

---

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

No. SJC-11776

---

WILLIAM F. READE, JR.  
PLAINTIFF-APPELLANT

V.

WILLIAM FRANCIS GALVIN & ANOTHER  
DEFENDANT-APPELLEE

---

On Appeal of a Denial of an Indigency Status  
Superior Court Department, Barnstable Division

---

**BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE**

---

Georgia Katsoulomitis (BBO#  
560473)  
Executive Director  
Massachusetts Law Reform  
Institute, Inc.  
99 Chauncy Street, Suite 500  
Boston, MA 02111  
617-357-0700  
GKatsoulomitis@mlri.org

Phillip Kassel (BBO# 555845)  
Executive Director  
Mental Health Legal Advisors  
Committee  
24 School Street, 8<sup>th</sup> floor  
Boston, MA 02111  
617-248-1884  
PKassel@mhlac.org

Dated: April 8, 2015

Counsel for Amici Curiae

2678997.2

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICI CURIAE..... 1

STATEMENT OF THE CASE..... 4

SUMMARY OF ARGUMENT..... 4

ARGUMENT.....

    I.    THE COURT COSTS OF INDIGENT PERSONS STATUTE SETS OUT A  
          PROCEDURE FOR WAIVER OF COURT COSTS WHICH IS EFFICIENT  
          AND EFFECTIVE, AND WHICH ENABLES POOR LITIGANTS TO HAVE  
          FAIR AND EQUAL ACCESS TO THE COURTS.....6

        A. Legislative History.....6

        B. Despite the clarity of the statute and procedures,  
          indigent parties are sometimes harmed when  
          applications are mishandled by courts.....14

    II.   ALTHOUGH THE CLERK INITIALLY ACTED IMPROPERLY IN THE  
          HANDLING OF MR. READE'S REQUEST, THE COURT PROPERLY  
          DENIED HIS THIRD REQUES.....17

        A. Once Mr. Reade's request was before the judge, the  
          judge could properly consider facts outside the  
          affidavit in determining whether Reade was entitled to  
          a waiver or substitution of court fees.....21

        B. Mr. Reade's receipt of federal veteran's benefits does  
          not entitle him to a waiver of court costs because he  
          is not in fact poor.....23

CONCLUSION.....26

APPENDIX.....A-1



**TABLE OF AUTHORITIES**

**Cases**

Commonwealth v. De'Amicis, 450 Mass. 271 (2007).....

Commonwealth v. Lockley, 381 Mass. 156 (1980).....

Commonwealth v. Morgan, 453 Mass. 54 (2009).....

Hashimi v. Kalil, 388 Mass 607, 609 (1983).....

Roe v. Rosencratz, 71 Mass.App.Ct. 901 (2007).....

Sterlite Corp. v. Continental Casulty Co.,  
397 Mass. 837 (1986).....

**Statutes**

G.L. c. 115.....

G.L. c. 261 § 27.....

G.L. c. 261 sec. 27A-G.....

G.L. c. 261 sec. 27A.....

G.L. c. 261 sec. 27B.....

G.L. c. 261, § 27C.....

G.L. c. 261 sec. 29.....

1974 Mass. Acts c. 694.....

1980 Mass Acts c. 539.....

**Other Authorities**

Memorandum of Chief Justice Margaret Marshall on  
Instructions to the Court on the Administration of  
The Indigent Court Costs Law, March 25, 2003.....



INTEREST OF AMICI CURIAE

Massachusetts legal aid programs represent low income clients seeking fee waivers in the courts of the Commonwealth. Every year, legal services attorneys represent thousands of poor people in landlord-tenant, public benefits, consumer, mortgage foreclosure, mental health, civil rights, domestic violence and family law cases. In almost every affirmative case, legal services clients seek a waiver of filing fees and service of process costs. In many cases, clients request waiver of other costs such as those for a witness subpoena or fee for issuance of an injunction.

*Amici curiae* respectfully submit this brief to highlight the critical importance of the Indigent Court Costs Act to low income litigants, to note some day-to-day problems with the implementation of the law, and to comment on the merits of the appeal.

*Amici* legal services programs are:

**Massachusetts Law Reform Institute** ("MLRI") is the statewide poverty law and policy center. Its mission is to advance economic, racial and social justice for low income people through legal action, administrative and legislative advocacy, coalition building and information about laws, policies and

practices that impact low income people. MLRI also serves as the backup support center for the legal services delivery system in Massachusetts, providing legal aid programs throughout the state with technical assistance, advice and counsel on laws, policies and practices that affect low income individuals, families, and communities. For almost 50 years, MLRI has been a leader in advancing reforms that have benefitted hundreds of thousands of low income people in Massachusetts.

MLRI was a leader in advancing court reforms in Massachusetts that ensured that poor people could receive fair and equal access to the courts of the Commonwealth. In the early 1970s, MLRI drafted and coordinated the passage of the Massachusetts Court Costs for Indigent Persons Statute (commonly known as the Indigent Court Costs Act), G.L. c. 261 sec. 27A-G, as first enacted by 1974 Mass. Acts c. 694. MLRI has extensive historical and institutional knowledge regarding the genesis and intent of this statute and its proper administration. The Indigent Court Costs Act, when administered properly and in accordance with its provisions, effectively and efficiently secures due process and equal protection of the laws for poor

litigants in a manner that is not burdensome to the courts or to poor litigants seeking fee waivers.

**Mental Health Legal Advisors Committee** ("MHLAC"), was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. It provides legal and policy advocacy throughout the Commonwealth for indigent persons that have or are perceived to have mental illness, a population that is often adversely affected by prejudice arising from stereotypical assumptions and is typically unable to afford the costs of filing and pursuing litigation. In a wide variety of cases, including those involving access to or custody of children, MHLAC staff members often file affirmatively, utilizing the streamlined and effective procedures under the Indigent Court Costs Act. Fee waiver procedures that permit ready court access are extremely important to members of the MHLAC client population seeking to vindicate legal rights. It would adversely affect MHLAC's practice if changes in rules governing applications and consideration of fee waivers were to make the process more cumbersome.

Because funding for civil legal aid is limited, legal services programs are unable to represent many

income eligible persons who reside in their program service areas. Consequently, many of these people will represent themselves in court. *Amici* have a strong interest in ensuring that this is possible. Poor litigants can access the courts only if they are able to secure waivers or state payment of court fees and costs.

The case before the court considers the grant of a fee waiver application, an issue of immense importance to *amici's* clients, to the clients of legal services programs, and to unrepresented litigants throughout the state.

#### **STATEMENT OF THE CASE**

*Amici curiae* adopt the Intervenor Office of Court Management's Statement of the Case.

#### **SUMMARY OF ARGUMENT**

The Court Costs for Indigent Persons Statute, G.L. c. 261, §§ 27A-G and 29 (commonly referred to as the "Indigent Court Costs Act"), was signed into law in 1974 in order to address inconsistencies and inequities in court administration resulting in barriers to access for poor people attempting to

assert their legal rights.<sup>1</sup> The statute, which is considered the most comprehensive of its kind in the nation, requires courts to waive and authorize state payment of certain costs, ensuring poor people access to justice in the courts of the Commonwealth.<sup>2</sup>

The Act is effective and efficient for all parties; if administered properly, it does not impose burdensome requirements on either poor litigants seeking fee waivers or administratively time-consuming procedures on the court system.<sup>3</sup> However, despite the clarity of the statute and its procedures, applications for fee waivers are often mishandled by the courts, which sometime cause significant harm to indigent litigants.<sup>4</sup> In fact, there were errors in the Trial Court's handling of Reade's waiver request,<sup>5</sup> even though the clerk ultimately was correct in referring the matter to a judge,<sup>6</sup> who was entitled to review information other than the affidavit,<sup>7</sup> and correctly denied Reade waiver of costs.<sup>8</sup>

---

<sup>1</sup> Pages 6 - 10.

<sup>2</sup> *Id.*

<sup>3</sup> Pages 10 - 14.

<sup>4</sup> Pages 14 - 17.

<sup>5</sup> Pages 17 - 20.

<sup>6</sup> Pages 20 - 21.

<sup>7</sup> Pages 21 - 23.

<sup>8</sup> Pages 23 - 26.

Finally, it is unequivocally clear from the statute's history and language that the beneficiaries of this law are intended to be indigent litigants; people who are poor and for whom the payment of court fees and costs would create an insuperable barrier to justice or would pose a substantial financial hardship.<sup>9</sup> Therefore, inclusion of the term "veterans benefits' programs" among those affording categorical eligibility for fee waiver under the indigence definition in sub-section (a) of G.L. c. 261, § 27A should be interpreted as limited to means-based veterans' benefits, excluding federal benefits that are provided regardless of need.<sup>10</sup>

#### ARGUMENT

I. THE COURT COSTS OF INDIGENT PERSONS STATUTE SETS OUT A PROCEDURE FOR WAIVER OF COURT COSTS WHICH IS EFFICIENT AND EFFECTIVE, AND WHICH ENABLES POOR LITIGANTS TO HAVE FAIR AND EQUAL ACCESS TO THE COURTS.

A. **Legislative History and Background.**

When legal aid programs first came into being in the late 1960s, they found that many poor persons had difficulty accessing the courts because of their inability to pay court fees or costs without forgoing

---

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

necessities. To initiate a court action, a litigant not only had to pay the filing fee, but often a fee for service of process and, in some Probate and Family Court cases, the costs of newspaper publication of notice. Some poor persons had to post a bond before being able to appeal certain types of cases, such as summary process evictions. Others could not feasibly conduct litigation through discovery, subpoenaing witnesses and incurring similar costs because those costs were prohibitively expensive.<sup>11</sup>

To address these problems, in the early 1970s, the Massachusetts Law Reform Institute (MLRI) drafted, and led a campaign to pass, comprehensive legislation in the Commonwealth of Massachusetts that addressed the out-of-pocket court costs of low income people in Massachusetts who were litigants in any state court proceeding.<sup>12</sup> A bill, drafted by MLRI Staff Attorney

---

<sup>11</sup> See Allan G. Rodgers, *Rap-Ups of a Retired Reformer: Stories About How Legal Services Advocates Transformed the Laws for Poor People in Massachusetts*, 85-87 (2013). See also, Allan G. Rodgers & Ernest Winsor, *The Indigent Court Costs Law: An Overview and Update*, MA Bar Assn. Sec. Rev., v.6, no.1, p. 3 (2003).

<sup>12</sup> *Court Access for All*, Boston Globe, June 29, 1974, p.6, excerpt: "It is a truism that a right is not better than the procedure for exercising it. A man without a mouth will take small comfort in the right to a full belly. Without adequate courts the right to a fair trial is a nullity. And, similarly, the right

Ernest "Tony" Winsor, provided for an affidavit of indigency, with two level of financial information to cover regular court costs (e.g., filing and publication fees) that could be approved without more than a showing of financial need, and extra costs (e.g., court transcript and witness fees), which could be approved by a judge via a showing of need for the expense.<sup>13</sup>

In 1974, "An Act to Relieve Indigent Litigants of Burdensome Court Costs in Civil and Criminal Proceedings," Senate Bill 1099, was filed in the Massachusetts State Senate by Senators William Bulger, Alan D. Sisitsky and Members of the House of Representatives.<sup>14</sup> The preamble of this legislation

---

of redress in the courts is a mockery to those too poor to afford it . . . .The [court] fees can amount to hundreds of dollars in lengthy but vital cases. The large sums effectively would bar poor persons access to the courts. In Massachusetts the indigent must rely on a helter-skelter, case-by-case assertion of the right to state subsidy for court costs. Sometimes the counties pay the fees; often the penniless litigant simply loses his right to press his claim."

<sup>13</sup> See, Allan G. Rodgers, Rap-Ups of a Retired Reformer: Stories About How Legal Services Advocates Transformed the Laws for Poor People in Massachusetts, p. 86.

<sup>14</sup> A re-drafted bill was filed by Sens. Alan Sisitsky, Chester G. Atkins, William M. Bulger, Stephen J. McGrail and Members of House of Representatives, S 1099, An Act To Relieve Indigent Litigants or Burdensome Court Costs in Civil and Criminal

highlights the overarching intent of the legislation:  
to safeguard the due process and equal protection  
rights of poor people who are unable to pay court fees  
and costs and for whom these fees and costs create a  
barrier to the court system:

[T]he General Court hereby finds and declares  
that many litigants in both civil and criminal  
cases are unable to secure due process of law and  
equal protection of the laws in the Courts of  
Massachusetts by reason of being too poor to  
afford the fees and costs (not including  
attorneys fees) incident to such litigation.  
Therefore the purpose of this act is to provide  
for the absorption, payment or obviation of such  
fees and costs, initially by the counties and  
ultimately by the Commonwealth. This Act shall  
be given liberal construction to the end that its  
broad and humane purpose may be served.

With strong support from then-Senate President  
William Bulger and then-Speaker of the House Charles  
Flaherty, in 1974, the Massachusetts legislature  
adopted, and then-Governor Francis Sargent signed, The  
Court Costs for Indigent Persons Statute, G.L. c. 261,  
§§ 27A-G and 29 (referred to as the "Indigent Court

---

Proceedings. H 2756, An Act Requiring the  
Commonwealth to Pay the Expenses of Indigent Persons  
in certain Criminal and Civil Proceedings, was filed  
in Massachusetts House by Reps. Barney Frank, Melvin  
H. King and Angelo Scaccia in 1974. S 1099 was sent to  
the Committee on the Judiciary, then to the House  
Committee on the Judiciary and was accompanied by a  
new draft, H.5859. After referral to Committees, the  
final legislation, The Court Costs for Indigent  
Persons Statute, was signed by Governor Francis  
Sargent on August 2, 1974.

Costs Act") that requires or permits courts to waive or pay certain court costs of indigent persons. It is considered the most comprehensive statute of its kind in the nation, as well as the most efficient; if properly applied, it is both easy to administer by the courts and it does not subject poor litigants to overly-burdensome requirements.

Those eligible for waiver or state payment of court costs were divided, for ease of administration, into three groups:

i) Category A - Those who are receiving certain identified means-tested public benefit program payments, which makes them automatically eligible for waiver or state payment.

ii) Category B - Those not receiving a means-tested public benefit program payment but whose income is below 125 percent of the federal poverty line.

iii) Category C - Those in neither Categories A nor B but who nevertheless do not have the funds to pay for any court costs that a non-poor litigant would believe necessary to conduct the litigation.

The statute divides allowable costs into two categories:

i) Normal costs, including filing fees, service of process and similar costs that are assessed as a matter of course in litigation. The statute provides that a person presenting the need for help on these costs should have them waived or paid as a matter of course.

ii) Extra costs, including the costs of subpoenas and depositions, which are "reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay." G.L. c. 261, § 27A.

The Indigent Court Costs Act provides a simple procedure for the approval of fee waiver requests. A party in any court proceeding or appeal may request waiver of court fees and costs by filing an affidavit with the court's clerk, register or recorder ("clerk"). The affidavit of indigency is signed under oath "on a form prescribed by the [C]hief [J]ustice of the [S]upreme [J]udicial [C]ourt," showing the affiant meets the requirements of the statute. G.L. c. 261, § 27B.

Chief Justice Marshall prescribed the current forms and provided guidance to courts and clerks in a

Memorandum dated March 25, 2003.<sup>15</sup> Memorandum of Chief Justice Margaret Marshall on Instructions to the Court on the Administration of The Indigent Court Costs Law, March 25, 2003 ("Chief Justice's Memo & Instructions"). Attached as Appendix A. This Court recently constituted a new Committee on Indigency, charged, among other tasks, with reviewing the form affidavit and suggesting amendments to it.

In accordance with the statute and the Instructions, applicants complete the prescribed form to show that they are "indigent" under the definition in the statute.<sup>16</sup> G.L. c. 261, § 27B. The clerk reviews the form and grants the application for waiver "forthwith" without a hearing or any further

---

<sup>15</sup> Consistent with the eligibility categories set forth above, the prescribed "Affidavit of Indigency" form, effective May 5, 2003, allows an applicant to request a waiver of fees and costs by checking one of three boxes. Box A says the applicant receives an enumerated type of public assistance benefit; box B says the applicant's income is below the poverty level; and box C says the applicant is unable to pay filing fees "without depriving [himself or herself] or [his or her] dependents of the necessities of life." Applicants who check box C must also complete a supplemental affidavit providing more information about the applicant's income and expenses.

<sup>16</sup> A separate form and a "more onerous indigency requirement" are used for prisoner filings. Commonwealth v. De'Amicis, 450 Mass. 271, 272; G.L. c. 261 § 29 (2007); Chief Justice Memo and Instructions App. A p. 3. Mr. Reade is not a prisoner.

proceeding when the form "appears regular and complete on its face," shows that the applicant is indigent, and shows the applicant is requesting waiver of normal fees and costs. G.L. c. 261, § 27C(2).

The clerk brings an affidavit to the attention of a judge in only three situations: (1) when the affidavit does not appear to be "regular or complete on its face"; (2) when the affidavit shows the applicant is not indigent; or (3) when the applicant seeks the waiver of extra (not normal) court costs. G.L. c. 261, § 27C(2), (3). In such instances, the judge may review the affidavit and grant the request or may schedule a hearing on the request. G.L. c. 261, § 27C(3). In *amici's* experience, most applications are disposed of without judicial hearings. Indeed, in most cases, the procedure requires little of the clerk's time, and relatively few court resources.

This is true because the current affidavit and procedure are designed to elicit relevant information necessary to determine whether an individual is indigent and unable to afford court fees and costs. By relying in large part on prior determinations of governmental agencies that do a searching indigence inquiry as a condition of dispensing public benefits,

as well as the well-established federal poverty guidelines, current law allows low income litigants to quickly access the court without a burdensome, unnecessary, and public inquiry into their financial affairs. See G.L. c. 261 § 27 (ensuring confidentiality of affidavit). The procedure preserves the dignity of the litigant, and ensures both equal access to the courts and an equal opportunity for justice. Commonwealth v. Lockley, 381 Mass. 156, 160 (1980) (purpose of the statute is to ensure that indigent litigants may proceed in as effective manner as would be available to a person of means).

**B. Despite the clarity of the statute and procedures, indigent parties are sometimes harmed when applications are mishandled by courts.**

Despite the clarity of the statute and the modest procedure it requires, *amici* have frequently observed unnecessary and often harmful problems in practice.<sup>17</sup>

---

<sup>17</sup> The examples in this brief are drawn from *amici's* own experience and from examples cited by field advocates. In addition to knowledge gained by providing direct legal assistance to clients, legal services programs learn about the experiences of self-represented litigants seeking fee waivers by virtue of the statewide Massachusetts Legal Services Websites Projects, housed at MLRI, which facilitates the

For example, despite the requirement set forth in G.L. c. 261 §§ 27C (2) & (3) that applications be decided "forthwith," some courts take as long as six weeks to rule on certain fee waiver requests, especially those submitted subsequent to filing of the initial pleading. See, M G.L. 261 §27B (permitting waiver requests while the case is pending).

A legal services attorney reports representing an indigent client in a post-foreclosure summary process case. After the defendant lost his case, he timely filed a notice of appeal accompanied by an affidavit of indigency and a request for waiver of the costs of the appeal. Two days later, or one day after the expiration of the appeal deadline, contrary to the provisions of G.L. c. 261, § 27C(1), a clerk informed the attorney that the notice of appeal was not docketed because there was no documentation to support the defendant's claim that he was indigent. The attorney asked the clerk to docket the appeal *nunc pro tunc*, since the statute requires that the affidavit be accepted notwithstanding any apparent inadequacy and

---

provision of advice, information and referral to pro se litigants. In *amici's* opinion, the examples cited are representative of the experiences of at least some low income individuals and their counsel when seeking waivers of fees and costs.

that the court "proceed as if all regular filing fees had been paid." *Id.* The clerk refused, however, and an appeal to the judge was also unsuccessful. The client's right to appeal was forfeited.

Also, some courts will require applicants to submit supplemental affidavits even when the law does not require it; for example, when the applicant indicates income below 125 percent of poverty guidelines under part (b). One legal aid program represented a woman who fled with her children from a husband that physically abused her for many years and refused to provide financial support. The legal aid lawyer helped the woman file for divorce, but the woman's request for a waiver of filing and service fees was denied. She swore that her income was below 125 percent of poverty, but the clerk would not rule on the fee waiver without a supplemental affidavit of indigency, which, since there is no requirement for it, was not prepared. The lawyer had hoped to have the summons and complaint served on the husband the next day, when he was being arraigned in a criminal case, but by the time the supplemental affidavit was presented and the waiver application approved, the husband disappeared. As she was unable to effect

personal service on the husband, the battered woman was not able to obtain prompt financial relief in her divorce case.

II. ALTHOUGH THE CLERK INITIALLY ACTED IMPROPERLY IN THE HANDLING OF MR. READE'S REQUEST, THE COURT PROPERLY DENIED HIS THIRD REQUEST.

Although the court ultimately correctly denied Mr. Reade's request, the initial handling of the request by the clerk was improper.

First, the statute provides that clerks must, without delay, approve applications for waiver of normal fees and costs when an applicant presents an affidavit that is "regular and complete on its face" and shows that the applicant is indigent. G.L. c. 261, §27C(2). "Except in prisoner cases, such papers should not be referred to a judge for decision, nor should further information be requested if the papers are properly completed." Chief Justice's 2003 Memo & Instructions, App. A, p. 4, ¶(4). There was nothing irregular or incomplete on the face of Mr. Reade's third application. Rather, the clerk referred the application to the judge, in part, because the amount requested for service fees and costs was unjustified.

In this regard, the clerk failed to follow the correct process. Once a court makes a finding of indigency, it must approve requests for any "normal fees and costs."<sup>18</sup> G.L. c. 261, §27C(4). Applicants completing the prescribed affidavit must state the fees that they are seeking to waive or to have the state pay. Applicants describe the service (e.g., fees for serving court summons), then must fill in a blank stating (or in most cases estimating) the cost.

The Chief Justice's 2003 Memo & Instructions acknowledges that applicants often will not know the costs of services when they seek waiver. If the costs seem to be incorrect, the court may give a more accurate estimate, but nevertheless should approve the application. Chief Justice's Memo & Instructions, App. A, p.5, ¶ (8).

Thus, if an applicant lists an inordinately high amount for an ordinary court cost, as Mr. Reade did in

---

<sup>18</sup> "Normal fees and costs," are defined in the statute as "the fees and costs a party normally is required to pay in order to prosecute or defend the particular type of proceeding in which he is involved" and specifically includes filing fees; service costs; costs for the issuance and service of a subpoena and witness fees for trial or deposition; jury trial fees; removal fees; costs assessed in a bill of costs; and fees for the issuance of an injunction, restraining order, writ or other process. G.L. c. 261, §27A

his request for fees covering service of two government officials, the court may supply a more accurate estimate of the cost, but should still approve the application.

The Intervenor Office of Court Management of the Trial Court argues that Mr. Reade's third affidavit is not regular and complete on its face because he asked for "an unjustifiable amount of service fees." Brief of the Office of Court Management of the Trial Court ("Intervenor's Brief"), p. 14. In fact, however, it was not appropriate for the clerk to deem Mr. Reade's application "irregular" simply because of an inaccurate estimate of the cost of the fees for which Mr. Reade sought waiver. Chief Justice's Memo & Instructions, App. A, p. 5 ¶(8). Had this been the only issue raised by Mr. Reade's third affidavit, the clerk should have made a more accurate service cost estimate and approved the application without sending it to a judge.

In this case, however, Mr. Reade sought state payment of other anticipated costs. While a clerk may approve a request for waiver of "normal" court costs,

a judge must approve a request for waiver of "extra" fees and costs. G.L. c. 261, §§ 27C (2) & (3).<sup>19</sup>

The statute defines "extra fees and costs" as costs "not necessarily required" in the type of case involved, and includes, for example, "the cost of transcribing a deposition, expert assistance and appeal bonds and appeal bond premiums." G.L. c. 261, §27A (fifth par.)

Mr. Reade's third affidavit requested waiver of fees for expert services, for taking and transcribing depositions, and for tape recordings, all of which are specifically listed in the statute as "extra fees." G.L. c. 261, §27A. The clerk in this case was therefore correct to refer Reade's third affidavit to

---

<sup>19</sup> The statute provides:

(2) If an affidavit appears regular and complete on its face and indicates that the affiant is indigent, as defined in section twenty-seven A, and requests a waiver, substitution or payment by the commonwealth, of normal fees and costs, the clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

(3) If the affidavit does not appear to satisfy the condition of paragraph (2), the clerk or register shall forthwith bring the affidavit to the attention of the justice or judge...

G.L. c. 261, § 27C.

a judge for that reason. The clerk was also entitled to consider information from two other affidavits of indigency Mr. Reade submitted previously and determine that they gave rise to a question about his indigency before referring the question to the judge. Roe v. Rosencratz, 71 Mass.App.Ct. 901 (2007).

**A. Once Mr. Reade's request was before the judge, the judge could properly consider facts outside the affidavit in determining whether Reade was entitled to a waiver or substitution of court fees.**

Once the clerk referred Mr. Reade's third affidavit to a judge, the judge's options were to approve Reade's request, or, as he did here, schedule a hearing. G.L. c. 261, § 27C(3).<sup>20</sup>

In its brief, the Intervenor incorrectly argues that once the clerk properly submitted Mr. Reade's affidavit to the judge, the judge was required to broadly examine the applicant's financial position to assess indigency. Intervenor's Brief P. 18. On the contrary, if the judge is satisfied from the affidavit

---

<sup>20</sup> G.L. c. 261, § 27C(3) provides that the clerk "shall forthwith bring the affidavit to the attention of the justice or judge...The justice or the judge may grant such request forthwith or may have the clerk or register notify the affiant that a hearing will be held on the affidavit within five days."

that the applicant is indigent, the statute affords the judge discretion to grant the request for the fee waiver upon nothing more than a review of the affidavit. G.L. c. 261, §27C(3).

When a fee waiver matter, however, is before the judge because the applicant requested extra fees and costs, and not because there is a question about indigency, the judge is not authorized to give scrutiny to the financial circumstances of the applicant. Instead, the judge is limited to a consideration of whether the requested item is "reasonably necessary to prevent the party from being subjected to disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires." G.L. 261, §27C (4); Commonwealth v. Lockley, 381 Mass. at 161. <sup>21</sup>

In making a finding of indigency, the judge is permitted to consider information from other court filings. In Roe v. Rosencratz, 71 Mass.App.Ct. at 903,

---

<sup>21</sup> In contrast, if an affidavit suggests that a litigant may not be indigent, and "it appears at the hearing that there is a serious question" on this score, then the judge is required to consider certain enumerated factors and may also look at other relevant facts. See G.L. c. 261, §27C(3) (emphasis added).

the Appeals Court held that a court, in making a determination of indigency, could consider any information before the court, including prior filings by the affiant inconsistent with the affidavit. Consequently, the judge, at the hearing on Reade's third affidavit of indigency, properly considered the two affidavits of indigency Reade had previously submitted.

**B. Mr. Reade's receipt of federal veteran's benefits does not entitle him to a waiver of court costs because he is not in fact poor.**

Though the specific terms of the Indigent Court Costs law have changed over time, its consistent goal has been to provide a streamlined procedure for ensuring court access to persons that are indigent.

Indigent is defined to include:

a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans' benefits programs or who receives assistance under Title XVI of the Social Security Act [SSI benefits] or the Medicaid program, 42 U.S.C.A. 1396, et seq...

G.L. c. 261, §27A. Persons receiving the government benefits listed may simply check box A on the prescribed court form. Eligibility for all of the listed public benefits is contingent on demonstrated

financial need - except for some federal veterans' benefits that are not means-based.<sup>22</sup>

It was not always the case that federal veterans' benefits were apparently included among those conferring categorical eligibility. Until 2000, categorical eligibility for fee waivers based on veterans' benefit receipts was limited to the *Massachusetts'* veterans' cash assistance program. 1980 Mass. Acts, c. 539, §5. In 2000, the legislature amended this part by striking the word "Massachusetts" from the definition of "indigent." G.L. c. 261, §27A as amended by 1980 Mass. Acts c. 539, §5. This deletion is significant because Massachusetts veterans' benefits are awarded only to veterans with financial need. G.L. c. 115, §5(second par.) Though *Amici* have been unable to locate any legislative history to explain the deletion of "Massachusetts," it is unlikely that this change was intended to entitle

---

<sup>22</sup> Some types of federal veterans' benefits are awarded regardless of financial need, for example, federal disability compensation benefits which are awarded for service-connected disability. 38 U.S.C. §§1101-1163. Also, a few recipients of MassHealth receive state funded medical insurance on the basis of eligibility criteria that do not include financial need. *Amici* are informed that this Court's Committee on Indigency is considering this matter. Mr. Reade's case does not raise any issue about MassHealth or Medicaid eligibility.

recipients of any type of veterans' benefits, regardless of financial resources, to cost waivers.<sup>23</sup> Chief Justice Marshall explains the statutory change as motivated by the need to render benefits program names current. Chief Justice's 2003 Memo & Instructions, App. A, p. 2.<sup>24</sup>

This interpretation is consistent with the very purpose of the court costs statute, which is to assist litigants who are unable to afford fees or costs. Commonwealth v. Morgan, 453 Mass. 54, 63 (2009). Though the statutory language could be interpreted to expand the definition of "indigent" to include persons receiving veterans benefits, regardless of whether those benefits are needs-based, this doesn't make

---

<sup>23</sup> The Commonwealth owes a tremendous debt of gratitude to its veterans and to those currently serving in the armed forces. However, given the limited public funding for indigent court costs, waiving the court fees and costs of all the Commonwealth's veterans, regardless of financial need, is counter to the intent of the statute and would tax the indigent court costs fund to the detriment of needy veterans and others entitled to court access.

<sup>24</sup> Notwithstanding the statutory language, the Indigency Affidavit itself asks the affiant if he or she receives "Massachusetts Veterans Benefits Programs." The word "programs," however, could reasonably be interpreted (especially by a pro se litigant) to mean receipt of any veterans' programs and benefits in Massachusetts.

sense given the statute's purpose. When interpreting statutes, this Court has often looked not only to the law's plain language, Hashimi v. Kalil, 388 Mass 607, 609 (1983), but also to the legislature's underlying intention. Sterlite Corp. v. Continental Casulty Co., 397 Mass. 837, 839 (1986). This approach is called for here.

Mr. Reade receives veteran's benefits, but he is not poor. He is able to pay court costs, and, despite errors in handling his application, the court properly denied Mr. Reade's request for waiver.

#### **CONCLUSION**

For the reasons cited in the foregoing brief, because Mr. Reade's prior affidavits show he is not indigent, the court properly denied his third request for waiver of court costs.

Respectfully Submitted

Massachusetts Law Reform Institute  
Mental Health Legal Advisors Committee

As *AMICI CURIAE*

By their attorneys:

Georgia D. Katsoulomitis (BBO# 560473) (Lead Counsel)  
Executive Director  
Massachusetts Law Reform Institute  
99 Chauncy Street, Suite 500  
Boston, MA 02111  
Phone 617-357-0700  
GKatsoulomitis@mlri.org

Phillip Kassel (BBO# 555845)  
Executive Director  
Mental Health Legal Advisors Committee  
24 School Street, 8th floor  
Boston, MA 02111  
617-248-1884  
PKassel@mhlac.org

#### **Certificate of Service**

I, Georgia D. Katsoulomitis, hereby certify that on April 7, 2015, I caused two copies of the foregoing Brief of the *Amici Curiae* to be delivered via first-class U.S. Mail, postage prepaid, to counsel for the parties of record in this case.

\_\_\_\_\_  
Georgia D. Katsoulomitis  
(BBO# 560473)

