



# Family Law News

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

Maryland State Bar Association, Inc.

October 2004

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*Editor: Walter A. Herbert, Jr.*





## *A Message from the Editor*

Welcome to our first issue of the 2004/2005 bar year! We saw many of you at the annual meeting in June, highlighted as always by our humorous year-in-review skits; a special thanks to Ron Bergman for the short films he conceived and directed, and no, I didn't really punch him out during a motions hearing...

We have a wonderful article by Ron Tweel of Charlottesville, Virginia, on child custody evaluations. Mr. Tweel takes you from the initial question "Do I really need an evaluation?" right through to the cross-examination of an evaluator...it's a long article, but well worth a close read. Many thanks to Geraldine Hess for revising the text to bring the concepts in line with Maryland law.

I'm sure that many of you know Dave Titman of Howard County; read his refreshing "The Fit and Happy Lawyer." Vince Wills of this Section Council provides a primer for those who take GAL appointments, and Sandra Barnes of the AG's office asks the rhetorical question: "When is it reasonable to abuse a child?" Actually, I think that it was a rhetorical question, although as the parent of a 12 year old boy I could probably give her an answer...

Your local Family Law committee leaders have responded enthusiastically to our call to Mark Your Calendars, and we have several pages of up-coming events for you.

We have Case Notes, and even a recipe hidden inside. Due to the length of this issue we had to put a few regular features on hiatus, but never fear, our Sports Up-date and *The Skinny on Practice In:* will return in December.

Gosh, it's good to be back.

Please contact me with thoughts, comments, article ideas, etc.:

[Herbertlaw@worldnet.att.net](mailto:Herbertlaw@worldnet.att.net)

301.952.0707

Next Issue: December 2004

# Message from the Chair

I recently received inquiries from a few members of the Family Law Section raising some basic but very important issues – what are the benefits of membership in the Family Law Section and what opportunities are there for participating in Section activities? To answer these questions, an explanation of who we are, what we do and how we do it is the appropriate starting point.

The Family Law Section has well over 900 members and is governed by its 20 member Section Council. The Section Council is also advised by its past-chairs as ex-officio members, many of whom continue to participate in Section Council activities in accordance with our by-laws. The Council meets monthly from September to June for regular business meetings at different venues throughout the State and on other occasions as needed. Subcommittee meetings are held as needed, particularly during the legislative session and in preparation for MICPEL presentations and the annual meeting. Council meetings are not open to the general membership although we do invite other members of the Bar, the judiciary, the Legislature, etc. to attend certain meetings. We co-sponsor CLE programs with MICPEL (such as *Family Law University* and *Hot Tips*) and generally are responsible for providing the agenda, the speakers and the written materials. Our members write articles for the *Bar Journal* and the *Electronic Bar Brief* as well as prepare public-service brochures (in conjunction with other sections) for distribution by MSBA to the general public. The Section Newsletter, *Family Law News*, under the guidance of Walter Herbert, has become required reading.

Perhaps our most time-intensive activity is participation in the legislative session each year. The Section Council, as permitted by the MSBA charter and by-laws, and in cooperation with other sections and the MSBA lobbyist, begins its legislative involvement long before the yearly session begins. Council members review proposed legislation, testify at bill hearings, provide written testimony, communicate with legislators, and participate in numerous status conferences during the session. Last year was very successful as many of the bills we sponsored and/or initiated were enacted. The amount of time expended by Council members during that session was very significant. All Council members participate in this process to some degree.

The Section Council sponsors an annual program in Ocean City. This past year, we introduced a legislative update at which Senator Grosfeld and Delegate Dumais summarized not only the family law bills that were enacted or defeated but also gave the membership some unique insight into the legislative process. The Beverly Groner award was presented at that meeting to Senator Grosfeld for her outstanding contributions to the field of family law. A special committee is appointed each year to select candidates for that annual award. Of course, the Council presents an entertaining educational program completely written and produced by the Section Council members and other Section members at the annual meeting.

The Section Council is comprised of 15 members-at-large and 5 officers. Five members-at-large are elected each year for 3 year terms from as diverse a geographic area as is practical. Candidates are selected by a nominating committee that convenes each March/April with a slate presented to the full Council for final nomination in May. The slate is then presented to the Section at the annual meeting in Ocean City in June. Officers are also nominated by the nominating committee and are selected on the basis of Council membership, participation during their term as members-at-large and other factors. Any member of the Family Law Section may submit a request to the nominating committee to be considered for membership on the Section Council. If you choose to do so, you should submit your resume and a request to be considered for nomination to the Section Council to any officer by March of the year in which you would like to be considered.

Due to the number of members in the Section, we do not hold general membership meetings except for the annual meeting. We are currently working with MSBA to expand the Listserv for the Family Law Section to disseminate information to members. Section members are entitled to discounted admissions to MICPEL presentations and publications. The Newsletter is available on-line to members in addition to the printed version that is mailed to members.

Last year, under Chair Paul Reinstein, the Section Council achieved new levels of success in all of our activities. This year, with the assistance of the many dedicated and talented members of the Section Council and the Section, we shall strive to continue that tradition of excellence.

We need and welcome input from Section members on issues and matters of concern and interest to family law practitioners. We encourage suggestions from members for legislation, rules revisions or other procedural issues. Authors are needed for articles in various publications. Listserv monitors are being considered to respond to general questions posed by members. We welcome interest from members who wish to be lecturers and authors for MICPEL programs and publications. The list goes on.

This year, we contemplate strengthening our ties with family law committees and sections of local Bar Associations. Invitations will be sent to those associations for members to meet with us at some Section Council meetings. We will also participate in programs with MSBA to involve members of other sections in our activities and we in theirs.

In addition to our “family law” activities, our Section is formally *The Section of Family and Juvenile Law*. Although our past activities relating to juvenile law have not been as extensive as our

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# MARK YOUR CALENDARS:

\*The Family Law Committee of the **Prince Georges County Bar Association** meets on the third Wednesday of each month at 4:45 p.m. in the Circuit Court Law Library. Each meeting includes a Guest Speaker...all are welcome. Upcoming topics include:

October 20: Adoption Practice and Procedure, with Judge Steven Platt and Ms. Cheryl Willis of the Family Division

November 17: Domestic Violence Litigation Up-date, with Judges Rhodes and Lewis.

December 15: Holiday Party!!!

Only 72 shopping days until Christmas...

Walter A. Herbert, Jr., and Justin Sasser, Co-Chairs

\*On September 8, 2004, the Family Law Committee of the **Howard County Bar Association** held their first meeting for 2004-2005 at Jess Wong's Hong Kong restaurant in Columbia, Maryland. The attendance was at a record high with 21 persons in attendance. Future meetings shall be every other month on the third Tuesday with the next meeting to be held on Tuesday, November 19, 2004 at 12:00 noon at Jesse Wong's Hong Kong. The speaker shall be announced. If you wish to be placed on the Family Law Committee e-mail update list for notice of future meetings, please contact Jolie Weinberg by e-mail at [jgw@weinberg-schwartz.com](mailto:jgw@weinberg-schwartz.com), or by telephone at 410-997-0203. We welcome all new members to the Family Law Committee and look forward to a productive year.

Jolie Weinberg  
Chair, Family Law Committee  
WEINBERG & SCHWARTZ, L.L.C.  
2000 Century Plaza, Suite 446  
10632 Little Patuxent Parkway  
Columbia, Maryland 21044  
(410)997-0203

\*The **Baltimore County Bar Association Family Law Committee** plans to have six dinner meetings and two educational programs this upcoming year. Our meeting schedule is as follows.

9/22/04 (Weds.) — Dinner Meeting — Towson Golf & Country Club — Meet and Greet the Family Law Division Judges (outgoing and incoming)

10/20/04 (Weds.) — Dinner Meeting — Location: TBA — Speaker/Topic: Sarah Longson, Esq.: Bankruptcy/U.S. v. Kraft/Splitting T/E

11/30/04 (Tues.) — Dinner Meeting — Location: TBA — Speaker/Topic: Leon Berg, Esq.: Putting one spouse out of house titled to other spouse w/out DV

1/19/05 (Weds.) — Educational Program (Courthouse) — Topic: Business Valuations — Happy Hour (Location TBA)

2/16/05 (Weds.) — Joint Dinner Meeting with Professionalism Committee — Location: TBA — Speaker: Glenn Grossman, Deputy Bar Counsel, Attorney Grievance Committee

3/24/05 (Thurs.) — Joint Dinner Meeting with ADR Committee? — Location/Speaker: TBA

4/19/05 (Tues.) — Joint Dinner Meeting with City Bar — Location/Speaker: TBA

5/19/05 (Thurs.) — Educational Program (Courthouse) — Topics: Hot Tips/Legislative Update/Case Law Update — Happy Hour (Location TBA)

All meetings are 6:00 p.m. cash bar, 6:30 p.m. speakers, and 7:00 p.m. dinner, at a cost of \$38.00 per person. The seminars are at 4:30 p.m. at the courthouse, with a 6:00 p.m. happy hour at another location to follow, at a cost of \$20.00 per person. The meetings and seminars are open to all.

If you have any questions, please contact Suzanne Farace, Chair, at 410-821-2910 or [sfarace@fslawoffice.com](mailto:sfarace@fslawoffice.com) or Craig Little, Vice Chair, at 410-828-6100 or [cjlittle@family-law.com](mailto:cjlittle@family-law.com).

## \*Montgomery County Bar Association

Family Law Section Meetings are held on the **third Thursday of the month at 5:30 p.m.** in the CLE classroom at the Bar Association building 27 W. Jefferson Street, Rockville, Maryland 20850 from 5:30 pm to 8:30 pm.. After a brief business meeting, a program concerning a topic of interest is presented. The Program Committee has planned several timely and interesting topics to be presented this year. In addition to the programs presented at the regular monthly meetings, the Section plans and presents various breakfast and evening CLE programs.

The October program will be a presentation by the Sexual Assault Legal Institute (SALI), part of the Maryland Coalition Against Sexual Assault, Inc. The proposed topic for November involves new guidelines for Parenting Coordinators and will be sponsored by the Divorce Roundtable. In lieu of the December meeting, the Section will host the annual holiday party (date and location to be announced).

The Section is hosting a Breakfast CLE on **November 4, 2004** with the Honorable Dennis M. McHugh entitled "Breakfast with Judge McHugh - Everything You Wanted to Know About Appearing in Judge McHugh's Courtroom and More!" Breakfast CLE's are held

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## Message from the Chair . . .

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other endeavors, we expect this year will require a significant effort on our part participating in important juvenile legislative proceedings as well as addressing other important concerns in this area.

If you wish to become actively involved in Section activities, to offer suggestions or comments, or to let us know how we might improve our efforts and activities, let us hear from you. Our MSBA Web page lists the names and contact information for all of the members of the Section Council, including the present officers and past-chairs. If a Section Council member is from your jurisdiction, he or she may have some "local knowledge" that addresses certain concerns. The Family Law Listserv reaches every member of the Section who has provided an email address to MSBA unless a member has opted-out. Most questions or issues receive numerous responses from Section Members as well as Council Members. Section members who wish to contribute to the Newsletter should contact Walter Herbert. Anyone desiring to participate in MICPEL programs should contact Stacy LeBow Siegel.

Many family law attorneys are not members of the Section. For those who are not, we need you and want you to become members. Our collective voice becomes stronger and louder in the Courts, at the Legislature and elsewhere as our numbers increase. If you do not belong to the Family Law Section, sign-up, get involved and stay involved.

Is membership in the Family Law Section worthwhile? Do you get value for your dues? Are there opportunities for participation that will benefit not only individual practitioners but the Bar as a whole? Before being elected to the Section Council, I silently asked these questions. I found, after working on the Section Council with some of the most talented attorneys, masters, judges and legislators, the answer to each question is a resounding "YES".

*Barry J. Dalnekoff*, Chair 2004-5  
Annapolis, Maryland

## CHILD CUSTODY EVALUATIONS

*By Ronald R. Tweel, Charlottesville*

*Maryland Law updates by Geraldine Welikson Hess, Rockville*

### I. INTRODUCTION.

Being a family lawyer in the 21st Century has become more and more complex. Not only does one need to know how to draft a QDRO, determine gross income for child support formulas, and keep up with the weekly decisions of our Court of Appeals, one must also know a considerable amount concerning the mental health profession, the effects of divorce on children and clients, and the methodology, including strengths and weaknesses, of a child custody evaluation performed by a mental health professional (MHP). This paper is by no means meant to be an exhaustive analysis of child custody evaluations ("evaluations") but hopefully it will provide some useful information. Each case is different, and research with appropriate resource materials, as well as the use of your own MHP, is often needed to represent your client in an adequate fashion. The following is an outline of some of the inquiries and considerations which should be made when representing a client in a custody dispute.

### II. SHOULD I ADVISE MY CLIENT TO HAVE AN EVALUATION?

This question is not easily answered. My belief is that too often lawyers advise clients to engage in an evaluation when it is counterproductive for the client. Before the decision is made, one should take into consideration the following:

A. Does my client already have an advantage in the litigation? In other words, if I represent a custodial parent whose spouse is a non-involved parent, I generally see no need for an evaluation. I would probably already have the neighbors, the teachers, the doctors, and the Sunday school personnel to testify on my client's behalf. It is at that time that I play "four corners" and take my lead and sit on it. I do not want to risk interjecting a component that could damage my already strong case.

B. What are the children's ages and attitudes? If the children are of an age at which the MHP will listen to them, and if they have been or can be alienated or manipulated by the other parent, I have to consider seriously whether it is to my client's advantage to have an evaluation. I generally do not speak to the children, but I do on occasion, given the circumstances of each case. This is where judgment comes into play, as one cannot use a "cookie cutter" approach to all cases. Further, if I have a strong case, in which the children clearly want to reside primarily with my client, and there is a Guardian *ad litem* with a favorable view, the very substantial extra cost of an evaluation is probably not needed.

C. Where have the children been living since the separation? If the children have been living with my client and

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## Mark Your Calendars . . .

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in the CLE classroom of the Bar Association Building at 27 W. Jefferson Street, Rockville, Maryland 20850 from 7:45 am to 8:45 am. A delicious hot breakfast is served at the CLE's and the cost is only \$10.00 with advance registration and \$12.00 at the door. To register, contact Rocio at the Bar Association at (301) 340-2534.

On **November 17**, Hadrian N. Hatfield and Michael L. Kabik will present a program entitled, "Protect Your Clients When Dealing With International and Immigration Issues in Custody and Divorce." Evening CLE's are held in the CLE classroom of the Bar Association Building at 27 W. Jefferson Street, Rockville, Maryland 20850 from 5:30 pm to 8:30 pm. The cost per each three-hour program is \$60.00 or \$30.00 for new practitioners. To register for a CLE or obtain a fall passport at a reduced cost (four seminars or more), call Rocio at the Bar Association at (301) 340-2534.

For more information regarding programs and events, contact Sharon Johnson (301) 251-4010 or Karen Robbins at (301) 260-0223.

### \*MICPEL

#### MARITAL PROPERTY WORKSHOP

Friday, October 8, 2004  
8:45 a.m. – 1:00 p.m.  
Johns Hopkins University Montgomery County Campus  
9601 Medical Center Drive  
Rockville, Maryland

Friday, October 29, 2004  
8:45 a.m. – 1:00 p.m.  
University of Baltimore Business Center  
Corner of Charles Street and Mt. Royal Avenue  
Baltimore, Maryland

**MICPEL** and the **Maryland State Bar Association Section of Family and Juvenile Law**, in cooperation with the University of Maryland School of Law and the University of Baltimore School of Law, have joined forces to present "Marital Property Workshop." The

program will be presented on Friday, October 8, 2004 at the Johns Hopkins University Montgomery County Campus in Rockville, and on Friday, October 29, 2004 at the University of Baltimore Business Center in Baltimore.

You will learn about the more complex issues such as: burden of proof; dissipation; extant property; source of funds; tracing; valuation of businesses; valuation of property; relationship of monetary award to alimony; stock options; and qualified and non-qualified deferred compensation plans.

Our outstanding faculty for this program in Baltimore includes Program Co-Chair **Thomas C. Ries, Esq.**, Kaufman, Ries & Elgin, P.A.; **Michael G. Hendler, Esq.**, Adelberg, Rudow, Dorf & Hendler LLC; **Richard B. Jacobs, Esq.**, Hooper & Jacobs, LLC; **Sheila K. Sachs, Esq.**, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC; **Stacy LeBow Siegel, Esq.**, Stacy LeBow Siegel, LLC; and **Jerrold A. Thrope, Esq.**, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC; and our outstanding faculty in Rockville includes Program C-Chair **Jo Benson Fogel, Esq.**, Jo Benson Fogel, P.A.; **Cynthia Callahan, Esq.**, Dragga, Callahan, Hannon & Hessler, L.L.P.; **Cheryl Lynn Hepfer, Esq.**, Law Offices of Cheryl Lynn Hepfer; **Geraldine Welikson Hess, Esq.**, Law Offices of Cheryl Lynn Hepfer; **Stephen E. Moss, Esq.**, Deckelbaum, Ogens & Rafferty, Chartered; and **Joseph C. Paradiso, Esq.**, Paradiso, Dack, Taub & Sinay P.C.

Tuition is \$149 for Members of the Family & Juvenile Law and Young Lawyers Sections, and \$169 for MSBA Members. Attendees receive four (4) hours of lecture and discussion, written materials, a continental breakfast, and a 15% discount on all MICPEL publications purchased on the day of the program.

For more information on "Marital Property Workshop" visit MICPEL's website <http://www.micpel.edu> or the MSBA website <http://www.msba.org>. Or telephone MICPEL at 410-659-6730 or e-mail us at [info@micpel.edu](mailto:info@micpel.edu).

\*MSBA Annual Meeting June 2005: Never too early to start planning. . .

## Child Custody Evaluations . . .

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I have a strong case, then I will generally not seek an evaluation.

D. If I have a weak case with impediments to a successful outcome, i.e., a busy working parent, then I often will ask for an evaluation. It is almost as if the evaluation is a “no lose” situation for my client. When my client’s case has problems, I feel that the evaluation may be one of my only hopes for arriving at a successful outcome.

E. Does my client appear to me, a lay person, to have any emotional or mental disorder? Of course an attorney should never attempt to diagnose a client, but with some experience we certainly can discern certain obvious defects. For example, extreme narcissism on the part of the client is fairly easy to detect. It will be a key element in the evaluation since the MHP will quickly determine that the parent is more concerned about the divorce issues than the children. Also, the parent may be totally unable to avoid discussing the divorce in any conversation regarding the children. This behavior will be a very negative factor in any evaluation by a MHP and if, after coaching by counsel, a parent cannot overcome this mindset, an evaluation has to be viewed with caution.

F. It is often helpful to obtain all of the client’s mental health and medical records before a decision as to whether an evaluation should be requested. Do not, however, be afraid of a diagnosis of depression by your client’s treating physician. Most normal people experiencing a traumatic divorce have some degree of depression. Judges are accustomed to depression in divorce cases. Realize that there are two kinds of depression, i.e. situational depression and clinical or biological depression. Remember these are my terms and not the terms of the professionals. In other words, is this depression caused by the divorce (situational) or is this depression caused by some chemical imbalance (biological)? Therefore, one should speak to the client’s treating psychologist before the decision to request an evaluation is made.

G. Know your judge. Does the judge ignore this type of testimony, slavishly adopt it, or fall somewhere in between? If this information is unknown, contact other lawyers who are familiar with the judge’s proclivities.

H. With this information in hand and after a full and frank discussion of this information and your thought processes with the client, you and the client should decide jointly whether an evaluation will be helpful.

I. Can the client afford it?

### III. HOW TO SELECT AN EVALUATOR.

A. Obtain the CV of each potential evaluator and scrutinize it for experience, education and particular biases. In this instance, one should review all articles or publications written by the MHP because they may provide some indication as to the MHP’s particular interests or propensities. Has the MHP received special forensics training?

B. Most MHPs come from a specific school of thought. Much of this is dependent upon where they did their training and to what extent they use one scientific model vs. various other models. This is something one should try to determine, especially with the help of other professionals in the field that an attorney can contact informally.

C. What is your personal experience with this MHP in other evaluations? This may be one of the most important factors. Does this person customarily recommend joint legal and physical custody unless there is some unusual circumstance? Does this person always tend to recommend custody for the primary caretaker? Keep a file in your mind or your file cabinet on every MHP within hiring range.

D. Have at least a phone interview with all potential evaluators if you are unfamiliar with them. Ask them for their CV before the interview. During the interview, one should inquire as to the school of thought adhered to; the methodology to be employed; the tests to be used; and the degree to which the MHP will use collateral witnesses. Further, find out the number of contacts with each parent and the children that will take place in the evaluation process, and determine whether this person is willing and/or able to take the requisite time to do a thorough evaluation.

E. There is obviously a difference between a psychologist, a psychiatrist, a licensed clinical social worker, a licensed clinical professional, etc. One must know the difference in the training and thought processes of these different MHPs.

F. Do not allow a treating professional to be an evaluator since it is a clear conflict of interest and violates the APA Guidelines.

G. The evaluator must have education, training and experience in:

- ♦ Child and family development
- ♦ Child and family psychology
- ♦ The impact of divorce on children

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**Women's Bar Association of Maryland**  
**Mid-Year Meeting & Rita C. Davidson Award Dinner**

The Honorable Deborah K. Chasanow  
Award Recipient  
The Honorable Diana Gribbon Motz - Presenter  
**Monday, November 1, 2004**

Marriott Hotel  
6400 Ivy Lane  
Greenbelt, MD 20707  
301.441.3700

Professional Development Seminar - *Tooting Your Own Horn: Practical Strategies for Developing Self-Promotion Skill and Comfort* presented by Dr. Ellen Ostrow of LawyersLifeCoach LLC

Seminar - 5:00 pm  
Cocktail Reception - 6:00 pm  
Dinner - 7:00 pm

**Members/member's guest \$65 each**

Member: \_\_\_\_\_ Member's Guest: \_\_\_\_\_

(WBA members can each bring one guest at member's rate)

**Non-Member \$85** Name: \_\_\_\_\_

**Students \$45** Name: \_\_\_\_\_

Consider a donation to help students attend WBA events: \$ \_\_\_\_\_

Please indicate if a special entrée is desired: \_\_\_\_\_ Vegetarian \_\_\_\_\_ Kosher

Number of persons that will attend seminar \_\_\_\_\_

Mail Registration and Payment to: WBA, PO Box 1223, Hunt Valley, MD 21030

Fax credit card payment to 1.888.228.8990

Telephone #: \_\_\_\_\_ Card #: \_\_\_\_\_

Exp Date: \_\_\_\_\_ Signature: \_\_\_\_\_ **Reg. Deadline: 10.25.04**

Contact Amy B. Glaser, Vice-President at 301-952-0100, [aglaser@kmnl-law.com](mailto:aglaser@kmnl-law.com) or  
Hilda Jungclaus at 800.459.0118, [execdirector@wba-md.org](mailto:execdirector@wba-md.org) for more information.

**WEBSITE OF THE MONTH:**

[www.aaml.org](http://www.aaml.org)

"Protecting the family...improving the practice."

The website of the American Academy of Matrimonial Lawyers. Contains a Divorce Manual for clients and an extensive library of articles to assist the practitioner. The articles are grouped into topics, such as **Children, Financial, and Trial Techniques**, and include such titles as "Advanced Trial Techniques in Custody Cases" and "Putting the Fee in the Bank."

See the notice located in this issue for the ninth Annual Symposium to be presented by the Maryland Chapter of AAML, to be held in November.

## Child Custody Evaluations . . .

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H. Is the MHP acquainted with the APA Guidelines and are they followed in an evaluation?

I. Does the evaluator have a good reputation with the judge? Most judges have long memories.

J. Once all this information has been collected, discuss it with the client and make a knowledgeable decision as to the appropriate evaluator.

### IV. CONFERENCE WITH CHOSEN EVALUATOR BEFORE THE EVALUATION COMMENCES.

A. Once an evaluator has been selected, it is important that you confer with the evaluator *before* the process begins. I have had unfortunate circumstances arise when I spoke with the evaluator well after she had proceeded with her evaluation. The evaluator had already made up her mind as to what she believed and what her opinions would be and, therefore, my input was basically disregarded. This relates not only to the analysis of certain facts which you may want to provide to the evaluator, but also to other information which may have been omitted from the evaluation process.

B. Be ready to state in a brief and cogent fashion the salient facts which support a favorable outcome for your client.

C. The evaluator expects counsel to be an advocate. Therefore, do not hesitate to provide a favorable slant, but be careful not to overstate your client's position. Also, do not overstate the bad attributes or actions of the other parent.

D. Do not be afraid to include some general analysis from a legal/psychological standpoint as to what you have been able to observe at hearings or depositions as to the other party, such as positions taken in negotiations, etc. We are not mental health professionals, but we *should* know more than the average person about mental health issues.

E. Provide the evaluator with important documents that will be helpful to him or her in reaching an opinion. An example of this may be letters written by the other parent that praise the parenting ability of your client; apologize for certain negative conduct; are vindictive statements; are statements indicating an unwillingness to cooperate in co-parenting the child, etc. I am often amazed at what parties put in writing, especially e-mail, in these types of cases.

F. Do not be afraid to state to the evaluator a position taken by the other parent in negotiations between the parties. One

must be careful about stating to the evaluator positions taken between counsel, because of potential ethical concerns.

G. Make sure that statements to the evaluator are consistent with what you are advising your client. Do not focus on the other party's deficiencies without directly relating them to the impact on the child. An exhaustive list of the other parent's faults that cannot be directly tied to a negative impact on the child is not useful and can make the wrong impression on the MHP. Advise your client to always give "child centered answers" to questions posed by the evaluator.

H. Do not establish an adversarial relationship with the evaluator. The evaluator should feel comfortable with counsel and have trust in what is presented in the process.

### V. DISCOVERY.

A. As soon as the case commences, interrogatories, requests for production of documents, and perhaps even requests for admissions, should be submitted. This also relates to the potential evaluation.

B. In this discovery process, one will want to discover the names of any MHPs or medical doctors used by the opponent, plus other factors that would be helpful to the evaluator in the evaluation process. This information can then be used in your conference with the evaluator before the evaluation begins. As time progresses, I find requests for admissions to be more and more useful. Not only do I use them for information, but I use them for authentication of letters, e-mails and other documents.

C. Depositions are of course helpful in fleshing out information that cannot be discerned or obtained through written discovery techniques.

D. Subpoenae *duces tecum* are very important when it comes to obtaining the mental health records of the opposing party. Mental health records should be analyzed carefully.

In Maryland, a party has a patient-psychiatrist/licensed psychologist/licensed certified social worker privilege with regard to any diagnosis or treatment they received outside of the custody evaluation. Courts and Judicial Proceedings 9-109, 9-121. A party does not automatically waive their patient-psychiatrist/licensed psychologist privilege when custody is in issue or when a custody evaluator is appointed. Laznovsky v. Laznovsky, 357 Md. 586; 745 A.2d 1054 (2000).

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## September Birthdays:

Madeline Kahn: "Oh, sweet mystery of life I've found you!!!" A wonderful comic actress, added class to Blazing Saddles and Young Frankenstein, among other films.

Adam Sandler: "I'm not a golfer, I'm a hockey player." Haven't cared for most of his films because I think that gross out humor is too easy, but Happy Gilmore was a riot...

Joan Jett: After all, she is from Rockville...

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## October Birthdays:

Theodore Roosevelt: Imagine, a political leader who **read** and **wrote** books..."Do not all these things interest you? Isn't it a fine thing to be alive when so many great things are happening?"

Groucho Marx: "Either this man is dead or my watch has stopped!"  
"I was married by a Judge...I should have asked for a Jury."  
"Politics doesn't make strange bedfellows, marriage does."  
Stop me. Happy 114<sup>th</sup>, Julius...

Mickey Mantle: Ran like a deer, hit for power, when he died every man I know over 40 felt a twinge...

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## November Birthdays:

Joe DiMaggio: Ran like a deer, hit for power, when he died every man over 90 felt a twinge...

Carlo Collodi: Creator of Pinocchio...fortunately for my client's, and probably your's too, that thing about his nose is make believe...

Jimmie Hendrix and Bruce Lee: 2 cultural icons of the early '70's, share the 27<sup>th</sup> as a birthdate...it's been 30 years since they died, and people still listen to Hendrix and watch Lee's movies...

## Child Custody Evaluations . . .

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It is likely that there is no automatic waiver of the patient/ licensed social worker either, although Laznovsky did not specifically address the patient-licensed social worker privilege. If the party chooses not to waive the privilege, you will not be able to obtain their mental health records. However, if the party waives the privilege so that the custody evaluator receives the mental health records, then you should be able to receive a copy as well.

E. Most important is whether to formally depose the evaluator. If one receives a favorable report, then talk to the evaluator on an informal basis. Formal discovery through subpoenas *duces tecum*, depositions, etc. may be counterproductive for several reasons. First, it will alert opposing counsel to do the same. Secondly, it may irritate a sensitive evaluator.

F. If the report, however, is critical of or disappointing to the client, then I believe that discovery is important. First, a subpoena *duces tecum* to the evaluator should request his entire file and especially the raw data from any tests. I will discuss below in the section on depositions why the test data can be so critical.

In Maryland, the raw data can only be directly provided to a psychiatrist or psychologist. Before the raw data is provided by the evaluator there must be a court determination that your chosen psychiatrist/psychologist is qualified by his/her training, education, or experience to receive and interpret the raw data. Md. Health-General Code Ann. 4-307(e)(2), (3).

G. Once one has obtained the file and the raw data from the evaluator, it should be reviewed with a consulting MHP. Do not feel so experienced or knowledgeable that you can completely analyze this information without the help of a mental health professional.

H. Where appropriate, review this material with your client. One may need to be selective about what information to share with your client.

I. Whether the evaluator's deposition is taken is based upon certain factors. Obviously, if one does not find information in the subpoenaed documents that would be helpful, then perhaps a deposition would not be useful. If your evaluation of the report, along with your consulting MHP, cannot discern any weaknesses in procedure or substance, then a deposition is questionable. Also, if the weakness in the documents, data or analysis of the evaluator is questionable or improper, then one must determine whether exposing this in a deposition is wise. One may want to wait until trial to surprise the other party and the evaluator and not give them an opportunity to repair the damage.

J. The bottom line is that discovery techniques are very important when a custody evaluation is used, and discretion must be used as to which particular techniques you employ.

### VI. READING AND ANALYZING THE EVALUATOR'S REPORT.

Much of this section relates to both the potential deposition and the cross-examination of the MHP. This section therefore should be read in conjunction with the following section. Some of the issues to be considered in reading and evaluating the report are as follows:

A. Before reading the report, one should become thoroughly familiar with the APA Guidelines on the conduct of an evaluation. Even though these guidelines are merely aspirational, it is accepted within the field that they should be followed. Dr. Arnold Stohlberg testified in a case on my behalf that he is aware of certain Virginia psychologists who have been disciplined by the State Board for not following these aspirational guidelines.

B. The report at a minimum (according to APA Guidelines) should cover the following areas:

- ♦ Parenting capacity in conjunction with the psychological and developmental needs of each child.
- ♦ Assessment of the adult's capacity for parenting, including knowledge, attributes, skills and abilities, or lack thereof.
- ♦ Psychological functioning and developmental needs of each child, including an understanding of the child's custody preference where appropriate.
- ♦ Assessment of the functional ability of each parent to meet those needs, including the evaluation of parent/child interactions.
- ♦ The parents' values, as they relate to the ability of each to plan for a child's future and to provide a stable and loving home.
- ♦ Potential for inappropriate behavior or misconduct that might adversely affect the child.

C. Review the report for any societal biases or prejudices of the evaluator. Does it appear from the report that any bias based upon age, sex, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture or other socioeconomic status may prevent an objective evaluation? The APA Guidelines are clear that this is critical.

D. One should have access to a DSM IV, which categorizes mental health disorders and provides criteria for diagnosing

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## *Do Something Different...*

Happy Halloween. Try this fall recipe for your Halloween or fall gathering.

### ***Sweet Potato Casserole***

3 cups of Sweet Potatoes  
2 eggs  
1½ cup butter  
1 tsp. vanilla  
1 cup sugar  
1⅓ cup evaporated milk

#### Topping

1⅓ cup margarine  
1 cup brown sugar  
1 cup chopped pecans  
1½ cup all purpose flour

Combine all ingredients in large mixing bowl.  
Spread in 9X13 baking dish.  
Sprinkle and spread topping.  
Bake at 350 degrees  
for 30 minutes.

Submitted by:  
Melissa L. Windsor

*Executive Administrative Aide to Judge Julia B. Weatherly*

## **Legal Quotation of the Month**

“He taught me housekeeping: when I divorce I keep the house.”

Zsa Zsa Gabor

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them. This should be in every family lawyer's library. If you see a diagnosis of a mental illness or a disorder, syndrome, etc., you should look up the rules and criteria for that diagnosis, and indeed whether it is recognized by the DSM IV at all.

E. Is the evaluator familiar with the DSM IV, not the DSM III? (Believe it or not, I had a case where the evaluator was using the DSM III and not the DSM IV).

F. First, start with the procedural aspects of the report. Note specifically, the dates of all conferences, the length of time for all conferences and phone calls, the dates of all tests, the length of time for all tests, the setting in which the tests were taken, and the nature and extent of all contacts with collaterals.

G. Explore carefully the amount of time that the evaluator watches the parent and child interacting. Many MHPs opine that it takes at least two occasions to obtain an accurate analysis.

H. Note all conferences with the attorneys as to number and duration. I have seen several reports where the evaluator has spent more time with opposing counsel than with me and this should be highlighted at trial.

I. Note all factual statements that do not cite a source. This should be explored in discovery or at trial.

J. Note where the evaluator has relied upon a single factor or source of information to reach a conclusion. A report needs "convergent validity," which is when multiple sources corroborate one fact or conclusion. Note where the evaluator has mixed data and observational information with interpretations in the same sentence. Data and observational information should be in one section of the report, and the conclusion and inferences drawn therefrom should be in another.

K. Amazingly, one will occasionally find in some reports that the data and the information obtained are not consistent with the conclusions. This is critical. I have had several cases where this has occurred.

L. Make sure that the raw data from tests are included in a comprehensive fashion in the report. I had one psychologist include only 50% of the data from a MMPI II computer-generated test result in his report. He omitted all of the adverse information because of his bias in favor of the father. This is why obtaining the raw data is important. This is also why the use of a consulting MHP is critical.

In Maryland, the raw data will not be included in the report because as stated earlier, the raw data cannot be disclosed

to lay persons and can only be disclosed by court order to an appropriate psychologist or psychiatrist.

M. Beware the evaluator who sanitizes the report by omitting critical facts or observations which are inconsistent with his final conclusions. Make sure that all salient facts known to you and your client are listed in the report. If they are not, this is fodder for cross examination. Further, make sure there are no factual errors.

N. Scrutinize the report to determine if the conclusions that are reached are consistent with the observations and test results. One would be surprised as to how often they do not. This is one of the basic errors made by untrained MHPs or MHPs who are biased.

O. Write down every omitted fact that is not included in the report for use at a subsequent time, i.e., deposition or trial.

P. List all critical collaterals who were *not* interviewed. This will be important at deposition or trial.

Q. Review the entire report with your consulting MHP.

R. The APA Guidelines clearly dictate that the MHP should not be an advocate for either parent. However, certain reports will have either direct or indirect advocacy which should be highlighted at the appropriate time, i.e., deposition or trial.

S. Review the report to see how the evaluator relied upon empirical data or the behavioral sciences. The more scientific foundation that can be provided in the report, the more reliable and valid it will be. Reports that are not scientifically based are generally not considered to be valid or reliable.

T. Be sure that the report does not spend too much time in analyzing the causes for the divorce unrelated to child centered issues. This can happen if MHPs who have specialized in adult therapy venture into the realm of custody evaluations. Unfortunately, this has happened to me and produced a very superficial and inappropriate evaluation since the report did not center on parenting capacity.

U. Do not be misled by a report that diagnoses your client with some mental disorder that may not affect his or her parenting ability. I had one case where my client was diagnosed with a borderline personality disorder (serious problem), but none of her deficiencies affected her parenting capacity. This applies to such problems as depression and

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## Child Custody Evaluations . . .

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anxiety. Therefore, one must make sure that any diagnosed disorder, especially from testing such as the MMPI II, is related to parenting capacity.

V. The term “best interest” is freely used in child custody cases. Remember that if the order states that the primary purpose of this evaluation is to assess the “best psychological interest” of the child, you should scrutinize the report for opinions that do not relate to this issue.

W. Be careful where reports emphasize too much the child’s physical environment, school placement, and relative physical advantages of the home or neighborhood of the possible custodian, instead of the psychological best interest of the child. This is missing the forest for the trees.

X. Does the report clearly state the following?

- ♦ Assumptions.
- ♦ Data.
- ♦ Interpretations.
- ♦ Inferences all premised upon established professional standards.

The evaluator must be able to articulate these specific areas, show how they were used in the recommendation, and explain how they are based upon established professional and scientific standards.

Y. In attempting to determine whether or not it is a scientifically based evaluation, try to discern whether the scientific literature is consistent with the report. Allow your consulting expert to assist you in this process.

Z. If the report identifies a mental health problem for either party, does the report state how this will have an adverse impact on the child? Remember, the impact on the child is critical for every good or bad statement made in the report.

AA. Maryland subscribes to the *Frye-Reed* test for admissibility of evidence. It is important that the evaluators’ report and testimony address the experts chosen methodology and that it is shown that this methodology is generally accepted as reliable in the scientific community. If they are unable to do this, then the testimony should be excluded and/or they are ripe for cross examination.

BB. Determine whether the recommendation offered in the report exceeds the data collected from various sources. If so, highlight this at trial. Are the recommendations based upon absent information?

CC. Make sure that the report distinguishes data from inferences to be drawn from data. This is one of the most common mistakes by MHPs.

DD. Does the report describe or acknowledge the existence of parental conflict and its impact on the children? If so, what results and inferences are drawn from that fact?

EE. Does the report attempt to discern parental alienation? If so, what specific data or facts support this inference and what impact does it have on the children?

FF. Does the report answer questions that were not asked? If so, determine why this happened. Alternatively, did the report fail to address questions that needed to be addressed? If not, why not?

GG. Did the MHP use projective tests? Projective tests such as the Rorschach or T.A.T., cannot predict with accuracy the reliability of the information provided. Other types of tests need to be given to corroborate truthfulness of a test response.

HH. Has the evaluator received training on the MMPI II and not just the MMPI I? (Believe it or not, I had a case where this happened).

II. All major conclusions must be validated by at least two sources (convergent validity). A good report will assess the parental competencies by:

- ♦ Examining the functional abilities of each parent.
- ♦ Identifying the areas of strengths and weaknesses of parental competency.
- ♦ Exploring the relationship between observed parental strengths and weaknesses and specific parental demands.
- ♦ Assessing the fit between each parent’s observed competencies and their relationship with each specific child.
- ♦ Recommending remedial or dispositional options.

JJ. Did the evaluator have specific planned questions for each child in his interviews? Was it merely a random conversation? Planned and organized questioning should address these areas:

- ♦ Emotional well being of the child
- ♦ Physical well being of the child
- ♦ School performance
- ♦ After-school activities
- ♦ Recreational activities

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## Child Custody Evaluations . . .

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- ♦ Cognitive development
- ♦ Social development
- ♦ Social involvement, i.e. peer group involvement
- ♦ Religious identity
- ♦ Sexual identity and gender related issues
- ♦ Communication skills
- ♦ Child's perception, if any, of primary and secondary caretaker
- ♦ Child's perception, if any, of "psychological parent"
- ♦ Sibling relationships
- ♦ Child's perception of relationship with each parent
- ♦ Child's perception of extended-family involvement
- ♦ Child's description of daily routine and parental involvement in it
- ♦ Child's description of each parent's discipline and rules
- ♦ Child's involvement with each parent
- ♦ Child's custodial preference and explanation of why

If no structured interview process was used, then important issues may have been omitted. And if there is more than one child, then perhaps both children are not being asked the same questions.

LL. Since parental ability and capacity to meet the child's physical and psychological needs is the most important issue, does the report address the following questions:

1. Which parent provides the children with a safe, secure, predictable, consistent and stable environment?
2. Which parent is better able to provide for the child's physical, material and financial needs?
3. Which parent respects and encourages the children's religious heritage?
4. Which parent respects and encourages the children's cultural identity?
5. How does each parent perceive each child's understanding of who the child views as the psychological parent?
6. How does each parent perceive each child's understanding of who the child views as the primary and secondary caretaker?
7. Which parent provides the most encouragement for the children's educational performance?
8. Which parent provides the most guidance and assistance to the child's educational performance?
9. Which parent is available to help the child with homework on a consistent basis?
10. How does each parent participate in each child's daily life?
11. Which parent provides a more flexible schedule?
12. Which parent provides better supervision?
13. Which parent provides more reliable scheduling?
14. What is each parent's understanding of how each child feels about the proposed parenting plan?

15. In what ways are the age-related issues, for which each child needs the other parent's involvement, being appropriately addressed?

### VII. CROSS EXAMINATION/DEPOSITION OF EVALUATOR.

A. Once the report has been reviewed thoroughly, the first question to be asked is whether it meets the necessary standards. In Maryland, the question is whether it meets the *Frye-Reed* test. In summary, the *Frye-Reed* test requires that the methodology used by the expert be generally accepted as reliable within the expert's particular scientific field. *Frye v. United States*, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374., 391 A.2d 364 (1978).

B. If the report cannot meet the required standard, then a Motion in Limine should be filed. The basis for preventing the expert from testifying pursuant to a Motion in Limine, or restricting the expert to certain portions of his evaluation, is the violation of the *Frye-Reed* standard, the violation of the APA standards, or the violation of any State standards.

C. I have been successful on several occasions with a Motion in Limine in preventing the testimony in its entirety or limiting the testimony to accepted procedures. Most of the time, one can expect to lose these motions, as I have done, because the court will consider it a matter going to the weight of the evidence. Nonetheless, it can be valuable if it makes the court question the validity, reliability and acceptability of the MHP's report and testimony.

D. All of the observations made above in the section addressing the review of the report are potential lines of questioning in a deposition or at a trial.

E. For young children, one must be aware of attachment theory and the particular assessment that maybe used on rare occasions for children age 0 to 5. This is a new approach in which the principles of attachment theory need to be understood.

F. One of my favorite techniques in cross-examining evaluators is to determine what they don't know. I use a standard format by asking them if they are aware of a particular fact which was not included in their report. If the evaluator is not aware of the fact, then I ask hypothetically that if it were true, would it change his opinion. Usually, he will say that it will not. I then string together as many unknown facts as I can, asking the same question. After I have gone

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## Child Custody Evaluations . . .

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through two or three of these facts, I will ask a third question which is, "Hypothetically, if all of the stated facts are true, would these facts collectively change your opinion?" If I do that after each substantive question and set forth as many relevant unknown facts to the evaluator as possible, sometimes I can justifiably come up with 20 or 30 facts relative to the parents or the children. In essence, the format is as follows:

1. Are you aware of fact X?
2. Hypothetically, if this fact is true, would it change your opinion?
3. Hypothetically, if all of the above facts are true, would these facts collectively change your opinion?

This can greatly undermine the evaluator's credibility before the court.

G. It is always important to read everything that has been written by the evaluator in terms of articles, journals, CLE materials, treatises, etc. This can be very fertile ground.

H. In Maryland, the statutory basis for expert testimony is contained in Maryland Rule 5-702. Expert testimony may be admitted if it will assist the trier of fact to understand the evidence or determine a fact in issue. The court shall consider (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject and (3) whether a sufficient factual basis exists to support the expert testimony.

The Maryland Code does not specifically address the admissibility of expert testimony by a licensed social worker. The determination as to whether this witness is an expert is within the sound discretion of the Court. *In re Adoption/Guardianship No. CCJ14746, 360 Md. 634, 759 A.2d 755 (2000).*

Custody evaluation reports often contain hearsay, statements and opinions of collateral witnesses such as teachers, pediatricians, psychologists, and neighbors. A trial judge exercising his/her independent judgment in making a final decision can base his/her decision on these reports, however the parties need to be given an opportunity to review the report, cross examine the evaluator and produce outside witnesses to establish inaccuracies in the report. *Denningham v. Denningham, 49 Md. App. 328, 431 A.2d 755 (1981).*

I. As for the expert's credentials, some of the questions which you may want to ask are:

- ♦ Is the MHP a member of the American Psychological Association?

- ♦ Does the MHP treat or test children or adults?
- ♦ Has the MHP ever been denied a license or membership in a professional organization?
- ♦ If the MHP has been trained as a counseling psychologist, can he/she clearly delineate why he/she has confidence in utilizing the assessment techniques needed in an evaluation?

J. In questions relating to the evaluation procedure (in addition to those in the above section relative to reading the report), one might want to ask:

- ♦ Were significant persons excluded from the interview process and if so, why?
- ♦ What information was omitted from the report and why?
- ♦ What type of standardized administration procedures were prescribed for the tests, and were they followed? If not, why?
- ♦ What is the purpose or relevance of utilizing the standard methodology for taking a test and how can it skew the results if you don't follow that methodology?

K. If the evaluator used the MMPI II, inquire as to the following:

1. What is the difference between the MMPI I and the MMPI II?
2. Have the evaluator state the method by which the MMPI was originally established (by testing low-socioeconomic-level inpatient inmates in Minnesota who exhibited psychological disorders in the 1940s).
3. Have the evaluator admit that this test is not a custody evaluation.
4. Have the evaluator admit that the MMPI II test does not determine parental capacity.
5. How was the MMPI II scored? Was it scored by hand or by computer? What service was used to score it by computer?
6. If it was scored by computer, are there internal inconsistencies in the responses? If so, was there an attempt to reconcile these inconsistencies?
7. How many MMPI II tests has the evaluator administered and how many of them has he personally scored?
8. Did the evaluator personally administer the test?

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9. Have the evaluator admit that standing alone, an MMPI II has very little if any significance in a custody case.

10. Have the MHP admit that it is difficult to conceptualize or research characteristics that define good parenting capacity.

11. It is much easier for an MHP to identify bad parenting characteristics than to define good ones.

12. If one feels that the evaluator is not familiar with the APA Guidelines, ask about specific aspects of this document.

13. Ask the MHP what is an alternative competing hypothesis to the conclusions of the report and ask him to explain why it does not apply.

14. Attempt to lead the MHP into statements that go beyond the data and facts solicited.

15. Make sure that there is independent corroborative data to relate to any elevated scores on the MMPI II.

16. Question the MHP on his ability to determine deceptiveness or outright lying by the parent from this test.

17. Inquire as to relative strengths of a parent that may go untapped by the MMPI II because the test is designed to explore psychopathology.

18. What process and factors were used to compare the parental capacity of each parent?

19. Did the MHP fully inquire into each parent's background and history? How?

20. What process did the MHP use to observe the children with each parent?

21. Were these observations structured or unstructured? Why?

22. Who brought the child to the appointments?

23. If one's client possesses any of the following, ask the MHP to admit that good parenting behavior includes:

- a. Two-way communications
- b. Clear emotional and physical boundaries
- c. Clear priorities
- d. Good supervision of children's behavior
- e. Nurturing self-esteem
- f. Knowledge of children's strengths and weaknesses
- g. Good role model
- h. Good disciplinarian
- i. Encourages relationship with the other parent
- j. Good moral reasoning

### VIII. CONCLUSION.

A good evaluation can be extremely helpful, but a poor one can be useless or harmful. Counsel is certainly part of the process of making sure that good evaluations are conducted and, if not, that the weaknesses of the bad ones are exposed.

### IX. BIBLIOGRAPHY.

Some of the literature that may be reviewed is as follows:

1. Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations*, 1998, Sage Publications, Inc.
2. Mark J. Ackerman, *Clinician's Guide to Child Custody Evaluation*, 1995, John Wiley & Sons, Inc.

**Ronald V. Tweel, Esquire**, is a partner with Michie, Hamlett, Lowry, Rasmussen & Tweel in Charlottesville, Virginia. He is Past Chair of the Board of Governors of the Family Law Section, Virginia State Bar and a Fellow, American Bar Foundation, American Trial Lawyers Association and American Academy of Matrimonial Lawyers.

**Geraldine Welikson Hess, Esquire** is a partner at the Law offices of Cheryl Lynn Hepfer, a firm that practices family law in Montgomery, Prince Georges, Calvert, Charles Anne Arundel and Howard Counties.

# When is it Reasonable to Abuse a Child in Maryland?

## Charles County Dep't of Social Services v. Vann

Let me confess my bias. Despite having the occasional urge to land the gratuitous swat on the behind of the preteen going up the stairs, I have never thought it "reasonable" for a parent to injure and harm a child. I figure it this way: if society frowns on a boss hitting an employee to correct her attitude and on a spouse resorting to domestic violence to promote better spousal behavior, it should similarly frown on a parent hitting and injuring a child. And what about that old adage, "Pick on someone your own size?" Thus, you can imagine my distress when the Court of Appeals recently placed its precedential seal of approval on something called "reasonable" child abuse. See *Charles County Dept. of Soc. Servs. v. Vann*, \_\_ Md. \_\_, 2004 WL 1686629 (July 29, 2004).

In *Vann*, the Court actually held that a parent in Maryland may not only hit a child but may also injure the child under circumstances that harm the child's health or welfare or expose the child to a substantial risk of such harm, as long as the injury is inflicted in the name of "reasonable corporal punishment." Before, however, you counsel your clients to oil up their belts, be warned. *Vann* is unlikely to spur local departments of social services to wink an approving eye at child abuse.

A little background may help you share my critical eye about what *Vann* will and will not do. At common-law, parents had the right to use "reasonable corporal punishment" as long as the punishment was not "excessive and cruel." See *Bowers v. State*, 283 Md. 115, 126-27 (1978). In 1973, the Legislature codified this prohibition by making "child abuse" a crime. Even today, to convict a parent of felony child abuse, the State must prove, not only that a parent caused an injury under circumstances that harmed a child's health or welfare or threatened such harm but also that the parent did so "as a result of a cruel or inhumane treatment or as a result of a malicious act." CL § 3-601(a)(2).

For many years, local departments of social services used the criminal definition to make findings in child protective services ("CPS") investigations. In 1989, however, the legislature removed the intent language from the CPS definition, directing local departments to focus solely on injury, and harm or risk of harm. FL § 5-701(b). Yet a third set of provisions, FL § 4-501 *et seq.*, permitted a court to consider child abuse as it is defined in FL § 5-701(b) as a sufficient basis for a domestic violence protective order. Since 1985, FL 4-501(b)(2), however, has carried the caveat that: "[n]othing in this subtitle shall be construed to prohibit reasonable corporal punishment, including reasonable corporal punishment, in light of the age and condition of the child from being performed by a parent or a stepparent of the child."

Based on the plain language of these three separate provisions, the State argued in *Vann* that, although the legislature intended

that individuals not be put in jail or barred from their homes solely on the basis of "reasonable corporal punishment," when it came to local departments making findings and keeping records, parental intent was irrelevant. Although giving this argument points for being "superficially logical," the Court rejected it. In logic that escapes me, the Court held that the legislature intended only one definition of "child abuse" in the Family Law Article, and that the corporal punishment caveat in the domestic violence provision, FL § 4-501(b)(2), must be read to also modify the CPS definition of abuse, FL 5-701(b).

Counseling local departments on how to apply *Vann* is a challenge. At least initially, local departments of social services will begin the finding process with the traditional inquiry as to whether a parent caused an injury under circumstances that either harmed the child's health or welfare or exposed the child to a substantial risk of such harm. For example, if a parent spanked a child, leaving a hand print on the buttocks and no other visible or reported signs of injury or discomfort, a local department might find that the child's health or welfare was neither harmed nor placed at substantial risk of harm. Accordingly, the local department would not reach the issue of whether the parent was engaged in reasonable corporal punishment. If, however, the child had difficulty sitting two days after being hit, or was also observed to have a bruise near the eye, the local department might well find that the child's health or welfare was harmed (based on discomfort) or placed at substantial risk of harm (based on the proximity of the injury to a vulnerable area of the body), and continue to the *Vann* part of its analysis.

As an aside, until *Vann*, local departments reasonably viewed "making a finding" as the simplest and least intrusive part of their three-part mandate to protect, make findings, and offer services. After all, injury and harm are nearly "check-off" items, and even substantial risk of harm may be deduced from the location of the injury and a quick review of the circumstances under which the injury was inflicted. After *Vann*, however, things become more complicated.

After finding that parental conduct satisfies the plain language definition of FL 5-701(b), the first inquiry under *Vann* is whether the parent actually injured the child in the course of corporal punishment. This might be harder than you would think. Obviously, if a parent says to a child, "Stand still, I am going to spank you for lying to me," the matter is quickly resolved. But what about a mother who smacks her daughter in the face when her daughter calls her "a very bad word or two." Is this corporal punishment or an impulsive gesture of anger? What about the father who shoves his teenager after his teenager shoves him?

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## Child Abuse . . .

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Over time, presumably, social workers will flesh out how to distinguish between parents who adopt physical means to punish or correct a child's behavior and parents who act impulsively or angrily with no such specific intent.

Once a social worker determines that an act was intended as corporal punishment, the second inquiry is whether the punishment was "reasonable." *Vann*, at \* 7, offers two bits of wisdom:

To discover whether the corporal punishment was lawfully executed, the agency assesses the reasonableness of the punishment not only in light of the child's misbehavior and whether it warranted physical punishment, but also in view of the surrounding circumstances in which the punishment took place, including the child's age, size, ability to understand the punishment, as well as, in the instant case, the minor's capacity to obey his parent's order to stand still while being struck by the belt. . . .

[T]he reasonableness of corporal punishment depends not simply on the misbehavior of the child and the amount of force used in the punishment from the parent's perspective, but also on the physical and mental maturity of the child, and the propriety of the decision to use force in circumstances that may increase the potential for serious injury.

Considering the determination of whether a child's behavior warranted physical discipline, a supervisor asked, "Are you going to give us some kind of list?" Presumably, such a *Vann* diagram would have some sort of sliding scale of offenses, from losing a library book to poking out a younger sibling's eye with a stick, and a corresponding indication of the amount of injury or harm permitted to correct or punish that offense.

This initial inquiry will also require some consideration of whether the parent tried other "less harmful" methods of punishment before resorting to physical punishment. Such parental inquisitions will presumably focus on how and when the parent previously used time-outs, withholding possessions, grounding, restricting IM use, etc. And you thought social workers were nosy and judgmental before? Now, presumably, they will be required to pass judgment on parenting techniques and choices well beyond the single incident at issue.

The next, and perhaps more comprehensive inquiry, will focus on "circumstances," both as to the child and as to the parent. Child-specific considerations involve not only the child's age, size, and vulnerability (both emotionally and physically), but also his or her cognitive ability to understand (and appreciate?) the reason for the "correction," and to accept the punishment where and how intended. In *Vann*, for example, the

ALJ had found that it was unreasonable to expect a six-year-old to stand still and accept strikes on the buttocks with a belt buckle. Parent-specific considerations involve choice of implement, location and severity of the strike, the parent's mental and physical condition, and a parent's intent.

To standardize consideration of these factors, social workers will also no doubt beg for a tool or instrument that, after adding and subtracting points, allows precise and consistent determinations as to whether corporal punishment was reasonable. It might look like this:

A score of 10 or above means that the corporal punishment was unreasonable:

Points were assigned in this case as follows

### 0 Points

- " Intended loc.of blows (buttocks)
- " Severity of inj. or intended inj. (no med.treatment req'd.)
- " No. of strikes (2) " Expl. of purpose of punishm't; and child's ability to understand (child was able to explain)
- " Use of other disc. ("usually my dad just talks to us").

### 1 Point Each

- Age (5)
- Size (short and slight)
- Transgression (minor - "didn't put scissors back where they belonged")
- Ability to stand still (put arms behind her to block blows).

### 2 Points

- parental condition (Alcohol played a factor)
- Use of implement ("Switch")
- Par. Emot. Cond. ("out of control")
- Child's abil. to stand still (was aiming for buttocks, but child sustained welts on the arm).

Total No. of Points: 12 = Not Reasonable Corporal Punishment

But let me share a secret with you. All the fancy new diagrams and charts local departments might devise will likely have little impact on findings, only on their presentation. DSS investigators already consider all of the factors discussed in *Vann*, not only in making findings but in assessing the future risk to a child and in determining what services might benefit a family. With or without *Vann*, most DSS workers will find that, when a parent not only injures a child but harms the child's health or welfare, the parent did not act "reasonably." Even when a parent has not actually

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## Child Abuse . . .

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harmed a child's health or welfare but has simply exposed the child to a substantial risk of harm, the risk alone signals not only bad judgment but also the possibility of repeat bad judgment. Unless the agency can make and maintain findings in these cases, it will have no records with which to view future events in context. (See FL § 5-714 (requiring expungement of records related to "ruled out" findings).

Accordingly, now as before, an event is "CPS-worthy," if a local department would benefit from keeping the record. In the case of a physical injury inflicted by a parent, a local department cannot keep a record if it does not find child abuse. In the case of corporal punishment, it cannot find child abuse unless the punishment was unreasonable.

Over time, I predict that most agency decisions will reflect the bias that, if there is any truly "reasonable" corporal punishment, it is punishment that is administered without injuring a child, without harming the child's health or welfare, and without exposing the child to a substantial risk of harm. Thus, despite *Vann*, local departments are unlikely to find much child abuse reasonable.

Sandra Barnes, Esquire, is with the Office of the Attorney General/Department of Human Resources

*The views expressed herein are the personal views of the author and are not intended to reflect the views of the Attorney General of Maryland.*

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## CASE NOTES

### **Issues: Jurisdiction – divorce cases filed in both Pennsylvania and Maryland; default judgment in Maryland – whether proper service was made *Roddy-Duncan v. Duncan*, 157 Md. App. 197 (2004).**

*By Marjorie Roberts*

*Paralegal for Christopher R. vanRoden, Esquire*

Facts: Appellant, Mary Roddy-Duncan (Ms. Duncan) and Appellee, Theodore Duncan (Mr. Duncan), were married on March 12, 1988, in Philadelphia, Pennsylvania. Three children were born to them as a result of the marriage. The parties separated on January 9, 1999, when the family was living in Johnstown, Cambria County, Pennsylvania, located in the western part of the state. Mr. Duncan worked for the federal government and was transferred to the Washington D.C. area. He lived in northern Virginia for nine months and then moved to Montgomery County, Maryland. Ms. Duncan remained in Pennsylvania. On January 27, 1999, Ms. Duncan filed a Complaint for Divorce and Child Custody in the Court of Common Pleas in Cambria County, Pennsylvania. Mr. Duncan filed his Answer on April 4, 1999. On June 16, 2000, an Amended Interim Order addressed child custody, where the parties shared legal custody and Mr. Duncan was awarded primary physical custody of the minor children. On December 4, 2000, a Consent Order was entered in the Cambria County Court. The Order confirmed the custody determination, but added that Ms. Duncan had "partial physical custody."

On August 14, 2002, Mr. Duncan filed a Bill of Complaint in the Circuit Court for Montgomery County requesting an absolute divorce from Ms. Duncan, custody of the three children, and child support. A scheduling conference was held on November 14, 2002. Neither Ms. Duncan nor anyone on her behalf appeared. Ms. Duncan did not file an Answer to the Complaint.

Trial was set for December 27, 2002. Mr. Duncan requested an Order of Default, stating that the Petition for Absolute Divorce and a Summons were served on Ms. Duncan on August 25, 2002. At the December 27, 2002 Hearing, the trial court granted the Order of Default, filed on December 31, 2002. Mr. Duncan was granted an absolute divorce in Maryland on January 31, 2003, granting him sole legal and physical custody of the three children. Ms. Duncan was ordered to pay child support and was charged with arrearages. No testimony was given with respect to the service of the Summons or the Complaint. Judgment was entered on February 4, 2003.

Simultaneously, in Pennsylvania, the court docket continued. The Pennsylvania court denied Mr. Duncan's request of May 15, 2002 to have the divorce case transferred to Maryland and signed an Order denying the transfer on June 3, 2002. On June 19, 2002, Mr. Duncan tried to have the Pennsylvania case dismissed, but the court denied that request by Order dated July 21, 2002. Neither court knew of Mr. Duncan's taking the law into his own hands by slipping this case into the Maryland court system. The Pennsylvania court scheduled a hearing on December 11, 2002, on both the divorce and alimony *pendente lite* issues, 16 days before the Maryland hearing. Mr. Duncan asked the Pennsylvania court to postpone the hearing so that he could get some medical testing done

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## Case Notes . . .

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and received a continuance from the court. He deceived the Pennsylvania court system and went to court in Maryland and received a final decree of divorce on January 31, 2003.

On March 5, 2003, Ms. Duncan, pro se, filed with the Maryland court a Motion to Vacate the Judgment, claiming “Lack of Jurisdiction, Proper Service, Duplicate Pleading & Fraud, Mistake and Irregularity.” She claimed that she was never properly served with a Summons or a Complaint for Divorce. Mr. Duncan filed his opposition on March 12, 2003. The Court denied Ms. Duncan’s motion without a hearing on March 28, 2003.

The Pennsylvania filed a report on June 24, 2003, recounting Mr. Duncan’s pattern of deception and characterizing his procedural behavior. The Pennsylvania hearing officer concluded that Mr. Duncan “had deliberately misled the Maryland court into believing that there was no still pending divorce case in Pennsylvania.” The Circuit Court for Cambria County, Pennsylvania adopted the hearing officer’s recommendations in an Order dated July 21, 2003. The Pennsylvania divorce case was still pending in Pennsylvania, while having been finalized in Maryland.

Held: “It is that denial of the Motion to Vacate without any further inquiry into its allegations that compels us to reverse in this case.”

The Court of Special Appeals reversed and remanded this matter to the Circuit Court for Montgomery County. At least two “red flags” were flying which should have caused the trial court to pause and make further inquiry. “We feel confident that either of those ‘alerts,’ had they been noticed by the trial judge, would have caused him serious concern.” A default judgment should not have been entered until it was perfectly clear that there had been proper service on the absent party, Ms. Duncan. In Ms. Duncan’s Motion to Vacate, she alleged: “The Defendant here was never served with a summons or complaint for divorce in this matter and her attorney in Pennsylvania informed this Court by letter (Exhibit C) of the matter in Pennsylvania, giving Defendant the impression that this case in Maryland would be dismissed.” (Emphasis supplied by the Court of Special Appeals). The Summons had been given to Ms. Duncan in Maryland at a visitation exchange, but service was by Marlene Young, a person who had been listed as having the same address as Mr. Duncan and had been living with Mr. Duncan for several years. Ms. Young was Mr. Duncan’s sole witness at the December 27<sup>th</sup> hearing and also testified that Mr. Duncan had not cohabited with Ms. Duncan for two and one-half years, and that there was absolutely no chance of a reconciliation. The question that the Court of Special Appeals had was whether Ms. Young was any more neutral a party as Mr. Duncan would have been had he served Ms. Duncan himself. The Court of

Special Appeals noted that the trial judge was uninformed as to the validity of the service of process, not misinformed. The Court’s concern about this matter is with what was not said as opposed to what was said. On remand, the court should look at this closely.

The other issue that the Court of Special Appeals addressed was jurisdiction, a more serious concern. The trial court only knew that there was a custody matter in the Pennsylvania courts and only received orders relative to this. They did not know that a divorce case was pending in Pennsylvania. Mr. Duncan’s counsel “did absolutely nothing to disabuse the trial judge of that critical misapprehension. A very effective modality of deception is to relate and to emphasize partial information while remaining discreetly low-keyed about other critical information.” The Court of Special Appeals stated that “[e]ven if this case involved only custody and not divorce, it is clear that it would have to be sent back. The Uniform Child Custody Jurisdiction Act, of which Maryland is a signatory, insists upon complete and effective interstate communication when one state is considering entertaining a custody action when custody proceedings are still pending in another state. Maryland Code, Family Law Article, § 9-206(a) squarely requires that Maryland defer exercising jurisdiction until the proceeding in another state has been stayed.” The court pointed out that the Maryland court was required *sua sponte* to determine whether custody proceedings were still pending in another state. Under the Uniform Act, the court must ascertain whether it has jurisdiction and if it does, then the court must determine whether there is a custody proceeding in another state that has jurisdiction. If another state does have jurisdiction, the court must decline to exercise its jurisdiction. *Etter v. Etter*, 43 Md. App. 395, 398 (1979), quoting *Carson v. Carson*, 565 P.2d 763, 764-65 (Ore. Ct. of App. 1977). The Court of Special Appeals made the point that “when two states are possibly involved in the same or overlapping litigation, neither should plow forward unilaterally without at least consulting the other.”

The Court of Special Appeals reversed the judgment and remanded the case back to Montgomery County so that the trial judge can reconsider the Motion to Vacate the Judgment at a hearing that full arguments from both parties can be heard. The Court also stated that the trial judge may wish to consider “whether there were any ethical lapses in the manner in which the case was originally presented to him.”

Practice Considerations: To avoid jurisdictional mayhem in custody and divorce cases, make sure you and the court thoroughly research whether another case is pending in another State. Do not start a divorce case in one state when there is a

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## Case Notes . . .

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custody case in another. Both types of cases should be held in one state, not two.

### **Gladis v. Gladisova, 2004 WL 1878196 (Md.)**

This matter was on appeal from Baltimore City Circuit Court to the Court of Special Appeals when the Court of Appeals issued a writ of certiorari *sua sponte*.

The facts of the case are as follows: The parties were married in the Slovak Republic and had a child, Ivana in 1993. The year after the marriage and Ivana's birth, Mr. Gladis moved to the United States where he still lives 10 years later with his new wife and baby. Neither Ivana or Ms. Gladisova have ever lived in the United States. Mr. Gladis filed for divorce from Ms. Gladisova in Baltimore City in 1998 and in that decree, he was required to pay child support for Ivana, although an amount was not specified. In June of 2002, Ms. Gladisova filed a Petition to establish support in the Circuit Court of Baltimore City pursuant to the Maryland Uniform Interstate Family Support Act. The issue in setting the amount of child support was whether or not the Court could deviate from the Maryland Child Support Guidelines (hereinafter referred to as the "Guidelines") given that the total average monthly cost of Ivana's care in the Slovak Republic was \$200.00 less a month than what should have been paid under the Guidelines.<sup>1</sup> Master Furnari thought a deviation was appropriate but Judge McCurdy disagreed in ruling on Ms. Gladisova's Motion to Alter and Amend and the Court of Appeals concurs with Judge McCurdy.

The Court of Appeals found that the application of Guidelines initially was appropriate as a Guidelines' award is presumptively the correct amount of child support to be awarded when the parties' combined monthly adjusted income does not exceed \$10,000.00, which is the circumstance in this case. An appellate court will only disturb a child support award made pursuant to the Guidelines if there is a clear abuse of discretion. Voishan v. Palma, 327 Md. 318, 609 A.2d 319 (2002). The Court of Appeals found no abuse of discretion in the application of the Guidelines by Judge McCurdy. First, the Court examined the legislative history of the Guidelines which revealed the legislature's express intent to ensure child support awards sufficiently meet the needs of child and to improve the consistency and equity of the awards. *Id.* at 322, 609 A.2d at 321. "A child should receive the same proportion of parental

income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together." *Id.* Therefore, the Court found it was just that Ivana enjoy an "above minimum" standard of living as it corresponded to her father's economic position. 2004 WL 1878196 8 (Md.). The Court referred to the recent decision in Smith v. Freeman 149 Md. App. 1, 814 A.2d 65 (2002) by way of analogy. If Mr. Freeman's child gets to benefit from increased support as a result of her father's salary increase, then Mr. Gladis's child should benefit from increased support as a result her father's increased economic strength by virtue of living in the US. The Court also expressed concern about recognizing a new factor to consider in deviating from the Guidelines which would make awards less predictable and uniform.

There was a vigorous dissent by Judge Raker, who was joined by Judge Harrell, in which she found the application of the Guidelines unjust and unfair in this instance. She argued that the Guidelines were not meant to apply to the circumstance where the custodial parent and child are living outside the United States. Further, she found that the factors set forth under Ann. Code of Maryland, Family Law §12-202(a)(2)(iii) for considering a deviation from the Guidelines are not exhaustive and do not preclude a review of the disparity in child-rearing costs in a foreign jurisdiction. Finally, Judge Raker noted that Ivana would not be enjoying this higher standard of living ordered by the Circuit Court had her parents stayed together because her parents would have lived a lifestyle commensurate with their earnings, whether in the US or the Slovak Republic. As a result of the Circuit Court's ruling, Ivana will now live at a higher standard of living than her fellow citizens as her father's US dollars will have greater purchasing power in the Slovak Republic.

I would note that Mr. Gladis did not present evidence of his expenses associated with his second child which is a recognized reason for considering a Guidelines' award inappropriate under §12-202(a)(2)(iii).

*Heather Q. Hostetter, Esquire, is a partner with the Bethesda, Maryland, firm of Strickler, Sachitano & Hatfield, P.A.*

### **(Footnotes)**

<sup>1</sup>Ivana's expenses were presented in Ms. Gladisova's financial statement filed with the Court.

## My Life as a Guardian ad Litem

This article will attempt to provide an overview of the role and responsibilities of a *Guardian ad Litem* from one practitioner's perspective. The examples, comments, and suggestions are based on my own experience and the experiences of the other members of the firm that I work in.

Usually, I am appointed as the GAL by one of two ways: agreement of the parties or court appointment. I rarely receive a blind appointment without prior consultation, as issues of potential conflict or time constraints should be explored. When the court or the parties call me, I first determine whether or not there is a conflict of interest and whether I have any conflicts with the dates for the custody pre-trial conference and trial. Usually, the court or the parties will also ask the amount of the fee escrow required. Generally, I believe that a case that requires the appointment of a GAL likely needs a fee escrow commensurate with that of any contested case.

There are several options for where the escrow can be held: 1) each party's attorney can hold his or her client's share of the fee escrow in his or her escrow account; 2) I can hold the fee escrow in my firm's escrow account; or 3) the escrowed fees can be deposited into the Registry of the Court. Holding fees in the GAL's escrow account can be problematic, since the GAL's fees generally must be approved by the court. There are pros and cons to the other two alternatives. Having each party hold his or her client's fee escrow in his or her escrow account may be problematic, if the client becomes dissatisfied with the GAL or his or her attorney. On the other hand, the advantage of using counsel's escrow account is ease of payment. Occasionally, the parties agree to pay the fee without the necessity of filing a motion for fees. The advantage of depositing escrowed fees in the court registry is that the court maintains control over the funds. The disadvantage is the red tape: you must file a motion to receive the fees, and the court order must make specific direction to the registry. (The court also requires that counsel file a federal W-9 form at the time of receipt of payment.) Despite the red tape, I prefer to have the GAL fee escrow deposited into the registry of the court.

Another preliminary task as the GAL is to ensure that the court order correctly describes your role. If you are appointed only as the *Nagle v. Hooks* attorney (*Nagle v. Hooks*, 296 Md. 123, 460 A.2d 49 (1983)), then the order should say so. If you are the GAL but a child is in therapy, the order should also state that you also have the authority of a *Nagle v. Hooks* attorney, i.e. to waive (or not to waive) a child's therapeutic privilege. If it is the court's or the parties' intention to appoint you as the GAL, then the order should clearly designate you as the GAL and should also state that it is your role to determine the child's best interest. Orders stating that you are appointed merely as counsel for the child are a problem, as only a GAL has qualified judicial immunity. See *Fox v. Wills*, 151 Md. App. 31, 822 A.2d 1289,

*cert. granted*, 376 Md. 139, 829 A.2d 530 (2003). See also [Searching for Answers about the Role of the Guardian ad Litem](#), C. Callahan and V. Wills, Maryland Bar Journal, May/June 2003.

Once you receive the order appointing you as the GAL, you should obtain written permission from each party's attorney permitting you to speak with his or her client. If an attorney will not give you permission, you may not talk to the party without the attorney's presence. Generally, attorneys are willing to permit the GAL to meet with their clients without the attorney being present. Early on, some GALs send a letter to the parties explaining his or her role and instructing the parties to refrain from talking to the children about the litigation. Generally, unless the case is hotly contested or there is an issue regarding parental alienation, I do not send initial instructions to the parties. Before meeting with the parties, I obtain copies of the pleadings and any other relevant documents from the parties' attorneys.

The next step in the process is to meet with each of the parties. Usually, the first meeting with a parent is in my office. At this meeting, I request that the parties bring copies of report cards, any therapists reports, school evaluations, and any other document that a party thinks is relevant. I also request that each party provide a list of third party contacts. During the meeting with each party, which usually lasts two to three hours, I discuss a variety of topics, including the following: age; education; housing and neighborhood; employment, including hours of employment and travel obligations; role with the children (current and while the parties lived together); household responsibilities including responsibility for child related duties; problems in the marriage; cause of the break-up of the marriage; any "significant others"; children's activities and the parents involvement in them; the decision-making process used by the parties when they lived together; children's religion; children's health; children's performance in school; how the children are coping with the separation; the names and phone numbers of any persons who have relevant knowledge; and any other issue relevant to the particular case. At the end of the meeting, I make arrangements to meet with the children, usually at the home of each parent.

If the issue is visitation only, I generally meet at the home of the parent who is seeking visitation. However, if the children are older, I may meet with them at my office instead. If the children are younger, I generally try to meet with them at one of their parent's homes, so that they have the security of a parent and familiar surroundings. If the issue is custody, I try to meet with the children at each parent's home. I do this for two reasons: to view the appropriateness of the home and surroundings and to observe the interactions between the

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## My Life as a Guardian ad Litem . . .

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child and the parent. It also helps if the issue is going to be joint physical custody to see the distances between the parties' homes and school, etc. After the initial introductions, I ask the parent to wait in a different room. In one relocation case, the father wanted to move the children to Michigan. I met the children in Maryland and then, while the children were visiting the father in Michigan, I went to Michigan and visited the dad's home, the dad's brother's home, and the children's potential school. I also met with the children's teachers and the dad's significant other.

The purpose of meeting with the children is several fold, and includes the need: to see if the children have been affected by the separation or litigation; to see if the children have any issues that need to be addressed; to see if the children have a preference; to explain my role to the children; and to see how the children are doing overall. I never ask a child where he or she wants to live, with which parent, or which time-sharing arrangement is preferred. Instead, I try to ask questions about what types of things the child does at mom's house and at dad's house, the names of their friend's at each house, the rules at each house, whether the child has fun at mom's house and at dad's house, the types of discipline at each house and other similar questions. I always try to ask the same question for each parent so that the child doesn't perceive any unfairness or bias in the questions.

Once I have spoken with the children, I try to communicate with the persons who the parties have indicated on their lists, the so-called "collaterals." However, unless you put a limit on the number of people to be listed as collaterals, you may get more names than you need or want. I usually try to talk to professionals first - teachers, pediatricians, therapists, etc. Then, I talk to other collaterals, who tend to be of two types: those who think that mom (or dad) is great or those who think that mom (or dad) is rotten. I normally try to limit each parent to five or fewer of the non-professional collaterals. When talking to collaterals, consider whether you may need the testimony at trial. If a collateral witness has given you a critical piece of evidence, but you are concerned about how they might ultimately testify, consider having another person sit in with you during the interview. Your co-interviewer can become a witness if necessary because your collateral changes his or her testimony at trial. Remember, as the GAL, you are one of the attorneys in the case. Pursuant to Rule 3.7 of the Maryland Rules of Professional Conduct, an attorney cannot testify as a witness at trial. As the GAL, you also have the right to conduct your own discovery, including taking your own depositions.

Once I have spoken to the parties, children, and the collaterals and reviewed all relevant documents, I formulate a recommendation, which I will present to the parties either before or

at the pre-trial settlement conference. Usually, once the parties know the GAL's position, discussions ensue to try to settle the case.

If the case does not settle, then the GAL must participate fully at trial. As the GAL, I have sat at counsel table with one of the parties, I have sat in the jury box, and I have sat at my own table. I prefer not to sit at a table with counsel, because it gives the impression of siding with one of the parties, but sometimes space precludes other options. I also prefer not to sit in the jury box, because it gives the impression that the children's voice is not as important as those of the parents. In many courtrooms, there is a table in front of the jury box, which most judges will let me use. In any event, you should check with the court regarding where you sit.

The GAL's role during trial is the same as that of the other attorneys. The GAL is permitted to give an opening statement, call witnesses, cross-examine witnesses, offer exhibits, and give a closing argument and recommendation. If I am going to call witnesses as the GAL, I try to coordinate with the other attorneys, so that there is no duplication of witnesses and the attorneys can manage their time better. Normally, when I call a witness, the witness is usually a court evaluator, a therapist or a teacher. The parties usually call any third party witnesses that I would have called. Generally, the court will not specifically allot the GAL one third of the scheduled trial time; however, the court has always given me ample time to call my own witnesses and to cross-examine a witness.

Although the GAL must present his or her recommendation and convey any child preference to the court, the GAL does not necessarily have to testify in order to give his or her recommendation. In the trials in which I have participated as the GAL, I have given my recommendations to the court in either my opening statement or closing argument. I have never submitted a written recommendation. The better practice is probably to give the oral recommendation at the end of the case after all of the evidence has been admitted. I am aware that occasionally an attorney in a case calls the GAL to testify as a witness. This practice seems to be permissible, *see Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993), despite the ethical prohibitions. When the GAL is called as a witness, one of the parties usually has a strong objection to the GAL's recommendation. Whether to make a record, to placate a client, or to subject the GAL's recommendation to the rigors of cross examination, calling a GAL as a witness is often very risky. It most often results in the basis for the GAL's opinion being highlighted and strengthened.

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## My Life as a Guardian ad Litem . . .

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An obstacle that the GAL must overcome at trial is how to get a child's out of court statement into evidence. There are several methods to accomplish this. First, the GAL could call the child as a witness; however, in most cases, this is a bad practice. One of the jobs of the GAL is to minimize the level of conflict that the child is subjected to during the litigation. Putting the child on the witness stand puts the child in the middle of the fight. It also creates the possibility of the child feeling that he or she is responsible for the outcome of the trial or overwhelming guilt about the choice of saying something bad about one parent or lying under oath. If I am going to involve the child during the trial, I will usually make a request at the beginning of the trial that the court talk to the child in chambers. Chambers interviews are permissible; however, there are certain technical requirements, such as recording the interview, that must be met. Another method of getting the child's out of court statement into evidence is through an expert, i.e., a custody evaluator or a therapist. Again, it had been my experience that in most cases the parties do not object when a GAL relays an out of court statement or the child's preference to the court.

After all of my duties as the GAL are completed, it is time to submit a motion for fees to the court. My practice is usually to reduce my normal billing rate when I am the GAL, because the GAL's role is to assist the court and the parents, and is in the nature of service to the profession. However, I have been told by more than one judge that if each of the parties are paying his or her attorney the full rate, it is unfair to the children to pay their attorney at a reduced rate.

A caution to the wise GAL: beware of manipulation by the parties or their attorneys. Many times, a party, or his or her

attorney, will try to enlist the GAL into a cause. Sometimes it is necessary for the GAL to take a position on an issue early in a case; however, in most cases, I try not to take a definite position until the end of the case (at least not before the pre-trial conference). Once the GAL takes a position, often one of the parties ends up becoming somewhat of an adversary. Taking an early position also subjects the GAL to the criticism that he or she has decided an issue without having done all of the necessary work. Another word of caution to remember is that as the GAL, you are not the parent. The GAL should not be making parental decisions, unless the parties agree to it. For example, in one case, mom wanted to take the child to see a therapist who was particularly receptive to mom's position. Since this occurred at the beginning of the case, there was no custody order in place. Therefore, the statute that says the parents are the joint natural guardians of their child controlled. Dad did not want the child to see that therapist. In order to help her case, mom wanted me to tell dad that the child should continue in the therapy. Instead, of deciding what I thought was a parental decision, I sent a letter to the therapist, mom and dad wherein I stated that dad was opposed to the therapy and that the parties should attempt to select a therapist agreeable to both of them. The moral of this story is that the GAL should limit his or her role to the litigation. The GAL should not make parental decisions. GAL is defined as "[a] guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." Black's Law Dictionary 713 (7<sup>th</sup> ed. 1999). The GAL is not the court-appointed guardian of the person.

*Vincent Wills, Esquire,, is a partner in the Rockville, Maryland, firm of Dragga, Callahan, Hannon & Hessler, LLP, whose practice is primarily family law.*

# The Fit and Happy Lawyer

by David Titman

Chairman of Solo and Small Firms of Howard County Bar Association.

One of the advantages about being an attorney is the control you have of your daily schedule. How you control your schedule will determine the quality of your life and the life of those around you. I offer to you six quality of life tips that work for me; maybe they can work for you.

Tip 1 - Use it or lose it. The exercise of your body and brain is the best way of maintaining their vitality. Few of us have the discipline to sustain for more than a few weeks a daily "work out" in the gym, but everyone can do what I refer to as "couch potato" workouts. For instance on Wednesday evenings while I watch *The West Wing*, I spread a blanket on the floor and do push ups, crunches, leg lifts, running in place and body stretches and twists. By the end of the program I have gotten a good workout rather than merely sitting on the couch.

The same principle applies to parking garages (take the stairs not the elevator) and midweek grocery-necessity shopping (walk rather than drive). Carrying ten pounds of groceries in your canvas bag, lifting it as you walk (like a "dump bell" curl) keeps your arms strong. The walk is refreshing and by taking your child, parent-child communications are greatly enhanced.

Tip 2 - Take time to Experience. Regardless of how busy you are, take a break to walk outside, deep breathe, and look around. By refreshing yourself, you will work more efficiently, effectively and creatively. At least once every hour during your work day, stop what you are doing, go outside and breathe deeply. A few minutes break make a big difference in your mental outlook. Having made countless arguments to a judge, jury, or spouse, the best ideas usually have their genesis during such times of relaxation and reflection.

Tip 3 - Do it Now. The mantra of William Donald Schaffer still rings true. If something needs to be done, do it now. Specifically, don't put off your annual medical examination. Recently a client died after surgery for colon cancer. As her personal representative, I couldn't help thinking if only she had taken such a precaution, I would not be standing in her home going through her life's possessions.

It is not uncommon to read about Bar Counsel action against attorneys who have been disciplined for being dilatory - to the detriment of their clients. There are occasions for procrastination, but not in the practice of law. For those of us who handle personal injury cases, get them trial ready; if the adjuster believes you are ready for trial, you should improve your settlement chances.

Tip 4 - If you are depressed - get help. I read that when Jane Fonda broke with Ted Turner, he became depressed and suicidal. Let me see ... the man has zillions of dollars and a ranch in New Mexico the size of Alaska - what's wrong with this picture? Depression can happen to anyone at anytime. Resolution can involve something as simple as time off or "talking it over with a friend" to the more involved professional intervention with medication.

Check the MSBA home page for further information - <<www.msba.org>>

Tip 5- Compliment. Every day I make it a point to compliment at least one person on something. I believe in positive strokes. Receiving a compliment can really raise your spirits. Of course there are occasionally exceptions.

The other day as I was leaving the Afghanistan restaurant at the Harper's Farm Village Center (the food is wonderfully seasoned), I complimented a woman with a very attractive head scarf. As the woman shyly thanked me, her middle Eastern husband looked at me rather sternly. Later my wife informed me that in some cultures women wear various garments to discourage compliments (by hiding their beauty to all but their husband) and she believed maybe my compliment had been a cultural gaff.

Tip 6 - Be Happy. An oft repeated reason for a long life is the ability to laugh. The late Norman Cousins believed that humor had a rehabilitative affect for sick people. He recommended sick people watch "Three Stooges" movies. This theme has also been advocated by Dr. Andrew Weil who believes a positive disposition is important to avoid sickness. In keeping with this suggestion, for those of you who travel abroad, I offer some useful English expressions (not usually found in travel books) that have been translated into various languages for your use.

## Are all of your jails this filthy?

Vos prisons sont toutes aussi dégueulasses ?  
¿Todas sus cárceles son así de inmundas?  
Sind alle eure Gefängnisse so schmutzig?

## Yessir, you folks certainly have made a mess of this country.

Oui Monsieur, grâce à vous, c'est vraiment le bordel dans ce pays.  
Sí, señor,ustedes ciertamente han cagado a este país.

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## The Fit and Happy Lawyer . . .

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Ja, mein Herr, ihr habt wirklich eine Müllhalde aus diesem Land gemacht.

### **You wouldn't have these ghettos if you people were willing to work.**

Vous n'auriez pas ces ghettos si les gens avaient la volonté de travailler.

Ustedes no serían tan pobres, si estuvieran dispuestos a trabajar.

Ihr würdet diese Ghettos nicht haben, wenn ihr wirklich arbeiten wolltet.

### **Could I see some merchandise that the rats haven't found?**

J'aimerais voir de la marchandise que les rats n'auraient pas touché.

¿Puede mostrarme mercadería que los ratas aún no hayan tocado?

Könnte ich irgendeine Ware sehen, an der die Ratten nicht dran waren?

### **This is the third time I've told you, so listen up this time.**

C'est la troisième fois que je vous le dis, écoutez-moi bien donc.

Es la tercera vez que se lo digo; pare esas orejas, por Dios. Ich sag' dir das jetzt zum dritten mal, also hör wenigstens diesmal zu.

### **You call this beer?**

Vous osez appeler ça de la bière ?

¿A esto le llama usted cerveza?

Nennt ihr das etwa Bier?

### **Stop laughing and bring me the bill.**

Arrêtez de plaisanter et apportez-moi l'addition.

Deje de reírse y tráigame la cuenta.

Hören sie auf zu lachen und bringen sie mir die Rechnung.

### **We kicked your ass in World War II.**

Nous déclinons depuis la Deuxième Guerre Mondiale et j'en suis la preuve.

Mi país entró en decadencia después de la Segunda Guerra Mundial y yo soy prueba de ello.

Wir haben seit dem Zweiten Weltkrieg ganz schön nachgelassen, und ich bin der Beweis dafür.

## AAML SYMPOSIUM

The American Academy of Matrimonial Lawyers is holding its ninth annual Symposium on November 11, 2004. This year, the Symposium is returning to Turf Valley Resort and Conference Center in Howard County at 2700 Turf Valley Road, Ellicott City, Maryland, where a number of previous Symposiums have been held. Registration will begin at 8:15 a.m. and continue until 9:00 a.m., at which time the program will begin. The Early Registration tuition is \$225, with significant discounts applied if a firm sends more than one attendee.

This year's program promises to be compelling; the theme of the program is "How to Settle Your Domestic Cases". As pressure from the Courts mounts to resolve domestic cases through settlement, and as more and more administrative junctures are built into the various Court procedures for the specific purpose of settlement, a study of this important process bears enormous relevancy to us all. The morning speaker will be nationally renowned author and speaker, Dr. Charles Craver, Professor of Law at George Washington University, whose remarks bear the title: "Effective Legal Negotiating: How to Get What You Want - Every Time."

This year's luncheon speaker will be the Honorable Lynne Battaglia, of the Court of Appeals of Maryland. The afternoon session will be broken into two separate sessions, during the first of which the President-Elect of the American Academy of Matrimonial Lawyers, Barbara Handschu, will speak on the Use of Parenting Plans in Settlement. Finally, a panel consisting of Judges Ann Sundt (Circuit Court for Montgomery County), Audrey Carrion (Circuit Court for Baltimore City), Ronald Silkworth (Circuit for Anne Arundel County), Julia Weatherly (Circuit Court for Prince Georges County), and John O. Hennegan (Circuit court for Baltimore County) will offer comments on "Settling Your Domestic Case: Practice and Process Throughout Maryland".

Put this year's Symposium on your calendar now and plan to attend. The Brochures containing the registration form will be mailed out very shortly; if you would like to attend and do not receive one by October 10 please contact Susan Elgin (410.828.6100), Leslie Billman (410.262.1200) or any other Fellow of the Maryland Chapter.

We look forward to seeing you there.

# *S i m p l e P u m p k i n M u f f i n s !*

## WET STUFF:

1/2 cup (1 stick) melted butter

1 cup granulated sugar

2 large eggs

1 cup plain pumpkin (half a 1 lb. can)

DRY STUFF (mix together in separate bowl)

1 2/3 cup all purpose flour

1 TBL pumpkin pie spice

1 tsp baking soda

1/4 tsp. baking powder

1/4 tsp salt

## LAST STUFF:

1 cup (6 ounces) chocolate chips

1/2 (1 1/4 ounces) sliced blanched almonds

Melt the butter. Mix in the "wet stuff." Mix in the "dry stuff." Mix in the the "last stuff." Spray muffin tin with Pam or use cupcake cups. Bake at 375 until done.

ENJOY the abundance of the harvest season!

*By Liz McCloskey, who is the mother of 3 soccer players and the wife of an aging soccer player, (and an all-around interesting person in her own right; she previously contributed to our Beach Reading list in the June 2004 issue).*