



Family Law News

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

Maryland State Bar Association, Inc.

July 2005

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Editor: Walter A. Herbert, Jr.



A Message from the Editor

The practice of Family Law requires us to learn a little bit about everything, from tax law (proper treatment of alimony payments) to ballet lessons (cost of private training for child support calculations) to sexual deviancy (actually, some of us merely put prior knowledge to use when we begin to practice, but let's be kind). Our very own former prosecutor Marty Sitterding puts her prior knowledge of...er, of criminal law, to use in her fine article *What Family Law Attorneys Need to Know About Criminal Law* and Jonathan Greene looks at the intersection of Family and Immigration Law. The intrepid Diana Metcalf reports from the field with her *AFCC Annual Conference* round-up, *Solving the Family Court Puzzle*, and we even have another of those practice and procedure articles for you; by the time we finish this series covering the secrets in all 24 jurisdictions the powers that be will change their protocols just to tease us...no, actually by the time you read this it will have changed...

June 2005...and so another Bar year draws to a close; why, by the time you read this the Annual Meeting will have come and gone, with another *educational* program from your Section Council at our business meeting... Many thanks to our outgoing Section Chair, Barry Dalnekoff; his unwavering support for *FLN* kept it coming to you in its present form during a slight crisis earlier this year.

We've had a wonderful year, brought several new writers aboard *HMS FLN*, and look forward to the new Bar year.

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

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Next Issue: September 2005

LEGAL QUOTATION OF THE MONTH

"We tell ourselves that trials are about truth, but they are also very much about clarity. The most convincing case wins, not necessarily the truer one." Steven Lubet, [Murder in Tombstone The Forgotten Trial of Wyatt Earp](#)

Following the killings of Billy Clanton and Frank and Tom McClaury, the infamous "Shootout at the OK Corral", Wyatt Earp faced a grand jury in Tombstone, Arizona; this book examines that proceeding. Fascinating look at procedure in the 1880's, legal tactics, difficult clients...Lubet is a law professor.

Message from the Chair - June, 2005

The theme of this year's annual program – *Annapoloz* – is a fitting note on which to end this year. I heard rumors, unfounded no doubt, that some people believe the Section Council is like the man behind the curtain – never seen, sometimes heard and of little overall value. This year, however, anyone who may have entertained such thoughts will need to think again. Each year, our activities become increasingly more demanding and time consuming but the results are worth those efforts as our visibility and credibility as a Section increases.

My past messages have touched on what we, as a section, have attempted to do and what we have achieved. The Newsletter, Hot Tips, Family Law University, MICPEL programs, the Beverly Groner Award, the Listserv, the Website, the legislative programs, pro bono activities, *The Bar Journal*, public information brochures, local bar association and law school liaisons and, of course, the Annual Meeting program in Ocean City – all of these are made possible by the very fine, able and talented lawyers of the Section Council. It has been my distinct honor and privilege to have served with the present and past members of the Section Council, and there is no

quick and simple way to express my gratitude and appreciation for all of their time, effort and energy that has made the work of the Section Council the success that it is and will continue to be in the future.

In addition to the members of the Section Council, the folks at MSBA headquarters as well as our friends at MICPEL deserve hearty thanks. Without the incredible administrative support we receive from MSBA and unfaltering assistance from MICPEL, we simply could not survive, let alone thrive.

The Family & Juvenile Law Section is one of the most active, important and necessary sections of the Maryland State Bar Association. I again urge those who are not members to join the Section; those who are members to get involved with the Section's activities; and those who are involved to do even more. We do make a difference and we must continue to do so.

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

When Immigration Meets Family Law: An International Collision

by Jonathan S. Greene¹

Combining immigration law and family law is often as promising as mixing oil and water. Unfortunately, you are going to have to do some fancy legal chemistry someday because immigration issues are appearing all the time in family law cases.

Maryland might have more than 800,000 foreign born residents. Of those, between 200,000 and 250,000 Maryland residents are immigrants without any legal documents. Many more are present in the state on temporary visas for work, study or vacation. Maryland and Delaware also feature the highest ratio of undocumented immigrants to legal immigrants in the Northeastern United States.²

Not surprisingly, many practitioners have to deal with foreign born residents in family law cases all the time. While a good family law attorney can obtain a great result in a divorce case, failure to pay attention to the immigration consequences can result in a client being deported and never enjoying the benefits that were so richly deserved.

There are many scenarios for family law attorneys to keep in mind to avoid an unintended disaster. This article intends to focus on one particular problem in the area of support. If readers like the information contained below, other immigration issues will be explored in future articles.

By the way, family law practitioners are not alone in facing immigration issues. If ever in doubt, family law attorneys should consult with highly qualified immigration counsel for assistance. More than 700 lawyers from Maryland, D.C. and Virginia belong to the American Immigration Lawyers Association, the leading specialty bar for immigration lawyers.³

(Endnotes)

¹ Jonathan Greene is a member of Howanski & Greene, LLC in Towson. He is the current chair of the Washington, D.C. Chapter of the American Immigration Lawyers Association and a frequent speaker and author on immigration and family law issues.

² The number of undocumented immigrants and legal immigrants is estimated by the Pew Hispanic Center, "Estimates of the Size and Characteristics of the Undocumented Population," Jeffrey S. Passel, March 2005.

³ The organization can be contacted at www.aila.org

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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:

No July meeting: we need a break...

August 17: Planning meeting for the 2005/2006 Bar Year

Justin Sasser and Elveta Martin, Co-Chairs

***Baltimore County Bar Association Family Law Committee**

Thursday, June 23, 2005 - 4:00 p.m. - Grand Jury Room in the Court House; Baltimore County Bar Association Family Law Committee Organizational Meeting

Wednesday, September 28, 2005 - 6:00 p.m. - Towson Golf and Country Club -September meeting of the Baltimore County Bar Association Family Law Committee

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MICPEL

Family Practice 2005 Update

August 26, 2005
9:00 a.m. – 1:15 p.m.
University of Maryland Shady Grove
9640 Gudelsky Drive
Rockville, MD

August 31, 2005
9:00 a.m. – 1:15 p.m.
University of Baltimore Business Center
1415 Maryland Avenue
Baltimore, MD

In one comprehensive program you'll learn about all of the major developments in Maryland family law during the past twelve months. We'll also clue you in on some small developments that have changed family law practice in subtle,

but important, ways. You'll get an invaluable update on case law, legislation and court rules. Your guides on this interesting and informative tour through family practice territory are Paul Reinstein, Bryan Renehan and Stacy LeBow Siegel - veteran MICPEL faculty members and respected, experienced, highly effective lawyers, who have concentrated their practices in this area for many years. In addition to the great learning opportunity, you'll have time to network with colleagues and make new contacts among attendees who consider this highly regarded annual update to be a required component of their professional development plan as family law practitioners. New case law, new legislation, new rules, plus analysis of court trends over the past year, advice on advocating in the gray areas left unresolved by recent decisions, and lots of practical tips on avoiding procedural pitfalls - in short, everything you need to know to keep up-to-date in family practice - will be covered.

Please contact MICPEL at 410.659.6730 or e-mail info@micpel.edu for more information or to register for this program.

Tuition:

MSBA Family Law Section Members: \$149
MSBA Young Lawyers Section Members: \$149
MSBA Members: \$169
All Others: \$199
Flex or Select Pass Holders: \$0
Video Replay: \$149
PA MCLE Credits Fee (\$2/hour): \$8

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My mother, Lorraine Herbert, turned 75 years old on May 11. My sister Bonnie had a party for her on May 15, most of the family and friends were there, great food (the *lasagna* was wonderful, Carmella). But...what with Daniel's soccer game, and getting ready for a trial with Leo Keenan (this couple split and reconcile, split and reconcile, accompanied by calls to the Sheriff, etc.) and getting this issue ready, well, I forgot to get her a card. I know, I feel like a heel, and so, on behalf of the 1,000 members of the Family & Juvenile Law Section of the Maryland State Bar Association:

Happy Birthday, Mom!!!

Is Your Client's Income Properly Reported?

Spouses may try to hide funds during divorce proceedings in several ingenious ways to improve the share of the ultimate financial settlement. Here are some of the methods and how to catch the offending parties.

By Cheryl B. Hyder, MT, CPA, CFE, CVA

Bart and Alice were the seemingly perfect couple – married 32 years, four grown children, six grandchildren. Bart had built Bacme Electric into a multimillion-dollar business and provided well for his wife and family. He had provided well for his mistress, too. A mutual friend had told Alice about Bart's dalliance and before long Alice had filed for divorce. Bart wasn't going to split without taking some big bucks, however. For years he had been hiding away funds in secret accounts, with cooperative relatives, and through illegal and dubious business practices.

But Melanie, an astute fraud examiner and forensic accountant retained by Alice's lawyers, thoroughly examined Bart's finances. She discovered the hidden accounts and investments, and his other illegal money arrangements. Bart now had to give up thousands of dollars in assets, answer the charges of a criminal investigation, and endure his kids' rejection. Oh, and his mistress left him.¹

* * * * *

Every couple wants a successful marriage, but sometimes the dream becomes a nightmare when events lead to a failed relationship culminating in one party filing for divorce. Due to the lead time usually associated with a deteriorating marriage, one or both parties may engage in varying degrees of "divorce planning." Tactics may range from setting aside liquid assets to cover necessities during the divorce proceedings (including professional fees), or outright fraud, all of which improves one party's share of the ultimate financial settlement.

Either spouse may engage in tactics designed to result in a greater monetary award even though only one spouse may be in a moneyed ("independent") position. As a result, family law practitioners, fraud examiners, and forensic accountants should never forget that information received from either party may be intentionally misstated and/or manipulated.

It's important to address the issues encountered during the income, or support, aspect of a case. Be cognizant that a spouse may legitimately be so distraught by the deteriorating marriage that he or she is distracted from his/her otherwise lucrative and successful livelihood to the point where income suffers. At the same time, however, there may be other reasons for the sudden decline in income available to support the family and so it's necessary to look at the financial representations with a critical eye.

Defining underreported personal income

A basic definition of underreported personal income is net cash flow of a legal or illegal nature, which a party failed to disclose to a third party in accordance with that party's reporting criteria.

Either unreported or understated income may be referred to as "underreported" income. Underreported income may be attributed to direct as well as indirect sources. When an individual gains financial advantage – with or without an apparent, positive impact on cash flow or liquidity – this is said to create an indirect source of income available for support by virtue of the benefit received.

One must understand and accept a few truisms before being able to understand how income is underreported:

· *"Income" is in the eye of the beholder.* By this, I mean that what's considered "income" for support purposes may not be recognized as income outside of family court. Further, the particular rules identifying income available for support are established according to state law.

· *It's possible for income to be earned before it's received.* Income is either earned and re-assigned to a third party co-conspirator, or intentionally not paid until a later date at the recipient's request. One should consider whether the payer and the recipient account for the item in the same manner and in the same tax period, and of course, whether the recipient is able to influence the timing of the payment.²

· *It's possible for income to be received before it's earned.* This is the reverse of the second item; in this instance, the recipient receives advances against future earnings or future expenses if there's a bona fide expense account involved. These advances should be disclosed as debt on the individual's personal balance sheet; however, the accountant or attorney must make complete inquiry of the company regarding the security for repayment, loan terms, etc. to ensure that the "loan" isn't a disguised bonus and represent current income.

· *It's possible for income to be disguised as loans or other payments.* For example, an illusory reduction in compensation is created by "loaning" the company a portion of one's

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salary (in which case, the "loan" is "re-paid" a few days after the divorce is final). In another common scam, a cooperative employer may reduce cash compensation while at the same time assent to making direct payments to third parties on behalf of the employee. Net (after tax) income available for support may also be artificially deflated by increasing tax withholdings. The taxes are ultimately refunded to the taxpayer-spouse when a tax return is filed, but in the interim period it appears that net cash flow is reduced (for instance, if a pay stub showing year-to-date withholdings is used to calculate net income available).

· *It's possible for income to be earned, received, and simply omitted from the reporting process.* This is a classic application of the "Fraud Triangle" first proposed by Donald Cressey, a noted researcher in the area of occupational fraud and abuse. His theory is that all frauds have common elements, which can be explained in our context as follows:

- ♦ **Pressure:** One of the spouses, perhaps the independent spouse, feels pressured to maintain a certain lifestyle while also providing a similar lifestyle for the estranged spouse.
- ♦ **Opportunity:** Because of the voluntary reporting system used in the family court system a spouse with a vested interest in underreporting income is given an opportunity to omit income from an income and expense report and/or a tax return for the corresponding year.
- ♦ **Rationalization:** The spouse is able to justify his or her actions by one of two common mind-sets: "I've earned it and I'm keeping it," or "I deserve it for putting up with that rascal."

Defining income available for support

"Income available for support" generally includes income from all sources and may include something called "potential income" when allegations of voluntary or intentional impoverishment are involved.

Sources of income available for support must be identified before they can be quantified. Where does one look for this income? Forensic accountants and fraud examiners are specially trained to recognize information that's omitted, as much as they are skilled in examining facts provided. A common mantra is that it's as much about what you *don't* see as it is about what you *do* see. For instance – when reviewing marital bank accounts, are all expenses that you'd expect to see accounted for? If not, why not? Here's a simplistic illustration of the thought process: one spouse may disclose income of \$100,000 yet at the same time claim expenses of \$125,000. How did the couple make ends meet? The answer may be as

innocent as an error (reporting something twice), or as sinister as the existence of a complex scheme in which unreported income is deposited into hidden bank accounts to fund expenses or investments that may also be undisclosed.

If it's suspected that one of the individuals was contemplating separation or divorce prior to the actual event and therefore had ample time to plan the financial separation, additional work will be required to ensure that all income sources are captured and assets are counted. This expanded scope may mean analyzing additional historical years of the marriage, applying supplemental procedures to the base information, or including third parties in the discovery process.

Identifying income

A good starting point in identifying income sources, marital assets, and liabilities,³ is to review information previously reported to third parties for purposes unrelated to the divorce. These data points provide a benchmark reality check from a time when "things were good" and often predate a spouse's urge to manipulate actual finances or financial reports, at least with regard to the domestic situation.⁴ Be careful to keep these data points in perspective, however, because the requirements for the referenced report may differ from those of the court. Thus, it's entirely possible that the amounts previously reported won't agree to "reality" as defined by the family court, for any number of legitimate reasons.

Earnings, or compensation for services, are the most common form of income. Are earnings always considered "income" for family court purposes? Well, it depends. Earnings generally can be included in support calculations when they become accessible (that is, available). When compensation for services rendered consists of something other than cash wages, an appropriate line of inquiry and analysis may include the following questions: When does the right to the income become absolute and unrestricted? Does the spouse have the ability to designate an alternate payee? Can the spouse influence the timing of the payment? As these questions demonstrate, one spouse may be able to defer some elements of income until after a date of particular significance in the divorce proceedings. The facts and circumstances of a particular case may indicate that a proper line of inquiry includes future expectancies as well as other known sources of income.

Future expectancies, or income that might be anticipated to be received in the future, include such items as personal performance bonuses, large contract awards to a business (which

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impacts the business owner or executive's compensation), or other business opportunities. This may represent present earnings, which are beyond the predicted or normal compensation stream. As a result, it may be possible to manipulate apparent receipt of this income by diverting it to a trusted source while the divorce winds its way through the legal system. For example, one spouse may earn money that's entrusted to a sibling who then uses the funds to surreptitiously pay certain expenses on behalf of the concealing spouse. The result is "parked" income resting with a co-conspirator during the pendency of the divorce action, possibly used to fund lifestyle expenses or start-up business ventures, which are then concealed from the court. Opportunities to engage in this conduct are greater when a business enterprise is involved; as a result, a forensic accountant or fraud examiner will probably need to examine the relationship between the business' income and expenses and those of the marital unit.

Other common sources of income available for support, besides compensation, may include:

- Net cash flow from rental real estate, which is defined by reference to actual cash flow and not "allowable" deductions for income tax purposes. Support statutes aren't consistent in their treatment of depreciation or other "paper" expenses for determining the "ordinary and necessary" expenses that offset cash flow in determining income available for support.

- Amounts received, which are intended to replace income, are themselves considered income. Insurance benefits in place of lost compensation, such as workers' compensation, or unemployment or disability insurance, are considered income available for support. These benefits are distinguished from assistance-based programs such as food stamps, or transitional assistance that are *not* counted as income for support purposes. Be alert to the possibility of "intentional impoverishment," which occurs when the recipient spouse tries to change his or her employment status to reduce apparent income for a greater financial benefit through the divorce proceedings.

- Investment income, such as that arising from interest, dividends, and trusts, *may* be considered an element of income available for support, depending on the particulars of a case. Some jurisdictions prohibit a "double dip," which occurs when income is counted toward both support and asset distribution. If the money received is a return of capital or principal, however, it isn't generally considered in the calculation. When analyzing your facts, ask these questions:

- ♦ Is the income stream reinvested in the principal or distributed to the owner?

- ♦ Is the underlying asset marital, and if not, have the courts ruled that the character of the attributed cash flow is marital or excluded?

- ♦ Is the non-taxable as well as taxable income stream considered appropriately?

- Non-compensation cash flow from an operating business or investment partnership. This includes such items as dividends or distributions of business income or property (with or without consideration of the company's historical cash retention and distribution policy). This cash flow, as discussed below, may take the form of direct cash payments *to* the spouse or *on behalf of* the spouse.

Following are some other examples of an "income disconnect," in which the income reported to family court and another party may legitimately differ:

- Not all "income" is reported on a personal income tax return. Such things as tax-free interest and dividends, certain insurance proceeds, and retirement plan income needn't be reported.

- Items may be included in "income available for support," which one wouldn't otherwise consider as accretions of wealth or sources of income. When the independent spouse makes a discretionary contribution to his or her closely held business' profit sharing plan, he/she is decreasing the business' profits. This has a compound effect – the business' income (and cash flow) available to distribute has declined⁵ and that individual's compensation, and perhaps that of other employees (which presumably would have been paid currently), is partly deferred.

- So-called "loans" lacking substance or possibly intent to ever repay may be reported as debt of the subject spouse, but may in fact be a source of additional cash flow and income. For instance: Dr. Smith routinely pays personal expenses from his business, and his astute bookkeeper accounts for these items as a loan to Dr. Smith from his medical practice. Unfortunately, the tax accountant isn't quite as alert and so these advances are never reported as income to the good doctor.

Other sources of cash flow may or may not generate income available for support based on the facts of a particular case. These fact-sensitive sources are outside the scope of this article, but include stock option awards, retirement benefits, trust distributions, and gifts. Instinctively, one may presume the character of these items isn't "marital"; however in certain situations this may not be the case.

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June Birthdays:

Ray Harryhausen: Filmmaker, Stop Motion Animator: Noteworthy film was "Jason and the Argonauts" (in my Walter Mitty moments I am Jason and OCSE are the sword-wielding skeletons!) Best man at Ray Bradbury's wedding...

Malcolm McDowell: Actor: In what film did he and his impish, fun-loving pals spend an evening in "The Korova Milk Bar"!!!

July Birthdays:

Ann Landers and Abigail Van Buren: I admit it, I read their advice columns: our past chair Keith Schiszik clipped one of Ann Landers columns on how to screw up children of divorce and handed it out to clients for years...now you know that Keith reads Ann Landers, too.

William Hanna: Of Hanna/Barbera fame, creator of *Tom & Jerry* and *The Flintstones*: another admission, I have spent considerably more time over the years with Fred and Wilma than with Prosser or Rotunda...

August Birthdays:

Judge Lance Ito: Let O.J.'s trial go on for a year, I'm lucky to get 3 hours in front of a Master.

Preston Sturges: I guess this is our Hollywood issue: Screenwriter, Filmmaker, renaissance man. Invented the perfume "Red Red Rouge" in his early '20's, wrote numerous stage hits and wrote and directed some of the funniest films of the '30's and '40's: *The Great McGinty*, *Hail The Conquering Hero*, *Sullivan's Travels* and my favorite, *The Miracle of Morgan's Creek*: small town girl wakes up with a hangover and while racking her brain to review the night before finds herself married and pregnant and yes, it's a comedy. William Demarest (later Uncle Charlie of *My Three Son's* fame) is the harried father coping with his daughter Trudy Kockenlocker's problem as well as trying to shield his far-too-worldly younger daughter, 14 year old Emmy:

Kockenlocker: You wasn't thinking of getting married, was you?

Emmy: At fourteen? I was thinking of going down to the corner and having a soda.

Kockenlocker: I didn't mean what you was thinking about right now. I mean generally.

Emmy: Generally, yes.

Kockenlocker: Generally, yes what?

Emmy: Generally, yes, I think about marriage. What else do you think I think about?

Kockenlocker: Oh, you do, do you?

Emmy: Anybody can think about it, can't they? It doesn't cost anything to think about it. It's only when you do it that it costs two dollars.

Kockenlocker: *What* costs two dollars? You seem to know a great deal about a subject far beyond your years...

Burt Ward: The Boy Wonder turns 60...

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Finally, be aware that income reported elsewhere may have been “puffed,” or overstated, if it served in the best interests of the individual. For instance, a loan application or personal financial statement submitted to a bank in connection with a request for financing will usually contain a section asking for details on the applicant’s income. That individual may believe that to secure the necessary financing some aggressive (and fictional) arithmetic is in order.

Closely held business considerations

If one spouse is a principal or key executive in a business enterprise, there are unique opportunities to manipulate his or her personal income due to the direct relationship between the business’ income and that of its owners. When a business has a good year, the presumption is that its principals and key executives receive larger bonuses, and the opposite is true as well. It follows, then, that by artificially deflating a company’s profitability, one can create the illusion of having less income available to an individual attributed to that business – conveniently in the period of or immediately preceding separation.

The most common scenario occurs when the business pays personal expenses on behalf of the independent spouse and fails to include the amount(s) paid in the spouse’s income (that is, treats the expenses as ordinary and necessary business expenses). When the business pays personal or other discretionary expenses for the independent spouse, this creates income attributable to that person for purposes of calculating support, irrespective of its inclusion in income reported for tax or any other purpose. The mere payment of personal expenses through a related business isn’t what is objectionable; the objection arises from the business’ failure to account for the payment as part of compensation.

One should be aware that it is possible that the business included those items, which were personal in nature and paid directly by the business, in the individual’s compensation. Thus, one should *not* assume that payment of personal expenses by a business is improper on its face. One must determine if the expenses were attributed to the individual and included in his or her compensation. If the items are accounted for by the business as *advances* or *loans* to the individual, or as *business expenses*, then it’s likely that the individual’s personal income will be underreported for income tax if not other reporting purposes. If there are elements of “personal income” improperly characterized by the business, these items may be either considered additional income available for support, or “normalizing adjustments” for purposes of an associated business valuation – but not both.⁶

Manipulating or accelerating expenses of a company subject to one spouse’s control is another way to adjust personal

income, this time by reference to business income. The business income, which otherwise would be available for distribution to its principals, is intentionally and falsely diminished to decrease the apparent income available for distribution and therefore, support. Common schemes may include:

- directing prepayment of legitimate business expenses;
- issuing payments to related parties for services never rendered (in some instances, the cash is “parked” with the recipient until a later date when it’s refunded); and
- intentionally overpaying vendors with the expectation of receiving a refund (which the spouse will convert to cash after the divorce).

Unfortunately, it’s also conceivable that persons other than the involved spouse may cause a dip in the business’ operations thus depressing the business income available for distribution to that spouse. For instance, if a trusted executive is embezzling, less income will be available to the owner-spouse due to situations beyond his control. If this occurs, the two spouses may need to work together – first to resolve the embezzlement through proper legal channels, including prosecution and restitution (if available), and then adjusting the financial analyses. At the end of the day, the subject company’s results of operations and financial position should be as close to economic reality (pre-event), for both the inevitable business valuation and the evaluation of income available for support without penalizing either spouse for the misdeeds of the third party.

As this discussion indicates, direct or indirect sources of income may escape detection unless a forensic accounting and/or fraud examination is conducted.

Assume nothing

One shouldn’t assume that a single instance of underreported income for a particular purpose creates a reporting pattern consistent among all interested parties and reports issued to them. The same person who engages in underreporting for income tax and/or divorce purposes may also over report his or her income when applying for loans or disability insurance. It’s imperative that as many available data points as possible be sought out and corroborated. Any inconsistencies, no matter how slight, need to be investigated.

The financial discovery process may take on a feeling similar to that of a federal tax authority investigation. This

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is because understatement of income available for support has a motive comparable to understatement of taxable income – “less is more.” In both cases, underreporting enables the reporter to keep more and part with less income. As a result, a “divorce planning” technique may only reflect changes in the magnitude of possibly already existing tax fraud.⁷

Due diligence required

How does one determine whether income is properly represented to the court? A forensic accountant or fraud examiner will usually conduct an initial interview with a client about lifestyle issues and possibly review reports prepared for the court detailing the marital lifestyle.⁸ The next step will likely be inspection of preliminary documents secured by the attorney early in discovery, such as financial statements and tax returns for the individuals and any business entities associated with them. These documents provide insight into the finances of the parties, including the expected or potential sources of income and possibly an otherwise undisclosed business enterprise in which one of the parties has a financial interest.

Some of the fundamental sources of information to request access to include:

· *Income, estate and other tax returns.* These documents should be requested for the parties to the divorce, including any related business enterprises. If there are allegations of income diversion to a paramour then that individual's income tax returns should also be requested. All tax returns contain an affidavit (above the signature line) stating that the document is being signed under penalty of perjury by both the preparer and the subject of the reporting.

· *Personal and/or business financial statements.* These are prepared for the independent spouse relative to life insurance or loan application requirements but may also be prepared for estate planning or other bona fide purposes. These forms are often prepared by the accountant for the business or individuals, and may be required for compliance with loan covenants or other reasons such as life or disability insurance applications or estate planning. The financial statement, particularly if a bank or insurance form is used, may also contain a statement attesting to the accuracy of the information reported and requiring the signature of the preparer and the subject.

· *Loan and insurance applications.* These documents are examined for consistency with other disclosures as well as additional information. Applications of this nature are signed

under penalty of perjury or with some similar statement attesting to their accuracy.

· *Bank, brokerage and other investment account statements and canceled checks.*

· *Site visit to a business owned or controlled by one spouse.* If one spouse owns a business, the expert should visit it and check out how its run, how often the owner is on the premises, and his or her relationship with employees. All these details can provide clues as to whether the spouse-owner is receiving unreported income or inflating expenses.

Glaring errors, irregularities, or possible frauds may be discovered in the tax returns, financial statements, and applications. These are the same documents whose accuracy was attested to in a sworn statement by at least one party if not both spouses, and possibly by a third-party preparer. When these errors, irregularities or possible frauds occur, the impact on the divorce proceeding isn't clear.

In some jurisdictions, special masters or judges may halt proceedings and, off the record, urge the parties to settle the case rather than disclosing on the record and in meticulous detail the nature of the improprieties to the detriment of both spouses. Others tend to “let the chips fall where they may.” These “chips” may include intervention from tax authorities as the result of a revenue agent discovering the improprieties by reading family law decisions. The federal tax authority's actions may be warranted; for instance, a cash hoard containing excessively high amounts of unreported income may be uncovered, or there may be a substantial amount of personal expenses (in one case, 90 percent) deducted as business expenses on the business' income tax returns. If tax authorities become involved, either because a revenue agent discovered improprieties by reading published cases or because another party contacted the agency, then in most cases neither spouse will benefit. Obviously, the spouse who engaged in underreporting taxable income will have financial consequences that may be severe. The other spouse, who may or may not be an “innocent spouse” according to tax statute, will also feel the repercussions in the way of reduced income available for support or fewer assets available for distribution.

The biggest question is whether the documents and other evidence provided by each party for examination by the other spouse's experts will support the other information provided and that which the forensic accountant or fraud examiner is able to discern using specialized methodologies. The business

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PARENT COORDINATION

An Effective Means to Reduce Child Custody Conflicts and Litigation

By Patricia J. Simpson, MS., LCPC

Background

In many instances of divorce, especially involving child custody or child support, there is a high level of conflict between the parents. The child is often used as a tool and is thrust into the conflict adding undue stress to a child that is already suffering as a result of the divorce or custody conflict. The conflicts result in the parties routinely returning to the Courts to resolve even the most minor grievances. The result is an inundated Court System attempting to resolve issues of which the Court, in general, has insufficient information on which to base a decision.

In many situations the parents have poor communications skills relative to each other, which is exasperated by one or the other being angry, frustrated or frightened by the dissolution of the marriage. Each wants the child to see him or herself as the aggrieved party and the other parent to be the "bad guy." In general, this is not healthy for the child, since the child should be allowed to have a loving relationship with both parents. Statistics show that children in high conflict divorce and custody battles show high levels of depression and /or anxiety. These children are at high risk of poor social development, aggressive behaviors, oppositional/defiant behavior, poor academic performance, eating disorders, substance abuses, and mental illness.

Parent Coordination: Goals and Advantages

The first goal of Parent Coordination (PC) is to reduce conflict for parents and children by teaching the parents problem solving and conflict resolution skills. The second major goal is to move the parents towards an effective co-parenting relationship. Parent Coordination strives to open lines of communication between the parents by teaching them communication skills that will reduce the probability of conflict. The third major goal is to help parents understand normal child development and the impact that conflict has on the child. It is hoped that armed with such knowledge, parents will be more inclined to remove the child from the conflict and place the child's needs above their own.

Parent Coordination has several advantages. It cost and time effective relative to legal fees and court schedules. Parent Coordination can reduce parents' stress when they believe he or she is "heard" immediately. The Parent Coordinator can initiate immediate resolution. Because the PC is involved routinely, alienating behavior on the part of either parent can be spotted and reduced or eliminated. If

Court ordered, neither parent can "fire" the PC if they don't get their way. And finally, if the parents are cooperative and amenable to embracing change, the PC and Court strife can be time limited.

Roles of the Parent Coordinator

The PC is typically an individual who has specialized training in human behavior (licensed counselor/psychologist/social) in order to recognize behavior patterns; mental health counseling; conflict resolution and in most instances mediation skills. The PC has multiple roles. First, he/she can assess the parent's current state relative to anger, frustration, mental health and ability to consider the children's reaction to the conflict. Further the PC assesses communications and modifies as necessary, the means and style of communications to reduce conflict. Using books, training materials and direct intervention, the PC will help the parents understand the impact of their conflict on the child and make choice that are in their child's best interest.

Typically the PC will help the parents learn how to appropriately address issues that have the potential for conflict. Such issues as: Time sharing including temporary modifications to Court ordered schedules; parental contact for the non-custodial parent; differing concepts on discipline, household rules, and day to day routine; daycare and babysitting; education, including change in schools, teachers meetings, homework; extracurricular activities, transportation and transfer of the child and their belongings; the involvement of significant others and extended family members.

The Parent Coordinator cannot address issues such as: Change in legal custody; change in parenting time that would impact child support; a parent's permanent move out of state or a significant distance from the other parent; allegations of physical or sexual abuse; or, the introduction of a new party as custodian for the child. Nor can the PC provide legal advice to either parent or act as a therapist for the either parent or the child.

Optimal Ground Rules for Effective Parent Coordination

Depending on the court, the Parent Coordinator is appointed by the Court as an agent of the Court. The Court order usually defines the level of authority of the PC ranging from teacher to arbitrator. In some instances parents

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Parent Coordination . . .

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and their attorneys can agree to Parent Coordination under the general oversight of the Court. The Parent Coordinator may ask both parents and the attorneys to sign a contract or the Court will design an all inclusive order that provides for every detail regarding time, fees, and the previously noted issues relevant to the particular case. The parents must understand that cooperation and change is in their own, and the child's best interests. In either case it is best if the attorneys are instructed to disengage and allow the PC the opportunity to develop a rapport with both parties. It should be recognized that neither party will change overnight and that often the party with the most significant issues will disagree with the PC and try to return to litigation tactics to gain an advantage. For the PC process to be effective the attorney must not engage, but should reflect their client back to the PC with the encouragement to fully cooperative. Litigation should be suspended except for dire situations, and even then the PC should be allowed the opportunity to resolve the conflict first. The attorney for either party may be contacted if it is felt that the client may be putting himself at legal risk due to some action or behavior. The PC should have access to both the parents' and child's medical, mental health and education records and professionals. Further, the PC should establish a rapport with the child and Guardian Ad Litem should there be one.

The Court order usually defines the level of reporting the Court expects. This typically includes periodic written reports or reports prior to specific hearing dates. Copies of such reports are provided to the parents via their attorneys. This provides the attorneys the opportunity to monitor their clients progress, and if necessary offer further encouragement for continued improvement.

The Evolving Process

Parent Coordination is a relatively new concept in the Maryland Family Court System. Some counties are reaching a level of maturity while others are still initiating the process. Each County must assess their own needs, select the aspects of the concept that best suit it and establish their own baseline processes. Even then the County must be fluid in its approach, as the concept and experiences dictate evolution.

I have been practicing Parent Coordinator in Charles and Prince George's County for approximately one and one-half year. Both counties have used my skills in creative ways to seek the best solutions for parents experiencing divorce or

the long-term, deeply entrenched cases that appear insolvable. When I am asked why I prefer to work with parents who create so much conflict and appear not to be motivated to change, I respond that my role is to motivate parents to experience the joy of giving their child a happy childhood free of conflicts of loyalty and feeling responsible for the family strife. My skills are growing with every case and I have been extremely fortunate to work with family courts and attorneys who are dedicated to assisting these families to stop their conflict. I recognize the importance of having a legal support system that respects my skills and is open to alternative, creative choices that move these parents to develop a co-parenting relationship that is not focused on who wins the child but how the child can be a winner. The stress associated with working with these families is high but worth seeing the reduction of the conflicts and litigation. I gain satisfaction from being a part of the team that supports and moves the family towards healing. I feel professionally empowered that family law and mental health professionals interface and unite to find better solutions for these families. All of us intuitively understand that when we provide a child conflict and guilt free access to each parent, we are helping a child to grow into a healthy, productive adult. I am excited about developing Parent Coordination in the Southern Maryland Courts and expect that it will serve as a creative resource for the Courts and the families they serve.

Patricia Simpson is a Licensed Clinical Professional Counselor who has provided mental health resources to seven Maryland Family County Circuit Courts for twelve years. She is currently assisting the development of standards of practice for Parent Coordination Programs in Southern Maryland Courts.

A Birth Announcement!!!

Baltimore City Family Division Master (and Section Council member) Christopher Panos and his partner, Dennis Cashen, proudly and joyfully announce the birth of their daughter, Catherine Sophia Cashen-Panos, who arrived in this world on February 7, 2005 at 4:47 p.m. Cate (as her dads call her) weighed in at 8 lbs., 3 oz. and 20.5 inches long. Master Panos happily reports that Cate's continuing objection at sleeping through the night was overruled with finality during her fourth week of age.

PARENT COORDINATION: The Parent's Perspective

By Anon.

I love being a mom! Since becoming a mom, raising my son so that he knows he is loved and respected has been one of my long-term goals. This hasn't changed just because I'm divorced. What has changed is that my son now has two homes instead of one. Maintaining a balance between these two homes such that our son can thrive, and neither parent feels cheated regarding time with our son, has been added to the mix.

Don't get me wrong. My own selfish preference would be that my son and his father spend little time together. But my son has a need to be with his dad and to develop his own opinion of his father without my undue influence. My son's father also has the right to develop his own relationship with his son. To make a long story short, my son's father and I ultimately came to an agreement for 50/50 custody with parent coordination based on the recommendation of a private custody evaluator.

Parent coordination is a fairly new concept, not yet widely adopted. I've been told that the concept originated with the publication of "The Unexpected Legacy of Divorce" by Judith S. Wallerstein, et al. in 2000. Adult children whose parents were divorced 25 years previously were interviewed in preparation for this book. I've read it and could engage in a lively debate about its scientific merits, but one thing becomes clear to anyone who reads this book: children are adversely affected to an incredible extent when exposed to their parents' divorce conflict.

All parents want what's best for their kids. Unfortunately, a lot of parents have trouble getting past their own anger and hurt after a divorce, and exposure to the resulting conflict seriously hurts the kids. In parent coordination, a third party is used to help teach the parents how to get past the conflict and onto a different level of interaction for the benefit of their children. This third party is available to go to court for those situations that cannot be otherwise resolved. The parent coordinator can also be used as a "tie breaker" in rare situations when the parents cannot agree upon some time-constrained situation that the parent coordinator believes is critical to the child's well being. Parent coordination isn't meant to be feel-good therapy, it's meant to help parents get past their anger and get on track for parenting their children.

My parent coordinator is a highly trained, vastly experienced woman who will put me in my place in a heartbeat. Before our introductory meeting, she insisted I read a book by her mentor, "Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children's Needs" by Philip M. Stahl, Ph.D. If you've ever heard about parallel playing among children, this book talks more-or-less about parallel parenting, or co-parenting. We then met and talked about the background of my situation, her background, the goals of parent coordination, our expectations of each other, the financial stuff, and how we were going to proceed. She had this same kind of introductory session with my son's father.

As it turns out, my child's father and I had set up a rather good situation for our child even before our PC became involved. From the start of our separation, we had maximized our physical avoid-

ance of each other. Our communications were by e-mail. Child exchanges were generally done through daycare pickup/dropoffs. We had developed this distance for several reasons, and it was probably the best thing we could have done for our child.

To start with, our PC insisted we send all our e-mails to her before sending them to the other parent (she still gets cc'd on everything). She wished to monitor our ability to keep our interactions on a professional level, establish a baseline for our interactions, and start immediately on the job of helping us improve our communication skills. She and I have spent hours on the phone talking about the positives and negatives of my written communication style, how my approach may have elicited an undesirable response when one was received, how I can get things back on track when this happens, and how I can improve my approach for next time. Sometimes these nuances seem silly and unreasonable, but they also seem to work. I can also occasionally see the impact she's had on my son's father's writing, and I appreciate the consideration he shows.

Things have been improving slowly but surely. My son's father and I now routinely attend the same school functions, we occasionally exchange e-mails just to relay information on interesting things our child has done, and we cooperate regarding special events that change our childcare calendar. Our son is delighted to have both parents at his school functions, gets to participate in almost every family event, is doing very well in school (he's just been accepted into the Gifted and Talented Program!), and happily switches from parent to parent.

While I believe we still have a way to go before this new routine is established and there's no fear of going back to our old, negative marital routine, there are several things we have going for us. One, our PC has a wonderful background in working with both children and adults. She has some incredible insight into what makes a person tick (I know she has me pretty well figured out). She has numerous ways to approach every issue, and we often discuss several of them before one "clicks" for me. Her patience with slow-to-understand clients is wonderful. In fact, something she's been telling me the last three times we've spoken has just registered, probably eliminating what could have been significant future conflict.

Two, I don't believe our attorneys have ever, either intentionally or unintentionally, raised the level of conflict between my son's father and me. I know my own attorney has actively discouraged me from what many would consider a reasonable course of action, discouraged me because it would have raised the level of conflict, perhaps past a point of no return. While both attorneys were active in the remnants of our case for many months after our PC came on the scene, their roles and that of the PC have had no overlap. They allow her to do her job and keep solely to their legal positions.

Three, my son's father and I are dedicated to giving our son a happy childhood. While we are unable to do it in the same household, I can say we are both dedicated to giving our son the love and respect he deserves.

Editor's Note: Parent Coordinators

We have included elsewhere in this issue articles from (1) a Parent Coordinator and (2) a parent who is currently utilizing the services of a Parent Coordinator. For those practitioners who have not had occasion to work with a Parent Coordinator and may wish to do so, we include the following:

1. WHEN TO APPOINT A PARENT COORDINATOR
2. WHEN NOT TO APPOINT A PARENT COORDINATOR
3. CONTRAINDICATIONS TO THE APPOINTMENT OF A PARENT COORDINATOR
4. SAMPLE ORDER

Our thanks to Judge Ann Sundt of the Montgomery County Circuit Court for her assistance.

WHEN TO APPOINT A PARENT COORDINATOR

- History of parties indicates lack of experience in joint decision-making (i.e., one parent routinely made parenting decisions; now other parent wishes to be involved) rather than lack of success in co-parenting.
- Willingness of parties to work with a Parent Coordinator.
- Ability to pay.
- Specific areas of improvement or specific tasks to be addressed.
- Parents share similar goals/values for their children.
- No final legal custody order (i.e., legal custody reserved pending further hearing).

WHEN NOT TO APPOINT A PARENT COORDINATOR

- History of domestic violence.
- Allegations of sexual abuse.
- Bullying; intimidating behavior.
- A mental health diagnosis that is not being treated.
- History of threats against professionals.
- Proven substance abuse.
- Habitual denigration of other partner.
- Geographic distance.
- Financial constraints.

CONTRADICTIONS TO THE APPOINTMENT OF A PARENT COORDINATOR

1. Protective Order prohibiting contact
2. Domestic Violence
3. Alcohol or drug abuse, untreated
4. Psychosis
5. Major Depressive Disorder, untreated
6. Bipolar Disorder, untreated
7. Inability to afford Parent Coordinator fees
8. Geographic factors: (i.e., transportation issues that would limit participation)
9. History of threats to professionals (e.g., malpractice suits, physical harm)
10. Express statement of unwillingness to participate or previous history of noncompliance with Court Orders
11. Habitual disrespect for other parent (i.e., denigration, bullying, intimidation)
12. History of sexual abuse

SAMPLE ORDER

Parent Coordinator: The parents shall employ a Parent Coordinator to assist in determining the Children's best interests with respect to the issues enumerated in subparagraphs (1) and (2), and for parental dispute resolution. The Parent Coordinator shall be selected by the parents from a list proposed by (evaluator or current mental health professional). The selection shall be made in writing not later than 30 days from the date of this Order. The Parent Coordinator, if necessary, shall work directly with the Children's care providers, including but not limited to mental health care providers, teachers and/or learning specialists, and pediatrician.

1. The parents and the Parent Coordinator shall work to develop a written plan, directed at establishing policies which enhance the Children's lives as they move back and forth between the parties' homes, and in the Children's best interests, to maximize their time with each of the parents. Specifically, the parents and Parent Coordinator may address and reach agreements about how and when homework will be done, clothing exchange and return, responsibility for transportation to and from activities, telephone access, participation by each parent in the Children's school and other activities, and medication exchange and other health information. Other issues that may arise can be addressed with the approval of the parties and the Parent Coordinator .

2. Access may be increased for the Mother or the Father, and schedules may be adjusted as the parties and the Parent Coordinator agree, in order to develop a schedule which best meets the needs of the Children. However, no permanent change may be made to the schedule set forth in this Order unless the change is in writing, signed by both parents and the Parent Coordinator.

3. Nothing herein shall be deemed to alter the Mother/Father's authority for final decision-making.

4. The parties shall equally divide the cost of the Parent Coordinator and Arbitrator.

Case Notes:

Issues: Third Party Custody - Fitness of Parents - Exceptional Circumstances.

***McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005).**

By Marjorie Roberts, Paralegal for Christopher R. vanRoden, Esquire

Facts: Appellant, Charles David McDermott married Laura A. Dougherty on November 26, 1994, in Baltimore County and resided in Harford County. One child was born to them, namely Patrick Michael McDermott, born April 30, 1995. Mr. McDermott filed for divorce, custody, and child support on September 29, 1995. Initially, Mr. McDermott was awarded custody of Patrick. It was then changed to the child's mother and subsequently to the Doughertys because of his lengthy periods of absence from his employment as a merchant seaman and his mother's incarceration. A Consent Order gave the grandparents, the Doughertys and the McDermotts, temporary joint legal custody of Patrick with primary residence to the Doughertys in February, 2002. Mr. McDermott had *de facto* custody of Patrick from August 2002 until December 2002, which is a period of time that he was home from his employment as a merchant seaman. Patrick also spent a lot of time with his father in the summer of 2003. When Mr. McDermott was in Maryland, he had regular and frequent contact with Patrick.

Appellant, Charles David McDermott, was granted a Writ of Certiorari by the Maryland Court of Appeals over the custody of his son. Sole legal and physical custody of Patrick was awarded to the minor child's maternal grandparents, Hugh and Marjorie Dougherty, by the Circuit Court for Harford County on September 8, 2003, and subsequently affirmed by the Court of Special Appeals in an unreported opinion on April 5, 2004. The mother of the child was found to be unfit as a parent for custody of the child. The Court of Special Appeals denied Mr. McDermott's Motion for Consideration on May 21, 2004.

The primary reason for custody having been awarded to the Doughertys was that Mr. McDermott was at sea six months at a time, as required by his job in the merchant marine. Mr. McDermott was not declared an unfit parent. "[T]he court found that his employment in the merchant marine, requiring him to spend months-long intervals at sea, constituted 'exceptional circumstances' as that term was defined in *Ross v. Hoffman*, 280 Md. 172, 191, 372 A.2d 582, 593 (1977) ("*Hoffman*"), and the 'best interest of the child' and need for a stable living situation thus warranted that custody be placed with the Doughertys." The trial court based its "extraordinary circumstances" on the seven guidelines used in *Hoffman*.

"The factors which emerge from our prior decisions which may be of probative value in determining the existence of exceptional circumstances include the [1] length of time the child has been away from the biological parent, [2] the age of the child when care was assumed by the third party, [3] the possible emotional effect on the child of a change of custody, [4] the period of time which elapsed before the parent sought to reclaim the child, [5] the nature and strength of the ties between the child and the third party custo-

dian, [6] the intensity and genuineness of the parent's desire to have the child, [7] the stability and certainty as to the child's future in the custody of the parent."

Ross v. Hoffman, *supra*, 280 Md. at 191. The circuit court presented its summary in its September 2003 memorandum opinion. They found that Mr. McDermott's absences from his job requirements were "exceptional circumstances" that warranted custody to be awarded to the Doughertys.

Mr. McDermott appealed on the following: "Is concern that the parent might not obtain employment and remain in the state of Maryland a high enough concern to meet the 'only to prevent harm or potential harm to the child' standard required by the U.S. Supreme Court case of *Troxel v. Granville* . . ." [530 U.S. 57 (2000)]; whether the facts involved in this case constitute "exceptional circumstances" as described in *Shurupoff v. Vockroth*, 372 Md. 639 (2003); and whether the Order violated *Schaefer v. Cusack*, 124 Md. App. 288 (1998), which held "that custody must be decided based on the circumstances as they are now and not based on a future plan or conjecture or based on past behavior that has ceased".

Held: The Maryland Court of Appeals reversed the judgment of the Court of Special Appeals and remanded to that court with instructions to reverse the decision of the circuit court, and directed that custody be awarded to Mr. McDermott. Consideration of counsel fees for Mr. McDermott was remanded to the Circuit Court for Harford County.

The Maryland Court of Appeals held that a father's absence from his son's life due to his employment as a merchant marine does not constitute exceptional circumstances that would warrant a transfer of custody from the father to a third party, or in this case, to his son's maternal grandparents. Mr. McDermott made appropriate arrangements for the care of his child during his absences. The trial court did not find him unfit. It is presumed that fit parents act in the best interests of their children. His absences are not an extraordinary or exceptional circumstance for awarding custody to the Doughertys.

"We hold that in disputed custody cases where private third parties are attempting to gain custody of children from their natural parents, the trial court must first find that both natural parents are unfit to have custody of their children or that extraordinary circumstances exist which are significantly detrimental to the child remaining in the custody of the parent or parents, before a trial court should consider the 'best interests of the child' standard as a means of deciding the dispute."

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Case Notes . . .

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“We further hold that under circumstances in which there is no finding of parental unfitness, the requirements of a parent’s employment, such that he is required to be away at sea, or otherwise appropriately absent from the State for a period of time, and for which time he or she made appropriate arrangements for the care of the child, do not constitute ‘extraordinary or exceptional circumstances’ to support the awarding of custody to a third party.”

It is a fundamental constitutional right for a parent to have custody of his child when a child custody dispute is between a fit parent and a private third party. There is no constitutional right for a third party to raise a child not of his own (other than state proceedings to protect the child from parental harm). “It is only if the parents are unfit, or if there is some exceptional circumstance exposing the child to harm, that the child may be removed from the custody of the parents.”

Justice Wilner wrote a Concurring Opinion, stating that the trial court erred in granting custody of Patrick to the Doughertys. He did not agree with the Court of Appeals’ “sudden and wholly unnecessary *purported* discarding of those standards” listed in *Ross v. Hoffman, supra*. Justice Wilner stated: “I say ‘purported’ because it is not clear to me what the Court has really done in its 113-page slip opinion, other than to sow uncertainty and confusion in an area that demands clear and accessible guidelines.” The Court of Appeals “suggests, with its right hand, that the best interest of the child standard no longer ap-

plies in disputes between a parent and a non-parent—that the parent’s Constitutional right to custody is predominant—but, with its left hand, seems to indicate that that is not the case at all, and that, in the end, courts must act in the child’s best interest. Why the Court chooses to take such an unnecessarily convoluted path is a mystery to me.” . . . “The presumption afforded under *Ross* is rebutted *only* when the evidence shows that the parent is *unfit* to have custody or that *exceptional circumstances exist which would make parental custody detrimental to the child’s best interest.*” . . . “In the end, even under the Court’s new approach, the trial court will have to apply the best interest standard. The Court agrees that a parent’s Constitutional right to raise his/her children is not absolute. It agrees that custody may be denied to a parent if the evidence shows that the parent is unfit, and it even continues to bless the alternative basis for denying parental custody—exceptional circumstances *which would made [sic] parental custody detrimental to the child’s best interest.* That will necessarily require the court to examine and be governed by what is in the child’s best interest. So why go through 113 pages of convolution to say, in the end, what has already been said, confirmed, and reconfirmed in a few clear simple paragraphs.” (Emphasis in original)

Practice Considerations: The constitutional right of parents is first over any third parties. The best interest of the child standard is used only if both of the parents are unfit or exceptional circumstances exist which would make parental custody detrimental to the child’s best interest.

AFCC Annual Conference

Solving the Family Court Puzzle: Integrating Research, Policy, and Practice

by Diana H. Metcalf

“Law school was a process in which my left brain circled around my right brain and ate it,” David Hoffman, J.D., presenter, quoted one of his friends during a panel discussion on The Lawyer as Problem Solver. AFCC tries to un-do the damage by taking an interdisciplinary and international approach to family law, including both right brain and left brain activities.

Among the outstanding achievements of AFCC’s committees and task forces presented at the 42nd annual conference were Model Standards of Practice for Parenting Coordination, and revision and evaluation of the existing Standards of Practice for Child Custody Evaluations. More than fifty other workshops were attended by almost 700 participants at the Association of Family and Conciliation Courts in Seattle, May 18-21, 2005. Participants included judges, lawyers, psychologists, social workers, mediators, court administrators, researchers, parent educators, custody evaluators, counselors, court commissioners, academics, parent coordinators, and financial planners, all sharing a strong commitment to work collaboratively through education, support, and access to services to achieve the best pos-

sible outcome for children and families through the resolution of family conflict.

It was heart-warming for this writer to see so many family law judges attending, and presenting, at the conference. Current trends in relocation cases were discussed in one of the plenary sessions by an international panel consisting of the Honorable Mary Lou Benotto, Superior Court of Justice, Toronto, Canada; the Honorable Peter Boshier, Principal Family Court Judge, Family Court of New Zealand, Wellington, New Zealand; the Honorable Diana Bryant, Chief Justice, Family Court of Australia, Melbourne, Australia; the Honorable W. Dennis Duggan, Albany County Family Court, Albany, NY; and the Honorable Jerilyn Borack, Superior Court of California, County of Sacramento, CA, moderator. The justices discussed recent caselaw and the critical factors considered by their courts in these problematic cases.

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AFCC Annual Conference . . .

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Sixty-nine exemplary family court programs were identified by a subcommittee of the AFCC Court Services Task Force (published in *Exemplary Family Court Programs and Practices*), including seven in Maryland courts. Profiles of the programs highlight special features and contain contact information, to foster sharing about exemplary practices that meet the critical needs of the courts and the people they serve. Maryland presenters of some of the exemplary programs, Keith Schiszik, J.D., from Frederick, and Risa Garon, LCSW-C, BCD, CFLE, Executive Director of the National Family Resiliency Center, Inc., Columbia, stressed the importance of dialog between lawyers and mental health professionals, and urged divorce lawyers to send their clients to counselors. For example, grief is not addressed by lawyers in a typical divorce, yet competent handling of this factor can make all the difference in a family's long-term outcome.

The above-mentioned panel, *The Family Lawyer as Problem Solver*, examined alternative approaches, including collaborative family law, unbundling legal services, coaching parties in mediation, the child representative's approach to alternative dispute resolution services, and online education assistance for separating, divorcing, and divorced parents. The distinguished panel members were Charlie Asher, J.D., Freedom 22 Foundation, South Bend, IN; Barbara Chasnoff, J.D., ABA Child Custody Pro Bono Project, Chicago, IL; David Hoffman, J.D., Chair, ABA Section of Dispute Resolution, Boston, MA; and Forrest S. Mosten, J.D., Author, *Unbundling Legal Services*, Los Angeles, CA. Mr. Asher urges us to ask, "Where are husband and wife now? Where do we want them to be in two years? How can the court help them to get there?" He also notes the irony in the fact that parental conflict is the most danger to children, when parents would run into a burning building to save their child.

Other workshops included Ethical Infractions and Malpractice in Child Custody Evaluations, Comparative Mediation Styles, Access After Abuse, The Changing Legal Rights of Children of Gay and Lesbian Couples, Innovations in Case Management, International Custody Abductions to Non-Hague Islamic Countries, and What the Research Shows About Lawyer Negotiations, to name a few.

Collaborative Divorce, which provides three-dimensional client services, was the subject of, or at least a subject of, several workshops. In one, the presenters role-played several scenes from a collaborative divorce. Each party had an attorney and a coach, who was a mental health professional (who was not that party's

therapist). The team's child specialist served as an advocate for the children, and the financial specialist determined how the family would pay for the professionals involved. One of the roles of the coach was to train the party in active listening skills, to facilitate communication and meaningful discussion regarding custody, visitation, and property distribution during the divorce, even during inflammatory episodes. The attorneys agree at the outset that neither will represent their clients in court, should the collaborative process break down. Although collaborative divorce is only a few years old, presenters stated their cases resulted in reconciliation 8-14% of the time.

Another outstanding plenary session focused on *The Politics of Research: The Use, Abuse, and Misuse of Social Science Data*. Presenters showed how some data have been misused by selectively quoting only part of a study's findings in order to advance a political agenda of an advocacy group, while ignoring data that do not support that agenda. The panel encouraged attendees to always ask "What is the source?" and to prefer peer-reviewed journals for reliability of data over magazines, TV, and internet articles.

Silent Voices in the Family Courts: Fathers and Young Children was presented by Marsha Kline Pruett, Ph.D., Connecticut Mental Health Center, New Haven, Kyle D. Pruett, M.D., Yale Child Study Center, and JoAnne Pedro-Carroll, Ph.D., Children's Institute, Rochester, NY. They studied children ages 3-1/2 to 7, and provided data on parental "gatekeeping" regarding the custodial parent's control of the other parent's access to children following separation. The young children did not understand the details of the court system, but they knew that the judge is the one who makes the decisions, and they had some advice for judges. One child stated the judge should ask the parents if they love each other. "And they HAVE to say yes. And then the judge should give them another chance, and lots of other chances."

The Honorable Hugh Starnes, Chief Family Judge, Fort Meyers, FL, incoming president of AFCC, sends a warm invitation to attend the AFCC Regional Training Conference, September 22-24, 2005, Breckenridge, CO; to the AFCC 43rd Annual Conference, May 31-June 3, 2006, New Orleans, LA; and to the AFCC 44th Annual Conference, May 30-June 2, 2007, which will be in Washington, D.C.

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BED-TIME AND PART-TIME COMMUNICATIONS: PROTECTION OF MARITAL CONVERSATIONS UNDER THE SPOUSAL COMMUNICATIONS PRIVILEGE

An Exploration of Uncharted Waters

By Stephen E. Moss, Esquire

Maryland's statutes and case law generally make almost every facet, statement and act during the marriage of the parties relevant during a divorce or custody trial. Maryland's equitable distribution statute, Annotated Code of Maryland, Family Law Article § 8205, as well as its statute on alimony, Family Law § 11106, provide that one of the factors to be considered in each of these contexts is "the circumstances that contributed to the estrangement of the parties" and "any other factor that the Court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award....". Family Law Article § 8205. Moreover, in a custody case, generally every fact relating to a party's character and capacity to parent is relevant for consideration. "This authority clearly empowers courts applying the best interests standard to consider any evidence which bears on a child's physical or emotional well-being." Bienenfeld v. Bennett-White, 91 Md. App. 488, 605 A.2d 172, 180 (1991), and Montgomery County Department of Social Services v. Sanders, 38 Md. App. 406, 381 A.2d 1154 (1977).

There is much to suggest that there are many matters occurring during a marriage which should never be discussed in a courtroom, much less see the light of day. For some reason, however, parties, whether because of the zeal to win, anger at the spouse or through lack of guidance, appear hellbent at self-destruction and present evidence which has the effect of a two-edged sword, injuring both parties to the marriage.¹ Counsel are often confronted with this problem and need to find a way to preclude the injury or embarrassment which may result from such disclosures.

Under these circumstances, the question that arises is whether everything that occurs during the marriage is admissible into evidence and do parties have the capacity to prevent evidence from being introduced concerning their statements and conduct during the marriage. The answer is to be found in the privileges accorded by Maryland law.

Title 9 of the Courts and Judicial Proceedings Article (hereinafter "CJP") contains numerous strictures on "competence, compellability and privilege." Of particular interest to family lawyers is CJP § 9105, (Attachment 1) which governs when spouses can testify, as follows:

"One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage."

There is no appellate case in Maryland discussing the extent to which the statute is applicable to the trial on a family law case. Section 9105, read literally, would prevent spouses from testifying about marital communications under any circumstance, including a domestic relations trial. However, Maryland cases, as well as national cases, make it clear that this type of statute cannot be read literally.

Obviously, we must first decide what is a "communication" under this statute. Communications may not be limited merely to verbal utterances. According to 81 Am. Jur.2d, § 324, "a statutory privilege for confidential communications between spouses includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other due to the confidence existing between them by virtue of the marital relationship." Consequently, while normally one person is competent to testify about the mental status of the other person based upon observation [see State v. Conn, 286 Md. 406, 407, 408 A.2d 700 (1979) and Maryland Rule of Evidence 5701], it is arguable that § 9105 precludes a spouse from testifying about the mental capacity of the other spouse based upon observations in a confidential context. Moreover, the Supreme Court of Massachusetts held that a statement in writing was not protected under a similar confidential communication statute. Com. v. Szczuka, 391 Mass. 666, 464 N.E.2d 38 (1984). However, the New York courts treat written communications as privileged if they are written under confidential circumstances. Symington v. Symington, 215 A.D. 553, 214 N.Y.S. 307 (1926). No case dealing with the confidentiality of e-mails between spouses has been located. However, unencrypted e-mails generally are not viewed as a secure means of communication. See ACLU v. Reno, 929 F. Supp. 824, (E.D. Pa. 1996).

It is axiomatic that for a conversation to be protected by this statute, the statement must be confidential. It is presumed that a communication between spouses is confidential. Coleman v. State, 281 Md. 538, 380 A.2d 49 (1977). The nature of the communication may also indicate whether it is intended to be confidential. For example, "where the marital communication amounts to an admission or confession of a crime," the communication would generally be treated as confidential. Coleman, 380 A.2d at 53. This would suggest that a confession of adultery² would be deemed confidential and protected. A statement which is a threat or a crime against the other spouse is not protected. Harrison v. State, 37 Md. App. 180, 376 A.2d 1144 (1977). Moreover, it is generally recognized that a statement is not confidential if it is made in the hearing of third persons. Master v. Master, 223 Md. 618, 166 A.2d 251 (1960) (discussion between parents in the presence of children old enough to understand fully what was being said held not confidential). Spouses frequently engage in marital counseling in order to improve or preserve their marriage. Clearly, a confidential communication would be protected if it was solely between the spouses; and the communication would be protected if it was between the individual spouses and a counselor, pursuant to the psychiatrist/psychologist-patient privilege under CJP § 9109. But is the spousal privilege lost when a communication is in the presence of a third party such as a joint counselor? Although the Court of

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Special Appeals has held that statements by non-married individuals in joint counseling sessions are not privileged, Reynolds v. State, 98 Md. App. 348, 633 A.2d 455 (1993), the same opinion stated that “No waiver of the privilege should result from the holder’s limited disclosure to a person who has a separate confidential relationship with the holder,” in the context of a statement to a prosecutor. 633 A.2d at 462.³ A case from the State of Washington is directly on point. In Redding v. Virginia Mason Medical Center, 878 P.2d 483 (1994), the Court of Appeals of Washington held that the patient-psychologist privilege could prevent the disclosure by the therapist of statements of spouses made in joint therapy sessions which were intended to be confidential. However, the Court further held that in a controversy solely between the two spouses, the spousal privilege did not prevent disclosure by either of the spouses.

Notwithstanding this decision, it is the writer’s opinion that the public policy of Maryland to protect psychiatrist/psychologist-patient communications and to protect spousal communications and to encourage parties to seek counseling and communicate freely with each other is so strong that Maryland would likely preclude testimony either by the therapist or a spouse when either spouse objects to the testimony.

Most recently, in Brown v. State, 359 Md. 180, 753 A.2d 84, 85-86 (2000), the Court of Appeals held “that (1) § 9105 does not render a spouse “incompetent” to testify regarding confidential marital communications but rather establishes a privilege on the part of the person making the communication to preclude testimony by the person’s spouse that discloses the communication, (2) the privilege may be waived by the person, but (3) it was not waived in this case.” Here, the defendant in a criminal case did not waive his privilege by asserting a “she did it” defense. By interpreting the statute as a privilege rather than an “incompetency” statute, a spouse can testify if the communicating spouse does not object; and a stranger to the communication has no basis to object to the testimony.⁴

Coleman v. State, *supra* is instructive on the question of whether Maryland’s statute should apply even in a divorce context. Generally, by the time a marriage gets to the divorce court, the marriage is in a shambles, and there is little left to protect. However, Coleman recognizes the great public policy of protecting communications during marriage and explicitly holds that the privilege applies until there is an actual divorce. Indeed, in Coleman, the marriage was a sham as the parties were married a few months prior to trial as a “business proposition” and at the time of trial Mrs. Brown had instituted divorce proceedings. This exposition on the public policy of Maryland would seem to support the conclusion that § 9105 would apply with equal force in a divorce case. Moreover, in State v. Enriques, 327 Md. 365, 609 A.2d 343 (1992), a husband’s threats to his wife were held not to be privileged communications. However, his subsequent apology; requests for reconciliation; and acknowledgment of the need for treatment were held to be inadmissible marital communications. Importantly, the Court stated that “in the fifteen years since we decided

Coleman, the Legislature has taken no action to add any express exception to the statute. Since the Legislature is presumed to know the law, we conclude that it intended that our interpretation of the statute in Coleman should obtain.” In view of these holdings, the Court of Appeals in Brown v. State, *supra*, emphasized that “in both cases, we noted that there were no exceptions to the statute.”⁵

Moreover, the existence of statutory exceptions actually reinforces the Brown Court’s logic. Under CJP § 9106, the privilege does not apply in a criminal case involving abuse of a minor, or a crime against the spouse (Attachment 1).⁶ Thus if the legislature intended to permit disclosure in divorce or custody cases, it surely could have made other exceptions.

There are very few decisions in other jurisdictions which shed light on the admissibility of confidential communications either in a divorce proceeding or custody proceeding. In Grobin v. Grobin, 184 Misc. 996, 55 N.Y.S.2d 32 (1945), a letter written by a husband to his wife after they were separated was admitted in a proceeding for an interlocutory decree of divorce. Although the Court accepted that the marital communication privilege would apply in a divorce case, the court reasoned that the privilege would have no application where the letter recognized the status of separation and possible subsequent divorce between the parties and contained a confession of adultery which the Court concluded was not induced by the marital relationship of the parties. Interestingly, the Court would not permit the wife to identify her husband’s handwriting and required the identification to be made by a third party, because she was disqualified from testifying against her husband under another statute. See also Symington v. Symington, *supra*.

There are many other instances where evidence has been excluded in a family law case because of important public policies. However, because of the extraordinary burden of the obligation on the Court to protect children and fairly divide marital property, it is likely that a Court will either expressly or implicitly draw an inference against a person who invokes a testimonial privilege to prevent some otherwise relevant evidence from being heard. See Robinson v. Robinson, 328 Md. 507, 515, 615 A.2d 1190 (1992), (adverse inference drawn against a party who invoked her Fifth Amendment privilege in a custody proceeding; and Kramer v. Levitt, 79 Md. App. 575, 558 A.2d 760 (1988) (where the privilege against self-incrimination permitted the refusal to make discovery subject to adverse inferences being drawn); and Long v. Long, 141 Md. App. 341, 785 A.2d 818 (2001) (although an adverse inference may be drawn from invoking the Fifth Amendment, it was improper for the Court to infer the person was an unfit parent).

The Court of Appeals in Brown noted that at common law, there was no privilege against disclosure of spousal statements in a custody proceeding.⁷ However, both Coleman and Brown made it clear that § 9105 is not merely declaratory of the common law but represented

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an expression of public policy to prevent disclosure of marital communications. Indeed, Coleman declared that “the injury that would inure to it [the marriage] by disclosure is probably greater than the benefit that would result in the judicial investigation of the truth.” 281 Md. at 541, 380 A.2d at 52. Put to the test, the Court may well create an exception where the marital communication is critical to protecting the welfare of a child. However, since there is generally sufficient conduct on the part of the parties to enable the Court to make an appropriate decision, it is likely that the Court would find that the marital privilege applied. Moreover, where the welfare of the child cannot be resolved without consideration of protected communications, it is possible that the Court will find some means of gaining access to the information it requires. For example, in Laznovsky v. Laznovsky, 357 Md. 586 (1999), 745 A.2d 1054 (2000), the Court of Appeals recognized the public policy behind granting a privilege not to disclose communications between a patient and psychologist in a custody case pursuant to CJP § 9-109. However, the Court of Appeals made it clear that after exhausting all possible means of obtaining equivalent information concerning the mental health of the declarant, the court was free to require a mental health evaluation of the person invoking his privilege in order to obtain the required information – but other than through forcing disclosure of an otherwise protected confidential spousal communication.

The foregoing discussion suggests that the marital privilege is alive and well in Maryland and arguably applies with full force in a divorce proceeding and is likely to be applied in a custody proceeding unless it would jeopardize the interest a child.

Hypothetical

Wendy and Harry have been married for 25 years. Both have been caring and involved parents and worked well in jointly raising their two children, now 8 and 12. Harry candidly revealed to Wendy one night that he had not disclosed hundreds of thousands of dollars of income on the joint returns that the parties had filed during their marriage. During joint marital counseling with a licensed psychologist, Wendy said she had found caring for the children to be a horrible experience and even had thoughts that life would be much more pleasant if the parties’ children were no longer around to annoy her. In response, Harry stared at Wendy for an extended time as if he were rebuking her to a horrible degree. Wendy was frightened and thought Harry was cruel for acting like this. Indeed, whenever Wendy did something during the marriage which bothered Harry, he would make the same cruel stare at Wendy.

A few years later, Harry threatened Wendy that he would get even with her if she ever told anyone about his undisclosed income. Wendy became so infuriated, that she wrote Harry a letter stating that she had never loved him and now was in love with another man. . Harry determined he had to leave. He sent Wendy an e-mail in which he apologized about Loretta and stated that he needed an

opportunity to consider what was best for the family and that the children should be with their mother in the meantime.

Is any communication between Wendy and Harry admissible into evidence in a custody or divorce proceeding?

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(Footnotes)

¹For example, the parties often wish to disclose that not all income was reported in a joint Federal income tax return. However, because the standard of living of the family is often reflected by an amount of income greater than their reported income would permit, there is a potential for serious civil, as well as criminal, penalties. Not everyone is protected by the “innocent spouse” rules of § 6015 of the Internal Revenue Code.

²Adultery is a crime under Article 27, § 4, punishable by a fine of \$10.00.

³In a related context, the Court of Special Appeals in Levin v. Levin, 43 Md.App. 380, 405 A.2d 770 (1979), held that either party could waive the client-accountant privilege under CJP § 9110, so that the accountant could testify about discussions concerning the joint income tax returns of the parties. The Court never dealt with the spousal privilege as indirectly precluding the accountant’s testimony.

⁴See Brown for a complete analysis of the protection of marital communications at common law through the present statute.

⁵This construction is to be contrasted with the normal rule that “[p]rivilege statutes must be narrowly construed.” Reynolds v. State, 633 A.2d at p. 464.

⁶Similarly, § 161005 of the District of Columbia Code permits disclosure of confidential spousal communications in a domestic violence proceeding, notwithstanding a broad spousal privilege statute. D.C. Code § 14306(b) (Attachment 2). Virginia also prohibits, without consent, examination of a spouse “in any action as to any communication privately made by one to the other while married,” but nullifies its spousal privilege where Virginia law “confers upon a spouse a right of action against the other spouse.” Annotated Code of Virginia, § 8.01-398. Virginia also protects confidential communications in criminal cases, under § 19.2 - 271.2 (Attachment 3).

⁷The Court of Appeals in Brown cited Wigmore on Evidence, § 2239 at pp. 247248 (McNaughton Rev. 1961, for the proposition that “in orthodox practice, in proceedings involving the custody of children” (emphasis in original), a spouse’s testimony was admissible. This was distinguished from a divorce proceeding, however.

PRINCE GEORGE'S COUNTY DOMESTIC/FAMILY LAW CASE MANAGEMENT POLICIES/PROCEDURES

All domestic actions filed in Prince George's County, except for domestic violence actions brought in the District Court, are filed with the Circuit Court and placed on the domestic track. Domestic cases in Circuit Court proceed through their conclusion within the Family Division of the Court. The Family Division Consists of ten Circuit Court Judges, six Masters, and a variety of support and related service staff. Judges serve in the family division on a rotating basis, generally serving staggered two year terms. One of the Family Division Judges hears only juvenile delinquency matters. Similarly, one of the Masters hears only juvenile delinquency matters, as well as CINA cases. A Director oversees the Division and is responsible for administration of the staff as well as the overall functioning of the Division. There is also a Coordinating Judge who is primarily responsible for assuring the policies of the Judicial Circuit and the Bench are communicated to the Division. The Coordinating Judge further acts as a liaison with various agencies and the Bar. A list of the current Masters and key personnel is included at the end of this article. Additionally, a schedule of fees related to the Family Division is also provided.

Once a domestic Complaint is answered, or a default Order entered, the case file is transferred to the Family Law Paralegal Division, where the file is reviewed to determine its appropriate "track." If the case is a simple uncontested divorce, counsel will be contacted to schedule a hearing before a Master in the 8:30 a.m. uncontested hearing docket. If the case is contested, a Scheduling Conference Notice will be issued, directing the parties and their counsel to appear on a set morning before the Family Division. At the Scheduling Conference, parties and counsel will meet with a Family Division Paralegal to evaluate the issues in the case, as well as set discovery deadlines and *pendente lite* and trial dates. If there are immediate issues that must be addressed that day (initial support, visitation access), the parties will also be directed to a Master for a brief hearing on those issues. Generally, the hearing will be limited to one-half hour; where more time is required, the temporary support and access hearing can generally be scheduled within forty-five (45) days.

Following the Scheduling Conference, a Scheduling Order will be recommended by the Master and, if no exceptions are filed, issued by a Division Judge (usually the Coordinating Judge). Where agreement is reached on any issues, those agreements are so noted in the Scheduling Order, and a separate Order is prepared either by counsel containing the terms of the agreement. Where there remain disputed issues, the Scheduling Order will also establish deadlines for discovery and motions, it will set a pretrial conference date in front of a master, and set a trial date. The Order will further set a *pendente lite* hearing as appropriate. Where it is anticipated a hearing will last less than three hours, it will generally be set in front of a Master. If it

appears the hearing will last longer than three hours, it must be set in front of a Division Judge. The Merits trial will, if appropriate, be set six months from the date of the Scheduling Conference to allow for the completion of discovery.

The Scheduling Order may also include a provision directing, as appropriate, a party or parties for mental health and/or substance abuse evaluation, it may order that a custody or visitation investigation be conducted (also called a home study), it may order the parents participate in a parenting educational seminar and it may mandate the parties participate in alternative dispute resolution (though the ADR cannot be binding). Furthermore, where paternity is at issue, the Order may direct paternity testing. Upon request by a party or upon its own initiative, the Order may appoint an attorney for the child. It should be noted that where the Order directs any of the afore-referenced provisions, costs will be assessed either between the parties or to a specific party. The Court will take into account a party's fiscal circumstances and may waive or lower costs.

If the Court determines that a home study is warranted for custody issues, it may Order a full study or a partial study. A full study involves a home visit and interview with each parent, and can include interviews with other involved parties, a review of school and medical records, and other such investigations. A partial study may be limited to just one parent or may simply entail a home visit. The Master or Judge determines which is more appropriate. The Family Services department attempts to complete its investigation and report within 60 days, though exceptions may apply. The Court may determine that a study should be done on an expedited basis, in which case the Family Services department will, to the extent possible, complete the report sooner.

To assist parties and attorneys in navigating through family actions in Prince George's County, the Division contains a Family Division Information and Referral Center (FDIRC) located in the courthouse. There are five workstations for court check-in and for assistance. The Center also has forms available.

Previously, an "Emergency Court" was established within the Circuit Court to deal with family law issues of an emergency nature. That has since been modified. Now, a Chambers Judge is assigned on a daily basis to Courtroom 058M (near the Family Division). All emergency filings will be assigned to the Chamber's Judge, who will hear not only emergency cases, but criminal pleas and ex-parte domestic violence petitions. (It is strongly recommended that counsel only bring real emergencies before the Chambers Judge; lack of access or lack of support is not considered an emergency). An emergency filing, as

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well as any other pleadings, must be filed with the Circuit Court civil clerk, currently located on the Fourth Floor of the Circuit Court Annex. Counsel will then be directed to Courtroom 058M. Given the fact that criminal pleas and domestic violence cases will also be heard here, counsel should expect to wait.

A new aspect of the domestic case management is that if a Judge heard the trial in a case, that same judge will be assigned to that case for any further proceedings, including post-judgment contempt and modifications. If a domestic case remains very contested as it heads toward trial, the case may be set before a Settlement Judge before being set for trial. If the original trial was heard by a Master, a modification hearing would bypass mediation and be set for trial before a Master; the modification trial may be reset by the Master if a home study is needed.

Prince George's County Family Contact List

Courthouse located at: 14735 Main Street, Upper Marlboro, Maryland 20772.

Family Division Director: Linda M. Morris - (301) 952-3024

Family Division Coordinating Judge: The Honorable Julia B. Weatherly - (301) 952-3822

Family Division Information and Referral Center Associate Director: Patricia Perez, Esq. - (301) 780-8000

Family Services Coordinator: James E. Wilson - 301) 952-3892

Family Division Scheduling:
Masters: (301) 952-4613
Judges: (301) 952-4407, Ext. 4

Differential Case Management Coordinator: Angie Loor - (301) 952-5875

Family Division Judges: (Since the Judges serve in the Family Division on a rotating basis, they will not be specifically listed, as the information may not be current.)

Note: Those Judges whose chambers are located in the CAB

(County Administration Building) are located at 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772-3050.

Family Division Masters:

Ann R. Sparrough (Juvenile) - (301) 952-4411
DaNeeka V. Cotton (Child Support) - (301) 952-4648
A. Michael Chapdelaine - (301) 952-3806
Judy L. Woodall - (301) 952-3793
Thomas Rogers, Jr. - (301) 952-3329
Paul D. Wright, III - (301) 952-3844

Prince George's County Fees and Costs Schedule

Case Filing Fee: \$105.00 (\$95.00 + \$10.00 MLSC surcharge)
Appearance Fee: \$10.00
Petition for Contempt: \$25.00
Custody–Foreign Decree: 35.00 (\$25.00 + \$10.00 MLSC surcharge)
Modify Custody/Visitation/Support/Alimony: \$25.00
Dismissal (voluntary): \$15.00
Foreign Judgment: \$50.00
Writ of Garnishment: \$25.00
Appeal Fees: \$110.00 (\$60.00 + \$50.00 filing fee for Court of Special Appeals)
Supplemental Complaint After Judgment for Limited Divorce: \$105.00 (\$95.00 + \$10.00 MLSC surcharge)
Sheriff's Fee (check payable to Sheriff): \$30.00
Guardian *ad litem* fee: \$1,500.00 each party
Nagle v. Hooks attorney fee: \$250.00 each party
Parenting Class Fee: \$100.00 (two sessions @ \$50.00 per session)
Home Study Fee (fee is split by parties): Full - \$400.00, Partial - \$200.00
Psychological/Mental Health Evaluation Fee: \$750.00 each party
Mediation Fee: \$150.00 each party (covers two Sessions)
Substance Abuse Screening: Free

NOTE: There is no separate Master's fee in Prince George's County

Special thanks to the Honorable Julia B. Weatherly for her assistance.

Leo J. Keenan, III is an associate with Goozman, Bernstein & Markuski in Laurel, where he has practiced domestic, bankruptcy and personal injury law for the past seven years.

What Family Law Attorneys Need to Know about Criminal Law

by Martha Ann Sitterding, Esquire

You are sitting at your desk, the phone rings and your domestic client has just been served with an *ex parte* order which alleges that your client has assaulted, threatened to assault, raped, committed a sexual offense or falsely imprisoned their spouse or child. Congratulations, you have just become a criminal lawyer. All of the above are criminal offenses. Whether or not your client has been charged with a criminal offense at the time they are served, from now on your decisions must be made not only in light of the issues of custody, visitation and use and possession, but also as if your client will face charges based on the allegations which give rise to the *ex parte* order. These considerations are frequently competing between the domestic case and the criminal case as will be illustrated below. Simply, the two cases, criminal and domestic, arise from the same facts but there the similarities end.

If you do not have experience in the practice of criminal law, it may be advantageous to consult counsel who is a criminal law specialist. If however, you do not have the luxury to bring in other counsel, either because you need to take immediate action or your client does not have sufficient resources to employ a second attorney, you will have to work your way through the minefield of two potential cases. This article takes a procedural look at the charging of a crime to sentencing with some commentary on the interplay between the domestic and criminal case. It does not pretend to provide a detailed explanation of trial considerations, specific statutes, rules or legal cases. It is suggested that the first text you consult in beginning to handle the criminal matter is Maryland Rules Title 4, *Criminal Causes* and the *Criminal Procedure Article* of the Annotated Code of Maryland.

A criminal case arises by the filing of a charging document which is a written accusation alleging the defendant has committed a crime. There are three (3) types of charging documents: [1] criminal information, [2] statement of charges or [3] indictment. Charging documents are issued by the State, not an individual and it is the State who is the moving party. The charging document must set forth in a clear and concise manner the name of the defendant, the date of the offense, a location of the offense which places the matter under the jurisdiction of the court in which the charging document is filed and a specific statement of the offense to put the defendant on notice of the charge. While the citation of the offense (i.e. the section of the *Criminal Law Article* or other reference to the Annotated Code of Maryland) must be stated, error or omission in the citation is not grounds for dismissal of the charge. Amendments by the State to the charging document which does not change the character of the offense may be made at any

time before verdict. This should be remembered because, if during the trial, a flaw in the charges is disclosed, the State has the right to fix the error by amendment before the verdict.

There are two (2) types of crimes. The lesser offenses are misdemeanors. Assault in the second degree, threats of assault, false imprisonment, sexual offenses in the fourth degree and most but not all attempts to commit more serious offenses are misdemeanors. Additionally there are some felonies which are solely in the jurisdiction of the District Court. Misdemeanors and felonies solely in the jurisdiction of the District Court are brought by information or statement of charges. An information is criminal charges brought by the State's Attorney. A statement of charges is a charging document filed in the District Court by a law enforcement officer or judicial officer by application filed with a District Court Commissioner. A District Court Commissioner is a judicial officer who functions in each county and is charged with determining whether, on the complaint of a civilian or law enforcement officer, a crime has been committed and upon the arrest of a person, the terms of the defendant's release.

The more serious offenses are felonies. Assault in the first degree, sexual offenses in the first, second or third degree, rape and child abuse are felonies. Felonies and some misdemeanors originate in the Circuit Court by either indictment or information. An indictment is a charging document brought by a grand jury. If a felony is charged by information in the District Court, a preliminary hearing will occur or be waived before the matter is forwarded for prosecution in the Circuit Court. The purpose of the preliminary hearing is for the State to demonstrate a basis for the charges brought against the defendant. The State must prove that the evidence in the light most favorable to the State supports the charge brought and that the defendant is the one who did the crime. It is the defendant's duty to request a preliminary hearing within ten (10) days of his initial appearance or the right is waived.

Charging documents may be served on the defendant by mail or law enforcement officer along with a summons stating the date, time and place the defendant must appear. The State's Attorney may ask the court for a warrant for the arrest of a defendant for any number of reasons, but usually because the defendant either has failed to appear for court or poses a danger to another or the community. If the court determines that probable cause for the arrest has been demonstrated, the defendant is subject to immediate arrest. Arrest warrants are not the usual means of bringing criminal

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charges. When an arrest warrant is issued, service is by a law enforcement officer. Where the officer has knowledge that a warrant for the arrest of the defendant has been issued, the officer has the power to arrest the defendant, even if the officer does not have physical possession of a warrant. The defendant does not have to be served with the warrant at the time of his arrest so long as service of the warrant and charging documents occurs in a reasonable time thereafter. After a warrant is issued, but before service or the expiration of ninety (90) days, whichever is first, the warrant is not subject to public inspection. Hence, if your client suspects that a warrant has been issued, you as counsel, will not have the right to that information directly from the court. If there is a reasonable basis to believe that a warrant exists for your client, you may contact the State's Attorney on behalf of your client to determine the status of the charges so as to avoid the arrest of your client and arrange for the surrender of your client.

Arrest is most easily defined as when the defendant is not free to leave the custody of a law enforcement officer. A defendant may be arrested prior to the charging document being issued where the actions that brings about the charges is a misdemeanor or felony taking place in the presence of a law enforcement officer or where the law enforcement officer has probable cause to believe a felony has been committed. In such instances, the defendant is brought by the arresting officer to the District Court where a charging document is filed. Where an officer has probable cause to believe a protective order has been violated and either the protective order has been filed in the court where the alleged violation occurred or when the person eligible for relief has a copy of the order which appears valid on its face, an officer may arrest without charging documents.

In either instance when an arrest occurs, the defendant is taken before a judicial officer, usually a District Court Commissioner, without unnecessary delay but in no event later than twenty-four (24) hours after the arrest. The purpose of taking the defendant before a judicial officer is for an initial appearance. At an initial appearance, the defendant is advised of the charges against him, his right to counsel, where a preliminary hearing is available to the defendant the right to such a hearing, and the date, time and place for the defendant's next appearance before the court. Bail is also determined. In determining bail it is presumed that the defendant is entitled to be released on bail or on his promise to appear unless the judicial officer believes the defendant is a threat to himself or others or is a flight risk. Exception to this presumption occurs when the maximum penalty the defendant faces is death, life imprisonment or is charged with one of the offenses listed

under *Criminal Procedure Article 5-202*. One such offense, when bail can be denied, is a violation of an existing protective order.

If your client is not released, your first obligation is to get your client out of jail. You can assist your client in doing so by arranging for the posting of bail. Bail can be posted by cash, real property or by bondsman. In instances where you are attempting to post real property, the real property pledged must be posted by all persons who are owners. Usually the family home will not be available to the Defendant if the spouse, co-owner, is the alleged victim. If you are hiring a bondsman, the premium will be ten percent (10%) of the full bail set, which premium is not refundable. Cash paid by or on behalf of the person charged is refundable. If your client cannot make the bail or the posting of bail will be too draining on the resources of the client (a bond once posted will be held by the court until the criminal matter is resolved), you will attend a bail review hearing. This hearing will be heard at the next sitting of court. and will focus on the two issues the judicial officer reviewed previously, i.e. whether or not the defendant poses a danger to himself or others and whether the defendant is a flight risk. You will be able to call witnesses at a bail review hearing. Usually clients are not brought to the court for a bail review hearing which instead the hearing is conducted by closed circuit broadcast from the detention center to the courtroom with only counsel present in the courtroom. In setting bail, not only can a court set the amount of money to be posted as bail, the court can set pre-trial release conditions, i.e. having no contact with the complaining witness, anger, drug, alcohol or psychological treatment, as well as pretrial supervision. Should the court impose as a condition of bail a "no contact" with the victim provision, this order will remain in effect until disposition of the criminal case even if the protective order is not granted and there is no restraint from contact in the domestic case and vice versa.

Once past the charging phase, you will need to investigate the case. In the domestic case, there is great access to information. Interrogatories, Request for Production of Documents, Request for Admissions, Records Depositions and Depositions all provide great access to knowledge of the opposing side's case. This is because settlement is encouraged. In the domestic case the opposing spouse and your client mutually control the litigation. The case can be settled and consent orders entered.

Compare this to a criminal case where the opposing spouse, (i.e. the complaining witness), is just that; a witness. The

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case is brought by the State of Maryland and it is the State's Attorney's office that makes all decisions as to the prosecution of the case. Should the complaining witness seek to end the criminal case, he may ask that the case be dropped but the complaining witness does not have the power to end the case. Further, in the criminal case, while the complaining witness can assert privilege to not testify as to communications occurring between the two spouses, including facts concerning the incident giving rise to the *ex parte* relief, where the complaining spouse has made a statement to another person, those statements can be used in the criminal prosecution even over the complaining spouse's objection. The effect is that once criminal charges are brought, the parties lose control over the proceeding.

Few avenues exist for discovery in the criminal case. In the District Court, the State will produce any material or information that tends to negate or mitigate guilt or punishment of the defendant. If the defendant makes a request, the State will permit inspection and copying of (1) any portion of the documents containing a statement or a substance of a statement by the defendant which the State intends to use at trial or hearing and [2] each written report or statement by an expert whom the state expects to call. In the Circuit Court the State will produce, [1] any material or information that tends to negate or mitigate guilt or punishment of the defendant, [2] relevant material regarding searches and seizures, [3] acquisition of statements by the defendant to state agents the State intends to use and [4] pre-trial identification of the defendant by a witness for the State. Upon request of the defendant, the State will produce [1] the name and address of each person the State intends to call as a witness at trial, [2] statements of the defendant to a state agent the State intends to use at trial, [3] statements of co-defendants, [4] reports or statement of experts made in connection with the action, [5] any tangible thing the State intends to use as evidence and [6] any property of the defendant in the State's possession, whether or not the State intends to use that evidence. Depositions are not available in District Court unless by agreement of the State and defendant and upon order of the court and in Circuit Court additional conditions apply including that a witness may move for a protective order. If agreement is not reached as to deposition in Circuit Court, the State or the defense may either request a deposition of a witness but only where the court is satisfied that the witness may [1] be unavailable to testify, [2] the witness's testimony may be material and [3] the taking of the deposition is necessary to prevent failure of justice. At the same time, there is nothing to prevent the discovery available in the domestic case from being used in the criminal case. This can be a blessing in obtaining infor-

mation you could not get otherwise, such as statements under oath from the complaining witness. However, any statement that your client makes, oral or written, can be used by the State and as such you may have to make a choice as to your client fully asserting or defending claims during discovery in the civil case as compared with the assertion of the Fifth Amendment Privilege in the civil case to prevent evidence from being developed in the criminal case.

Fifth Amendment issues are difficult even for the seasoned practitioner. The Fifth Amendment allows a person charged with criminal offenses to not be compelled to give evidence against him. In order for a defendant to assert the privilege, the privilege must exist and not have been waived. A privilege may be waived intentionally or unintentionally, knowingly or unknowingly. Any time a person who is charged with a crime or may be charged with a crime makes a statement to another, the privilege is waived as to the content of the statement. There are exceptions to this rule. When the person to whom the defendant confides is in a confidential relationship the Fifth Amendment right is preserved as to the conversation. Persons having privilege include attorneys, priests, therapists, social workers, spouses, and some others. For a confidential relationship to exist the communication must occur in a manner consistent with the relationship (i.e. with the attorney in consultation, with the priest in confession, with the therapist in therapy) and the conversation must occur one on one. In a less than one or one situation and to a person not covered by a privileged relationship, statements of the defendant can be admissions and introduced either in the criminal or domestic case.

Your client may assert Fifth Amendment privilege in either the criminal or domestic case. However, Fifth Amendment protection can only be asserted where testimony may tend to incriminate the person of a crime. Hence, the defendant may have provided, in civil discovery, information that will affect the criminal case, because it may have been impossible to avoid the production of this information because Fifth Amendment protections may not have existed at the time of discovery. However, once it becomes apparent that even the possibility of criminal charge exists, whether filed or not, the defendant obtains the right to assert privilege. Thus, once the issue of actual or possible criminal charges arises, protection against allowing the defendant to make adverse statements is immediate.

Such protection should be considered as soon as the notice of the *ex parte* petition is given or the client is aware he may

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be subject to being charged. It will be up to you, as the defendant's counsel, to be alert for the pitfalls of potential waiver. For example, if you receive a call from your client announcing the service of criminal charges or ex parte order, before you ask your client to explain the background of such charge, you must first understand the circumstances from which the call is being made. From the domestic practitioner's perspective, you will be aware that the hearing on the protective order will take place in seven or fewer days. As a result you will want your client to give you information as soon as possible concerning the events that give rise to the ex parte order. The inclination is to say to the client "tell me about the events". However, unless your client is in a position to tell you of the events in total privacy, you may, by that simple question, cause your client to waive his Fifth Amendment privilege. Let us assume in our scenario, that the phone call to you is being made prior to arrest but from a position where the police officer can hear the statements of the defendant to you on the phone. If you ask your client the simple question "What happened?", and your client answers your question while in the presence of an officer or others, your client has just waived privilege and any statements he makes in the presence of the officer may be admissible. You may think that the decision in *Miranda* will save the statements made from being admissible but this is not correct. When an officer arrives and begin to investigate the occurrence, *Miranda* warnings need not be given. *Miranda* rights are only required once a person is in custody. Prior to that time, no warning will be given. Officers can ask any questions they want and the answers, as recited to the officer, will be received in evidence. Even after the *Miranda* warnings are given, the *Miranda* decision only prohibits the officer from initiating the questioning. Where a person who is charged initiates the communication, *Miranda* protections are not violated.

After the bond hearing, the next appearance of your client will, in all likelihood, be at the Protective Order Hearing because that hearing is likely to occur seven days after the first request for relief was made. Testimony in the protective order hearing will not be privileged and will almost always precede the criminal case. If your client testifies at the protective order hearing, the content of the testimony is sure to be used in the criminal case and any statement of the defendant concerning an element or related fact of the criminal action is clearly admissible in the criminal and/or domestic case.

Further, because of the different standards of proof between a criminal case and a civil case, the same evidence may give rise to two different results. In a domestic case the standard is a preponderance of the evidence. The mov-

ing party has the burden of proof and once the moving party has met his burden, the burden shifts to the opposing party. In a criminal case, the standard of proof is beyond a reasonable doubt and the burden always lies with the State to prove the elements of the case in accordance with that standard. At the same time, the doctrine of collateral estoppel applies in both cases. Careful consideration should be given to how this may help in the defense or prosecution of the cases. Assuming that the protective order is denied, criminal charges are not automatically dropped. Nor, if a protective order is granted, does it mean that the criminal prosecution will be successful. Unless an issue is fully decided by the court in one case, such that the doctrine of collateral estoppel applies, there will be no effect of the ruling in one case to the other.

The criminal case in the Circuit Court moves forward from the date of filing of the charging document under a time frame set by statute. The date for the trials in the Circuit Court must be established within thirty (30) days of the entry of appearance of counsel or first appearance of the defendant and shall not be set later than one hundred eighty (180) days from that date. The court will schedule matters in the District Court unaffected by statutory time frame save and except for speedy trial requirements. If your client has not appeared before a judicial officer previously and no attorney has entered their appearance in the criminal case, the first time your client will appear in the criminal court will be for an initial appearance. The purpose of the initial appearance is to advise the defendant of the charges against him, his right to counsel, and the date, time and place for the defendant's next appearance before the court. If an attorney enters their appearance before the date of the initial appearance, the initial appearance is cancelled.

During the period that criminal charges are pending, the fact that charge has been laid is not proof of anything and cannot be used in the domestic case as proof of the defendant's unfitness for custody or as proof of vicious or cruel conduct. However, there is nothing to prevent the complaining witness or another witness in the criminal case from giving testimony in the domestic case as to the events that gave rise to the criminal charges. During this period you will have to make a decision as to what approach you will take in handling the simultaneous cases. These approaches can be generally summarized in three fashions. The first strategy is to defend all matters head on by allowing the defendant to speak freely in both cases and not being concerned about such statements being used in ei-

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ther proceeding. This strategy should only be employed where your client is consistent in his statements, makes a good impression and his statements fit the physical evidence as to the alleged criminal acts forming an adequate defense to the crime or the outcome of the criminal case is secondary to the outcome of the civil case. The second strategy is to advise your client to make no statements, even at the cost of the domestic case. Finally, the third approach is to resolve the criminal case as soon as possible under the most favorable terms you can achieve, and concentrate on the domestic case. The decision as to which strategy to employ is solely based on the facts of each case and the preference of the client

In making these decisions it should be remembered that negative criminal consequences can arise from both the protective order hearing and the criminal case. In the protective order hearing, if a protective order is entered, even by consent and without finding, the respondent, i.e. your client, will thereafter have a Criminal Justice Information System (CJIS) entry. While the entry will not indicate a criminal conviction, for purposes of security clearance and job searches, this entry may seriously hamper the defendant's prospects as few persons doing security clearance checks differentiate the entry from a conviction.

Should the State decide to end the case before trial but after charges are filed the case can be ended by what is called a *nolle prosequi*, or more commonly a *nol pros*. This is a dismissal, however the charge can be re-filed at a later time. While most charges, particularly ones arising out of a domestic violence allegation are not *nol pros*sed, where more than one charge is brought under a single charging document and you enter into plea negotiation as to one of those charges, the other charges are usually dismissed by *nol pros*.

When your client is scheduled for trial on the criminal charges, you will have the option to try the case, attempt to enter into a plea negotiation or stet agreement or if the penalty which can be imposed is ninety (90) days incarceration or more, your client will have the right to a trial by jury. In some jurisdictions, a prayer for jury trial may postpone the trial. In other jurisdictions, a jury trial can commence on the date the request is made or the next morning. In either event a criminal case can only be tried one time. Trial commences when jeopardy attaches. Jeopardy attaches when the first witness takes the stand and begins to testify. Once jeopardy attaches, the case cannot be brought a second time unless a mistrial is requested by the defense or a hung jury causes the case not to go to verdict. If the criminal case is stopped before the first witness is called, sworn, and gives testimony, the case can be recharged.

In the proceeding paragraph, passing reference was made to the resolution of the case by *stet*. *Stet* is a means of indefinitely postponing the case such that a trial does not occur. The agreement is one reached by the State and defense and thereafter approved by the court. By accepting a *stet*, the defendant waives no right or defense he would have had the case been tried, except that since the defendant agrees to the indefinite postponement, he cannot later complain he was denied his right to a speedy trial. Sometimes *stets* resemble terms of probations as it can be agreed that the defendant will abide by a provision or provisions, such as no contact with the complaining witness during the term of the *stet*. Technically, a *stet* lasts indefinitely. However, during the first year, either party, the State or the defendant, can have the case removed from the *stet* docket and tried upon request. Thereafter, the case can only be taken off the *stet* docket and tried upon a showing of good cause. While this may sound somewhat ominous, the purpose of *stet* is to assure good behavior by holding something over the head of the defendant and at the same time not causing the matter to be tried. I have mentioned this at some length because frequently charges between spouses are handled by *stet*.

If the case proceeds to trial or plea, the defendant must appear and enter either a plea of guilty or not guilty. If a plea of guilty is entered, all the State needs to do is to read into the record a statement of facts which supports the plea and a conviction will follow. If you enter a plea of not guilty, you may proceed to trial, in which case witnesses are called. If you enter a plea of not guilty, you can proceed by way of a statement of facts in instances you and the State agree to those facts. If you proceed by statement of facts, the State will read from the charging document or the police report as the only evidence presented. At the end of the State's case, where a not guilty plea is entered, the defendant has a right to make a motion for judgment of acquittal, which is routinely requested and infrequently granted. If a plea agreement is reached between the State and defense, it must be remembered that unless the court has been a party to the agreement and the judge has agreed to be bound by the terms of the agreement, the court will have complete discretion, upon conviction, to impose any sentence up to the maximum allowed by law.

Where a conviction is obtained and your client does not have a prior criminal record, it is unlikely that a jail sentence will be imposed except for crimes of violence. Thus the likely outcome is probation. Probation is a period of

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time where the defendant's current behavior is scrutinized while some potential jail sentence is withheld. There are two types of probations. Under *Section 6-220 of the Criminal Procedure Article*, even though a finding of guilt occurs, when the probation is granted, the finding of guilt is stricken thus leaving the defendant without a criminal record despite the verdict. The benefit is clear but it must be remembered that if the defendant does not complete the terms of probation successfully, the penalty that can be imposed is up to the maximum penalty which could have been imposed at the time of the verdict. The other type of probation results in a conviction on the record, no incarceration and the retained penalty as specifically set forth at sentencing. This penalty can be imposed upon violation. In either event the length of probation can be up to five (5) years and can be supervised or unsupervised. Unsupervised probation results in a general charge of good behavior as well as any other terms imposed by the court. A supervised probation requires the defendant to report to a supervising agent who monitors the performance of the defendant during the portion of the term which is supervised. Reporting is by phone or in person to the agent. The term of probation can be part supervised and part unsupervised. The conditions of probation always require the defendant to commit no new offense, to work or attend school regularly and to report his address to the court. Various other conditions can be imposed by the court, which almost always include the prohibition against possession and use of controlled dangerous substances (illegal prescription or street drugs), prohibition against having under the defendant's control any firearms, as well as to allow an agent from parole and probation to visit the defendant's home if the agent requests to do so. Anger management, alcohol and/or drug rehabilitation classes are frequently imposed.

It should be remembered, particularly in cases where a spouse is the complaining witness, a probationary term will leave open some suspended sentence which can be reimposed if further charges arise. Since the defendant and complaining witness will likely have some contact during the domestic case, a further criminal complaint arising from these contacts may give rise to both a subsequent criminal charge and/or a violation of the probation imposed. Violation of probation occurs where the defendant fails to complete any term of the probation and/or a new criminal charge is filed during the term of the probation. A violation of probation charged is a separate offense and must be proven. However, where the basis for the violation is a second crimi-

nal charge, the violation will only proceed after a conviction on the new charge. If there is a subsequent conviction, and a violation of probation, the likelihood of incarceration substantially increases. This is why stet is preferred over a probation under *Article 6-220* because a stet is not based upon a conviction and as such a second allegation and conviction will cause nothing more than a trial of the first case.

Please understand that the above summary is the bare bones of criminal law procedure. It has not even attempted to deal with elements of offenses and defenses thereto. Anyone attempting to handle a criminal case must begin his evaluation of the case by carefully reviewing the actual crime that your client is alleged to have committed and the elements of each crime set forth in the statute or at common law. You will need to carefully listen to the statements of your client and any witnesses who will speak with you. State's witnesses frequently will not talk to you and there is no way to compel them to do so. Criminal law is literally much more trial by ambush than any domestic practitioner experiences in a civil trial. Another important difference between criminal and civil cases of which to be wary is that deadlines in criminal matters are **absolutes** and not flexible. A missed deadline is a waiver.

The antidote to problems in handling criminal law issues is to offer your expertise in domestic law to a person knowledgeable in criminal law in exchange for their knowledge and to handle the case together until such time as you are familiar enough with criminal law to handle both. Also, the local public defender's office can be a good resource to answer specific questions concerning the case and to inform the inexperienced criminal practitioner of the proclivities of the judge before whom the case is set.

A good result in the criminal case will be important to your client's future and your success in handling the domestic case. Because of the consequences to your client, be careful of where you tread in the minefield of the interaction between the two matters.

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The Not So Happy Couple and a Contract You Can't Refuse

Perhaps you represent a fine upstanding United States Citizen (a USC, in the vernacular) who met his sweetie on a wild and crazy vacation in a foreign country. This Adam whom you represent wants to marry his Eve with all due speed. Adam can either marry Eve in the U.S. or in her country. If he wants to marry here, he can sponsor her for a fiancée visa created for this purpose. If Adam marries in Eve's homeland, she will have to process her visa at the U.S. Embassy there.

No matter where this couple wants to tie the knot, there's going to be a whole lot of immigration forms submitted to the U.S. government, along with the correct documents, precisely measured photographs, medical examination, fingerprinting and the correct filing fees. Buried in this stack of paperwork lurks a bomb ticking away for the U.S. citizen spouse: the Affidavit of Support.

This document is also known as Form I-864 of the United States Citizenship and Immigration Services (bureau) of the Department of Homeland Security. The affidavit is required of nearly all sponsors of immigrants who seek permanent residence in the U.S. based on a family connection. The affidavit is a formal pledge of financial support, and Adam will need to sign it in order to get a visa for his beloved Eve.

The Affidavit of Support requires Adam to support Eve at 125 percent of the poverty level determined annually by the U.S. government. The current level for a family of two is \$16,307.¹ Adam's support obligation ends when 1) Eve has worked (or could be credited with) 40 quarters of work (ten years) that qualify for Social security coverage; 2) Eve loses her permanent residence status and departs the United States; 3) Eve naturalizes and becomes a U.S. citizen; or 4) Eve dies. Divorce does not end the obligation (see more on this later).

Adam now has two types of liabilities. First, Eve has the right to enforce the financial pledge against Adam. Although the document is not a contract in the typical sense (only one party actually signs it and it is called an affidavit), the document is identified in law as creating a contractual obligation.² The document itself has an acknowledgment that the sponsored immigrant can go to court to seek specific performance of the obligation and the sponsor agrees to submit to the jurisdiction of a federal or state court to enforce the affidavit.

There is some anecdotal evidence of attorneys successfully skewering sponsors for support in divorce cases.³ Think about it this way: If an immigrant spouse with little knowledge of English and limited work skills seeks alimony, that person might typically have a good case for support. Of course, the payor spouse might raise some difficult hurdles

that would often bar the alimony award. The affidavit practically offers a judge a side door to award support without having to reconcile the typical complications in the way of an alimony order.

The second liability is no more friendly to Adam. If Eve applies for certain federal or state means-tested public benefits, Adam is liable to reimburse the federal or state government or a private entity acting at government direction that dispensed the support. Federal means-tested benefits include Supplemental Security Income, Medicaid, and Temporary Assistance to Needy Families.

At this point in time, no reported case exists in which the Affidavit of Support has been upheld. A precursor to the affidavit, Form I-134, which is still in use at some embassies, has been challenged twice and found to be unenforceable.⁴⁴ *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992); *County of San Diego v. Vilorio*, 276 Cal. App. 2d 350, 80 Cal. Rptr. 869 (1969).

Whether the affidavit will be upheld in a case of precedential value as a binding contract remains to be seen. There is also no indication as to whether the obligations would survive a bankruptcy discharge.

So the affidavit creates obvious and devious pitfalls in divorce litigation. What about settlement? Can a party waive the obligation in a marital settlement agreement? The federal statute creating the obligation does not offer any such waivers. As a matter of public policy, it is questionable whether the obligation could be waived. Insofar as enforceability has rarely been tested, however, practitioners cannot rule out the possibility altogether. Indemnification of liability might be another area to explore. But the insertion of an aspirational clause into a settlement contract does not confer iron-clad protection.

The problem can arise even before the parties are contemplating divorce. In a prenuptial agreement for Adam and Eve, the same problem arises. If Adam seeks an alimony waiver or limitation, the Affidavit of Support can come back to bite him. Addressing it in the agreement is one way to try to limit the damage. Eve, meanwhile, may seek to initiate an enforcement action in the event of divorce, no matter what the agreement says.

By the way, the affidavit is also used to provide support for the sponsored immigrant's minor children that accompany her. Even though the new wife could not obtain child sup-

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port from her husband (since they are not his children, unless he adopts them), she could seek the support purportedly guaranteed in the affidavit. The annual obligation increases by \$4,075 per person. That ain't peanuts.

What is the right amount of support required by the affidavit? It's whatever keeps the immigrant spouse at the poverty line. If Eve has income, then no support might be required by the affidavit. If her income is very limited, then some support might be necessary to comply with law. The poverty guidelines start with a two-person household, so the number needed for Eve alone might be that number, half of that number or a decrease by \$4,075 from that number. It's your case, so you make the argument. Of course, for Eve's lawyer, sometimes it might be better to pursue alimony.

Family law attorneys facing cases featuring foreign-born residents need to gather information to assess whether immigra-

tion issues are going to arise in the cases. It's a good practice to ask on intake questionnaires where the person was born and whether the person is a U.S. citizen. Getting the basic information in the beginning can save a tremendous headache in the end.

(Endnotes)

¹ See Form I-864P, available at <http://uscis.gov/graphics/formsfee/forms/i-864P.htm>

² See Immigration and Nationality Act § 213A(a); 8 U.S.C. § 1183a(a).

³ There has been discussion on the American Bar Association Commission on Domestic Violence Law Listserv this year of the use of the affidavit to obtain support for battered immigrant women.

The Beach Reading List-2005

It's that time of year again. We have, as usual, pestered our betters for a list of the books that they have read and enjoyed in the course of the last year; after all, one can't be expected to personally wade through popular literature when *Desperate Housewives* is on . . .

It's good to see that we haven't lost our sense of humor. More than one of you suggested anything by P.G. Wodehouse: try the series detailing the misadventures of Bertie Wooster and his efficient valet, Jeeves. . . *Right Ho, Jeeves*, or *The Code of the Woosters*.

Contemporary fiction was not forgotten. *Everything is Illuminated* by Jonathan Foer: a man sets out to find the woman who might, or might not, have saved his grandfather from the Nazis. "Funny, smart, moving".

The Kite Runner by Khaled Hosseini: 2 boys roam the streets of Kabul, one is educated and reads voraciously and the other is illiterate and has a harelip. . . "Fast moving, touching".

Dancing in the Wings by Debbie Allen: a girl with long legs and big feet dreams of becoming a ballerina.

Murder remains a fit summer subject for many of you. The most popular book this year seems to be *Mr. Perfect* by Linda Howard: 4 women create a list of the attributes of Mr. Perfect and murder follows. . . "It has all the necessary components for a beach read: murder, mayhem, sex and violence. . . alpha males and steamy sex. . ." Linda Howard has also written *All the Queen's Men* and *Dream Man*.

Mystery author Martha Grimes still has her fans. They recommend *The Man with a Load of Mischief*, followed by *Jerusalem Inn*.

And in the "They Don't Fit Anywhere" category:

The Best of Stanley Weinbaum: Short fiction by an early giant of sci/fi. . . "Humor and warmth."

The Twelve Caesars by Suetonius, translated by Robert Graves. "Gossipy, salacious and intimate portraits of Caesar, Augustus, Nero and the gang!"

So, let's put away that 123 page decision in *McDermott*, grab a book and head for the beach. . .

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