



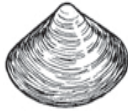
Family Law News

A newsletter published by the Section Council of the Section of Family & Juvenile Law

Maryland State Bar Association, Inc.

June 2009

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EDITOR: WALTER A. HERBERT, JR.



CHAIR'S MESSAGE -JUNE 2009

*A*s I think back while finalizing this message, I am surprised by how quickly this year went. And how busy it was.

Like all chairs I will be happy to have someone else take over the responsibility of the section council – more work than I thought, more rewarding than I expected in many ways that I would not have predicted. Perhaps the most rewarding, though, is the many ways in which the Section and its members have enriched my life in practice.

I have been a member of Section Council for 8 years. I was a member when the Beverly Groner Award was created as the result of the vision of Past Chair Leslie Billman I have been very proud to see it establish itself as the premier Family Law award in the State. This year, we formalized the criteria and process, now posted on our MSBA website, thanks to Justin Sasser's leadership.

I have been very involved with the legislative work of the Section Council, and been so appreciative of the hard work and dedication of the Council members who critique legislation, draft testimony, and personally attend hearings in the House or Senate to testify or observe. Our efforts in this regard bring credit to the Section Council, to the benefit of our lawyers and litigants. We are well respected in the legislature and with the MSBA Board of Governors, as experts whose opinions are valued. It is hard to overstate the significance of that for all of us who practice family and juvenile law.

For the first time ever in 2009, we held a legislative reception in Annapolis during the Session. It was a small undertaking this year, but well off the ground, and we hope to build on it for the future.

In addition to our legislative efforts, we continue to be a co-sponsor of the MICPEL family and juvenile law programs, and had another very successful year, including tremendous attendance at Hot Topics/Tips in February '09 and the Marital Property Workshop in the fall of '08. The Family Law Newsletter, thanks to the herculean efforts of secretary-elect Walter Herbert, continues to expand and be among the most well received newsletters of all of the sections. Also, we have continued this year with an initiative of outgoing Past President Marc Noren, reaching out to individual section members via the listserve.

We began an important dialogue with the AOC Rules Committee about how the Courts can better protect the privacy of family law litigants, addressing the questions of what information should be public knowledge and how the court should amend its rules and practices to eliminate unnecessary information from inclusion in the court's records.

This is an important discussion to continue, as the courts move ever close to full WEB access to court records.

Finally, it is important to note that all of you are part of this operation. PLEASE contact us. Tell us what you would like to have us focus on, and get involved. There is much work to be done, and it cannot all be done by the 20 Section Council members.

It has been an honor to have served on Section Council. Thank you all!



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DISCLAIMER

Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Maryland State Bar Association, its officers, Board of Governors, the Editorial Board or the Family & Juvenile Law Section Council.

The FJLSC makes every effort to check the accuracy of the articles submitted, but does not warrant accuracy.

Message from the Editor

A big congrats to Cindy Callahan, our Chair: on May 1, Governor O'Malley appointed her to the Montgomery County Circuit Court bench...well done, Cindy, and thanks for a great year...Kudos as well to former Council member Helen Harrington, appointed the same day to the Charles County Circuit Court bench. That's 3 current or former Section Council members appointed to the bench this year (...let's not forget Paula Price...)...thanks, Governor...

Spring time means Dodie Fait's Legislative wrap-up so see her annual Legislative article inside: congratulations to Dodie for her selection to the leadership of the Section Council, this means we get these wrap-ups for many years to come!

Do you ever wonder what happens when your client overpays child support or alimony? Jerry Solomon and Karen Amos had the same questions, only they actually researched the issues and write on them...see inside, and thanks Karen and Jerry...

We sometimes forget that this is the Family & Juvenile Law Section: Master Leah Seaton is trying to remedy that situation single-handedly, as she has a Case Note and an article in this issue.

Hope to see you at the beach...

E-mail me at Herbertlaw@att.net, and visit us on-line at:
http://www.msba.org/sec_comm/sections/family/

301.952.0707
Next issue: October 2009

Website of the Month

www.ourfamilywizard.com

"...information management for families..." This site helps families use the Internet to share info, set-up schedules, etc: great for people who don't, or can't, speak with one another... might give it a try myself (...I have a teenager in the house...)

Bonus Site!!!

www.lawpractice.org/resources/recession

The Law Practice Management Section of the ABA has put together a list of their top articles on how to deal with the economic downturn...very good stuff...

Montgomery County: Practice and Procedure

By: Geraldine Welikson Hess

In Montgomery County, the filing fee for divorce is One-Hundred and Five Dollars (\$105.00). After filing your Proof of Service, the Court will set a Scheduling Conference. Generally, the Scheduling Conference is scheduled for either three (3) to four (4) weeks after the Defendant's Answer is due, based on the Proof of Service, or two (2) to three (3) weeks after receiving the Defendant's Answer; whichever happens first. If you are not available on the date that the Court sets for the Scheduling Conference, you should contact the Family Law Assignment Office to obtain new potential dates (typically, you must reschedule the Conference within a two (2) week period of the original date provided), contact opposing counsel to clear one (1) of the new dates, file a Joint Line to Reschedule the Scheduling Conference to the new date cleared by Counsel with the Assignment Office, and provide a courtesy copy to the Assignment Office.

The Scheduling Conferences are conducted by Family Division Masters. At the Scheduling Conference, you will be scheduling future court dates and events. If visitation, alimony, child support, use and possession, contribution to household expenses/ mortgage payments, attorney fees, and/or court costs are issues, a *Pendente Lite* Hearing may be requested. If, at the Scheduling Conference, you do not request that an issue be heard at the *Pendente Lite* Hearing, you will not be permitted to present that issue at the *Pendente Lite* Hearing. In Montgomery County, you need to request both attorney fees and court costs as they are distinguished. You can request anywhere from one (1) to six (6) hours for the *Pendente Lite* Hearing, but less time will usually get you a quicker hearing date, and if you need four (4) or five (5) hours, you should be prepared to explain why you believe you need that amount of time. The *Pendente Lite* Hearing will be heard by a Master. Legal custody will not be addressed at a *Pendente Lite* Hearing.

If residential custody of the children is in issue, the case will be bifurcated into Custody Merits, and Remaining Issues Merits. If legal custody is in issue, but residential custody is not, then all issues will be heard together.

If custody and/or visitation issues are involved, the court may order your client to attend Co-Parenting Skills Enhancement Classes, which consist of two (2), three (3) hour classes. The parties will also participate in Parenting Mediation with a Court-Appointed Mediator. The Parenting Mediation consists of two (2), two (2) hour sessions. The purpose of the Parenting Mediation is to see whether the parents can resolve custody and visitation by way of a Parenting Plan, rather than litigating the issues. The Co-Parenting Skills Enhancement Classes and the Parenting Mediation are free of charge to the parties. On the day of the Scheduling Conference, prior to leaving the courthouse, your client must complete a Con-

fidential Mediation Questionnaire and drop it off at Family Division Services, Room 220. You can obtain a copy of this questionnaire by contacting Family Division Coordinator, Madeleine Jones.

You can request court services such as a court assessment or court evaluation. The difference between the assessment and evaluation is that the evaluation will include a home study and the contacting of collateral witnesses, whereas the assessment will not include these items. Please note that a home study will not be performed if the home is located outside of Montgomery County. Courthouse evaluators do not conduct psychological testing. If you want psychological testing, or prefer a private evaluation, you must to file a Motion requesting such an evaluation.

The results of your court assessment or court evaluation will be presented orally by the evaluator at the Custody Pretrial Conference. If the issues do not resolve at the Pretrial Conference, then a written report will be prepared and provided by the custody evaluator approximately one (1) week before the Custody Trial. A custody Pretrial Conference, and Custody Merits dates, will be set at in the Scheduling Conference. These dates will proceed if there is no resolution of the issues prior to the Pretrial Conference date and/or the Custody Merits dates.

For property issues, alimony, and the divorce, a Merits Pretrial Conference date will be scheduled. It is at the Merits Pretrial Conference that you will receive your Merits Trial dates. If these Merits issues will take more than half of a day, the parties and Counsel will be scheduled to attend Alternative Dispute Resolution (ADR). ADR is conducted by court approved family law attorneys who have satisfied training or experience requirements. You are required to participate in a minimum three (3) hours of ADR, and the cost to each party is One-Hundred and Fifty [\$150] Dollars per hour. The court usually directs that the costs be split equally between the parties. If everyone agrees, ADR can be extended beyond the three (3) hours, but the cost increases to the attorney's hourly fee.

If you have an emergency and need to appear before the court on an issue prior to the Scheduling Conference or *Pendente Lite* Hearing, you will need to file a Motion for Emergency Hearing. You should have the Family Law Clerk set up the Court file so that you can walk the file through to the Family Law Duty Judge. You must have contacted opposing counsel or the opposing party, and notified counsel or the opposing party, that you will be going to the duty judge on an emergency and work out a date and time to appear before the duty judge. Generally, the duty judge will not hear the matter unless notice has been given to opposing counsel or to the op-

(continued on page 5)

Montgomery County Procedures...

(Continued from page 4)

posing party and the judge considers the issue to be a true emergency. A true emergency might be a complete denial of visitation. If your client is getting visitation, but the visitation is limited or is not on a regular and consistent schedule, that issue will not be an emergency. An example of an emergency is one parent completely denying visitation of a newborn or infant child to the other party. Another example is one parent trying to remove the child or children from the country. Failure to pay the mortgage or potential foreclosure on the marital home has not been considered an emergency. If the case is not considered an emergency and is not heard by the duty judge, the duty judge may give you an Order for an expedited Scheduling Conference.

The Family Law Duty Judge changes every week. You can find out who the Family Law Duty Judge is by checking the schedule printed in the Montgomery County Bar Association Bar Journal, listed on the Montgomery County Bar Association Website (<http://www.montbar.org/Court%20Schedules/CircuitCourtSchedule.aspx>) or by calling the Court Clerk or Assignment Office.

IMPORTANT TELEPHONE NUMBERS:

Court Evaluators - Supervisor - Michelle Sarris - (240) 777-9065

Assignment Office - (240) 777-9000

Ms. Kristine Alexander
Ms. Denise Tucker

Family Division - (240) 777-9040

Family Division Masters and Secretaries:

Master Joan Ryon	(240) 777-9051
Melanie Justice	
Master Lisa Segel	(240) 777-9042
Anita Beisel	
Master Clark E. Wisor	(240) 777-9045
Sonya Collins	
Master Charles M. Cockerill	(240) 777-9048
Amanda Barrett	
Master Susan Polis	(240) 777-9054
Lorena Pacheco	

Family Division Case Managers - (240) 777-9075

Mr. Rick Dabbs
Ms. Kim Rhodes
Ms. April Nicholson
Ms. Alexis Vezellay
Ms. Sabrina Matthewson (Adoption/Guardianship)

Family Law Information - (240) 777-9402

ADR Coordinator - Master Holly Whittier - (240) 777-9108

Family Law Division Coordinator - Madeleine Jones- (240) 777-9061

Family Law Judges, Chambers Telephone number and Secretary:

Judge Marielsa Bernard	(240) 777-9366
Caren Montgomery	
Judge Thomas L. Craven	(240) 777-9261
Nancy McKinley	
Judge Robert A. Greenberg	(240) 777-9392
Lisa Sparacino	
Judge Eric M. Johnson	(240) 777-9197
Germaine Crawford	
Judge Richard E. Jordan	(240) 777-9205
Crystal Marshall	
Judge Ronald B. Rubin	(240) 777-9226
Charo Campbell	
Judge Nelson W. Rupp, Jr.	(240) 777-9282
Joyce Thrift	
Judge Steven G. Salant	(240) 777-9275
Cindy Smith	

And see:

<http://www.montgomerycountymd.gov/mc/judicial>

<http://www.montbar.org/>

Geraldine Welikson Hess, Esquire is a partner at the Law Office of CherylLynn Hepfer, a firm that practices family law in Montgomery, Prince Georges, Calvert, Charles, Ann Arundel and Howard Counties.



MARYLAND STATE BAR ASSOCIATION
FAMILY & JUVENILE LAW SECTION COUNCIL
REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee recommends the following persons for membership on the Family Law Section Council of the Family & Juvenile Law Section of the Maryland State Bar Association as members-at-large, with each to serve for a three (3) year term commencing on June 12, 2009:

Sally B. Gold (Baltimore City)
Hadrian N. Hatfield (Montgomery County)
Kristine Howanski (Baltimore County)
Craig Little (Baltimore County)
Alisa Cummins (Howard County)

The Nominating Committee also recommends the following person for membership on the Family Law Section Council of the Family & Juvenile Law Section of the Maryland State Bar Association, to serve for a two (2) year term commencing on June 12, 2009 (completing the unexpired terms of Dorothy R. Fait, who is nominated for Treasurer):

Vincent M. Wills (Montgomery County)

The Nominating Committee recommends the following persons to serve as the officers of the Family Law Section Council of the Family & Juvenile Law Section of the Maryland State Bar Association for a one (1) year term commencing on June 12, 2009:

Chair – Mary Roby Sanders (Baltimore County)
Chair Elect – Dorothy Lennig (Baltimore City)
Secretary – Walter A. Herbert, Jr. (Prince George’s County)
Treasurer – Dorothy R. Fait (Montgomery County)
Immediate Past Chair – Cynthia Callahan (Montgomery County)

In accordance with the By-Laws of the Family & Juvenile Law Section, this slate having been approved by a majority vote of the members of the Family Law Section Council on May 13, 2009, the above names are hereby submitted to the Maryland State Bar Association not less than thirty (30) days prior to the annual meeting of the Family & Juvenile Law Section. The approved slate shall be voted upon by the general membership of the Family & Juvenile Law Section in attendance at the annual meeting on June 12, 2009 in Ocean City, Maryland.

May 14, 2009

Respectfully submitted:

Marc B. Noren
Cynthia Callahan
Mary R. Sanders
Dorothy Lennig
Walter A. Herbert

New Domestic Partnership Benefits

By: Mark F. Scurti
Hodes, Pessin & Katz, P.A.

Until equal marriage is available for same sex couples in Maryland, the state legislature has passed a number of laws that provide certain protections for same sex and opposite sex unmarried couples. Last year, two important pieces of legislation were signed into law and became effective July 1, 2008.

The first provides for an exemption of the transfer and recordation tax when adding or removing a domestic partner from title to real property under Tax Property Article 12-108(c)(1)(viii) or (d)(1)(ii), 13-207(a)(2) or (3) and 13-403(b). A party can be added onto the deed of their domestic partner without having to pay the transfer and recordation tax, saving hundreds, if not thousands, of dollars in taxes. However, before advising your clients to do this, there are a few pitfalls of which to be wary. First, if there is a lien on the property by way of a Deed of Trust or recorded mortgage, permission must first be obtained as the transfer impairs the title to the property and could place the mortgage in default. Second, counsel needs to understand what is being transferred to the domestic partner. If Mary owns a house worth \$100,000.00, free and clear of any liens, and adds Susan to title, Mary has essentially gifted \$50,000.00 to Susan. This raises an issue with respect to whether or not a gift tax return needs to be filed by Mary. The same applies when removing a former domestic partner from title the transfer operates in reverse. It is therefore essential that a properly drafted Agreement documents the transaction to avoid certain tax consequences.

The second piece of legislation provides for visits by domestic partners and family at a hospital, related institution, or residential treatment center; allowing the domestic partner to accompany the other being transported to a hospital in an emergency vehicle (Health-General Article 6-201) and to visit in a hospital as immediate family in emergency situations (Health-General Article 6-202). Without an Advance Medical Directive, a domestic partner now has the ability to make surrogate decision making on behalf of the domestic partner comparable to a spouse (Health-General Article 5-605).

Now, a domestic partner is essentially recognized as legally able to make decisions for his or her domestic partner for health care purposes, including after death arrangements.

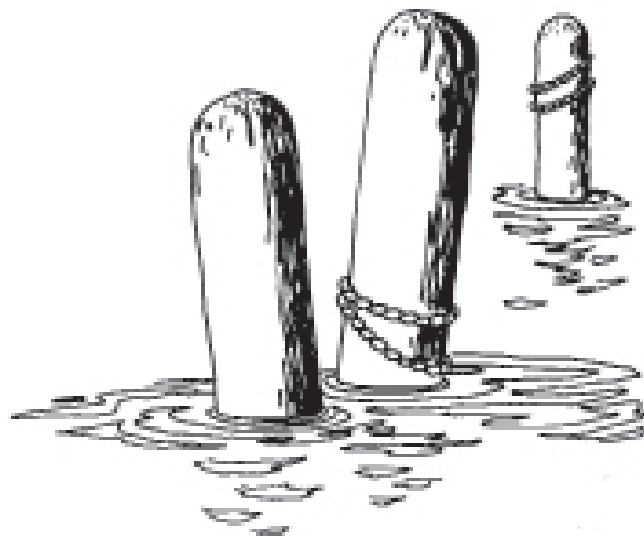
The Maryland code defines domestic partners as “an individual with whom another individual has established a domestic partnership.” (Tax Property Article 12-101(e-1). A domestic partnership is defined as “a relationship between two individual who: (1) are at least 18 years old; (2) are not related to the other by blood or marriages within four degrees of consanguinity under the civil law rule; (3) are not married or a member of a civil union or domestic partnership with another individual; (4) agree to be in a relationship of mutual interdependence in

which each domestic partner contributes to the maintenance and support of the other domestic partner and the relationship, even if both domestic partners are not required to contribute equally to the relationship and (5) share a common residence where both domestic partners live, even if: (i) only one of the domestic partners has the right to legal possession of the common residence; or (ii) one of the domestic partners has an additional residence.” (Tax Property Article 12-101(e-5)).

Evidence of domestic partnerships is provided by way of example in both the Tax Property Article 12-101 (e-3) and Health-General Article 6-101. Here an opportunity exists to draft Affidavits of Domestic Partnership that comply with the definition and can be attached to your client’s documents.

During the 2009 legislative session, an additional bill was passed that provided for an exemption of inheritance tax for domestic partners on jointly owned primary residence. This is expected to be signed by the Governor in May effective July 1, 2009.

The passage of these bills is significant in that it provides levels of protection for domestic partners in Maryland. The laws are drafted in a way that protects both same sex and opposite sex domestic partners. Family law practitioners should be aware of the impact of the law in drafting dissolution agreements and domestic partnership agreements for their clients.



MSBA Family and Juvenile Law Section Council

2009 Legislative Wrap Up

By: Dorothy Fait, Esquire

The Maryland Legislature ended its 2009 session on April 13th. There was a fair amount of success in the domestic violence area this session; however, other important family law bills will have to wait another year. Below is the rundown:

DOMESTIC VIOLENCE BILLS

1. HB 296/SB 267 - FAMILY LAW - PROTECTIVE ORDERS - SURRENDER OF FIREARMS

This Bill passed and will make it mandatory, rather than discretionary for a final protective order to order the respondent to surrender to law enforcement any firearm in the respondent's possession and to refrain from the possession of any firearm for the duration of the protective order. The violation would be a misdemeanor.

2. HB 302/SB 268 - FAMILY LAW- TEMPORARY PROTECTIVE ORDERS - SURRENDER OF FIREARMS

This Bill passed and authorizes a Judge entering a temporary protective order to order a respondent to surrender to law enforcement authorities any firearm in the person's possession. A violation would be a misdemeanor.

3. HB 98/SB 601 - DOMESTIC VIOLENCE - TEMPORARY PROTECTIVE ORDERS - EXTENSION

This Bill passed and provides for an increase in the period of time from thirty days to six months for a Judge to extend a temporary protective order, to enable the order to be served upon the respondent.

4. HB 464/SB 714 - DOMESTIC VIOLENCE - TEMPORARY PROTECTIVE ORDER - CUSTODY OF MINOR CHILD

This Bill passed and authorizes a Judge to order a law enforcement officer to use all reasonable and necessary force to enforce a temporary custody provision in an interim or temporary protective order.

5. HB 971/SB 811 - DOMESTIC VIOLENCE - DURATION OF PROTECTIVE ORDER - SUBSEQUENT ACT OF ABUSE

This Bill passed and provides that the maximum duration of a final protective order be extended from one year to two years if the Court had issued a final protective order against a respondent previously for an act committed within one year after a prior protective order expires.

6. HB 1196 - DOMESTIC VIOLENCE - PROTECTIVE ORDERS - NOTIFICATION OF SERVICE

This Bill passed and requires the Department of Public Safety and Correctional Services to notify a petitioner of the service of an interim, temporary, or final protective order.

7. HB 845/SB 1049 - DOMESTIC VIOLENCE AWARENESS - 'TWEEN/TEEN DATING VIOLENCE EDUCATION AND AWARENESS

This Bill requires the State Board of Education to develop and implement a program in the schools to educate students about dating violence. This Bill was substantially amended and passed the Senate and the House.

FAMILY LAW BILLS

1. HB 717/SB 740 - CHILD CUSTODY DETERMINATIONS

The "custody" Bill codifies the law of the State of Maryland with regard to custody determinations. The Bill died in both the House Judiciary and Senate Judicial Proceedings Committees.

2. SB 299/HB 898 - CHILD CUSTODY AND VISITATION-RELOCATION OF CHILD-CONSENT AND COURT APPROVAL

This Bill originally authorized a Court to include as a condition of a custody or visitation order a requirement that either party obtain consent of the other party prior to relocation. The Bill was substantially amended and now provides for a substantial advance notice of a relocation (90 days) and an expedited hearing if the relocation is challenged.

3. SB 474 - AWARD OF REASONABLE AND NECESSARY EXPENSES FOR PRO BONO REPRESENTATION

This Bill authorizes a Court in a proceeding relating to divorce, alimony, property or custody to award reasonable and necessary expenses to a lawyer or law firm operating pro bono.

The Bill received an unfavorable report from Judicial Proceedings and was withdrawn.

4. SB 155 - ESTATES AND TRUSTS - EFFECT OF DIVORCE OR ANNULMENT ON WILL

(continued on page 9)

Legislative Wrap Up...

(Continued from page 8)

This Bill clarifies the effect of an absolute divorce or annulment on a testator's Will executed before the absolute divorce or annulment. It establishes that all property or benefits that would have passed through the surviving spouse under the Will shall be treated as if the former spouse predeceased the testator. No action was taken on this Bill.

5. SB 70 - FAMILY LAW - CHILD SUPPORT ENFORCEMENT - MEDICAL SUPPORT FOR CHILDREN

This Bill provides for cash medical support to be added to the basic child support obligation under the Child Support Guidelines and divided between the parents in proportion to their adjusted actual incomes in certain circumstances. This Bill passed.

6. SB 647/HB 913 - MARYLAND'S MARRIAGE PROTECTION ACT

This Bill would provide a new section to the Maryland Constitution establishing that a marriage between one man and one woman is the only domestic legal union. This Bill failed.

7. SB 565/HB 1055 - RELIGIOUS FREEDOM AND CIVIL MARRIAGE PROTECTION ACT

This bill would provide that a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State. This Bill also failed.

8. HB 1401 - CHILD SUPPORT GUIDELINES - REVISION

This Bill updates the Maryland Child Support Guidelines and provides for substantial revisions. The Bill was a department

Bill and introduced late in the session. The Bill failed, but will likely be re-introduced next year.

9. HB 1181/SB 467 - DOMESTIC VIOLENCE - EXPUNGEMENT OF RECORDS

This Bill would have required that a Court, after a temporary or final protective order hearing, to order the expungement of Court records about the proceedings under certain circumstances. On the floor of the House, the Bill was sent back to the Judiciary Committee for further consideration. The Bill did not pass Senate Judicial Proceedings Committee.

10. HB 422 - CHILD CUSTODY AND VISITATION - MILITARY DUTY

This Bill requires that any order of modification of an existing child custody or visitation order, where one of the parents is on deployment in active military duty, to specifically reference that fact and to set a hearing on an expedited basis when a petition is filed by a parent in the military. This Bill passed.

11. HB 1114 - CHILD SUPPORT - POST SECONDARY EDUCATION

This Bill would require a parent to continue to support his or her children, if the child is enrolled full time in post secondary school. This Bill failed at the Judiciary Committee.

Dorothy Fait, Esquire, is the Legislative Chair of the MSBA Family & Juvenile Law Section; in June 2009 she will become an officer in the Section.

MARYLAND STATE BAR ASSOCIATION ANNUAL MEETING

June 10-13
Ocean City, MD



Sea. You. There.

The Birthday List



May

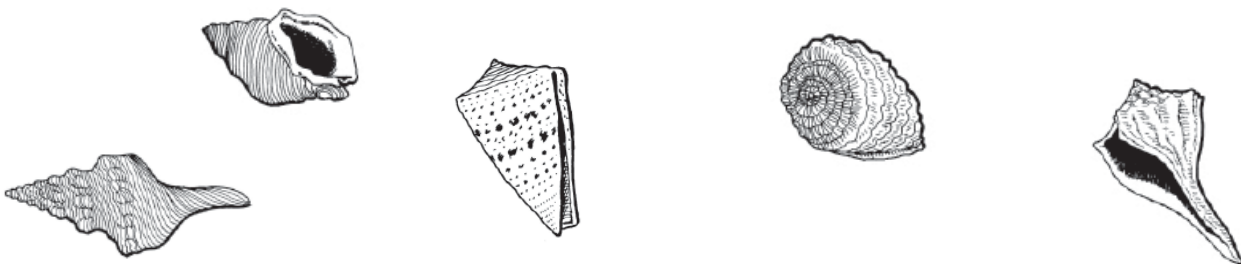
Henry Kaiser:

Industrialist, founder of Kaiser Shipyard, Kaiser Aluminum, Kaiser Steel...you get the idea. His firm built the famed Liberty ships which contributed greatly to the Allied victory in WWII. As an employer he figured out that healthy employees were more productive employees, so he put together a company health plan, which is now known as ... Kaiser Permanente.

June

Mary Katherine Goddard:

Printer and publisher, with her brother William she published, in 1777, the first edition of the Declaration of Independence which listed the signer's names. She later published the *Maryland Journal* and was the nation's first woman Postmaster.



Child Support Recoupment in Maryland

By: Jerry Solomon, Esquire

In law school I had an outstanding family law professor, Newton Pacht. Halfway through the family law course I went to see Professor Pacht about difficulty that I was having with him. Why, I asked, have I said nothing that has even remotely pleased you in class? He answered in two parts, the first of which I will not discuss publically. However, the second part related to molding one's mind into a thinking machine that questioned law (and in this case family law) from all different perspectives.

Nobody has ever examined how the change in one portion of family law has affected all other aspects of family law. Family law is the stepchild of the law and until we treat it otherwise it will have impact upon people's lives that we may not desire.

In March there was a discussion on the family law listserv about recoupment of child support. During the discussion one participant said that "child support is the obligation of a parent to a child, not to the other parent."

Not wanting to get thrown off of the listserv I said nothing to challenge this statement, especially knowing that there was a case out there that made this statement, even though this statement is not fundamentally sound. However, in preparing for this article, I did research the source of that statement, since that statement is fundamental to any recoupment argument.

Petitto v. Petitto, 147 Md.App. 280, 311, 808 A.2d 809, 826 (2001) states:

In *Barr v. Barr*, 58 Md. App. 569, 588, 473 A.2d 1300 (1984), we explained that child support is the obligation of a parent to a child, not to the other parent. Therefore, a parent who "overpays" has no absolute right to recoupment. The concern, of course, is that such a requirement ultimately could deprive the child of benefits already received. (Emphasis supplied)

The problem is that, first, *Barr* did not say that, and second, the statement is out of context. *Barr* said the following:

The court used the exact figure reflecting that income which each party had provided. Finally, we think it is will ill-grace that cross-appellant complains that he is charged too much for Beth's keep but, by demanding a credit for prior contributions, admits to having voluntarily paid more in the past than is demanded in the future. That cross-appellant has no right to recoup what he has volunteered heretofore should need no legal authority, but since it is challenged, we point to our statement in *Rand v. Rand*, 40 Md.App. 550, 553, 392 A.2d 1149 (1978):

that a party making child support payments pursuant to a court order has no right to restitution or recoupment following a reversal or modification of the award on appeal. (Emphasis in original)

Barr v. Barr, 58 Md. App. 569, 588, 473 A.2d 1300 (1984).

The reality is that child support is the obligation of a natural parent to support a child during that child's legal incapacity. We must distinguish between the *duty* the parents owe to a child and the *recipient* of the support payment to be applied for the benefit of the child.

Think of it this way. Suppose that the parents were separated and the child was removed from the custodial parent's home and placed in foster care. Both parents would have to pay child support to the state, the *recipient* of the support payment, for the *benefit* of the child. Suppose that the custodial parent gave the child to a grandparent, should the former custodial parent continue to receive the support? No. Merely giving the support money to the grandparents would not be proper because that would obviate the former custodial parent's obligation of support to the child. A custodial parent's support obligation is satisfied by providing food, clothing, shelter and the other necessities of life.

A fiduciary relationship generally arises where one person pays money to some person or entity by the benefit of a third party. This fiduciary relationship carries with it many obligations, including the duty to account for the expenditure of the money – except when it involves child support. If both parents died leaving money in trust for the children to be used on a monthly basis the law provides that, unless waived, the custodian must account for the money received for the benefit of the child. The court will not permit the custodian to use the money for their own benefit. However, a custodial parent does not have to account to anyone regarding the use of child support. The reader should consider the true nature of child support and lack of accountability when considering recoupment.

The issue of recoupment first surfaced in *Rand v. Rand*, 40 Md. App. 550, 392 A.2d 1149 (1978). The Court's approach to *Rand* can readily be ascertained in the opening paragraph of the opinion:

An announcer for a soap opera would bill this proceeding as yet another episode in the continuing saga of the Rand family -- the eternal, endless quest by Florence Rand to maximize the contribution of her former husband Robert toward the support of their daughter Virginia, and the equally determined effort by Robert to pay as little as he

(continued on page 12)

Child Support Recoupment...

(continued from page 11)

must. Unfortunately, this is not a soap opera. Real people are involved; and, for the fourth time in less than seven years an appellate court of this State is called upon to resolve the post-marital financial disputes between these warring parties. Would only that Virginia have had the benefit of the fortune invested in this seemingly interminable litigation.

The *Rand* court did not suggest any other form of resolution for the parties. Are the Rands any less entitled to judicial access to resolve their differences than General Motors and Ford entitled to resolve theirs?

Regardless, Mr. Rand successfully challenged the amount of child support ordered, in part upon his contention that the equal rights amendment required the court to consider the mother's ability to meet the needs of the child. The trial court had determined the needs of the child and ordered Mr. Rand to pay for those needs without considering any offset regarding the mother's duty to support the child. Had the court done so, argued Mr. Rand, his support obligation would have been offset by Ms. Rand's support obligation. The Court of Appeals agreed.

Mr. Rand paid his support pending appeal. Upon remand, Mr. Rand requested recoupment of the overpayment in support. *Rand* commenced its resolution of the dispute by mischaracterizing the nature of support, and assuming that the "amounts paid, or to be paid, under the order are not excessive."

The fixing of child support derives from the obligation of the parent to the child, not from one parent to another. It presumably represents the considered judgment of the court as to what the needs of the child are and what the parent subject to the order ought, and can afford, to pay. This, in turn, is necessarily *premised upon the assumption that the amounts paid, or to be paid, under the order are not excessive, and will, in fact, be applied exclusively to the ascertained needs of the child*, whether directly or indirectly, and not to any extraneous purposes. (Emphasis supplied).

Rand, supra, 40 Md. App. 550, 554, 392 A.2d 1149, 1152. By definition, this statement is false as applied because the Court of Appeals rejected the notion that Mr. Rand be exclusively responsible for the support of the child. In rejecting this argument the Court acknowledged that the level of support was excessive, something ignored by the *Rand* recoupment case.

The *Rand* court reasoned that a right to recoupment would have the effect of reducing the amount of child support during the period of recoupment, and therefore be in conflict with the purpose of child support. *Rand* ruled that recoupment was to be determined on a case by case basis, and allowed a partial

recoupment based upon a conclusion that:

the entire \$ 2,480 was expended in good faith and in reliance upon the previous order for Virginia's support, and there being sufficient evidence in the record to support both of those findings. . .

The *Rand* ruling raises two very obvious questions:

(1) If Mr. Rand had not paid the full amount of court ordered child support pending appeal, the court, under its own analysis, could not have ordered the payment of the difference because there could be no expenditure of support in good faith reliance on the order; and

(2) The issue in *Rand* was not the needs of the child. The issue was the apportionment of the needs of the child. There was not expenditure in good faith, it was expenditure of somebody else's money when it should have come from the guardian.

Smith v. Smith, 79 Md. App. 650, 558 A.2d 798 (1989), while labeled a recoupment case, is actually a set-off case. Recoupment is recovery resulting from paying too much under the terms of an order. A set-off does not claim that the amount paid under the terms of the order are incorrect. A set-off involves a valid agreement or order made by the defendant that offsets that amount of money claimed by the plaintiff.

Mr. and Mrs. Smith entered into an unallocated alimony and child support agreement. After entering into the agreement one of the children went to live with Mr. Smith, who unilaterally withheld \$300.00 per month from Mrs. Smith.

The *Smith* court allowed a partial "recoupment" based upon its application of the law of recoupment "the defendant seeks compensation from the plaintiff for damages resulting from the same transaction upon which the plaintiff's claim is based . . .," citing *First National Bank of Maryland v. Shpritz*, 63 Md.App. 623, 638, 493 A.2d 410 (1985), and *White v. White*, 34 Md.App. 635, 368 A.2d 1061 (1977). The problem with the *Smith* rationale is that the Court misapplied *White* and found a breach where none existed.

White involved a case where there was a child support order and one of the children went to live with Mr. White. Mr. White did not ask the court for modification of the support order. Instead, he withheld support. Mrs. White moved for contempt for not paying the full amount of child support. The *White* court held that Mr. White satisfied his obligation through a payment in kind since the child was in his custody. *White* discharged Mr. White's duty; it did not set an affirmative duty upon Mrs. White

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Child Support Recoupment...

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for support while the child was in Mr. White's custody.

The *Smith* case reasoned that:

Unlike the situation in the case *sub judice*, the custodial parent in *Quarles* fully performed her agreed responsibility to raise both of the parties' minor children. Kathleen, however, did not fully abide by the terms of the Agreement; she failed to provide for Lisa. It is this breach by Kathleen which allows Frederick to recoup his expenses. . . .

The problem is that the contract that was allegedly breached was for unallocated alimony and child support. So long as there was no designation between the alimony and child support there cannot have been a clear breach of the child support portion of the contract. Moreover, Mr. Smith retained the full benefit of his bargain, to make child support deductible, while Mrs. Smith was charged with the taxable consequences of that portion of the agreement that remained unchanged by the Court. There could have been no damage "resulting from the same transaction upon which the plaintiff's claim is based . . .," unless and until Mr. Smith affirmatively moved for, and obtained an order of child support against Mrs. Smith. Distinguish between recoupment and set-off in prosecuting and defending cases where money is claimed.

The final group of cases dealing with recoupment stems from retroactivity of an order. Simply put, retroactivity lies in the sound discretion of the trial court, but by statute, cannot be retroactive prior to the filing of the case. However, there is nothing simple about retroactivity.

Maryland, like all states, acted under the insistence of the federal government to establish child support guidelines as a pre-requisite for federal funding of various programs designed to help children in need. The federal demand had two major elements. First, the guidelines had to apply to all cases, regardless of whether the child was benefiting from the federal program. Second, the states had to adopt a law that only permitted an order to come into effect upon the filing of a complaint. This second provision, restricting the court's ability to enter an order only retroactive to the of filing of the complaint, as opposed to the accrual of a cause of action, created a zero hour statute of limitations.

If a non-custodial parent were involved in an automobile accident and was in a coma for a year, that parent could not obtain any relief from child support during the period of his or her legal incapacity. A parent who lost their job would have to immediately file for modification of child support regardless of the timing of prospects for employment. A custodial parent of a child hospitalized for an illness would have to

immediately ask for modification of child support in order to require a non-custodial parent to share in the cost of uncovered medical expenses.

Regardless of the arguments of what should be, the court's ability to modify an order cannot precede the filing of the complaint, but for one exception – paternity. A court cannot hold a father responsible for any amount due for child support if there is a paternity finding that the individual is not the father of the child. This applies even where the amount due for the child support precedes the filing of the pleading challenging paternity.

This article is premised upon two points:

- (1) family law is dynamic and interactive. As such, a change of one aspect of the law will affect other aspects of the law; and
- (2) courts should be very careful in applying precedent and the wording of the case law that may impact upon the law.

I only point to this very article to illustrate point two. I have purposefully led the reader astray on one of my points:

Regardless of the arguments of what should be, the court's ability to modify an order cannot precede the filing of the complaint, but for one exception – paternity. A court cannot hold a father responsible for any amount due for child support if there is a paternity finding that the individual is not the father of the child. This applies even where the amount due for the child support precedes the filing of the pleading challenging paternity.

This statement is misleading. The correct statement should be:

Regardless of the arguments of what should be, a court cannot hold a father responsible for any amount due for child support if there is a paternity finding that the individual is not the father of the child. This applies even where the amount due for the child support precedes the filing of the pleading challenging paternity **because the court is not modifying the preceding order, it is vacating the preceding order.**

We, as attorneys, should read cases to learn and question. If we only read to learn then we will never question the soundness of the case. If we read only to question then we will never learn the wisdom of the case.

Jerry Solomon has been practicing family law since 1982, is licensed to practice in MD and FL, and enjoys an AV rating from Martindale Hubble. He graduated from Howard University School of Law in 1982, magna cum laude, first in his class.

A Material Change in Circumstances: I Know It When I See It

By: Mary Roby Sanders and Christopher Nicholson

Somewhere in the big city, the following exchange takes place:

Client: Thank you for seeing me on such short notice. My oldest son is turning eighteen next week and I want to modify my child support and change custody.

Attorney: Well it is nice to see you again Ms. Rose, what has it been five or six years since the divorce.

Client: Oh no, it has been seven years since the separation, six years and four months since the agreement was signed and six years and two weeks since the divorce.

Attorney: Is Robert graduating this spring from Dickinson High School or does he have another year of school?

Client: No he is graduating this year and will be going to Slippery Rock State in the Fall to play on their chess team.

Attorney: Well congratulations and I hope that he was able to get some financial aid.

Client: Money is an issue for us and I want to get more child support and if I get custody changed do I get even more child support?

Attorney: Since your oldest son is going off to college and is over eighteen; maybe the child support will be reduced, not increased.

Client: That is part of the reason that I want a change in custody.

Attorney: Let's start off by reviewing the current support amount, the current access schedule and the ...

Client: I just want to know what I need to show to get the access reduced and the child support increased.

Attorney: The standard that the Court must apply for a modification of custody is two-step process. First the Court must access whether that has been a material change in circumstances. If there has been a finding that there has been such a material change, the Court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. Have there been any Court Orders entered since the Judgment of Absolute Divorce?

Client: I went to see Cindy Callahan a couple of years ago but, she said—did you know she is now a Judge?

Attorney: Did she file anything to modify the access or support?

Client: I did not think so, I never went back to see her after that first meeting.

Attorney: Tell me what has changed since the divorce that makes you think that access should be changed? What is different other than the change in the child's age?

Client: Is that enough?

Attorney: No.

Client: What is enough?

Attorney: What changes have there been?

Client: Tell me what I need to say and then I can tell you what has changed.

Attorney: Give me some examples of things that have changed—how old is your other son, Stephen?

Client: Stephen is now sixteen and his dad does not spend as much time with him—like I told you would happen—and Stephen spends a lot more time with his friends now that he got his license. Does child support include a car and car insurance?

Attorney: There is no right of a sixteen year old to have a car and spending more time with his friends is not a material change in circumstances.

Client: What if there is only a small change in the access, say one less overnight per weekend, can we just ask for that? Then we would not have to go all through the two-step process and we could just do a small change.

Attorney: No the same standard applies whether it is a big change or a small change.

Client: I did not want to bring this up, but at the time of the divorce you forgot to bring up that my ex-husband had a DUI and should not have received any access with either boy.

Attorney: Your ex-husband was never convicted of a DUI. He plead guilty to the charge of reckless driving, received probation before judgment and the DUI charged was dropped by the State.

Client: So what. Bring it up now as a change.

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Change in Circumstances...

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Attorney: The requirement of showing a material change has its basis in the concept of claim and issue preclusion. That is if it was not raised before, it cannot be raised now. This is to prevent people from going backward and re-litigating things that have already been decided. What else is there that has changed since the last Order?

Client: Tell me what to say and I will say it. What does your fancy law books say is a material change?

Attorney: I cannot tell you what to say and there is no laundry list of what constitutes a material change in circumstances. Each case stands on its own merits and the Court knows a material change when it sees it. To justify a change in custody, conditions must have occurred which affects the welfare of the child not the welfare of the parent. When all goes well with a child, stability not change is in his best interests.

Client: Wait, my friend's daughter filed suit against her father to stop having to go to access. Can you file for Stephen to no longer have to go for any access? Can I get even more child support? Let's call Stephen on his cell phone and he can tell you he does not want to see his father anymore.

Attorney: The law provides that upon reaching sixteen years of age, Stephen can petition the Court in his own name to seek a change in custody—it does not mean that Stephen can make his own decision about access.

Client: What about child support, my friend told me and then I looked it up on the internet and if the Guidelines are 25% higher now, I automatically get an increase.

Attorney: That is a common misconception, but it is not the law. When the Guidelines were originally enacted back in 1989 they provided the 25% differential to compare pre-guidelines cases with post-guidelines case.

Client: Well have they changed the guidelines since 1989?

Attorney: No, despite an attempt to change the amount of the child support under the guidelines, the Legislature has not seen fit to update them. In fact, while the cost of living has risen by 82 % since 1989, the child support amounts have remained the same.

Client: Well I am going to call my Representative.

Attorney: I encourage you to do so. If we can get the Legislature to change the child support amounts changed, you might be entitled to an increase based upon that alone.

Client: Do they have any idea how much it costs to raise a child?

Attorney: Yes.

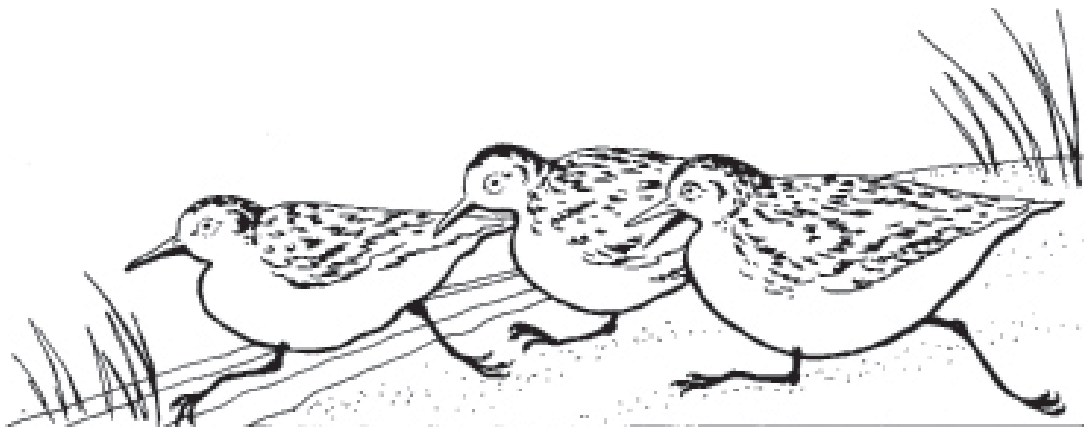
Client: You certainly have not told me what I want to hear. My ex-husband would have to pay your fees for the modification—right?

Attorney: There is no guarantee.

Client: I think that I am going to speak with Stephen and I shall get back to you—on second thought, I think it is something that I shall do on my own and my own way.

MD Fam. Law Article Section 12-202 (b) (2); *Wagner v. Wagner*, 109 Md. App. 1 (1996); *Sartoph v. Sartoph*, 31 Md. App. 58 (1976), *cert. denied*, 278 Md. 732 (1976).

Mary Roby Sanders is the incoming Chair of the MSBA Family & Juvenile Law Section Council; Christopher Nicholson is a Past-Chair of the MSBA Family & Juvenile Law Section Council.



Truancy Reduction Pilot Programs in Maryland Juvenile Courts: A Remedial Proactive Approach by the Courts to Help Children

By: Master Leah J. Seaton and Master Robert E. Laird, Jr.

A student is truant, under the definition of the Maryland Department of Education, if he or she is aged 5 through 20, was in membership in a school for 91 or more days, and was unlawfully absent for 20% or more of the days in membership. According to the United States Department of Education's *Manual to Combat Truancy*, (1996): "Truancy is the first sign of trouble. When young people start skipping school, they are telling their parents, school officials and the community at large that they are in trouble and need our help if they are going to keep moving forward in life." Studies also demonstrate that truancy is a leading indicator that a child may leave school before completion, have difficulty with employment, experience social isolation, and engage in criminal behavior. Truancy, if unchecked, has potential long-term adverse impact not only on the truant child, but also on the child's family, and community. Each high school dropout is estimated to cost society over \$800,000 during their lifetime.¹ In recognition of the importance of truancy reduction, a number of truancy prevention initiatives are underway in Maryland, and across the nation. The First Judicial Circuit's Truancy Reduction Pilot Program ("TRPP") is one of those initiatives.

In 2004, the Maryland General Assembly enacted legislation, codified at Sections 3-8C-01 through 3-8C-10, to create the First Judicial Circuit's TRPP. This legislation, sponsored by Delegate Norman Conway (District 38B, Worcester & Wicomico Counties) created a new cause of action in the juvenile Court, allowing Boards of Education in the four counties (Wicomico, Somerset, Dorchester and Worcester) within the First Judicial Circuit to file petitions, and bring truant children before juvenile Courts to receive the Court's guidance, treatment and rehabilitation. The legislation was re-enacted in 2007, and the pilot project was extended to include Prince George's and Harford Counties. Programs have been initiated in these counties, as well. The TRPP concept was revisited by the legislature once again during the 2009 session. At that time, a comprehensive evaluation from the Ruth H. Young Center for Families and Children at the University of Maryland School of Social Work was considered by the legislature. This evaluation documented the positive outcomes resulting from the TRPP in the First Judicial Circuit and made suggestions for improvement. After consideration of the evaluation, the General Assembly enacted the TRPP legislation permanently in 2009, allowing the existing TRPP programs to continue in the First, Third and Seventh Circuits, if funding is available. That legislation becomes effective June 1, 2009.

Prior to the enactment of the TRPP statute, Maryland law allowed truancy to be addressed by the Courts in one of two

ways. A child who is required by law to attend school and who is habitually truant can be adjudicated as a Child In Need of Supervision ("CINS") under Section 3-8A-01(e) of the Courts and Judicial Proceedings Article. A CINS case commences when, following a referral from a Board of Education, the Department of Juvenile Services authorizes the filing of a CINS petition. These cases, also heard in juvenile Court, likewise afford the opportunity for the Court to order remedial community-based interventions to meet the needs of the child. The Department of Juvenile Services, however, seldom authorizes the filing of a CINS petition.

In addition to CINS cases, truancy is also the issue before the Court in cases filed under the Education Article, Section 7-301. This section establishes criminal penalties for a parent or custodian who fails to send a child of mandatory school age to school. It also provides criminal penalties for inducing a child not to attend school and harboring a child who should be in school. Violations of this section are punishable by 30 days in jail and/or a \$500 fine. Historically, in the instances where criminal charges have been filed against parents, judges have been reluctant to convict parents, especially of older children when the parents testify that they were unable to control their children. In addition, criminal penalties are limited to parents only. No provision of Maryland law, including the CINS statute and the TRPP statute, criminalizes truant behavior by a child.

Since CINS petitions are rarely filed, and remedies in criminal cases against parents are punitive and not particularly productive, the ability of the Courts to address truancy issues in a meaningful and effective way to assist children was limited prior to the enactment of the TRPP. All stakeholders realized that truancy was not the sort of problem that can be cured with the application of blunt force. Studies have shown that truancy is a symptom of other problems, originating not just in the school, but in the family and community as well. Substance abuse, poverty, lack of supervision, devaluation of education are among the many problems faced by children who exhibit truant behavior.²

The concept of a Truancy Reduction Pilot Program in the Maryland Courts was first envisioned by staff from the Wicomico County Board of Education based on a similar program in the Delaware Courts. The Wicomico County Board of Education staff became aware of the Delaware program because of the existence of a reciprocal attendance policy with Sussex County, Delaware that allows students who reside in Delmar, Maryland

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Truancy Reduction . . .

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to attend Delmar High School, located just over the State line in Delmar, Delaware. Impressed with the success of the Delaware program, Wicomico County school staff sought similar assistance for children in Maryland. After gaining the support of the judiciary, the Boards of Education from the Lower Eastern Shore counties, and local legislators, legislation was introduced during the 2004 session of the General Assembly that resulted in the creation of the TRPP. The first case was filed in the Circuit Court for Wicomico County on December 22, 2004, followed by Somerset County on November 17, 2005, Dorchester County on February 2, 2006, and Worcester County on December 22, 2006.

A TRPP case commences when a local Board of Education files a Truancy Petition, alleging that a child mandated to attend school has been habitually absent from school without lawful excuse. (If the truant child is under 12 years old, a criminal charge against the truant child's parent must first be filed and then dismissed or set aside before filing a TRPP petition.) The Maryland Rules for juvenile cases, Title 11, govern the procedure, and, as in any juvenile matter, an adjudication hearing is scheduled on the petition. In the First Judicial Circuit, the hearing is scheduled before a juvenile master. At the adjudication hearing, or any hearings thereafter, a child may be represented by counsel. The hearings are conducted in an informal manner designed to allow all parties to present the maximum amount of evidence, and let the child and his or her parents feel comfortable in relating their problems to the Court.

When an adjudication is convened, the master first ascertains whether the petition was properly served and the child and parents are ready to proceed. If the case proceeds, the child and parents are given an opportunity to admit or deny the allegations of truancy in the petition. If, after consideration of the evidence, the child is adjudicated to be truant from school, then all parties are afforded an opportunity to be heard on issues each party believes may be contributing to the child's truancy. Ordinarily, the Court holds the disposition hearing immediately after the adjudication hearing and orders the family to undergo a family assessment that is conducted by a private provider and, in some cases, a substance abuse screening. Funding for the assessments has been provided by the Administrative Office of the Courts. These assessments result in written reports that are submitted to the Court.

A review hearing is held within thirty days of the adjudication/disposition hearing in order to review the findings in the assessments. Based upon the assessments, and any other evidence, the Court orders services designed to meet the child's needs. These services include mental health treatment, physical health screenings, vocational referrals, substance abuse treatment, mentoring, grief counseling, housing assistance for

the family, referral for special education assessment, tutoring, referral for wraparound, referral to Al-Anon and any other service to meet an identified need. Orders are not just issued to parents or children. Often, the Court will order the Board to provide services to the child that had not been identified prior to the Court's involvement.

After the first review hearing, the cases are normally reviewed by the Court at a truancy program docket every two weeks to ensure that the services have been implemented, to determine the effectiveness of interventions, to modify interventions if necessary and to monitor the child and family's compliance with services. After the child demonstrates progress and a willingness to comply with the Court's requirements, the reviews are scheduled once per month. The Court uses a mixture of positive reinforcements and negative consequences to gain compliance. Most children in the program have a history of failure to attend school and non-compliance with Board of Education services. The Court will generally reward the student through verbal praise and request that the Board give the child extra credit for projects. Gift certificates, arranging participation in special activities, a graduation ceremony and certificate upon completion are other positive reinforcements. Negative consequences consist of verbal reprimands, community service, book reports, extra projects, apology letters and withholding gift cards.

In order to complete the program and "graduate," the Courts have established informal benchmarks to monitor student progress. One method is to determine if the student has established a 90 day period without an unexcused absence. Reports from service providers, the child and the parent are also considered in making a determination to graduate a child from the program. Academic and behavioral progress is also monitored in order to determine if the three key elements of success - attendance, attachment and achievement - have been demonstrated by the child. The Courts use flexibility to respond to the individual needs of each child. If a child who has graduated from the program resumes prior truant behavior, a new petition can be filed.

According to the evaluation of the First Judicial Circuit TRPP submitted to the General Assembly in 2009 by the Ruth H. Young Center for Families and Children, 246 truancy petitions had been filed against children as of December 31, 2008. Of those cases, 61 % of the children who participated in the TRPP had successfully completed the program. To date, in Wicomico County, where the TRPP has been in existence since 2004, not a single successful graduate of the program has ever been the subject of a new delinquency case. In addition to these positive outcomes, the establishment of the TRPP has given Boards of

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Truancy Reduction . . .

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Education an option to address truant behavior after other out-of-Court interventions have failed. In each of the counties of the First Judicial Circuit, the filing of a truancy petition is a last resort by the local Boards of Education.

Having the truancy case heard by the Court serves three purposes. It impresses upon the child and parent that truancy is serious, and cannot go unaddressed. At the same time, truancy hearings are held in closed Courtrooms, all matters are confidential and the purpose is remedial, allowing the family to access services. Over time, many children and their families become comfortable with, and grateful for, the opportunity to address the family, community or personal issues that have caused the truant behavior in a confidential proceeding with all service providers present. Finally, a Court-based program mandates services, provides an opportunity for the child and family's concerns to be heard, and holds all parties accountable.

The TRPP also provides local Boards of Education with an alternative to filing criminal "failure to send" charges against the parent. While filing a criminal charge brings the parent before the Court, the only recourse available to the Court in the criminal case is to sentence the parent to a period of incarceration or to impose a fine. Truancy is a symptom that something is amiss for a child. Incarcerating or fining a parent does not address the problems in the family, school or community and has little chance of solving the truancy problem. Addressing a truant child's needs in the TRPP provides an effective early intervention to assist the child in avoiding the adverse outcomes that habitual truancy causes, such as delinquency, teen pregnancy, social isolation and under-employment.

The experiment begun in the First Judicial Circuit has met with success. During the period between 2005 and 2008, the truancy rates in Wicomico, Somerset and Worcester Counties consistently declined, against the trend in most of Maryland. Somerset County declined dramatically from 2.36% in the 2005-2006 school year, to .91% in the 2007-2008 school year. Wicomico County declined from 2.00% to 1.40%. Worcester declined from .65% to .34%. Although it is obviously too soon to determine what role the TRPP played in this decline, it would appear that the TRPP has had a positive effect in each of these counties. Anecdotally, in speaking with education professionals and affected parents in these counties, they are very pleased with the results of the program. On a further positive note, both Master Seaton and Master Laird have been litigating cases for over 20 years. In a profession where thank you is seldom heard from clients, it is unusual and pleasant to participate in a Court setting where at some point almost everyone, including those who do not successfully complete the program, express their appreciation of the Court's efforts.

Master Leah J. Seaton is the Master for Domestic Relations and Juvenile Causes in the Circuit Court for Wicomico County, Maryland. Master Robert E. Laird, Jr. is the Master for Domestic Relations and Juvenile Causes in the Circuit Court for Somerset County, Maryland.

Footnotes:

¹Daining, C., Bryant, V. & Crumpton, D. An Evaluation of the Truancy Reduction pilot Program of the First Judicial Circuit Court of Maryland (December 1, 2008) p. 20.

² *Id* at p.18.

Quotation of the Month

"Never raise your hand to your kids: it leaves your groin unprotected."

-Red Buttons

CASE NOTE

IN RE: Deontay J., Court of Appeals, No. 58, September Term 2009

By: Master Leah J. Seaton

In this recently issued opinion, the Court of Appeals addressed three issues. Procedurally, the Court held that the substance, and not the form, of a pleading seeking to appeal a Circuit Court ruling on custody in a Child In Need of Assistance (“CINA”) case determined whether an appeal right had been preserved. Second, the Court, citing § 9-101(b) of the Family Law Article, held that, in a CINA case, the Circuit Court must make specific findings that there is no likelihood of further abuse or neglect before returning custody to a parent with this parent’s history of neglect of five siblings. Third, the Court held that the Circuit Court has authority to modify an Order in a CINA case granting custody to the Department of Social Services, upon a finding of material changes of circumstances in the best interest of the child, even if an appeal of the previous Order is pending before the appellate courts. The question as to whether the Circuit Court retains the authority to modify the appealed Order turns on whether the modification defeats the appealing party’s right to prosecute an appeal or, conversely, renders the pending appeal moot.

ISSUES DECIDED BY COURT IN OPINION:

- 1) “Was the parent’s appeal of the Circuit Court’s April 21, 2007 decision to grant custody to the local department time-barred?”
- 2) “Did the trial court err by failing to make required specific findings required by Family Law Article § 9-101(b).
- 3) “Did the pending appeal of the Court’s April 21, 2007 Order, granting custody of Deontay J. to the Baltimore City Department of Social Services, preclude the Circuit Court from modifying that Order at a subsequent review hearing?”

BACKGROUND/PROCEDURAL POSTURE:

On August 21, 2006, the Baltimore City Department of Social Services (“local department”) commenced a Child In Need of Assistance action (“CINA”) by filing a Petition and Request for Shelter Care in the Circuit Court for Baltimore City. The local department requested that the Court continue Deontay, born March 6, 2006, in shelter care. In the Petition, the local department alleged that the Deontay’s mother abused alcohol and drugs, was observed walking in traffic in a “zombie-like” state with the Deontay in a stroller, and that, upon medical examination, the Deontay’s medical needs were not being met. The Petition and Request for Shelter Care also alleged that all of the Deontay’s five siblings had been previously found to be

CINA, that parental rights had been terminated for two of the siblings and that the Deontay’s father failed to take necessary steps to protect the Deontay from a neglectful situation. Following an adjudication hearing on September 13, 2006, Deontay was placed in the custody of his father, and an Order Controlling Conduct was issued to both parents. On October 5, 2006, the local department filed an Amendment to the Petition and Request for Shelter Care, alleging violations of the protective measures in the Order Controlling Conduct. On April 2007, following a contested disposition hearing before a Master, the Master recommended that the Deontay be placed in the custody of the local department. The Master’s written recommendations were filed on April 20, 2007, and the Circuit Court entered the recommended Order the following day. Deontay’s parent (“Petitioner”) filed exceptions on April 25, 2007. Following a hearing on September 7, 2007, the exceptions were denied.

On September 20, 2007, the Petitioner filed an appeal to the Court of Special Appeals. In an unreported opinion filed on May 15, 2008, the Court of Special Appeals affirmed the finding that Deontay was a child in need of assistance, but also held that the evidence and findings of the Circuit Court were insufficient to support removing Deontay from his father’s custody. Thereafter, the local department requested that the Court of Appeals issue a writ of certiorari.

In keeping with the requirements of the CINA statute, a review hearing was held in Deontay’s case on September 5, 2008 before the Circuit Court, while the appeal was pending before the appellate courts. By the date of the review hearing, the local department had agreed to return Deontay to the custody of his parent on or before November 18, 2008, but asserted that it could not return Deontay until the Circuit Court made required findings under § 9-101 of the Family Law Article. The Circuit Court decided to take no further action in the case and declined to make any findings, pending the receipt of instructions from the Court of Appeals.

HOLDING:

1) No. Request to Dismiss Appeal as Untimely Denied. Under the circumstances in this case, the Petitioner had the right to pursue judicial review. It is true that the Petitioner did not file a Motion to Vacate or any other pleading styled as an “appeal” within 30 days of April 21, 2007, the date the Court adopted the Master’s recommendations to grant custody to the local department. The Parent, however, timely filed exceptions

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IN RE: Deontay . . .

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to the recommendations on April 25, 2007. In the exceptions, the Parent requested reversal of the decision to remove Deontay from his father's custody. The Court held that the substance of the exceptions, rather than the form of the pleading, is the controlling consideration and that the request for relief expressed in the exceptions constituted the functional equivalent of a motion to vacate the April 21, 2007 Order. Under those circumstances, the Court held that appeal was timely filed.

2) Yes. Reversed and Remanded. Citing Family Law Article, § 9-101 (b), the Court held that, because Deontay's parent had neglected his siblings, the Circuit Court, in the CINA case, could not award custody of Deontay to that parent without making the specific finding required under Family Law Article § 9-101(b) that there is no likelihood of further abuse or neglect by the parent. On remand, the Circuit Court was directed to make the required findings at the conclusion of the hearing.

3) No. Reversed and Remanded. In *In re: Emiliagh F.*, 355 Md. 198, 733 A. 2d 1103 (1999), the Court of Appeals held that a trial court erred by closing a pending CINA case, terminating jurisdiction and granting custody to the father of the child, while the mother of the child was appealing an earlier CINA Order, removing the child from her custody. In that instance, the Court of Appeals held that, by terminating jurisdiction, the Circuit Court's modified Order effectively defeated the purpose of the mother's appeal. If successful, the appealing parent would continue to have the right to reunification services to regain custody of the child, at statutorily mandated permanency plan hearings before the Court. The Court of Appeals distinguished the instant case. Unlike the *Emiliagh F.*, post-appeal Order, modification of custody as agreed to by the parties in November 2007 in the instant case might have rendered the appeal moot, but would not have foreclosed the appealing party's right to prosecute the appeal. Further, the Court of Appeals held that the Circuit Court has a duty to modify custody, when there are material changes and the Circuit Court is persuaded that modification is necessary to protect the health, safety and well being of a child adjudicated to be a Child In Need of Assistance. In the opinion, the Court of Appeals cited the recent case of *In re Julianna B.*, ___ Md. ___ (2009), a delinquency case. While an appeal was pending, the Circuit Court modified the delinquent child's treatment service plan of the child. Although, as a result of this modification, the issue on appeal became moot, the Court of Appeals upheld the authority of the Circuit Court to modify the earlier Court Order, as the modification.

DISCUSSION

The following were Maryland statutes and rules were at issue in this appeal:

Court and Judicial Proceedings Article §3-801 et. seq

Family Law Article § 9-101

Md. Rule 11-111 – Juvenile Masters

The statutory provisions governing Child In Need of Assistance cases are found at Court and Judicial Proceedings Article §3-801 et. seq, and authorize the local department of Social Services in each of Maryland's local jurisdiction to initiate a CINA action by filing a CINA petition. If a child is found to be a CINA by the Court, the statute authorizes the Court to place the child in the custody of the local department or to issue an Order of Protective Supervision, placing the child in the custody of the parent or guardian under protective service supervision of the local department. The CINA statute requires the local department to establish a permanency plan for all children placed in the custody of the local department. Both state and federal law dictate that reunification with the parent or guardian is the preferred permanency plan in any CINA case. The CINA statute requires the Court to hold periodic review hearings, known as permanency plan hearings, for all children in the custody of the local department.

The statutes governing custody and visitation cases are found in the Family Law Article at §9-101 et. seq. Section 9-101 provides that:

(a) *Determination by court* - In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) *Specific finding required* – Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

In *Deontay J.*, the interplay between the CINA and custody statutes is discussed. The parties, pursuant to the permanency plan requirements of the CINA statute, agreed to return custody to the parent. The Circuit Court, however, determined that the findings required by the custody statute must be made in the CINA case. The Circuit Court further determined that the pending appeal of the April 21, 2007 Order precluded the Court from making those findings until the

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appeal was concluded. The appellate court disagreed, holding that modifying custody as agreed to by the parties may have rendered the appeal moot, but would not have defeated the right of the appealing party to prosecute the appeal. The Court of Appeals has, it appears, reaffirmed the fluid nature of custody rulings, including custody rulings in CINA cases. Circumstances regarding custody determinations frequently change over time.

For reasons that are unclear, the Circuit Court in Baltimore City entered the Order adopting the Master's recommendations on April 21, 2009 before the time for filing exceptions to the recommendations expired on April 25, 2009. Exceptions were timely filed, and an exceptions hearing was convened. In holding that the parent's appeal from the April 21, 2007 Court Order was timely, the Court stated that the timely filed exceptions were "the functional equivalent of a motion to vacate" the April 21, 2007 Order. The Court of Appeals opinion reaffirms that legal technicalities should not triumph over justice, particularly in matters of parental rights and child custody. The parent had plainly sought a reversal of the April 21, 2007 Order granting custody to the department and filed exceptions with an attached nine-page memorandum. Further, the Circuit Court held a hearing on the exceptions. The parent's failure to file a separate "motion to vacate" the April 21, 2007 Order, under those circumstances, did not preclude the parent from obtaining appellate review.

Practice Consideration

An Order granting custody is always subject to modification and changing facts frequently impact "best interest" determinations. In a CINA case, a practitioner should be mindful terminating jurisdiction during a pending appeal may well be prohibited in almost all instances. Termination of jurisdiction in a CINA case eliminates the ongoing permanency plan reviews, essentially foreclosing the appealing parent's right to continue to pursue custody. As state and federal law make reunification the preferred permanency plan in any CINA case, terminating jurisdiction of the CINA case while an appeal is pending defeats the appealing parent's continuing right to reunification with the child. Modifying custody in a CINA case is different. The case is still open, and the appealing party maintains the ability to seek a modified custody Order. If the Circuit Court's modification of custody during the pending appeal grants custody to the appealing party, then the pending appeal may become moot. Thus, there is a distinction between a permissible modification by the trial court that renders an appeal moot, and termination of jurisdiction or other action that defeats a party's right to prosecute an appeal.

Master Leah J. Seaton is the Standing Master in the Circuit Court for Wicomico County, for Domestic Relations and Juvenile Causes. She is a member of the Family and Juvenile Law Section Council.

CASE NOTE

The Bangs Formula Revisited- Numerators and Denominators and Pensions, OH MY!

By: Justin J. Sasser

Hot off the presses is a case that deals with a number of issues including a re-visitation of our old friend *Bangs v. Bangs*. Strap on your arithmetic caps my fine colleagues as I set the "Way Back Machine" for sixth grade, for we are about to encounter . . . (wait for it) . . . F R A C T I O N S! Lest you run from this article screaming "I went to law school so I didn't have to do math!", I promise a "kinder and gentler" reduction of same said nefarious numerators and devilish denominators into something more palatable (Now where did I put my spoon?). Therefore, in a mere mortal attempt to reduce to clarity the obfuscated principals of fractional interests of marital portions of pensions and similar retirement benefits I give you:

***HEGER v. HEGER*, 184 Md. App. 83; 964 A.2d 258 (2009)**

ISSUES ON APPEAL:

- 1) "Did the Circuit Court err in its determination of the marital property value of the home located at 2932 Golden Fleece Drive, Pasadena, Maryland 21122?"
- 2) "Did the Court err in denying the Appellant's request to be named beneficiary of the Appellee's survivor benefit?"
- 3) "Did the Court err in failing to grant to the Appellant the federal and state income tax dependency exemptions for the parties' two children?"

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Bangs Formula Revisited . . .

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4) "Did the Court err in denying the Appellant's request for an award of attorney's fees and costs?"

5) Did the Court err in issuing its Amended Judgment of Absolute Divorce dated August 31, 2007?"

BACKGROUND/ PROCEDURAL POSTURE:

The appellant, Stefanie Heger ("Wife"), and the appellee, Bryan Heger ("Husband"), were married on November 16, 1990, in Anne Arundel County. Two children were born of the marriage. The parties separated on November 15, 2003. On May 17, 2004, the Husband and Wife entered into a formal Parenting Plan, reached as a result of mediation, by which they were to share joint legal custody of the children but by which primary physical custody was to be with the Husband. The Parenting Plan was enrolled as a court order on June 11, 2004.

From 1977 through October 2003, the Husband was employed as an Anne Arundel County police officer. Over the course of that employment, the Husband sustained various physical injuries. After an operation on his back the Husband was approached by Anne Arundel County to discuss the possibility of a disability retirement. At that point, the Husband was eligible for regular retirement as of 1997. He and the Wife discussed the pluses and minuses of regular retirement versus disability retirement. Because the disability retirement benefits were greater each month and were not taxed, the Husband and Wife jointly agreed that the Husband should choose that option. By the time the parties were divorced on June 12, 2007, the Husband's police department service during the period of the parties' marriage amounted to 12 years and 11 months.

On June 12, 2007, Judge Silkworth issued a Judgment of Divorce Absolute and a 37-page Memorandum Opinion, filed by the clerk on June 15, 2007. The divorce was granted to the Husband on the basis of two years of voluntary separation. The Parenting Plan was incorporated into the divorce decree, whereby the Husband continued to have the primary physical custody of the two sons. The Wife was ordered to pay child support in the amount of \$ 836.00 per month. In terms of a monetary award, Judge Silkworth ordered that the Husband shall pay to the Wife, "as an adjustment of the equities, a monetary award in the amount of \$ 28,403."

One other order of Judge Silkworth is pertinent to this appeal. In his Order of June 12, 2007, Judge Silkworth had ordered the Husband to pay to the Wife "a 32% share of his pension payments." As a result of a Motion to Revise Judgment filed by the Husband on July 31, 2007, pursuant to Rule 2-535 alleging a **mathematical** error in the calculation of the marital portion of the Husband's disability pension, Judge Silkworth issued an

Amended Judgment of Absolute Divorce on August 31, 2007. The only change was to substitute "a 25% share of his pension payments" for the earlier "32% share."

HOLDING:

- 1) No. Circuit Court finding confirmed.
- 2) No. Circuit Court finding confirmed.
- 3) No. Circuit Court finding confirmed.
- 4) No. Circuit Court finding confirmed.
- 5) No. Circuit Court finding confirmed, remanded for reconsideration of monetary award and child support in light of a change in the percentage award of the marital portion of husband's pension.

DISCUSSION:

In this case there are many affirmations concerning the identification of marital and non-marital property, and the principals involving the equitable division of marital property. However, the outstanding holding references the further explanation of the application of the *Bangs* formula to a pension, both implicitly and explicitly. To begin, the Maryland Court of Special Appeals ("CSA") holds that it is initially necessary to take the total working life of an individual over the course of which a pension is accrued. This is how to determine the total monetary value of the pension itself. You must then determine what fraction of the total working life occurred during the marriage (the marital contribution) and what fraction of the contribution was non-marital.

In *Bangs v. Bangs*, 59 Md. App. 350, 475 A.2d 1214 (1984), the CSA set forth a mathematical equation that is to be used in calculating the portion of a spouse's pension which is subject to equitable distribution. The "*Bangs* Formula", as it has come to be known, is as follows: $(1/2) \times (\text{number of years and months of the marriage is the numerator and the total number of years and months of employment credited toward retirement is the denominator})$. For those of you in need of a refresher the fraction looks like this:

$$\frac{1}{2} \times \frac{\text{NUMERATOR (number of years and months of the marriage)}}{\text{DENOMINATOR (total number of years and months of employment credited toward retirement)}}$$

For a little self deprecation and insight into this author, I keep this equation on a "cheat sheet" of which I always hold near and dear (think of it as a tip table that you keep in your wallet – and don't say you don't know what I am talking about). As with most mathematical equations the calculation is done in logical steps. The denominator of that fraction in this particular case

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Bangs Formula Revisited . . .

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was the total working life of the Husband as an Anne Arundel County policeman, from October 21, 1977 through October 16, 2003, when he took his medical retirement (i.e. 312 months of employment in total). Second, we must determine how many of those 312 months of total employment were marital and how many were not, in order to determine what percentage or fractional share of the asset being evaluated was marital. Additional months of life (and of marriage) after the pension stops accruing are not a part of the denominator, because they have nothing to do with the value of the asset being assessed.

The CSA states that “That statement of the numerator was not wrong. It was, however, only a partial statement or a half-truth, and therein lies the danger.” The CSA goes on to state that “The additional meaning that is incontrovertibly implicit in the numerator, as *Bangs* is applied to this case, is “**WORKING years and month of marriage**” or “**Years and months of marriage IN WHICH THE PENSION CONTINUED TO ACCRUE AND GROW.**” In this case, unlike in *Bangs*, the accrual of the pension terminated before the marriage terminated.

Practice Consideration:

I know, I know, I have the same horrid response to cases involving hoary questions involving mathematical equations.

Yes, I said it, that four letter word, **M A T H**, that most attorneys loath with a passion. Even worse, I dropped the “F Bomb” – Fractions. However, this case is **BIG** in that it expressly defines what was implied through the *Bangs* Formula. So, just for a moment, dismiss those repressed memories of mathematical chalkboard embarrassment that are now flooding back (at least for me), and ask yourself one simple question. Is the calculation of my client’s, or their spouses’, pension based on the number of years they **worked** during the marriage? There! See that wasn’t so bad. Just remember to only use the number of months actually worked (i.e. the time during which the pension continues to accrue and grow) as the numerator, not the entire number of months of marriage. Also, remember that a marital interest in a spouses retirement benefits is not, I repeat, not automatic. Look at the FL §8-205 and go through the factors before you submit to automatic defeat and give up your clients’ hard earned retirement benefits.

Justin J. Sasser’s principal office is located in beautiful downtown Upper Marlboro, Maryland, and he is a member of your Family and Juvenile Law Section Council focusing his practice in the area of Family Law. If you have any questions or comments related to this article, he can be reached at (301) 627-4300 or jsasser@chesapeake.net

CASE NOTE

Alimony Overpayments: Beware to the Recipient

Billye Sanford v. Lucius Sanford, No. 01872, September Term 2007 (unreported)

By: Karen Amos, Esquire

A party making child support payments pursuant to a court order has no right to recoup any overpayments. The principle behind this rule is that the burden would fall upon the child and not the parent who received the overpayment. This case presents some insight as to how the appellate courts may view the issue of recoupment in a situation where there has been a long term overpayment of alimony to the recipient spouse and what effect, if any, the use of the payment toward minor children may impact the Court’s analysis.

BACKGROUND:

The parties to this matter were formerly Husband and Wife, having been divorced in the Circuit Court for Howard County on March 21, 2001. The Judgment provided for Mr. Sanford to pay to Ms. Sanford, by Earnings Withholding Order, rehabilitative alimony in the amount of \$1,000 per month for a period of twelve months. Pursuant to the Judgment, the alimony

would terminate on January 31, 2002. The Earnings Withholding Order did not provide a termination date for the alimony. In April 2001 and again in May 2003, Mr. Sanford sent a letter to the court regarding an order to terminate the alimony. He did not make any request for a return of the alimony overpaid. Neither letter was sent to Ms. Sanford. He claimed that he also sent a letter to Ms. Sanford in April 2002 asking her to “contact Maryland Family Court to terminate the alimony that I am still paying you...” Other than this correspondence, he took no further action until more than 3 ½ years later. As a result, following the twelve-month period, and continuing until December 13, 2006, monthly alimony payments continued to be paid to Ms. Sanford by virtue of the Earnings Withholding Order. Each year, Mr. Sanford claimed the alimony payments on his tax return. On Dec 12, 2006, Mr. Sanford filed a Petition for

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Alimony Overpayments . . .

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Modification of Child Support and Visitation and for Unjust Enrichment, in pertinent part, seeking to recover the alimony payments he had made in excess of the twelve-month period awarded to Ms. Sanford.

At trial, Ms. Sanford argued that a significant amount of the money had been spent on the children and, in any event, Mr. Sanford's claim was barred by laches since he failed to take any action to stop the payments over the five-year period. She contended that it would be unconscionable and inequitable to require her to reimburse Mr. Sanford because she never anticipated that the payments would need to be repaid and she acted in good faith in spending the money on the children of the parties'. She testified that the parties had an understanding that the excess payments would be used for the benefit of the children. Mr. Sanford acknowledged that he was aware the alimony was being paid over the five-year period and that he did not address the issue sooner because of personal issues in his life. The trial court ultimately held that Ms. Sanford "had no affirmative obligation to do whatever you do to get an earnings withholdings stopped....But she did have the obligation to do one thing. And that was not spend the money"... "she could have sent him a check for the difference. Or just held the money in escrow. Or put it in a bank account. Or do something with it. Not spend it." In so holding, the trial court granted Mr. Sanford's claim for unjust enrichment relating to the alimony and entered judgment in his favor in the amount of Fifty-Eight Thousand Dollars (\$58,000).

ISSUES ON APPEAL:

1. Whether the trial court erred in ruling that Mr. Sanford was entitled to recoup his overpayment of alimony under a theory of unjust enrichment?
2. Whether the trial court erred in ruling that the doctrine of laches did not bar Mr. Sanford's claim of unjust enrichment?

HOLDINGS:

1. NO. A claim for unjust enrichment is established when: (1) the plaintiff confers a benefit upon the defendant; (2) the defendant knows or appreciates the benefit; and (3) the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return. *Benson v. State*, 389 Md. 615, 651-652 (2005), quoted in *Bank of Am. Corp. v. Gibbons*, 173 Md. App. 261, 268 (2007). The Court of Special Appeals found that Ms. Sanford knew she was receiving a benefit from Mr. Sanford. The Court further found that the one letter Mr. Sanford sent to Ms. Sanford in April 2002 regarding the overpayment was sufficient notice that he did not wish for her to keep the overpayments and therefore he was entitled to recoup all of his overpayments subsequent to that date.

The Court then addressed Ms. Sanford's argument that requiring her to repay \$58,000 to Mr. Sanford would create an insurmountable hardship on her and therefore, this financial burden would impact the one remaining minor child of the parties. In considering this argument, the Court stated-

"Ms. Sanford argues that the trial court erred in finding it would be inequitable to allow her to retain the excess alimony payment because the overpayment of alimony is analogous to the overpayment of child support. Ms. Sanford argues that given the excess alimony payments were spent on the parties' children, allowing recoupment of the excess payments would ultimately lower the remaining minor child's standard of living. This Court has held "that a party making child support payments pursuant to a court order has no right to restitution or recoupment following a reversal or modification of the award on appeal." *Rand v. Rand*, 40 Md. App. 550, 553 (1978), quoted in *Barr v. Barr*, 58 Md. App. 569, 588 (1983). The policy behind this rule is that if recoupment were allowed, "the onus of the remedy would fall upon the child, not the receiving parent." *Rand*, 40 Md. App. At 555. Ms. Sanford invites us to hold that the policy considerations underlying the rule prohibiting recoupment of excess child support payments are germane to excess alimony payments. We decline Ms. Sanford's invitation to do so where, as here, it has been determined that there was little credible evidence that the excess alimony payments were used for the benefit of the parties' children." Ultimately, the Court ruled that even if Ms. Sanford, in good faith, spent the excess alimony payments on the parties' children, that fact alone does not preclude a claim for unjust enrichment. Notably, the court declined to rule that the use of the alimony overpayment for the benefit of the children was not a relevant factor. It left open the issue as to whether use of the payments for the benefit of the children, combined with other equitable factors, may be sufficient to trump an unjust enrichment claim for overpayment of alimony.

2. NO. Ordinarily, the doctrine of laches must include not only a lapse of time, but also some prejudice to the defendant. *Kaufman et ux. v. Plitt*, 191 Md. 24, 59 A.2d 634 (1947). When the party raising laches demonstrates prejudice and unnecessary delay, laches is appropriate when the plaintiff fails to act with due diligence in the enforcement of his rights. *Allied Inv. Corp. v. Jasen*, 716 A.2d 1085 (1998). While recognizing that Mr. Sanford did not file a claim to recoup the alimony for almost five years after the scheduled termination date, the Court of Special Appeals upheld the trial court's finding that there was no prejudice to Ms. Sanford, notwithstanding that the money was spent and she was now saddled with a \$58,000 judgment.

Karen Amos, Esquire, is in private practice in Howard County, Maryland