Courts Appoint Counsel in Parental Termination Cases

Clarence M. Dunnaville Jr.'s article "A New Role for Law Schools and the Bar" (*Virginia Lawyer*, December 2009) may lead the reader to believe that parental rights of indigent parents in the commonwealth are routinely involuntarily terminated per Virginia Code § 16.1-283 without the benefit of counsel. Nothing could be further from the truth in the courts of Newport News, Harrisonburg, and Rockingham County, where I have had the privilege of representing local departments of social services for eight years. Per Virginia Code § 16.1-266(D), these courts advise parents of their right to counsel in termination of parental rights proceedings and appoint counsel to indigent parents upon request. The Harrisonburg-Rockingham Juvenile and Domestic Relations Court generally also appoints counsel for absent parents per § 16.1-266(D).

Further, Mr. Dunnaville cites *Brazell v. Fairfax County Dep't of Soc. Servs.* to support his assertion that parents in involuntary termination proceedings are denied the right to counsel. In *Brazell*, the circuit court found that the biological mother was ineligible for court-appointed counsel because she was not indigent, and the mother's counsel conceded this point at the remand hearing. In *Brazell*, the mother was not denied the right to counsel because she could not afford a lawyer.

A Newport News circuit judge once told me that he would rather try a capital murder than a termination of parental rights case, indicating to me just how seriously he took the deprivation of a parent's fundamental liberty interest in raising his or her own biological child. The courts in which I have been lucky enough to practice have respected that constitutional right, have followed the law, and have routinely appointed counsel for indigent parents in involuntary termination of parental rights proceedings.

Kim V. H. Gutterman
Rockingham County Assistant
County Attorney
Harrisonburg

Mr. Dunnaville's response:

I appreciate Ms. Gutterman's thoughtful comments regarding my article and her sharing her experience in Newport News, Harrisonburg, and Rockingham County. There is no assertion in my article that parental rights are routinely involuntarily terminated without the benefit of counsel within the commonwealth. The article does correctly set forth what happened in two cases.

The facts outlined below, which are substantiated in transcripts of proceedings before the trial court, correct Ms. Gutterman's assertions regarding the Brazell *case:*

Ms. Brazell, as an indigent person, initially was represented by court-appointed counsel, who was permitted to withdraw on April 7, 2006, approximately one month prior to trial.

After her counsel withdrew, Ms. Brazell sought the assistance of legal services. She was advised that with a trial date of May 2, 2006, legal services was unable to represent her at the trial and that the best thing for her to do was to get the court to appoint another attorney to represent her. Legal services assisted her with preparation of a motion for a continuance, which was set for the same date as the trial.

Ms. Brazell appeared on the morning of trial with the expectation that counsel would be appointed and a continuance granted. On the objection of the Department of Family Services, the court declined to appoint counsel, denied the continuance, and forced Ms. Brazell to trial without the assistance of counsel.

No evidence was taken by the trial court at the time of trial with respect to Ms. Brazell's income or whether she met the indigency requirements. The trial court ruled against Ms. Brazell and terminated her parental relations with her children. Without the assistance of counsel, she appealed the adverse decision to the Court of Appeals. The Court of Appeals remanded the case to the trial court for a determination regarding Ms. Brazell's indigency at the time of trial.

As the transcript of the August 16, 2007, remand hearing reflects at page 34, legal services made a determination that she was indigent when it assisted her with her application for a continuance and advised her to seek a court-appointed attorney. That application was presented to the court at the remand hearing.

Contrary to Ms. Gutterman's statement that the trial court found Ms. Brazell ineligible for court-appointed counsel, the legal services finding of indigency was accepted by the court, and she was appointed counsel, who represented her on appeal.

As stated in my article, the Court of Appeals held that Ms. Brazell was required to be held to the same trial procedural requirements as if she had been represented by counsel, and because she had not objected to the introduction of improper evidence or made a motion to strike at trial, she was precluded on appeal by Rule 5A:18 from challenging the insufficiency of the evidence against her.

My purpose in discussing Brazell *and another case in my article was to illustrate that the inability of indigent persons to have legal counsel has had a huge impact on the lives of many citizens who lose fundamental rights because they are unable to navigate the legal system without the assistance of counsel. The need to make legal services available to all persons without regard to economic status is one of the greatest challenges facing the profession.*

Letters continued on page 10

Letters continued from page 9

VL Error Noted

The front cover of the February 2010 *Virginia Lawyer* magazine needed another edit. Unless the creative spelling — "detensions" — has replaced the customary spelling — "detentions" — you goofed. Otherwise, another helpful and interesting issue.

Thomas C. Carter
Alexandria

(Thanks to Mr. Carter and other readers who pointed out the mistake. Virginia Lawyer *regrets the error. —Editor)*

Lawyer Praises President's Column

For (Virginia State Bar President) Jon Huddleston:

All the best from Perth, Australia! I wanted to let you know how much I enjoyed your message in the December 2009 issue of *Virginia Lawyer*. http://www.vsb.org/docs/valawyermagazine/vl1209_president.pdf Roberto Clemente was my favorite baseball player and always will be — not least because of his humanitarian efforts. I have a similar story where I gave back to my neighbor the 1960 Pirates yearbook. He had given it to me when he moved out of his parents' home but now has a basement filled with 1960 Pirates memorabilia.

Your story brought tears to my eyes.

James S. Kolan
Midland, Washington

Sex with Clients? Never!

I just finished reading Legal Ethics Opinion 1853, Sexual Relationship with a Client. There are many things about the legal profession that I would like to change. This LEO synthesizes a lot of what is wrong with the legal profession. Wordy, obtuse, insensitive, unrealistic, and outrageous are just a few of the descriptive adjectives for LEO 1853.

I propose an alternative: "No lawyer — man or woman, regardless of sexual orientation — should ever have sex with a client."

No one can misunderstand the above. The above standard is what we owe the public. Anything less than a concise, clearly stated standard is a disservice to the profession and is what we owe our clients.

Terry W. Raney
Beaverdam

Response of VSB Ethics Counsel James M. McCauley:

Thank you for your interest in and comment on LEO 1853. I agree that we all could point to things in the legal profession that we would like to improve. Prior to publishing the opinion for comment and during the comment period the committee gave thoughtful consideration to the "bright line" rule you suggest but found it problematic. First, the bright-line approach would prohibit representation of spouses or other persons with whom the lawyer has a close and sexual relationship that existed before the professional engagement. Your proposal, unlike American Bar Association Model Rule 1.8(j), has no safe harbor for those situations. For example, I could not represent my wife on any legal matters and she would be compelled by the bright-line rule to pay for legal representation by another lawyer, when I am prepared to represent her without charging a fee. Second, a bright-line approach overlooks situations in which, infrequent though they may be, the lawyer and a sophisticated client — i.e., a corporate executive or general counsel for a corporate client have consented to a sexual relationship, where there is no possible impairment of judgment, conflict of interest, vulnerability, or exploitation of the professional relationship. Third, proposed LEO 1853 uses the terms "lawyer" and "client" throughout and therefore applies to all sexual relations between lawyer and client, regardless of sexual orientation.

As to the opinion being "wordy, obtuse, insensitive, unrealistic, and outrageous," the opinion borrows language from numerous public disciplinary decisions in which lawyers have been disciplined for having sexual relationships with clients in jurisdictions, including Virginia, that have chosen not to adopt a bright-line rule such as the one you suggest.

Letters

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