



“This Issue Will Not Go Away”: Continuing to Seek the Right to Counsel in Civil Cases

By John Nethercut

John Nethercut
Executive Director

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

Last year the question of whether a poor person has the right to appointed counsel in a civil case under Maryland’s state constitution came before the state’s highest appellate court. The court sidestepped a ruling on the right to counsel in a 4-to-3 decision, but three judges stated in the concurring opinion that the court should have reached—and recognized—a constitutional right to counsel in certain civil cases. Correctly foreseeing the next step in the effort to establish a “civil *Gideon*,” the concurring judges stated that “this issue will not go away So long as the Court declines to resolve it, the advocates for the poor will continue to seek judicial relief The poor need a yes or a no.”¹

This Maryland decision represents the latest in a long and continuing effort to establish a poor person’s right to counsel in certain civil cases. Ever since the U.S. Supreme Court established the right to counsel in most criminal cases in *Gideon v. Wainwright* but declined to extend such a broad right to civil cases in *Lassiter v. Department of Social Services*, advocates have advanced a variety of strategies and arguments to establish such a right.² California Court of Appeal Justice Earl Johnson Jr., one of the founders and leading proponents of the civil *Gideon* movement, observed that “poor people have access to the American courts in the same sense that the Christians had access to the lions when they were dragged into a Roman arena.”³ New York advocates argued for a right to counsel in eviction cases, and, although they did not establish the right, they did succeed in obtaining increased funding for legal services.⁴ Washington State has led the way in developing right-to-counsel arguments under the Americans with Disabilities Act.⁵ Maryland’s recent efforts were inspired by the drive and insight of one of the Public Justice’s Center’s founders, Prof. Michael Millemann, and by Wilhelm H. Joseph Jr., director of Maryland’s Legal Aid Bureau.⁶ Other scholars have addressed the possi-

¹*Frase v. Barnhart*, 379 Md. 100, 141 (2003).

²*Gideon v. Wainwright*, 372 U.S. 375 (1963); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

³Earl 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, and *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 199 (1994).

⁴Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARVARD CIVIL RIGHTS–CIVIL LIBERTIES LAW REVIEW 557 (1988); 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 AND SOCIETY REVIEW 419 (2001).

⁵Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004).

⁶Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MARYLAND LAW REVIEW 18 (1990).

About the Public Justice Center

A nonprofit legal advocacy organization founded in Maryland in 1985, the Public Justice Center (www.publicjustice.org) seeks to enforce and expand the rights of people who are denied justice because of their economic status or because of discrimination. The center selects and designs its cases and projects to advance its mission of “pursuing systemic change to build a more just society.” It uses the full range of strategies in the lawyer’s arsenal, including individual, class action, and appellate litigation; policy and legislative advocacy; and education. Its projects often involve multiyear campaigns that combine complex litigation, organizing and coalition building with its clients and other advocates, and bringing injustice to the attention of the media, the public, and legislators. Current focus areas include initiatives to

- reform landlord-tenant laws and procedures that encourage homelessness and community destabilization;
- stop the denial of medical care to pretrial detainees at the Baltimore City jail;
- enforce the rights of homeless children and foster children to access to education;
- be the legal watchdog to challenge administrative attempts to cut back health care programs for the poor;
- represent low-wage workers, who are often discriminated against, denied minimum wage and overtime, and likely to get fired if they speak out;
- speak for immigrants who often are unable to access the courts and government agencies for services, and
- establish a right to counsel in certain civil cases.

ble arguments and evidence in support of a broad right to civil counsel.⁷

Around the country a developing movement seeks to create or recognize a right to counsel in civil cases. The Public Justice Center hosts a monthly national

conference call of advocates who are collaborating on strategies and work. Advocates in some states are developing cases and considering legislation to establish a civil *Gideon* right, while other advocates are putting together coalitions and beginning to study whether their state may join this campaign.

In this article I review—from the practitioner’s viewpoint and with the hope of informing and inspiring others—some of the critical decisions and strategies that have shaped Maryland’s effort. What is obvious to any practicing lawyer or to anyone who has either been poor or represented a poor person is that

- the unmet need for civil legal services for poor people is immense despite the efforts of existing legal aid organizations and private pro bono counsel, and
- having a lawyer makes a difference. Parties represented by counsel obtain better results in the judicial process than unrepresented parties, at least in part because any party involved in an adversarial legal system requires “the guiding hand of counsel.”⁸ Those who can hire lawyers do so; those who cannot usually wish they could.

However, discussion of these points is beyond the scope of this article.

I. Organizational Prelude to the Civil Gideon Campaign

The right-to-counsel project, known as our “Civil Gideon” campaign, began in 2000, when the Public Justice Center launched its Appellate Advocacy Project in an effort to influence the development of civil rights and poverty law before state and federal appellate courts. The center works closely with the private bar, legal

⁷See, e.g., Alex Boraine et al., *What Is Access to Justice? Identifying the Unmet Legal Needs of the Poor*, 24 *FORDHAM INTERNATIONAL LAW JOURNAL* 187 (2000); William L. Dick Jr., *Note: The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 *WILLIAM AND MARY LAW REVIEW* 627 (1989); Simran Bindra, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 *GEORGETOWN JOURNAL ON POVERTY LAW AND POLICY* 1 (2003); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 *YALE LAW AND POLICY REVIEW* 503 (1998).

⁸As Justice Hugo L. Black stated: “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 has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.” *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

aid organizations, community organizations, and national networks of poverty law and civil rights advocates to identify cases that have the potential for accomplishing systemic change. Once these cases are identified, the center can devote its resources and expertise to develop the appellate presentation by

- participating as counsel for otherwise *pro se* litigants or as cocounsel with existing appellate counsel;
- submitting amicus curiae briefs that explain to the court the implications of the case for poor people;
- referring the case to a private law firm for briefing and argument;
- working with counsel at the trial stage to guide the development of important issues for appeal; and
- offering assistance to appellate counsel through strategizing, editing appellate briefs, and conducting moot courts for appellate arguments.

The work of the Appellate Advocacy Project is greatly enhanced by the Murnaghan Appellate Advocacy Fellowship, created in honor of the late Honorable Francis D. Murnaghan Jr. of the U.S. Court of Appeals for the Fourth Circuit. Annually since September 2001, a fellowship has been awarded to a young lawyer who has served as a judicial clerk, is committed to public interest law, and wants to spend a year in the center's Appellate Advocacy Project. Each Murnaghan Fellow has been key to the development of the Civil Gideon project. The Honorable Stephen H. Sachs, former attorney general and U.S. attorney for Maryland, has brought additional firepower to the Appellate Advocacy Project. Sachs joined the project as a mentor and brought with him the considerable resources of Wilmer Cutler Pickering Hale and Dorr LLP, whose attorneys have donated more than \$1 million in pro bono work. This involvement continues, as Sachs and the Wilmer lawyers are branching out to research other states' constitutions and their prospects for a Civil Gideon claim.

II. Strategic Decisions

The Maryland team considered several key strategic issues in deciding which strategy to use to seek recognition of a civil right to counsel.

A. Recognizing a Federal Constitutional Right to Civil Counsel a Possibility?

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

Despite the obvious need for counsel, subsequent Supreme Court decisions narrowly applied the logic of *Gideon* to civil cases. In *Lassiter v. Department of Social Services*, the Court held in a 5-to-4 decision that there was no Fourteenth Amendment due process right to counsel for an indigent in a proceeding brought by a state to terminate her parental rights. *Lassiter* did establish a test to weigh state and litigant interests to determine if a court might appoint coun-

sel on a case-by-case basis. The *Lassiter* balancing test has not proven to be a workable vehicle to provide counsel on any significant scale, yet it does tacitly recognize the importance of counsel.

We decided that challenging *Lassiter* on federal constitutional grounds would not be likely to succeed because the current Fourth Circuit and Supreme Court panels were not likely to be open to such an argument. Nor was there a groundswell of support around the country for such an action. But our research did indicate that we might ultimately succeed on state constitutional grounds.

B. Legislation to Increase Funding for Legal Services

In theory a constitutional right to counsel would be unnecessary if we could convince the public and legislatures at the federal and state levels to fund legal services adequately. Indeed, legal aid advocates in Maryland and around the country have been strongly promoting, and sometimes winning, legislative approval of new or expanded funding mechanisms. In practice we did not believe that Maryland's General Assembly would appropriate sufficient funds for legal aid for poor people unless it had to do so. A judicially recognized constitutional right, enforced by the court that recognizes the right, seemed a more likely motivator for increased funding from the legislature.

We are mindful, however, that even if the courts recognize a constitutional right to counsel, the legislature (guided by court decisions and perhaps by court rules) ultimately must decide how to implement and fund the right to counsel. The Maryland strategy was always intended to have two phases: first, recognition of the right by the courts; second, funding by the legislature. The arguments made to convince the courts are primarily legal in nature, whereas the arguments to convince the legislature would be primarily based on public policy and a cost-benefit analysis, yet to be developed, that would show how failing to provide counsel

would affect the individual litigant, the system of judicial administration, and society as a whole, compared with various models for delivering civil legal services to poor people.

C. Broad Versus Specific Rights to Counsel

A fundamental strategic choice that advocates face is whether to seek to establish a broad constitutional right to civil counsel and then use a series of cases to articulate the right's scope and application, or to seek to establish a right to counsel for particular types of cases or particular constituencies and hope to expand those specific rights later to cover more people and cases.

The Public Justice Center chose to seek the broad right largely because, as discussed below, we believed we had good legal arguments for this position under Maryland law and because this strategy would have the greatest impact. In seeking a test case, however, we sought a client involved in a disputed child custody matter—a type of case that implicated a recognized fundamental interest. Our hope was to establish a broad right, as applied to child custody cases, and then bring further cases to expand the scope and application of the right to other constitutionally protected interests.

Advocates in other states have sought to establish a right to counsel for particular types of cases or particular constituencies in the hope of then expanding those specific rights to cover more and more people and cases.⁹ There is, of course, precedent for the latter approach: more than half the states have established a right for indigent parents to be represented by counsel at state expense in child dependency and neglect proceedings. These states have recognized the right by statutory enactments or as a matter of state constitutional law, even though the U.S. Constitution does not mandate such recognition. In many other states, statutes require representation for indigent parents in certain types of cases

⁹See, e.g., Brodoff et al., *supra* note 5.

involving custody or termination of parental rights where the state is a party.¹⁰

D. A Broad Right to Counsel in Civil Cases Under the State Constitution

In Maryland, we believe we have a strong state constitutional basis for a broad right to counsel. Our argument rests on four articles of the Maryland Declaration of Rights—a document that, we argued, was “an older and better instrument of government” than the federal one later created in Philadelphia. This position is more than mere hubris or boosterism: Maryland’s fundamental document has two Magna Carta–based articles that were not replicated in the federal constitution and that directly affect the right to counsel. For that and other reasons, neither have Maryland courts been afraid to interpret Maryland’s constitution differently from the way federal courts interpret the federal constitution. We urge other advocates to consider whether similar arguments are applicable to their states.

1. Article 19: Equal Access to the Courts

Article 19 of the Maryland Declaration of Rights is based on Magna Carta language that is not replicated in the federal constitution:

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

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

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

Article 5 of Maryland’s Declaration of Rights is another critical provision that did not make it into the U.S. Constitution. As one writer noted, “No sooner had the colonial upstarts thrown off the imperial yolk than they set about asserting their rights as ‘Englishmen.’”¹¹ Article 5 asserts that all English laws that existed on July 4, 1776, apply to Marylanders:

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

The particular law relevant to the Civil Gideon movement is a hoary statute from the time of Henry VII. Among those “rights of Englishmen” was the Tudor statute 11 Henry 7 c. 12, which established the right to appointed counsel for indigent civil plaintiffs with meritorious causes of action. The Henry VII statute commands that “indifferent justice to be had ... as well to the poor as to the Rich” and that the Justices of the King’s bench “shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same....” The statutory test of indigency was met if the person swore to the chancellor that he was worth less than five pounds and the clothes on his back.

In 1809 the Maryland General Assembly asked William Kilty, then chancellor of Maryland, to inform it of which English statutes should be incorporated into Maryland law. The “Kilty Report” includ-

¹⁰See *Frase*, 379 Md. at 136.

¹¹Lawrence Hurley, *Sounding the Civil Trumpet*, DAILY RECORD, July 11, 2003, available at www.mddailyrecord.com.

ed the very Henry VII statute that provided a right to counsel and concluded that it had been introduced, used, and practiced in the Maryland colony. The Maryland Court of Appeals has frequently relied upon Kilty's report and has never rejected his finding that a particular statute had survived the crossing to the New World. Moreover, the Maryland General Assembly has never revised, amended, or repealed the Henry VII statute. We determined to ask the Maryland Court now to enforce this right.

3. Due Process in Maryland: The Same Process Due as Under the Federal Constitution?

Article 24 contains Maryland's equivalent of the due process clause. The question was whether the Maryland courts follow *Lassiter* and interpret Maryland's due process clause to be as narrow as the due process clause in the federal constitution. Maryland courts have shown a historical independence when interpreting their or Maryland's own constitution: the court of appeals holds that "simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart. Furthermore, cases interpreting and applying a federal constitutional provision are only persuasive authority with respect to the similar Maryland provision."¹²

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

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

obligation of the judiciary is the administration of the adversary process. Judicial administration certainly includes the "regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct"¹³ But properly supervising the adversary process is more than merely admitting and disciplining attorneys. The Maryland Court of Appeals recognizes that

[t]he statements of this and other courts announcing the obligation of the judicial branch to monitor and manage its own house are not hollow proclamations of power, for the placement of this responsibility with the judiciary represents a recognition of the special, and to a degree, unique relationship that has evolved over the years between the legal profession and the tribunals of justice it serves [The adversary system], whereby truth is garnered from the articulation of opposing points of view, [is] the preeminent tool through which fairness is achieved in the administration of justice in the country.¹⁴

The Public Justice Center argued in the *Frase* case that, quite simply, the court must fulfill its duty to "monitor its own house" by recognizing that attorneys are essential to the adversary process and that the court itself must ensure that counsel are available or appointed when necessary to administer justice fairly. The Civil Gideon—the right to counsel in civil cases—should be a matter of proper administration of the courts and should be required by the courts, whether or not other branches of government have addressed that right.¹⁵

¹²*Dua v. Comcast Cable*, 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002).

¹³*Attorney General v. Waldron*, 289 Md. 683, 692, 426 A.2d 929, 934 (1981).

¹⁴*Id.* at 695, 426 A.2d 929, 936 (1981).

¹⁵See Millemann, *supra* note 6, at 49–55.

Reading these four articles of the Declaration of Rights together, we concluded that Marylanders enjoy a right to counsel in civil cases. We resolved to ask the Maryland courts to recognize that right, to take the right from its colonial roots, and to apply it to the needs of the poor in today's world.

E. The Scope and Application of the Right to Counsel in Civil Cases

One of the most difficult conceptual issues for the Public Justice Center was to envision and articulate the scope of the right that we were proclaiming and a mechanism to apply that right to the realities of the administration of justice. Does a poor person have a right to counsel in all types of civil cases? If not all cases, which cases? Is the right limited to defendants, or does it include plaintiffs? Does it matter whether the opposing party has counsel or is also *pro se*? And if a lawyer is to be appointed, at what stage of the case? By whom? On what showing? Who is to appoint and pay the lawyer?

The *Frase* brief did not argue a particular mechanism for implementing the right but urged the court to “give modern application to rights rooted in centuries-old authority” and recognize the right in cases that meet the following criteria:

- First, a litigant must demonstrate indigency.
- 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 child custody, the potential loss of housing, issues affecting access to health care, and employment matters that determine the applicant's ability to earn a living.
- Third, a litigant must demonstrate unsuccessful attempts to secure counsel; such attempts include efforts to obtain representation from legal aid organizations.
- Fourth, a litigant must demonstrate that the case is not one in which counsel can be secured by virtue of a contingency fee arrangement or fee-shifting statute.

The Public Justice Center also pointed out to the court that case-by-case appointments of private attorneys cannot begin to address the pervasive need of the poor for counsel. Despite the commendable efforts of the private bar, greater reliance on their *pro bono* services is not efficient, effective, or fair either to lawyer or to client; the expertise of staffed legal aid organizations is required. Increased funding for legal services is obviously a matter for the executive and legislative branches, but those debates should be conducted in the context of a judicial finding that a right to counsel inheres in the Maryland constitution.

III. Tactical Considerations in Developing a Right-to-Counsel Case

In addition to our legal strategy and analysis, we faced numerous practical questions. We needed to find a compelling case, get it before the court of appeals quickly, and develop a range of allies in Maryland's legal community to impress upon the court the importance of the issue.

A. Outreach to Find Appropriate Test Cases

Although nothing is unique in the Public Justice Center's approach to developing a test case, the importance of thorough preparation cannot be overemphasized. First, extensive research by center attorneys, along with attorneys at Wilmer Cutler Pickering, resulted in our conclusion that we had a persuasive, though untested, argument that Maryland's constitution guaranteed its citizens the right to counsel in civil cases. Development of this legal theory was the precursor to defining the case that we would seek, but the legal research never ended: we continued to refine our theory throughout the development of the specific case and the briefing.

As we developed our legal theory, we also began searching for appropriate cases to bring to test the law. We decided that a contested child custody case was the best factual scenario to advance the argument and then conducted extensive outreach to start a stream of intake calls. We visited

many of Maryland's other legal aid providers, including the Legal Aid Bureau, domestic violence clinics, the Women's Law Center, *pro se* family law assistance projects housed at the courthouses, and lawyer referral services. We received press coverage about the effort and publicly launched the project at a statewide legal services conference.

The outreach efforts yielded a stream of calls and referrals, which Public Justice Center staff attorneys, clerks, and volunteers developed for consideration. Developing the legal arguments for the case was easy compared with the effort involved in finding the right case to present the issue to the court.

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

B. Procedural Hurdles

Two significant procedural challenges immediately presented themselves and were ultimately overcome. However, a third hurdle was the hook upon which the

majority hung its hat in deciding not to address the Civil Gideon issue.

The first procedural hurdle stemmed from our belief that, rather than spend what might be another year or more in the intermediate appellate court, Maryland's highest court had to decide this issue of first impression quickly. Counsel filed a petition for a writ of certiorari with the court of appeals.¹⁶ On April 9, 2003, the court of appeals granted certiorari and agreed to hear the case directly because of the significance of the issues presented.

The second was the significant question of whether the case was even appealable at the time. No final order or judgment had been entered. The order appealed from was, at least on its face, merely a denial of Frase's request for postponement of a review hearing. The court of appeals found, however, that the trial court's orders "were, at the very least, ambiguous with respect to this degree of finality" of the custody order because the trial court repeatedly scheduled the case for review without ever entering a final custody order from which an appeal could be taken. The court of appeals also held that the effect of the order was much broader than mere denial of a request for postponement: through its silence, the order in effect denied Frase's other motions, including a motion to recuse the judicial master, to appoint counsel, and to rescind the onerous conditions on custody. The denial of the postponement had the effect of confirming—for an indeterminate time—the conditions on her custody of her child. The court of appeals held that in these circumstances an interlocutory appeal might be taken.¹⁷

A third procedural difficulty, and the case's ultimate downfall, was mootness. This illustrates the problem of having a client whose test case is too good. The case presented three issues of first impression in Maryland: (1) the right of a fit mother to determine her child's best

¹⁶The court of appeals is Maryland's highest court; the state's intermediate court is called the court of special appeals.

¹⁷*Frase*, 379 Md. at 109–20.

interests, including where her family will live and with whom her child may visit, without interference from unrelated third parties and the state; (2) whether a master who must evaluate the credibility of his own former client against that client's former legal adversary, a party in the instant case, must be recused; and (3) whether indigent civil litigants in contested custody matters have the right to appointed counsel under the Maryland Declaration of Rights.¹⁸ In its decision the court of appeals gave our client a clear victory on the first issue, which, in the court's view, mooted the second and third issues. Since the court of appeals reversed the trial court orders that imposed conditions on Frase's custody of her son, the case was over without a remand and Frase had no need of a lawyer for any further proceedings. Although obviously this need is "capable of repetition" for Frase and millions of others, the court of appeals, in a 4-to-3 decision, decided that it did not now have to reach the right-to-counsel issue. In the second phase of Maryland's Civil Gideon effort, now begun, we are developing theories that will survive mootness and require the court of appeals to decide whether Marylanders have a civil right to counsel.

C. Recruiting Allies

In test cases, as in any struggle, one generally does not want to go it alone. Fortunately we were successful in recruiting widespread support from Maryland's legal community on this very important case. The University of Baltimore Law School Family Law Clinic and the Women's Law Center filed an amicus brief on the first-impression family law issues. Other amicus briefs came from the Legal Aid Bureau and other legal aid organizations and from the Maryland Legal Services Corporation (Maryland's Interest on Lawyers' Trust Account (IOLTA) administrator) on the unmet need for civil legal services. And the Maryland State Bar Association filed

an unprecedented amicus brief on the importance of having a lawyer in contested cases involving fundamental rights.

IV. Next Steps on the Road to Civil Gideon

The *Frase* case was the first step in an ongoing campaign in Maryland. Thus far our court of appeals has not spoken. It will speak. The Public Justice Center is now working with its allies to identify further test cases to bring to the Maryland Court of Appeals.

A national movement to establish a Civil Gideon right is emerging from Seattle to Baltimore. The strategies deployed to achieve recognition of this right vary, as advocates consider their own state constitutions, statutory frameworks, and the nature of their courts and legislatures. Public Justice Center counsel have spoken to a number of law schools, law clubs, and legal organizations and have participated in panel discussions in Maryland and Washington, D.C. The Civil Gideon movement has been widely reported in the press. Last November, the annual conference of the National Legal Aid and Defender Association in Seattle sponsored a panel discussion on Civil Gideon.

Following that conference, the Public Justice Center organized a loose coalition of advocates from legal services, academia, the private bar, state bar associations, IOLTA programs, and others who are interested in beginning or furthering the Civil Gideon effort in their own states. Already nearly fifty advocates from California, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New York, Ohio, Pennsylvania, Texas, Washington, Washington, D.C., and Wisconsin are participating. Organizations with national strategic reach, such as the Brennan Center for Justice, the Sargent Shriver National Center for Poverty Law, and the Center for Law and Social Policy are involved.

¹⁸Regarding the second question, several years previously the master had represented our client's mother in the mother's attempt to obtain custody of another of our client's children.

In January 2004 the Public Justice Center established an e-mail listserv and began sponsoring a monthly conference call with advocates on the list. Agenda items that the advocates have discussed to date include how to start a Civil Gideon project, the strategic pros and cons of using legislation versus litigation to establish a Civil Gideon right, and how the advocates would define the scope and operation of a Civil Gideon right. The Public Justice Center and the Shriver Center are teaming up to create an online library of briefs, decisions, research, and other material for their members. Pro bono associates at Wilmer Cutler Pickering, under Sachs's direction, are devoting substantial research time to analyzing the constitutional law of a host of other states with the objective of finding the next targets that may be amenable to the Civil Gideon argument.

We encourage advocates to join the national coalition and its ultimate goal to achieve recognition of a Civil Gideon right nationwide. Any advocate who wants to join this national coalition may contact Debra Gardner, the Public Justice Center's legal director, at gardnerd@publicjustice.org.

