August 2015

Access to Civil Courts - Indigents - Filing Fee; United States v. Kras

William I. Arbuckle

BANKRUPTCY—ACCESS TO CIVIL COURTS—INDIGENTS—FILING FEE

United States v. Kras, 93 S. Ct. 631 (1973).

ROBERT WILLIAM KRAS presented his voluntary petition in bankruptcy to the United States District Court for the Eastern District of New York in May of 1971. With the petition his Legal Aid Society Attorneys filed a motion for leave to proceed without prepayment of any of the filing fees[1] required as a prerequisite to discharge. Kras alleged that he was unable to pay the fees, even in installments, and that they should not be required of him either because (1) he was entitled to proceed *in forma pauperis* under the Federal Statute,[2] or (2) because the provisions of the Bankruptcy Act, which conditioned a discharge upon payment of a filing fee, would deprive him of his fifth amendment rights to due process and equal protection of the laws. The District Court rejected the statutory claim but granted the petitioner's motion on constitutional grounds. On direct appeal[3] the Supreme Court[4] (5-4 per Blackmun, J.) reversed, holding that Kras had neither a statutory nor a constitutional right to proceed in bankruptcy without first meeting the fee obligations. In so holding, the Court refused to extend the "access to the courts" principle of *Boddie v. Connecticut*[5] beyond its limited facts, i.e.: an "interest of basic importance to our society"[6] coupled with a "state monopolization of the means for legally dissolving [the] relationship."[7]

---

[1] The fees were required by the Bankruptcy Act, 11 U.S.C. § 32(b)(2) (1946) (no discharge without fees being paid), § 32(c)(8) (same), § 68(c)(1) ($37.00 for referee's salary and expense fund), § 95(g) (notice to creditors not required when there is dismissal for failure to pay fees), § 80(a) ($3.00 filing fee to clerk), and U.S. Supreme Court General Order in Bankruptcy § 35(4) (filing fees required for discharge but can be paid in up to nine installments).

[2] 28 U.S.C. § 1915(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

[3] Pursuant to 28 U.S.C. § 1252.

[4] Blackmun, Powell, Rehnquist, White, J.J., with Burger, C.J. concurring; Stewart, Douglas, Brennan, and Marshall, J.J. dissenting.

[5] 401 U.S. 371 (1971) (Hereinafter cited as *Boddie*).

[6] *Id.* at 376.

[7] *Id.* at 374.

The decision settled a controversy that has produced irreconcilable decisions in the lower courts[8] and among the commentators.[9] Justice Blackmun adopted the reasoning of Judge Travia in the lower court opinion and (consistent with other lower court cases[10]) quickly dismissed Kras's statutory argument. The court reached that result by noting that the current Bankruptcy Act as originally adopted in 1898[11] contained provisions that allowed waiver of fees upon the filing of an affidavit of inability to pay. The current *in forma pauperis* statute[12] had its origin in 1892.[13] The Court reasoned that when Congress passed the Referee's Salary Bill of 1946[14] petitions *in forma pauperis* were abolished[15] because "... the 1946 statute, being later and having a positive and specific provision for postponement of fees in cases of indigency, overrode the earlier general provisions of Section 1915(a) (the *in forma pauperis* statute)."[16] This line of reasoning is a legalistic, legislative interpretation that glosses over the fact that Section 1915(a) on its face applies to bankruptcy proceedings because of the language "... any suit, action or proceedings, civil or criminal..." The legislative history cited by both courts[17] is concerned only with the inequities of the pauper petition under the Bankruptcy Act and does not specifically exclude the operation of Section 1915(a). This is also contrary to the court's historical position of not interpreting a statute so that it overrules an earlier statute by implication.[18]

Even more disappointing than the statutory construction, however, was the court's failure to extend *Boddie* by not recognizing a constitutional right of access to the court. *Boddie* was a class action brought on behalf of women in Connecticut receiving welfare assistance and desiring to

---

[8] *Compare In re* Garland, 428 F.2d 1185 (1st Cir. 1970) (*held,* fees required) *with In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971) *and* O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972) *and* Application of Ottman, 336 F. Supp. 746 (E.D. Wisc. 1972) (*held,* fees not required).

[9] *Compare Access to Bankruptcy Court for Indigents: The Extension of Boddie v. Connecticut,* 16 S.L.U.L.J. 328 (1971) *with In Forma Pauperis Relief—An Endless Road?—In re Smith,* 6 U. RICH. L. REV. 175 (1971).

[10] *E.g., In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *In re* Smith, 341 F. Supp. 1297 (E.D. Ill. 1972), *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

[11] 30 Stat. 558 (1898).

[12] 28 U.S.C. § 1915(a).

[13] 27 Stat. 252 (1892). *See also* 28 U.S.C. §§ 832-836 (1940).

[14] 11 U.S.C. § 68 (1946).

[15] *Citing* H.R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess., 7 (1946).

[16] U.S. v. Kras, 93 S. Ct. 631, 635 (1973).

[17] H.R. Rep. No. 1037, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 959, 79th Cong., 2d Sess., 7 (1946).

[18] *See generally* Wright v. United States, 302 U.S. 583 (1937); Williams v. United States, 289 U.S. 553 (1932), Knowlton v. Moore, 178 U.S. 41 (1899).

obtain a divorce, but who were barred from filing their petitions by their inability to pay filing and service costs.[19] The court chose to ignore the "possible availability of public or private funds to enable petitioners-appellants to defray the expense requirements at issue" in the case.[20] Instead they held that the operation of Connecticut's statute[21] which prevented Ms. Boddie and others like her from dissolving their marriages solely because of their inability to pay the required costs was violative of the due process clause[22] of the fourteenth amendment.[23] All but one of the Justices agreed that access to the judicial process for divorce was a matter of right, but the exact constitutional nature of that right is confused in four separate opinions.[24]

Despite this confusion, after *Boddie,* most commentators expected the Supreme Court to extend the access principle to indigent bankrupts.[25] At least five lower courts[26] thought *Boddie* should and would be extended to indigent-bankrupts. Another lower court[27] held that the fees were unconstitutional before *Boddie* was decided by the Supreme Court and in spite of the opposite result reached by the *Boddie* District Court.[28] The speculation that the court would not do what it did was further enhanced by a Supreme Court case, *Frederick v. Schwartz*[29] and a District Court

---

[19] The undisputed allegations of Ms. Boddie's complaint listed the average cost to a litigant for bringing an action for divorce was $60.00 including a $45.00 filing fee and an additional $15.00 for service of process. Boddie v. Connecticut, 401 U.S. 371, 373 (1971).

[20] *Id.* at 374 n. 2.

[21] CONN. GEN. STAT. ANN. § 52-259-61 (Supp. 1971).

[22] U.S. Const. Amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[23] 401 U.S. at 380.

[24] 401 U.S. at 372-83 (Mr. Justice Harlan writing for the majority); 401 U.S. at 383-86 (Mr. Justice Douglas concurring); 401 U.S. at 386-89 (Mr. Justice Brennan concurring); 401 U.S. at 389-94 (Mr. Justice Black dissenting).

[25] *See, Access to Bankruptcy Court for Indigents: The Extension of Boddie v. Connecticut,* 16 S.L.U.L.J. 328, 338-39 (1971); *Bankruptcy Filing Fees Deny Indigents' Fundamental Interest In Access To Courts Under Due Process And Equal Protection Guarantees,* 18 WAYNE L. REV. 1431, 1445 (1972). *But see Boddie v. Connecticut: Free Access to Civil Courts For Indigents,* 76 DICK. L. REV. 749, 768 (1972).

[26] Along with the Eastern District of New York in the instant case there was *In re* Naron, 334 F. Supp. 1150 (D. Oregon 1971); O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wisc. 1972); *and In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972)

[27] *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

[28] *Id.* at 1090.

[29] 402 U.S. 386 (1971) (hereinafter referred to as *Fredrick*).

case, *Gatling v. Butler*,[30] holding that appeal filing fees can not pre-empt the right to appeal because the appellant is unable to pay the filing fee. *Frederick* and *Gatling* were explicitly grounded on *Boddie* and the due process clause of the fourteenth amendment.

The Nixon Court, now four appointees strong,[31] refused to hear the cry of the indigent and slapped them back into the 1960's with the "rational basis" portion of the Equal Protection Doctrine. Mr. Justice Blackmun in the majority opinion concluded that: "The rational basis for the fee requirement is readily apparent. Congressional power over bankruptcy, of course, is plenary and exclusive."[32] He then attempted to justify this by noting: "It serves also, as an incidental effect to promote the purpose of making the bankruptcy system financially self-sufficient."[33] This line of reasoning ignores two basic facts. The bankruptcy system has failed to be self-supporting since 1970[34] and, there is no proof that a substantial number of indigents would file for bankruptcy if the fees were waived for them. From the experience in Colorado after *In re Smith*,[35] just the opposite would appear to be true.[36]

The majority of the court refused to take the right of the poor one more step down the due process road to equality with the affluent. This failure to go on may signify a halt in the development of due process concepts as an aid to the poor. Until now, the concept was expanding steadily in many areas.

> In the criminal area of the law, due process has operated to place numerous procedural restrictions on State actions in dealing with the criminals.[37] Certain administrative actions have been similarly restricted as having a facsimile to criminal proceedings

---

[30] Gatling v. Butler 52 F.R.D. 389 (D. Conn. 1971).

[31] C.J. Burger (appointed June 23, 1969); J. Blackmun (appointed May 14, 1970); J. Powell (appointed December 9, 1971); J. Rehnquist (appointed December 15, 1971).

[32] 93 S. Ct. at 639.

[33] *Id.* at 640.

[34] 60 GEO. L.J. 1581, 1592 (1972). *See generally* Jackson, *Bankruptcy Administration Then and Now*, 45 AM. BANKR. L.J. 249, 275 (1971).

[35] 323 F. Supp. 1082 (D. Colo. 1971).

[36] 60 GEO. L.J. 1581, 1592 n. 70 (1972) stating as follows: In eight months following *Smith*, there were only three applications for waiver of fees in the 2100 personal bankruptcies administered. This happened despite the fact that *Smith* generated so much local publicity that legal aid and the bar presumably were aware of its effects. National Commission on the Bankruptcy Laws of the United States, Waiver of Filing Fees for Indigents (Professional Staff memorandum).

[37] *See e.g.*, North Carolina v. Alford, 400 U.S. 25 (1970) (guilty plea must be a voluntary and intelligent choice); Boykin v. Alabama, 395 U.S. 238 (1969) (due process requires a record adequate for any appeal that may be brought); Klopfer v. North Carolina, 386 U.S. 213 (1967) (accused has right to speedy trial).

because of the direct involvement of the State in depriving an individual of his rights.[38] Finally, due process has been applied to civil cases.[39, 40]

The majority opinion attempts to distinguish *Boddie* by giving divorce a different "constitutional level" than bankruptcy.[41] The majority stresses the language in *Boddie* that refers to the "State monopolization of the means for legally dissolving" the marriage relationship and the "fundamental importance" of the marriage relationship along with the associational interests that surround marriage and divorce.[42] Divorce or death are the only legal ways to end a marriage. Bankruptcy and death are the only legal ways to end debt. The married person can either co-habit happily or get divorced. The potential bankrupt can either pay his debts or go bankrupt. If a debtor's creditors are willing to renegotiate his debt, the debtor does not need bankruptcy in much the same way a married couple who have had a spat and then make up do not need a divorce. Bankruptcy, like divorce, is the last resort. One can only wonder why the court did not use the same rationale in *Boddie* and refer Ms. Boddie to a marriage counselor rather than allow her a divorce. This is in effect what the majority does when it states: "[A] debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At times, the happy passage of the applicable limitation, or other acceptable creditor arrangement, will provide the answer."[43] A more recent case indicates that the court is going to stick to this "alternative" rationale.[44]

---

[38] *See, e.g.,* Goldbert v. Kelly, 397 U.S. 254 (1970) (termination of welfare by state must be accompanied by opportunity for recipient to have notice and hearing).

[39] *See* Boddie v. Connecticut, 401 U.S. 371 (1971) (Connecticut filing fees for divorce deprived indigents of access to the Court and therefore violative of due process); Sniadach v. Family Finance Corp., 395 U.S. 337 (1960) (Wisconsin prejudgment garnishment procedure held a taking of property without proper hearing and therefore violative of due process); Armstrong v. Manzo, 380 U.S. 545 (1965) (insufficiency of notice in child custody proceedings); Mullane v. Central Hanover Bank & Trust Co., 330 U.S. 306 (1950) (requiring that notice be reasonably calculated under all circumstances to assure all interested parties a chance to be heard); Hovey v. Elliott, 167 U.S. 409 (1897) (service must be calculated to reach all partners when suit against partnership undertaken). *See also* Bennet v. Davis, 90 Me. 102, 37 A. 864 (1897) (statute requiring security in amount of assessed tax, interest and costs as a condition on taxpayer's right to challenge forced tax sale of his land was held to deprive a party of his right to be heard).

[40] *Bankruptcy Filing Fees Deny Indigents' Fundamental Interest In Access to Courts Under Due Process and Equal Protection Guarantees,* 18 WAYNE L. REV. 1431, 1434 (1972).

[41] 93 S. Ct. at 638.

[42] *Id.* at 637.

[43] *Id.* at 638.

[44] Ortwein v. Schwab, 93 S. Ct. 1172, 1174 (1973).

Mr. Justice Blackmun displayed a cold, indifferent disbelief of uncontroverted fact when he stated:

> This [the filing fees under an extended payment plan] is a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and a little more than the cost of a pack or two of cigarettes. If, as Kras alleges in his affidavit, a discharge in bankruptcy will afford him that new start he so desires, and the Metropolitan then no longer will charge him with fraud and give him bad references, and if he really needs and desires that discharge, this much available revenue should be within his able bodied reach when the ajudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained from creditors. (*Footnote omitted.*) [45]

Mr. Justice Marshall's dissent clearly points out the error of this reasoning. "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." [46]

There is one other curious aspect to this case. Mr. Justice Blackmun's opinion flies in the face of precedent and law school training when he attempts to explain the court's decision in light of the recent denial of certiorari.[47] Justice Marshall's dissent takes the majority to task for this shadowy illusion to the court's mystic powers when he says:

> Reliance on denial of certiorari for *any* proposition impairs the vitality of the discretion we exercise in controlling the cases we hear. . . .
>
> The point of our use of the discretionary writ is precisely to prohibit that kind of speculation. When we deny certiorari no one, not even ourselves, should think that the denial indicates a view on the merits of the case. It ill serves Judges of the courts throughout the country to tell them, as the majority does today, that in attempting to determine what the law is, they must read, not only the opinions of this court, but also the thousands of cases in which we annually deny certiorari.[48]

---

[45] 93 S. Ct. at 640.
[46] *Id.* at 646.
[47] *Id.* at 637.
[48] *Id.* at 646.

Kras signals a change in approach by the court on the question of access to the court. The line of cases that began with *Griffin* appears to have slowed at *Boddie* and stopped at *Frederick. Kras,* and not *Boddie,* is currently favored by the court. In *Ortwein v. Schwab*[49] the Court extended the rationale of *Kras* in upholding an Oregon filing fee of $25.00 for judicial appeals from rulings of the State Welfare Department. The Court, noting that in *Kras* it had already "emphasized the special nature of the marital relationship"[50] protected in *Boddie,* argued that old-age assistance was of "far less constitutional significance."[51] Justices Stewart,[52] Douglas,[53] Brennan,[54] and Marshall[55] each argued in separate dissents that *Boddie* and not *Kras* should have controlled. If the *Kras-Ortwein* line of cases continues to grow, the United States will remain locked in a "scheme of judicial review whereby justice remains a luxury for the wealthy."[56]

WILLIAM I. ARBUCKLE

---

[49] 93 S. Ct. 1172 (1973).
[50] *Id.* at 1174.
[51] *Id.*
[52] *Id.* at 1175.
[53] *Id.*
[54] *Id.* at 1177.
[55] *Id.*
[56] *Id.* at 1175.