(a). MLSC was established “for the purpose of receiving and distributing funds to grantees that provide legal assistance in noncriminal proceedings or matters to eligible clients.” §45D(a). “Eligible client” was defined as “any person unable to afford legal assistance” as determined by MLSC, with maximum income levels for eligibility not greater than 50% of the Maryland median family income. §§45C(c), 45G(e). “Legal

assistance” included “the legal representation of eligible clients by grantees and includes training, research, coordination with private attorneys and other activities necessary to insure the delivery of quality legal services.” §45C(g). MLSC was directed to “insure that grants and contracts are made so as to provide the most stable, economical and effective delivery of legal assistance and that eligible clients in all areas of the state shall have access to those services.” §45G(d). MLSC was empowered to require the keeping of records by grantees, to have access to such records, and to require such reports as it deemed necessary regarding activities conducted under its funding. §45G(g). MLSC was also directed to report annually to the Governor, Comptroller, and General Assembly on its activities. *Id.* MLSC is audited semi-annually by the Maryland Legislative Auditor. Beginning in 1998 MLSC funding came under the Judiciary’s budget, subject to annual budget review and approval by the General Assembly. MD. CODE ANN., CTS. & JUD. PROC. §7-408 (2002).

The MLSC Act provides that the Corporation’s board elects its chair and hires its executive director. §§45E(d), 45F. MLSC’s chairs have included Benjamin Civiletti (1982-86), Herbert Belgrad (1986-88), Benjamin Cardin (1988-95), Herbert Garten (1995-2003), and Vernon Boozer (appointed by Governor Ehrlich to the MLSC Board on July 1, 2003 and elected chairman on July 28, 2003).

The General Assembly also created a voluntary interest on lawyer trust account (IOLTA) program in 1982 pursuant to proposed legislation developed by

MSBA's Special IOLTA Committee chaired by Arthur Machen (then serving with Benjamin Civiletti on the National IOLTA Clearinghouse). MD. CODE ANN., BUS. OCC. & PROF. §10-303 (2002). Maryland was the fourth state in the U.S. to establish IOLTA funding for legal aid, which is now in all 50 states and the District of Columbia as well as Australia, Canada, and New Zealand. Converted to a mandatory program for Maryland attorneys by the General Assembly in 1989, IOLTA continues as MLSC's principal public funding source (approximately \$3.9 million in FY 2003, down more than 25% because of lowered bank interest from the early 1990s), along with surcharges on circuit and district court filing fees (approximately \$2.3 million annually), \$500,000 annually from the Maryland Abandoned Property Fund, and \$420,000 from the Administrative Office of the Courts, and private contributions. Rhudy, *supra*, 36 MD. BAR J., at 52-53. *See also* Robert J. Rhudy, *Funding Maryland's Delivery System*, 32 MD. BAR J., March-April 1999, at 32. The Maryland General Assembly also provided \$300,000 to MLSC in the FY 2004 state budget.

MLSC is Maryland's largest funding source for civil legal aid to low-income persons, followed by funding from the U.S. Legal Services Corporation to the Legal Aid Bureau, state agencies for a small class of civil services mandated by statute, court rule, or decisions, Administrative Office of the Court for assisted pro se family law programs, domestic violence representation and related services, foundation grants, and private contributions. Total current state public funding for civil legal aid is less than \$20 million annually, compared to approximately \$60

million annually for the Maryland Public Defender. Rhudy, *supra* 36 MD. BAR J., at 52-53.

MLSC makes and reviews every legal services grant on an annual basis. In FY 2002 MLSC made grants totaling \$6,898,556 to twenty-eight organizations. MLSC's principal grantee was the Legal Aid Bureau (\$3,495,200), followed by Maryland Disability Law Center (\$475,537), House of Ruth Domestic Violence Legal Clinic (\$242,254), Maryland Volunteer Lawyers Service (\$234,015), and Pro Bono Resource Center (\$137,792). Smaller grants went to county bar foundations to support pro bono, local domestic violence legal representation programs, and specialized programs representing the homeless, day laborers, immigrants, persons with HIV/AIDS, prisoners, and other groups. MLSC grantees in FY 2002 provided legal assistance in 109,430 cases. MARYLAND LEGAL SERVICES CORPORATION, ANNUAL REPORT, JULY 1, 2001 TO JUNE 30, 2002. Only about 12% of these cases involved representation in judicial or administrative hearings. Nearly 80% were closed following brief advice, information, referral, or legal counsel, with the remainder involving negotiation or other forms of legal assistance. MLSC FY 2002 Grantee Final Reports on file at the Maryland Legal Services Corporation. Many clients needed more extensive assistance, but the programs lacked sufficient resources (including private attorney pro bono capacity) to provide more service. About ten percent of the total services rendered were provided by pro bono attorneys, while the remaining services were delivered by nonprofit program staff attorneys and legal assistants. *Id.* Sixty-eight

percent of the persons served were women, primarily with minor children. The most common service areas, reflecting MLSC's priorities, were family/domestic (43%), housing (25%), child in need of assistance (7%), consumer (7%), and other (18%, including employment, health, education, income maintenance, individual rights, immigration, wills, etc.). MARYLAND LEGAL SERVICES CORPORATION, ANNUAL REPORT, JULY 1, 2001 TO JUNE 30, 2002. Cases served by MLSC grantees in FY 2002 were provided in close proportion to the geographic distribution of our State's low-income population.³

Because of declining IOLTA revenues, MLSC had to reduce its grant level for FY 2003 by 5%, with 18 smaller grant programs taking cuts between 10% and 20%. *Id.* Even with \$300,000 in new funding for MLSC from the state budget, MLSC was forced to continue FY 2004 grants at this reduced level because of IOLTA's decline.

Expanding Legal Services in Maryland since 1989: Bench, Bar, and Government

MLSC has initiated, funded, and participated in numerous commissions to determine legal need, increase resources, and develop a more effective and efficient legal aid system. Their reports include, among others: LEGAL NEEDS OF THE POOR IN MARYLAND (Mason-Dixon Opinion Research, Inc., conducted for Maryland Legal Services Corporation, July 1987); ACTION PLAN FOR LEGAL SERVICES TO MARYLAND'S POOR: A REPORT OF THE

³ Anne Arundel, 12,820; Baltimore City, 35,320; Baltimore, 9,166; Central Maryland, 6,605; Eastern Shore, 5,247; Montgomery, 8,567; Prince George's, 16,985; Southern Maryland, 4,411; Western Maryland, 8,141; Out of state and unknown, 2,168. MARYLAND LEGAL SERVICES CORPORATION ANNUAL REPORT, JULY 1, 2001-JUNE 30, 2002.

ADVISORY COUNCIL OF THE MARYLAND LEGAL SERVICES CORPORATION (Benjamin Cardin, Chair, Maryland Legal Services Corporation, January 1988); ADVISORY COUNCIL ON FAMILY LEGAL NEEDS OF LOW INCOME PERSONS, INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES (J. Joseph Curran, Chair, University of Baltimore Law School & Maryland Legal Services Corporation, March 1992); GOVERNOR'S TASK FORCE ON FAMILY LAW, FINAL REPORT (Hon. Robert Watts, Chair, October 1992); FURTHERING THE PRO BONO COMMITMENT IN MARYLAND: AN ASSESSMENT OF THE VOLUNTARY LEGAL SERVICES DELIVERY SYSTEM (John Tull & Associates, Pro Bono Resource Center, September 1992); MARYLAND LEGAL NEEDS ASSESSMENT SURVEY (Mason-Dixon Opinion Research, Inc., University of Maryland Law School and University of Baltimore School of Law, February 1995); MARYLAND COALITION FOR CIVIL JUSTICE, MARYLAND'S STATEWIDE LEGAL SERVICES PLAN FOR LOW INCOME PERSONS (Stephen Nolan, Chair, Maryland State Bar Association, July 1996); REPORT ON THE EVALUATION OF THE LEGAL SERVICES DELIVERY SYSTEM IN MARYLAND (John Tull & Associates, Maryland Coalition for Civil Justice, April 2000).

MLSC has used the findings and recommendations from these reports to set policies and grant priorities, create and assess model legal services projects, fund new programs, and undertake working relationships with the Judiciary, Maryland

State Bar Association and local bars, legal services community, law schools, foundations, and others to expand legal services. Through the work of outstanding leaders in the Maryland Judiciary, Maryland General Assembly, and Maryland State Bar Association to implement the reports' recommendations, Maryland has developed numerous programs and policies since 1989 that have substantially expanded pro bono services, court-based and other assisted pro se services, domestic violence legal protections, mediation, and funding for legal services. *See* Susan Erlichman, *Maryland's Diverse Legal Services System*, 32 MD. BAR J., March-April 1999, at 32; *see also* Rhudy, *supra*, 36 MD. BAR J., at 52-53.

The tasks before Maryland's civil legal aid system are very different from the Maryland Public Defender's services. Ours is a collaborative rather than a unified service delivery system; and unlike the criminal justice system, much of our work seeks to resolve conflicts prior to litigation being filed and thereafter with limited need for direct attorney-client involvement. Through the partnership of legal services providers, Maryland Judiciary, private bar, law school clinics, and other parties, the civil legal aid system focuses on the following activities for the efficient use of limited resources: (1) helping income-eligible persons understand their legal rights, responsibilities, and remedies through legal education and information; (2) helping them anticipate and prevent legal problems; (3) helping them resolve legal problems without litigation, either by resolving conflicts themselves with legal information or advice or through mediation or other approaches; (4) helping them to effectively use courts and

administrative hearings without full attorney representation (i.e., assisted pro se approaches) in appropriate circumstances; (5) screening potential cases to determine when legal representation is required to help clients effectively present and resolve meritorious claims and defenses in substantial civil matters involving family, safety, housing, employment, property, health, and other fundamental needs; and (6) providing legal counsel in such instances on an affordable (free or sliding-fee) basis to income-eligible persons. Rhudy, *supra*, 36 MD. BAR J., at 52-53.

Since 1999 MLSC has been developing a new “Maryland Legal Assistance Network” (MLAN) through a \$1 million grant from the Open Society Institute, supplemented with funding from the Administrative Office of the Courts, MLSC, and support from Legal Aid Bureau and other legal services organizations, to expand and coordinate legal information, advice, referral, and assisted pro se services, and help manage our legal aid system. Nearing completion, MLAN is housed at MLSC and has been developed under a 20-member Oversight Committee appointed and chaired by Chief Judge Robert M. Bell. MARYLAND LEGAL SERVICES CORPORATION & MARYLAND LEGAL ASSISTANCE NETWORK, MLAN FACT SHEET (August 2003); Robert J. Rhudy, *Creating a New Maryland Legal Assistance Network*, 21 NATIONAL LEGAL AID & DEFENDER ASSOCIATION CORNERSTONE 5 (Spring 1999). Intended as a national model, MLAN is currently being evaluated by a ten-member Evaluation

Committee of judicial, bar, law school, and federal Legal Services Corporation leaders appointed by Chief Judge Bell.

Unmet Legal Need

Based on the reports cited above, relevant surveys by the American Bar Association and our experience, MLSC agrees fully with the statements presented by other amici for the Appellant in this appeal regarding unmet need for legal aid for Maryland's low-income population. *See e.g.*, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS—MAJOR FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY (1994). Despite all good efforts to date, Maryland fails and is unable under current resources to adequately provide legal representation and assistance to its income-eligible population to resolve their critical civil legal conflicts.

Pursuant to Section 45 of the Maryland Legal Services Corporation Act, just over 1,000,000 persons (nearly 20% of the State's population) are income-eligible for legal aid. *See Rhudy, supra*, 36 MD. BAR J., at 50. Considering this statistic, it is useful to compare statistics provided for civil cases by the Maryland Judiciary and administrative appeals filed with the Maryland Office of Administrative Hearings with legal representation in litigation and administrative hearings by MLSC grantees (staff attorney and pro bono services) for FY 2001. MARYLAND JUDICIARY, ANNUAL REPORT—STATISTICAL ABSTRACT AND COURT-RELATED AGENCIES, 2000-2001; MARYLAND OFFICE OF

ADMINISTRATIVE HEARINGS, ANNUAL REPORT, FY 2001; FY 2001 grantee reports on file with the Maryland Legal Services Corporation.

In FY 2001 169,950 civil cases were filed in Maryland circuit courts, of which 98,426 were divorce, domestic violence, and other domestic relations matters. 756,544 civil cases were filed in Maryland district courts, of which 525,781 were landlord-tenant claims; 198,814 were contract or tort cases; and 25,914 were requests for protection or other remedies from domestic violence. 51,094 appeals were filed with the Maryland Office of Administrative Hearings, of which 24,740 (48%) were for claims involving the Maryland Departments of Health and Mental Hygiene, Human Resources, and Education.

In FY 2001 MLSC grantees closed 108,235 cases. The principal case service areas were family/domestic (43,732), housing (24,332), consumer/debt defense/bankruptcy (6,773), employment (6,263), and child in need of assistance (5,999). The CINA services were provided by Legal Aid Bureau, with most cases involving litigation. In all other cases closed in FY 2001, 11,680 were closed following representation in litigation and 1,960 following representation in administrative proceedings. Most cases (88,089) were closed following brief advice, information, referral, or legal counsel. As reported in another amici brief joined by MLSC, many clients sought and needed more legal assistance than could be provided by Maryland's legal services providers.

Assuming that most civil cases filed in circuit courts involve on average two parties would indicate 196,852 persons who potentially could benefit from

legal counsel and possibly representation. Also assuming that MLSC-eligible persons were parties in civil matters in the circuit courts at the same proportion as the Maryland population would equate to 39,370 potential legal aid clients potentially benefiting from such services. A similar process could be applied to domestic violence claims in district courts. Probably a substantial percentage of the defendants in landlord-tenant cases in district courts are income-eligible, even if only a small percentage of that number have offsetting claims or defenses that would substantially benefit from the assistance of legal counsel or representation. While litigants with tort claims or defenses may be represented through insurance or by attorneys under contingent fee arrangements, some are not; and a substantial percentage of defendants in contract claims involving debt collection will be MLSC-eligible persons, some of whom would have defenses or could otherwise benefit from legal representation. A substantial percentage of the appeals filed with the Maryland Office of Administrative Hearings, particularly regarding public benefits, social security, Medicaid, special education, and related issues, will similarly be on behalf of MLSC-eligible persons who could also benefit from legal assistance.⁴

⁴*See*, Action Plan for Legal Services to Maryland's Poor—A Report of the Advisory Council of the Maryland Legal Services Corporation (January 1988) , p. 12, indicating that “Maryland Department of Human Resources staff estimated that counsel was present (usually Legal Aid Bureau attorneys or paralegals) at about 15% of their contested hearings; and that there was a reversal rate in favor of the claimant of between 70-80% when such counsel was present, compared with 40-45% without counsel. Maryland Department of Health and Mental Hygiene staff provided specific data on the Medical Assistance Program (“Medicaid”), indicating that counsel was present at 21% of the hearings with a 76% reversal rate, compared to a 46% reversal rate when claimants were not represented by counsel. The Social Security Administration indicated that claimants had legal counsel in 49.5% of their contested claims. Such

In order to assure meaningful access to justice and the rule of law, an efficient civil legal aid system would be able to determine income-eligibility in such cases, make referrals to lawyer referral or other private resources for ineligible persons, assess claims and defenses or other strategies, assist some persons in representing themselves in simple matters, and provide representation in meritorious cases when significant issues (as defined by court rule, statute, administrative regulation, or other public process) are at issue. Consideration of the above data strongly indicates that Maryland's civil legal aid system lacks the resources to provide such services.

Contested Child Custody Representation

In early 1999 the MLSC board and staff concluded, pursuant to its work with staff and pro bono legal services programs, the Maryland judiciary, bar leadership, and others, that the need for representation for low-income persons in contested child custody cases was the most critical under-served area of low-income persons in our State. A parent's right to raise and protect one's children is at the top of our society's values. Our state has the responsibility to protect the child when parents cannot or will not do so. Our courts face few decisions more difficult than custody determinations when parents cannot agree on the best interests of the child, or when other parties seek custody. MLSC also concluded that such services could not be met through pro bono services or through existing staff attorney resources.

contested claims had a 60% reversal rate for claimants when counsel participated, compared with a 36% reversal rate in favor of the claimants when they did not have legal counsel.”

Following information, comment, and recommendations received at a public hearing at Maryland State Bar Association in June and numerous other meetings around the State, MLSC began the “Model Child Custody Representation Project” in October 1999 in Anne Arundel, Montgomery, and Prince George’s Counties with MLSC funding and additional support received from the Administrative Office of the Court. *See* Danzinger, *supra*.

Services are provided in the project through a combination of staff attorneys at the Legal Aid Bureau at its Annapolis and Metropolitan (Montgomery/Prince George’s) offices and by private attorneys who have agreed to represent parties in such cases at a reduced fee under the administrative support of the Montgomery County Bar Foundation, Law Foundation of Prince George’s County, and the YWCA of Annapolis and Anne Arundel County’s Legal Services Division. Priority for representation under the project has been placed on defined “high need” cases involving allegations of domestic violence, drug or alcohol abuse, and where the other party is represented by legal counsel. *Id.*

Between October 1, 1999 and June 30, 2002 the project closed 565 child custody cases, of which 240 cases were closed following representation in litigation and the remainder involved advice, counsel, negotiations, or other services. During FY 2002 services were being provided by 3.5 Legal Aid Bureau staff attorneys and approximately 60 private attorneys. Total cases closed in FY 2002 were 275 (98 reduced fee private attorneys, 177 staff attorneys, 140 cases involving representation in litigation) for total funding from the Administrative

Office of the Courts and MLSC that fiscal year of \$352,478, for an average cost per case of approximately \$1,282. *Id.*

MLSC contracted with the Center for Families, Children, and the Courts, University of Baltimore Law School (CFCC) to evaluate the project. CFCC's evaluation and report relied upon data compiled from periodic reports provided to MLSC by Legal Aid Bureau and the participating bar associations and YWCA. In addition, CFCC surveyed the project's stakeholders (clients, attorneys, judges, court personnel, project managers) by conducting on-site visits, telephone interviews, and by distributing questionnaires. The stakeholder survey revealed a high degree of satisfaction with the project. While the majority of judges and masters in the project counties were not aware of the project, those who were uniformly reported that the project was helpful both to litigants and the court, indicating that it facilitated the court's process, improved the quality of custody decisions, and promoted access to justice for low-income families. While making various suggestions, staff and reduced fee attorneys reported strong support for the project. Client surveys revealed a high degree of satisfaction with both Legal Aid Bureau and private attorney providers. *Id.*

MLSC has continued operation of the project, intending to implement some minor modifications pursuant to the findings of the CFCC report, and believes that the project has demonstrated its capability to serve such contested child custody cases (as well as other significant contested matters in litigation where representation is required to achieve meaningful access to justice) throughout Maryland.

Based on its experience and the level of litigation through the State, MLSC estimates that it could expand this project throughout Maryland for an additional \$2 million to \$3 million annually.

General Maryland Civil Legal Services Needs

While MLSC found a consensus that contested child custody cases deserve the highest priority for representation in civil legal matters for our State's lower-income members, there are clearly other types of cases affecting fundamental rights in which legal representation is needed to receive meaningful access to justice and benefit of the rule of law where our State fails to provide such services. Conflicts regarding employment, shelter, protection from violence and abuse, health care, competency, commitment and care for mentally ill and retarded persons, rights of prisoners, immigration, property, and other critical decisions concerning life, liberty, and the pursuit of happiness are determined pursuant to the rule of law in our courts and by other legal institutions. Furthermore, while MLSC believes that we have developed a legal aid system that provides a full range of approaches to help eligible members of the public understand their legal rights, responsibilities, and remedies, and resolve many disputes without litigation, our system lacks the resources required to make the appropriate screenings, assistance, and referrals to serve the relevant need. Finally, our legal aid system is subject to endemic fluctuations in resources because of the nature of its funding, and its programs are perpetually under-funded relative to other public law sectors for salaries, technology, and other essential needs, striving to do its work in a

constant state of near-crisis. MLSC estimates that our State could operate an efficient and effective civil legal aid system that could provide other appropriate civil legal aid services while identifying and providing legal representation in meritorious contested cases before Maryland's courts through approaches similar to the contested child custody representation project (above) in a broad range of fundamental legal issues for approximately \$12,000,000 to \$15,000,000 annually in additional public funding. Rhudy, *supra*, 36 MD. BAR J., at 53.

Legal services in other states and countries

Maryland had been a leader in legal aid funding in the United States from the early 1980s through the late 1990s. Our State's leadership, legal aid systems, applications of technology, pro bono approaches, and levels of private support are still rated at or near the top in the Nation.⁵ Recently the State's public support for civil legal aid has lagged far behind public funding generally, funding for other similar services, and legal aid funding in other states. *See* Robert J. Rhudy & Joseph Surkiewicz, *Justice for All—It's the General Assembly's Turn*, *The Daily Record*, February 15, 2003. According to an American Bar Association report issued March 2003, Maryland now ranks below such states as Maine, Massa-

⁵*See, e.g.*, Ken Smith, Martha Bergmark, & Wayne Moore, *The Full Access Financial Scorecard for State Access-to-Justice Communities*, MANAGEMENT INFORMATION EXCHANGE, Winter 2002 9, 13. "Full Access" means access for low income people, everywhere, to the level of legal help one needs to function as a responsible member, not a victim, in our society. Full Access is achievable. . . . Getting there means that people are in action on three fronts: Resource development; Delivery systems engineering; Leadership building. We call these the "cornerstones" of a Full Access vision. . . . Maryland [used as the example from five leading states reviewed] is currently within 65 percent of the Full Access level for the state's poverty population. . . . At its current level of \$19.6 million a year, and deploying the most efficient mix of service delivery systems, Maryland could provide Full Access to legal assistance for its poorest citizens." Management Information Exchange, Boston, MA, is the management journal for civil legal services professionals in the United States.

chusetts, Minnesota, Nebraska, Nevada, New Jersey, Oregon, Pennsylvania, Vermont, Virginia, and Washington in state public funding for legal aid on a dollar-per-eligible-person basis. Project to Expand Resources for Legal Services, American Bar Association, *Update on Legal Services Funding* (February 2003). In some instances the disparity is extreme. For instance, while in 2002 Maryland was providing \$6.31 per low-income person annually for legal aid, Minnesota provided \$19.87, New Jersey \$17.15, and Massachusetts \$15.60. *Id.*

When the civil legal aid system in Maryland and the U.S.A. is compared with most other developed Western countries, the picture is dismal. According to Justice Earl Johnson, Jr., of the California Court of Appeals (former executive director of the U.S. Office of Economic Opportunity's Legal Services Program, 1966-68, and the primary U.S. authority on comparative legal aid), the United States is the only major Western nation that does not provide a right to counsel in civil matters. Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); *see also* 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); Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994); Earl Johnson, Jr., Keynote Speech, Maryland Access to Justice Dinner, Pro Bono Resource Center, Baltimore, June 26, 2001 (on file with the Maryland Legal Services Corporation); Mauro Cappelletti et al., *Toward Equal Justice: A Comparative Study of Legal*

Aid in Modern Societies (1975); Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 237 (1994); Robert J. Rhudy & Joseph Surkiewicz, *When Will Maryland Catch Up?*, The Daily Record, July 3, 2003. Justice Johnson indicates that indigent persons, through constitutional provisions, statute, or court decisions dating from 1937 to the present, now have a right to counsel in a broad range of civil matters in Canada, England, Scotland, France, Germany, Norway, Denmark, Sweden, Belgium, the Netherlands, Austria, Spain, Italy, Portugal, Switzerland, Australia, and New Zealand. In addition to national action, most European countries are now required by international convention to provide counsel in civil cases following *Airey v. Ireland* (European Court of Human Rights, 1979), interpreting the fair hearing guarantee of the European Convention on Human Rights in an appeal brought by an indigent woman seeking a legal separation to require that member governments appoint free counsel for poor litigants engaged in civil cases. Most of these countries, including their provinces and states, fund civil legal aid for indigent persons at three to twelve times as much per capita as in Maryland and throughout the United States when all public funding is considered. *Id.*

Conclusion

Envision that a Maryland program established to serve the homeless is constructing a house to provide shelter from the cold. It has completed the framework for its house, with just enough roofing and siding to protect a small number of its residents from the elements. The program lacks the resources that it needs, however, to complete the house, and most of those it seeks to serve remain out in the storm.

For years many of Maryland's outstanding leaders at the bench, bar, and in public office have sought to create a society in which all our residents are assured equal access to justice and the rule of law. Despite their diligent efforts, one key component in our justice system is still incomplete. While they have completed the framework for a legal aid system to help our State's low-income residents attain justice under law in our courts and other legal institutions for their fundamental legal needs, we lack the resources to serve those in need.

We urge this Court to rule that Deborah Frase and other persons with similar conflicts concerning such critical legal issues have a right to counsel in such cases in Maryland. They and our State will benefit from such legal representation. Let us fulfill the promise of justice proclaimed when our State began.

Respectfully submitted,

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Dated : August 29, 2003
Times New Roman 13 Pt.

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2003, two copies of the foregoing Brief of Amicus Curiae were mailed first class, postage prepaid to:

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