

MEMORANDUM

To: Joan Meier, Executive Director, DV LEAP

From: Margaret Hannapel, Intern

Date: June 16, 2010

Re: Use of Sanctions to Bar Mother's Access to Courts

QUESTION PRESENTED

Can a court use monetary sanctions, such as an award of the opposing party's attorney's fees, as a means to limit a pro se mother's access to the courts in a child custody hearing when that mother cannot pay such sanctions (effectively creating a bar to access)?

BRIEF ANSWER

The first question that the court must address in applying sanctions is whether the application of such sanctions violates due process. To determine this, the court weighs the private interest (here, the mother's ability to see her children) against the state interest in the fee (both as a means of deterring litigation and maintaining judicial efficiency). The court should also consider the risk of erroneous deprivation, that is to say, that the mother is deprived of her children without legal cause. Because of the importance of the parent-child relationship, the mother's interest in her children should trump the state's interest in the fee. However, the court may also consider whether the mother is a vexatious litigant under either a state statute or the court's inherent ability to declare litigants vexatious. If the court determines that the mother is vexatious, that determination will tip the scales of due process towards the state. The balance then

becomes the mother's interest in filing vexatious or frivolous motions (low) against the court's interest in using its finite resources for access for other litigants with legitimate claims (high). Thus, only after the court has declared the mother vexatious should it impose an access-limiting sanction against her so as not to violate due process.

DISCUSSION

I. The Due Process and Policy Approach

The Court first addressed due process concerns in civil cases in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971), a case brought by a class of indigent women who could not obtain divorces because of their inability to pay a fee. The Court first considered the state's interests: determining that its interest "in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable." *Id.* at 381, 788. However, this state interest was not enough to override the compelling interest of the indigent women in obtaining divorces, because their interest "in having access to the only avenue open for dissolving their allegedly untenable marriages" outweighed the state's interest in judicial efficiency. *Id.* Thus, due process demanded that the class of women not be barred from divorce proceedings simply because of their inability to pay the fee.

The Court took the due process argument a step further in *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555 (1996), in which it held that a state court could not deny a mother the right to appeal a parental right's termination decision because of her inability to pay the appeal cost. In doing so, the Court recognized that, "[i]n contrast to loss of custody,

which does not sever the parent-child bond, parental status termination is irretrievably destructive of the most fundamental family relationship.” Id. at 121 (internal citations omitted). The Court noted that “[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” Id. at 116. Because the importance of this relationship outweighed the state’s interest in the fee (both as a means to deter frivolous appeals and as a revenue source), the mother had the right to proceed *in forma pauperis* at the appeals level. See also *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) (holding that, although indigent parents do not have an absolute right to appointed counsel in termination of parental rights cases, they may have a right in cases in which due process considerations require it).

Courts can use this due process analysis when approaching custody and parental rights termination cases. For example, in *In re K.L.*, 91 S.W.3d 1 (Tex. App. Fort Worth 2002), the Texas Court of Appeals considered whether an indigent father had a right to an effective court appointed attorney in a parental rights termination case. The court used three factors in determining what due process required. These factors, first laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, (1976) and again cited in *Lassiter*, 452 U.S. at 27-32, were: (1) the private interest at stake; (2) the governmental interest; and (3) the risk of error or injustice. The private interest in this case was the “right to ‘the companionship, care, custody and management of his or her children’ . . . an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’” 91 S.W.3d at 9, citing *Lassiter*, 452 U.S. at 27. The

state's interest was twofold: "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Id.* at 9. The court noted that the risk of error was high in such a setting, because "a parent whose parental rights are erroneously terminated due to counsel's deficiencies has no meaningful remedy to cure such error." *Id.* at 11. After weighing the state's interest against the father's interest and the risk of error, the court concluded that the father had the right to an effective court appointed attorney.

Another court has extended due process considerations to an indigent mother required to pay court fees in a custody dispute. In *Thomas v. Thomas*, 991 P.2d 7 (N.M. App. 1999), the trial court prohibited an indigent mother from requesting further hearings until she paid a fee for the guardian ad litem (GaL). The appellate court reversed, relying on "the spirit of the United States Supreme Court's cases [such as *Boddie, supra*] that ruled that indigents could not be denied access to the courts based on their inability to pay court costs and fees. The GaL's fees are the sort of incidental court costs that, if Wife demonstrated indigency, her failure to pay should not serve to deny her access to further hearings." *Id.* at 15. For a discussion of the public policy reasons supporting such due process considerations, see *In re Marriage of Norton*, 206 Cal. App. 3rd (Cal. App. 2 Dist. 1988) ("[l]ess affluent parties, typically wives, may be unduly discouraged from vigorously prosecuting legitimate claims and defenses if they face the prospect of having to pay substantial cost and fee awards to the other side...This creates an imbalance in the incentives to behave appropriately during settlement negotiations and litigation").

In *Wells v. Welborn*, Not Reported in F.Supp.2d, 2004 WL 3242340 (M.D. La. 2004), the court considered whether "consistent with the obligations imposed on them by

the Due Process and Equal Protection clauses of the Fourteenth Amendment, [the court] may require an indigent to pay a filing fee before allowing the individual to access state courts in child-custody matters.” In that case, a father had attempted to file motions to proceed *in forma pauperis* and to hold his former wife in contempt for denying him visitation. The court refused to accept these motions until he paid costs from a previous part of the custody dispute. After reviewing *Boddie* and *M.L.B.*, the court concluded that, based on due process concerns “when a party files a Motion to Proceed In Forma Pauperis in a family court matter, it is constitutionally impermissible for the Clerk of Court to refuse to process the motion.” *Id.* at *6.

These lower court cases demonstrate the weighing of private versus state interest in determining due process requirements in the family court setting. In these cases, the private interest is high under the standard set forth by *M.L.B.*, since the interest is in “associational rights this Court has ranked as of basic importance in our society.” 519 U.S. at 116. The state interest in either the fee (as both a means to deter potentially frivolous filings or to add monetary resources to the judicial system) or in not appointing an attorney is held below the private interest in familial associations. Thus, due process requires that the fee be waived or an attorney be provided in such cases.

However, there are situations in family law in which the private interest remains below the state interest. In such cases, the court draws a line between parental rights termination, discussed in *M.L.B.*, and other forms of custody disputes that do not rise to such a level of severity. For instance, in *In re Joshua M.*, 66 Cal. App. 4th 458 (Cal. App. 2 Dist. 1998), the California Court of Appeals considered whether a statute denying reunification services was constitutional. The father argued that such a statute denied

him due process and equal protection because, as an indigent, he could not afford to pay for private reunification services. In upholding the statute, the court distinguished the case from *M.L.B.*, which dealt with a permanent severing of the parent-child relationship. In this case, the father would still have access to his child because “[e]ven without reunification services, [the father] could reestablish contact with [his son] and presumably if this went well it could lead to visitation, which in turn could open other potential avenues to reunification..” *Id.* at 476. Because the father’s private interest in reunification services was lower than the state interest in the statute, the denial of those services did not violate due process. *See also Lane v. Lane*, not reported in A.2d, 1999 WL 413266 (Con. Super. 1999) (“The constitutional requirement to waive court fees in civil cases is the exception and not the general rule. This case does not fall within the exception. This case differs from *M.L.B.*...this case is not a termination of parental rights but is a change in custody. The distinction between the two is that in this case the plaintiff continues to maintain a relationship with her children and she has a right to still seek to regain custody by filing a motion to modify custody”).

II. Vexatious Litigants

To curtail a litigant’s access to the courts and still comport with due process, a court can declare him a “vexatious litigant.” Some states have a specific statute outlining the procedure and requirements for declaring a litigant vexatious. *See* Validity, Construction, and Application of State Vexatious Litigant Statutes, 45 A.L.R.6th 493. States without such a statute can rely on common law to declare a litigant vexatious and impose fines or sanctions that effectively restrict access. *See, e.g. Biermann v. Cook*, 619

So.2d 1029, 1031 (Fla. App. 1993) (upholding monetary sanctions against a pro se litigant, and thus restricting his access to the court, after balancing his constitutional right to due process against the court's desire to "prevent abusive nuisance litigation").

Federal courts can use the All Writs Act, which allows them to declare a litigant vexatious when certain conditions are met:

[f]irst, the litigant must be given notice and a chance to be heard before the order is entered. Second, the district court must compile an adequate record for review. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. Finally, the vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered.

Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1057 (9th Cir. 2007). *See also* 25 U.S.C. §1651(a).

Declaring a litigant vexatious is basically the court's way of placing the state's interest above that of the private litigant; in effect saying that, although the broad private interest might be a high one (such as a parent-child relationship), the state's interest in protecting both the courts and other litigants from frivolous or vexatious motions overrides the private interest in filing such motions. Applying the due process balancing test in such a manner shows that the litigant does not have a due process right to file vexatious motions.

For example, in *In re R.H.*, 170 Cal. App. 4th 678 (Cal. App. 5 Dist. 2009), the California Court of Appeals considered the application of the state's vexatious litigant statute to a father proceeding pro se in a child dependency action. The father attacked the statute under the theory that it unconstitutionally infringed on his First Amendment right to petition the government and his Fourteenth Amendment right to due process. In upholding the trial court's designation of the father as a "vexatious litigant," the court

held that “the right to petition does not confer the right to clog the court system and impair everyone else’s right to seek justice...Baseless litigation is not immunized by the First Amendment right to petition.” *Id.* at 703 (citing *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 (Cal. App. 3 Dist. 1997)). Thus, because the trial court had determined that his “voluminous as well as meritless appeals and writs” made the father a vexatious litigant under the statute, he was barred from the further filing of motions without prior court approval.

An example of a court imposing sanctions to bar access for vexatious litigants under its inherent authority is *Sibley v. Florida Judicial Qualifications Com’n*, 973 So.2d 425 (Fla. 2006). In *Sibley*, a husband proceeded pro se in filing a motion to disqualify the judge who oversaw his previous divorce proceeding. The Florida Supreme Court noted that the husband had filed eight other motions in four years stemming from the divorce, each of which had been deemed meritless. *Id.* at 425. When asked why he should not be sanctioned for frivolous motions, the husband argued that the court “lack[ed] the authority, constitutionally and otherwise, to impose a sanction upon him and restrict his access to this Court.” *Id.* at 426. The court rejected this argument, explaining an important state interest presented: that the court “has a responsibility to ensure every citizen’s right of access to the courts. A limitation on the petitioner’s ability to file would further the constitutional right to access for other litigants because it would permit this Court to devote its finite resources to the consideration of legitimate claims filed by others.” *Id.* at 427 (internal citations omitted). Thus, the state’s interest in judicial efficiency and protecting access for legitimate claims outweighed the husband’s interest

in continuing to file frivolous motions, and the court barred his future motions unless signed by an attorney.

Access-restrictive sanctions are not appropriate when the court has not already declared a litigant vexatious. In *Parish v. Parish*, 988 A.2d 1180 (N.J. Super.A.D. 2010), the New Jersey Superior Court considered its inherent ability to impose sanctions on a potentially vexatious litigant under state procedural rules. In that case, a custody dispute, the trial court judge limited the father's ability to file motions by denying a review of the father's enforcement motion until both parties had "a timely four-way conference with counsel, in an attempt to resolve the issues at hand." *Id.* at 50. The judge did so after specifically finding that the filing was "neither frivolous nor harassing," but merely that "the proceedings had been 'extremely contentious,' the discovery process 'arduous,' and the parties 'did not communicate effectively on the issues.'" *Id.* at 48, 50. In considering whether such sanctions violated due process, the court noted its "inherent authority, if not the obligation, to control the filing of frivolous motions and to curtail harassing and vexatious litigation," which meant that, "in certain circumstances, due process is not impaired by enjoining litigation." *Id.* at 48.

However, the court held that this was not one of those cases, specifically because the litigant was not vexatious and thus due process concerns placed the father's private interest above the state's interest. The court noted that an "injunction should be issued only after the judge (1) makes a finding that past pleadings were frivolous or designed for an abusive purpose; (2) fully scrutinizes the newly filed pleadings and determines them to be repetitive and within the scope of the proscribed vexatious matters; and (3) has unsuccessfully attempted to abate the abuse by employing [other] sanctions" that are

more narrowly tailored. *Id.* at 54. Because the trial court had specifically found that the father not abusive or frivolous, due process required that the court accept his motions.

CONCLUSION

Before the court can impose a sanction that would effectively bar a pro se/indigent litigant from the court, it needs to consider whether the litigant is vexatious. In that consideration, the court should weigh the presumption for access and the time-honored principle that pro se litigants are not held to the same strict standards as attorneys against the court's need to monitor its docket and prevent vexatious filing. Only in the most extreme circumstances should pro se litigants be deemed vexatious, and even then, sanctions should be narrowly tailored to avoid unnecessarily restricting access. The narrow tailoring of restrictions is especially important in cases involving the parent-child relationship, as the Supreme Court has recognized the unique significance of that relationship.