



Family Law News

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

Maryland State Bar Association, Inc.

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Message from the Editor

I hope that you all made the trek to Ocean City for our Annual Program in June; Dorothy Lennig did a great job as our Program Chair, our panels were informative and, as always, our vignettes were very funny. Dorothy now takes command as our new Chair, and our other new officers are Dorothy Fait as our Secretary and Justin Sasser as our new Treasurer; Mary Sanders assumes the post of Immediate Past Chair.

I think this is our first September issue...nobody *wants* to write in the summertime, but thank goodness some of our colleagues did. Our very own Dorothy Fait provides a handy list of important legislation that passed, and being Dorothy, she even gives us a list of the bills that failed (but will be coming back...) We have lots of Case Notes, and some interesting articles on Adultery and Marital Debt... as always, many thanks to all who responded to my badgering...

Finally, this is my last issue as Family Law News' editor. It has been a great ride of 7 years, but now it is my turn to step-up and plan the Annual Program as Chair-elect, and Dorothy Lennig, bless her heart, pointed out to me just how much work is involved in putting on our Annual Program.

Our new editor is Kristine Howanski, many of you will remember her as the Chair of the Baltimore County Family Law Committee, I am certain that we are in good hands.

By the way, I do expect each of you to be in Ocean City in June...see you at the beach...



Walter A. Herbert, Jr.
Kristine K. Howanski
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The FJLSC makes every effort to check the accuracy of the articles submitted, but does not warrant accuracy.

From Where I Sit

By: Judy Lynn Woodall

If I had a nickel for every request to impute income in a child support case without a finding of voluntary impoverishment, I could retire early. Well not really, but it would make for a hefty contribution toward a white linen tablecloth and napkin lunch. The issue of imputing income is a challenging one since a finding of voluntary impoverishment must, in every case, precede any imputation of income. Yes, say it out loud – there must be a finding of voluntary impoverishment before income can be imputed. A parent quits a job that pays \$100,000.00 per year to open a business that has the potential for making millions. After one year his or her income from the new business barely exceeds \$20,000.00 per year. This substantial decrease is due, in part, to a slow economy. Voluntary impoverishment? What about a custodial parent who has remarried and chooses to stay home with a child born as a result of her remarriage. Voluntary impoverishment? Finally what about the parent who has been seeking employment for the past two years and simply cannot find work but refuses to work at the local fast food restaurant. Should we make a finding of voluntary impoverishment? On the surface, this issue may seem straight forward however; closer examination takes us into a quagmire and reminds us of why we became lawyers in the first place. It is my hope that this article will provide a place to begin your research in the presentation (or defense) of this issue.

Maryland Code (1984, 1991 Repl. Vol., 2009 Supp) Sections 201(h) (1) and (2) of the Family Law Article defines, actual and potential income of a parent. Actual income is defined as, *actual income of a parent, if the parent is employed to full capacity*. Potential income means, *potential income of a parent, if the parent is voluntarily impoverished (emphasis added)*. Section 12-204(b) of the Family Law Article states . . . if a parent is voluntarily impoverished, *child support may be calculated based on a determination of potential income*. The Court of Special Appeals in *John O. v. Jane O*¹ defined voluntary impoverishment as *freely, or by an act of choice, to reduce oneself to poverty or to deprive oneself of resources with the intention of avoiding child support...*² The court set forth factors to be considered in determining whether a party is voluntarily impoverished. These factors are: 1) *his or her current physical condition*; 2) *his or her respective level of education*; 3) *the time of any change in employment or other financial circumstances relative to the divorce proceedings*; 4) *the relationship between the parties prior to the initiation of the divorce proceedings*; 5) *his or her efforts to find and retain employment*; 6) *his or her efforts to secure retraining if needed*; 7) *whether he or she has ever withheld support*; 8) *his or her past work history*; 9) *the area of which the parties live and the status of the job market there*; and 10) *any other considerations presented by either party*.³

The court in *John O* reviewed the very detailed evidence presented by both parties and remanded the case for the trial court

to make specific findings on the issue of voluntary impoverishment. The Court stated the failure of the court to find specifically that Mr. O voluntarily impoverished himself necessitated a remand. Hmmm. Nothing is simple in matters of love and child support.

In *Goldberger v. Goldberger*⁴, custody of the parties' six minor children was awarded to Mother (Appellee). The facts in this case were undisputed. Father (Appellant) was 32 years old, healthy as an ox but never worked a day in his adult life (or any other life). Father planned to spend his life as a perpetual learner – a student. Father was a student before he was married and remained a student after his children were born. Father's sole source of support came from family, friends and the kindness of strangers in his community. The trial court found Father had voluntarily impoverished himself and imputed income for the purpose of paying child support.

Notwithstanding his state of poverty, Father appealed the ruling citing as error the trial court's finding of voluntary impoverishment since he has always been voluntarily impoverished (the old "you knew I was a snake when you brought me here" defense). The Court of Special Appeals spent a couple of pages setting forth the relevant law about one's obligation to support one's minor children and concluded the Appellant had a legal obligation to support all six of his children. Whew, glad we cleared that up. The question then turned on whether income could be imputed to a party who never really had any. Yes, of course it can, which is why the court spent two or three pages talking about a parent's obligation to support one's children. The court went on to say, *whether the voluntary impoverishment is for the purpose of avoiding child support or because the parent has chosen a frugal lifestyle for another reason, doesn't affect the parents obligation to the child*.⁵

The Court of Special Appeals dispensed with Mr. Goldberger's argument and determined: *[For] the purposes of the child support guidelines, a parent shall be considered voluntarily impoverished whenever the parent has made a free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources*. The court instructed, in making this determination, the trial court should look at the factors stated in *John O*.⁶

The Court of Appeals in *Wills v. Jones*⁷ declined to adopt the rule in *John O* as being too narrow. The court stated *the question is whether a parent's impoverishment is voluntary, not whether the parent has avoided paying child support*. The *Wills* court did not seem to care why a parent had impoverished himself or herself, only that he or she had.

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From Where I Sit...

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In this case, Mr. Jones and Ms. Wills were the parents of a minor child whose support obligation was the subject of this appeal. As fate would have it Mr. Jones committed a crime and got caught. Mr. Jones was sentenced to a mandatory ten-year sentence. Mr. Jones was under court order to pay support for the minor child. Realizing he would not be getting any cost of living increases while incarcerated, he filed a motion to “Stay Enforcement of His Child Support Obligation”⁸. The master recommended Mr. Jones’ motion be denied finding his incarceration was “self-induced and voluntary”. The Circuit Court disagreed and granted the motion finding Mr. Jones was not voluntarily impoverished. The Court of Special Appeals affirmed the Circuit Court and Ms. Wills appealed arguing, Mr. Jones’ support obligation should not be modified because an incarcerated parent should be considered *voluntarily impoverished*.

The court discussed the meaning of “voluntariness” at length and concluded, *it stretches the imagination to conclude that Mr. Jones’ incarceration was voluntary* (and besides do you think he would have committed the crime if he thought he was going to get caught- I don’t think so).

In *Moore v. Tserouis*⁹, Father, the non-custodial parent, was under a support order for two children. He remarried and he and his new wife decided to move from Baltimore to Garrett County (I’m guessing to get away from wife number 1). Father filed a motion to modify his support order since his income in Garrett County would be less than what he earned in Baltimore. “Voluntary Impoverishment”? The master thought so, after all it’s not like he didn’t know that the wages in Garrett County were less than the wages paid in Baltimore. Court of Special Appeals said, nope. Court acknowledged the difference in income but stated, *[w]e do not believe, however, that a court can restrict a parent’s choice of residence in order to insure that he or she remains in or moves to the highest wage earning area*¹⁰.

*Wagner v. Wagner*¹¹ teaches nothing new but stands for the proposition when parties enter into litigation that starts in 1987 and concludes in 1996 it is time to invest in one of those wheelie carts for the purpose of transporting their file (all 16 volumes) so you won’t injure your back. Seriously, the Court of Special Appeals reiterated the holding in *Wills* stating, *to determine whether [a parent’s] impoverishment is voluntary, a court must... ask whether his [or her] current impoverishment is by his [or her]... own free will, regardless of the motivations therefore*¹² (emphasis added). When the dust settled, Mr. Wagner was awarded custody of the parties’ minor children. Mrs. Wagner took a job paying approximately \$60,000.00, resigned it for one paying \$20,000.00 and, if that wasn’t enough, she transferred her home to her parents for nominal consideration. The court stated, *the relevant inquiry, as clarified by the court in Wills, is whether Ms. Wagner brought about her impoverishment intentionally and of her own free will*.

The case of *Durkee v. Durkee*¹³ is similar to Goldberger in that the situation that caused the inquiry of whether a party was “voluntarily impoverished” existed during the marriage. In short, the court declined to adopt appellant’s contention that a court *may not find voluntary impoverishment unless the decline in income occurs after the separation*.¹⁴

Finally, two other cases worth reading are *Stull v. Stull*¹⁵ and *Petitto v. Petitto*¹⁶. In *Stull* the trial court imputed income to the obligor after a finding of voluntary impoverishment. The obligor was fired from his full-time and part-time job. He was fired from the full-time job for falsifying documents. Now, if you have been paying attention, you should have reached the same conclusion as the Court of Special Appeals – no voluntary impoverishment. This case was similar to *Wills* in that the court found the obligor did not intend the result of his actions. In *Petitto*¹⁷, the court found a custodial parent could also be voluntarily impoverished. The same free will (blah, blah, blah) analysis and *Jane O*¹⁸ factors followed the courts finding of voluntary impoverishment.

In conclusion, and as I encouraged you to repeat out loud earlier, in order to impute income a finding of voluntary impoverishment must happen first. The facts must support a finding that either the obligor or obligee has made a *free and conscious choice, not compelled by factors beyond his or her control, to render himself for herself without adequate resources*. The court has made it clear that the reason for the impoverished state is of no moment and has provided factors (found in the *Jane O* case) to assist in making this determination. Thereafter feel free to present facts and argue how much income should be imputed when setting child support pursuant to the Guidelines.

Judy Lynn Woodall is a Master in Prince George’s County and has served the citizens of Prince George’s County for the past eight years.

Footnotes:

- 1 John O. v. Jane O, 90 Md. App. 406 (1992)
- 2 Id., 90 Md. App. at 421
- 3 Id., 90 Md. App. at 422
- 4 Goldberger v. Goldberger, 96 Md. App. 313 (1993)
- 5 Id., 96 Md. App. at 326
- 6 John O. v. Jane O, 90 Md. App. 406, (1992)
- 7 *Wills v. Jones*, 340 Md. 480(1995)
- 8 The court treated Mr. Jones’ motion as one for modification pursuant to FL 12-104.
- 9 *Moore v. Tserouis*, 106 Md. App.275 (1995)
- 10 Id., 106 Md. App. at 283
- 11 *Wagner v. Wagner*, 109 Md. App.1 (1996)
- 12 Id., 109 Md. App. at 45 and 46

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Adultery: Who Cares. /?/!/*@%#!

By: Lindsay Parvis, Esquire

Do we care about the role of adultery in our cases? Does the Court? Should our clients care (as much as they do)? And, should we care more?

Many of us would say adultery has little or no impact on the outcome of a case. Perhaps more precisely, it should be said that adultery has an unknowable and unpredictable impact. That said, perhaps we jaded practitioners dismiss its importance to our clients and relevance to the court if properly presented.

Legal and Historical Context

While we all know that adultery is relevant as a ground, a circumstance contributing to the parties' estrangement (monetary award and alimony), and to custody as relates to the child(ren)'s welfare, why do we care legally?

The Reports of the Governor's Commission on Domestic Relations Laws (available in PDF on the Maryland State Law Library's Online Catalog) provide interesting insight:

Alimony "[T]o frame a proposal that would provide the fairest possible outcome of the alimony problem for most divorcing parties in this State, while vesting the Judiciary with discretion adequate to make special provision for the special virtues of Galahad and Griselda, and the special vices of Jezebel and Mr. Hyde" (January 1982 Report). "It is contrary to common experience to suppose that a Court will in fact ignore the comparative rectitude of the parties and regard virtue and vice in the same light, and it is contrary to the principles of equity that a Court should do so." (January 1980 Report)

Monetary Award "As virtue, embodied in the respective contributions of the spouses to the well-being of the family which is involved in the first factor, is relevant to the rights and equities of the parties in their marital property, so also is its correlative of fault, embodied in the fourth factor, which refers to the circum-

stances and facts which contributed to their estrangement...[C]ertainly equity requires that the listed factors be weighed by the Court and that the parties' contribution to the familial well-being and their contribution to familial ill-being both be considered." (January 1978 Report)

Grounds The Commission's Report (January 1982) is remarkably devoid of discussion, except as relates to recrimination and condonation.

What Adultery Is

Adultery is voluntary sexual intercourse between a married person and a person who is not their spouse. *Flood v. Flood*, 24 Md.App. 395, fn. 1 (1975). In the absence of direct personal observation of the act, circumstantial evidence from which a court can infer the adultery occurred is necessary to prove adultery. *Dougherty v. Dougherty*, 187 Md. 21, 27-28 (1946). Specifically, the spouse alleging adultery has the burden of showing, with corroboration, an adulterous spouse's disposition to commit adultery with the paramour and opportunity to commit adultery. *Id.* Mere suspicion and indiscretion alone are insufficient proof. *Donovan v. Scuderi*, 51 Md.App. 217, 222-223 (1982), internal citations omitted.

A Reality Check

No matter what the law says or intended, who cares and how much? A survey of practitioners in the real world sheds light...

According to **Carlos M. Lastra, Esquire**, a partner at Brodsky, Renahan, Pearlstein, Lastra & Bouquet in Gaithersburg, Maryland:

Adultery can be persuasive when it is the reason for the estrangement, as opposed to a symptom. When adultery is at issue, focus on whether marital income and assets were diverted in result. Where adultery caused the estrangement, despite no tangible financial effects, presenting the required proof can also benefit the client's feeling s/he was heard and so got a fair trial. When weighing whether and how to present adultery to the court, preparation is key: to show the level of deception, length and breadth of adultery, impact in the client's specific case (such as adultery continuing during marriage counseling, using adultery to attack the wronged spouse), and impact on adulterer's credibility.

From **Regina DeMeo, Esquire**, Senior Counsel with Joseph Greenwald & Laake's Rockville office and current Co-President of Collaborative Divorce Association, Inc.:

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- 13 *Durkee v. Durkee*, 144 Md. App. 161 (2002)
- 14 *Id.*, 144 Md. App. at 186
- 15 *Stull v. Stull*, 144 Md. App. 237 (2002)
- 16 *Petitto v. Petitto*, 147 Md. App. 280 (2002)
- 17 *Petitto v. Petitto*, 147 Md. App. 280 (2002)
- 18 *John O. v. Jane O.*, 90 Md. App. 406, (1992)

Adultery: Who Cares?...

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The most painful reality is that at the end of the day, the court may not be able to compensate someone who dedicated 20 faithful years to his/her family, only to have the other spouse run off with a younger model. The best advice I can give these clients is to seek counseling immediately, so that they can air their feelings, start the healing process, and hopefully get their emotions under control so that they can make sound financial decisions with respect to their legal divorce (which is different from the emotional divorce that may not come until much later.)

I am reminded of a quote I found in a fortune cookie not long ago: Love is like War, so easy to start, so difficult to stop. But it is our job to stop the war, and not feed into the anger our clients are feeling. It is our duty to be the voice of reason.

Ronald Bergman, Esquire of Houlon, Berman, Bergman, Finci, Levenstein & Skok, with offices in Greenbelt and Rockville, gives a broad view:

I have been practicing family law for over 35 years across the state. When I first started practicing, the issue of adultery carried some weight in some of the more conservative counties, and slightly affected alimony, marital property and attorney's fees awards. Mediation was uncommon in the 70's and early 80's. During the initial interview process, the clients were greatly concerned about the impact of adultery, and despite some reassurance that it wouldn't make a large impact, that attitude oftentimes carried through during the mediation process. So, for negotiation purposes, there was still leverage.

During the last 20-25 years, the affect of allegations of adultery has had much less of an impact on the outcome of cases in both mediation and litigation, except for monetary awards and settlements involving attorney's fees. However, regardless of your advice, the client's attitude can still be emotional and adversely impact the handling of the case.

Darcy Shoop, Esquire, a solo collaborative divorce attorney in Rockville and Past-President of Maryland Collaborative Practice Council and Collaborative Divorce Association, Inc., weighs in on the impact in the collaborative process:

In collaborative cases, acknowledgement of, rather than blame for, a sexual relationship outside the marriage can be important to help move settlement forward. Often the deep hurt and sense of betrayal felt by one spouse can be contained if those feelings are recognized by the other spouse. In one case, a spouse continued to deny such a relationship and the anger so obviously experienced by the other spouse during collaborative meetings created an almost insurmountable obstacle to productive discussion. The spouse who had the relationship was encouraged privately by the collaborative coach and lawyer to reveal the truth. At the next meeting, the relationship was confirmed and

regrets were expressed by that spouse. The other spouse said the confirmation was critical in helping to process the anger. The case ultimately reached amicable resolution.

Jeffrey N. Greenblatt, Esquire, of The Law Office of Jeffrey N. Greenblatt in Montgomery County, provides practical advice:

Clients think adultery is the be all, end all, whereas, if all else is equal, it alone rarely has a significant impact on most judges, who usually don't exact revenge upon the errant spouse. His greatest success pursuing an adulterous spouse arose from flagrant adultery, as if to purposefully hurt his client, coupled with outrageous expenditures on the paramour. The cost of pursuing an adultery claim must be weighed, and can be significant depending upon where the adultery occurs. There is a cost-benefit analysis for clients when deciding whether to spend \$10,000 - \$15,000 in investigative costs to prove the adultery when there is uncertainty as to what benefit the client would derive, if any (since no attorney can know if a client will be \$10,000-\$15,000 better off in the end). If the cost is less, then the decision is easier. A tip: It is usually cheaper to hire a private investigator here, even if you need to pay for their travel to investigate out of state/country because the cost at the time of trial is likely to be less, and you have the security of knowing that the investigator is close at hand.

Kenneth D'Angelo, a private investigator and founder of Target Investigations in Gaithersburg, provides a unique view:

His cases tend to fall into two categories: 1) proving grounds with opportunity and disposition; or, 2) custody matters, documenting impact of the adultery on the children (mistreatment, drug/alcohol use) and spending time away from family and money on a paramour instead of on the child(ren). For many clients, the key question is whether their spouse is telling the truth or lying. Ken finds clients are satisfied when they find out the truth, because until that point the client is in a quandary about whether or not to believe their spouse. In his experience as a fact witness, judges do not tend to make a huge case out of adultery – they prefer to establish the facts, prove the grounds, and move on. His tips for attorneys: Whether you are hands on or hands off, advise the private investigator what you want done and where to focus so the client's dollars are used wisely; don't overlook the emotional component by dismissing the adultery - clients need closure.

Karen Freed, LCSW-C, BCD, a therapist and collaborative divorce coach in Bethesda, offers the following advice:

The sense of betrayal is extremely deep and painful for the non-adulterer, and a constant point of tension is how much detail they

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Adultery: Who Cares?...

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need to know versus how destructive the knowledge will be. For attorneys, it is important not to minimize the impact of the affair on both parties, not just the non-adulterer spouse (as an adulterer's guilt can urge him/her to give up everything or be an obstacle to resolution if ignored). Attorneys should not use the affair as a whipping boy to gain advantage in the case; whether there is one affair or many, a betrayal is a betrayal and spouses need to find a way to move past this in negotiations and to coparent.

The Honorable Ann Sundt, Retired Judge of the Circuit Court for Montgomery County and Mediator with Creative Dispute Resolutions in Gaithersburg, brings two very helpful perspectives:

While adultery is alive and well, effective attorneys know there is no compensation for a broken heart. An attorney should do more than present a sobbing client in court; the judge wants to know what you want the judge to do. Answer that question with quantified financial damages as if it were any other type of damages case. Is there a period of time without expectation that the "wronged" spouse would work because of depression/grief/betrayal? Is there a need for mental health treatment and what is the cost? Should the therapist be called as witness? Is the adulterer lying or not respecting rules & procedures elsewhere? Make sure your client is prepared for this and understands that a sympathy play alone is not enough because judges are limited in how they can respond empathetically in fashioning a remedy.

In mediation, the issues can be explored more specifically, including the parties' positions resulting from the betrayal and

how these manifest as settlement demands. This is especially so when the "wronged" spouse finds themselves questioning everything and having confidence in nothing. It can be a great moment when in mediation an adulterer says "I never meant to hurt you. I did not realize the pain I would cause you." A mediator can show an aggrieved party that s/he feels badly for their pain; a judge cannot due to perceptions of bias.

Conclusion

Adultery is indeed alive and well. As attorneys, we operate in logic and reason, so tend to dismiss the impact of adultery on the bottom line because there is no tangible financial benefit and the cost to obtain proof may not be justified when other grounds exist. An emotional issue, adultery seemingly takes us outside of logic and reason. Because our clients and the law care, in the end, so should we.

Through informed client cost/benefit discussions, efficiently working with private investigators, developing a strategy balancing grounds versus contributing circumstances, and diligently quantifying and proving any financial damages, we put logic and reason to work and so show our clients we, too, care.

Lindsay Parvis is an associate at Dragga, Hannon, Hessler & Wills in Rockville, Maryland, where she focuses her practice on representing children, custody, domestic violence, and other family matters.

SAVE THE DATE!

MSBA 2011 Annual Meeting



June 8-11
Ocean City, MD



Sea. You. There.

Marital vs. Non-Marital Debt: The Impact on Property Disposition and Monetary Awards

By: Lindsey K. Erdman, Esquire

Every family law practitioner is all too familiar with the massive sea of debt in which most of our clients swim. Many clients in the midst of divorce, particularly in today's economy, are having trouble making their mortgage payment, let alone paying you or paying down that nagging credit card bill that seems to find its way into their mailbox each month. Lucky for you, that client has made their way to your office, and he/she wants relief and wants out of their debt, and to boot, they expect you and the Court to make their spouse pay for it. So, what are you to do and what advice do you give them? The advice you give them and the approach you take in Court must be premised on an understanding of the law as it relates to debt and how debt can be resolved by the Court.

So what exactly is marital debt?

The client that just came into your office to retain you following your initial consultation has just advised you that she maxed out her credit card to pay for a fabulous and romantic tour of the California Wine Country with her husband. You then discover that her husband left her less than two weeks after their return. Your client is out for revenge and she wants her money back, from him. You take a big gulp, realizing that your next words to her are not going to be particularly welcome. You put on your game face and say, "You may have a very difficult time getting that money back, unless we can get you a monetary award." Your client has no idea what you are talking about and you can see in her eyes that she's thinking of getting another lawyer. You got the same reaction the week prior when another client took out multiple parent-plus loans to pay for his son's four year education at University of Maryland, to the tune of \$80,000. Both clients, who we will refer to as Unfortunate Client 1 and Unfortunate Client 2 respectively, thought this was going to be really simple, particularly because they both heard through the grapevine from a "friend of a friend of a friend" that these liabilities constituted marital debt and would be split by the trial judge. You, being the bearer of bad news, have to tell them, "not so!"

Why is your client so surprised? The client's surprise usually stems from the common misconception about the liabilities that constitute marital debt under Maryland law. Oftentimes clients, and even many attorneys, believe that marital debt is a debt incurred during the marriage for a marital or family purpose (i.e., a child's college tuition, a family vacation, accumulated grocery bills, etc.), regardless of the spouse's name on the liability. And, in most states, a marital debt is any debt incurred during the marriage for the parties' joint benefit. See TURNER, BRETT R., *EQUITABLE DISTRIBUTION OF PROPERTY* § 6:97 (3d ed. 2009). Maryland law, however, differs drastically in its views

on marital debt, and it is the attorney's job to explain this carefully, and sympathetically, to his/her client.

In Maryland, by definition, a debt can only be a "marital debt" if the debt is directly traceable to the acquisition of marital property. See Harper v. Harper, 294 Md. 54 (1982). For instance, the first mortgage that was taken out at the time the married couple purchased the marital home is a marital debt because it was incurred for the purpose of acquiring a piece of marital property. Likewise, the lien encumbering wife's vehicle that wife purchased during the marriage is a marital debt. As explained in Kline v. Kline, 85 Md. App. 28 (1990), debt can be a marital debt even if the debt is not a lien or encumbrance on the marital property, i.e., husband borrows money from his mother or uses his credit card to purchase a boat during the marriage. A debt can also be a marital debt where the debt was used to acquire a piece of marital property, but the debt itself is attached to a different piece of property. For instance, in the case where a married couple takes out a home equity loan to purchase a timeshare, the portion of the home equity loan attributable to the acquisition of the timeshare is a marital debt that will be deducted from the value of the timeshare, not the value of the marital home on which the home equity loan is attached.

If a debt is not directly traceable to the acquisition of marital property, it is a non-marital debt. See Freedenburg v. Freedenburg, 123 Md. App. 729 (1998). Unfortunate Client 2's parent-plus loans taken out to pay for his son's college education are accordingly non-marital debt, as the debt was not incurred to acquire marital property. Even if those college expenses were paid using a home equity loan that encumbers the marital home, the portion of the home equity loan attributable to the college debt would still remain a non-marital debt, despite the debt being attached to marital property. Unfortunate Client 1's tour of the California Wine Country is also a non-marital debt. Even if the credit card debt incurred to pay for the trip was in the spouses' joint names, the debt would continue to be non-marital debt.

The Court is required to make a decision as to the proper characterization of debt as marital debt or non-marital debt based on the evidence presented. See Coutant v. Coutant, 86 Md. App. 581 (1991). Who owes the debt is as immaterial to a determination of whether a debt is marital or non-marital as who owns the property itself. See Kline, 85 Md. App. 28 (1990). Next we visit how the determination of whether a debt is marital or non-marital will impact your property case.

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Marital vs. Non-Marital Debt...

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So how does marital debt and non-marital debt impact my property case?

It is critical to first determine whether a liability is a marital debt or a non-marital debt to understand when and where that debt will come into play in the application of the Marital Property Act. The Court must engage in a 3-step process in arriving at a determination of a monetary award. See Ward v. Ward, 52 Md. App. 336 (1982); Harper v. Harper, 294 Md. 54 (1982); and MD. CODE ANN., Family Law §§ 8-203 through 8-205 (Replac. Vol. 2006). The Court must first determine which property is marital property, and then must determine the value of all marital property. See Ward, 52 Md. App. 336 (1982); Harper, 294 Md. 54 (1982); and MD. CODE ANN., Family Law §§ 8-203 and 8-204 (Replac. Vol. 2006). Only after the Court has determined and valued the marital property may the Court proceed to make a monetary award. See Ward, 52 Md. App. 336 (1982); Harper, 294 Md. 54 (1982); and MD. CODE ANN., Family Law § 8-205 (Replac. Vol. 2006). A marital debt is relevant in step 2 – the valuation of marital property. A non-marital debt, in contrast, will only come into play in step 3 – the determination of the amount and method of payment of a monetary award.

Marital Debt and Valuation

Marital debt comes into play in the second stage of the three-step process, when the Court is required to determine the value of marital property. The Court is required to adjust downward the value of marital property to account for any unpaid liability incurred to acquire that property. See Schweizer v. Schweizer, 301 Md. 626 (1984); Green v. Green, 64 Md. App. 122 (1985); Niroom v. Niroom, 313 Md. 226 (1988); see also Goldberg v. Goldberg, 96 Md. App. 771 (1993). If the marital debt exceeds the value of the piece of marital property, the value of that property is zero; marital property cannot have a negative value. See Kline, 85 Md. App. 28 (1990). Additionally, marital debt cannot be transferred from one piece of marital property to another. See Id. These holdings in Kline are of particular significance in today's tough economic times where unpaid balances of mortgages often exceed the fair market value of the house. Particularly devastating are the cases in which a home equity loan was taken out for use on improvements and/or additions to the house, intended obviously to increase the value of the home. At the time of absolute divorce, and later at sale, many attorneys and clients are finding that the fair market value of the home is not great enough to cover both the first mortgage and the home equity loan.

Non-Marital Debt and Monetary Awards

Non-marital debt has no function in the valuation process. See Schweizer, 301 Md. 626 (1984). Rather, non-marital debt will only come into play in the last step of the three step process, when the Court is fashioning a monetary award. Unfortunate

Client 1 and Unfortunate Client 2 are both placed in a very precarious position, and the attorney would be wise to explain at the outset of the case the difficult position in which the client finds him/herself.

First, the attorney and client must remember that a monetary award is discretionary. The decision whether to grant a monetary award is generally within the sound discretion of the trial court. See Alston v. Alston, 331 Md. 496 (1993). The Trial Judge may grant a monetary award “as an adjustment of the equities and rights of the parties concerning marital property.” See MD. CODE ANN., Family Law § 8-205 (Replac. Vol. 2006). In interpreting this Section, Maryland's appellate courts have discussed the legislature's intent in creating this law. The Court of Special Appeals has held that, “[t]he monetary award is designed to accomplish an *equitable* division of the marital property in an indirect manner.” See Ward, 52 Md. App. 336 (1982) (citing Ohm v. Ohm, 49 Md. App. 392, 396 at n.2, 431 A.2d 1371 (1981)) (emphasis added). In making a monetary award, the trial court must use its sound discretion to arrive at an award that is equitable and in accordance with the statute. See Alston, 331 Md. 496 (1993). Both the client and attorney must be mindful that what may appear fair to one person may not be fair to another, and what is equitable to one judge may not be equitable to another.

Second, although some factors required in considering a monetary award may fall in your client's favor, other factors may weigh against your client and/or the debt which your client faces may pale in comparison to other circumstances or evidence presented. The trial judge must consider each factor listed in Section 8-205(b) of the Family Law Article when determining whether to grant a monetary award and the amount of that award. Jandorf v. Jandorf, 100 Md. App. 429, 439, 641 A.2d 971 (1994). The trial court shall articulate that it has considered all of these factors when granting or denying a monetary award. Imagnu v. Wodajo, 85 Md. App. 208, 582 A.2d 590 (1990). The provisions of this section are mandatory, and the failure of the trial judge to apply the statutory factors will result in the award being vacated. See Bangs v. Bangs, 59 Md. App. 350, 475 A.2d 1214 (1984); see also Quinn v. Quinn, 83 Md. App. 460, 575 A.2d 764 (1990). As the attorney for Unfortunate Client 1 and Unfortunate Client 2, you will likely argue that factor 1 (the contributions, monetary and nonmonetary, of each party to the well-being of the family), factor 3 (the economic circumstances of each party at the time the award is to be made), and factor 11 (any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award . . .) favor a finding that a monetary award is appropriate. Unfortunate

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Marital vs. Non-Marital Debt...

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Client 1 may argue that her payment of the vacation was done to promote the well-being of the couple and was done in an attempt to bring the couple closer; that she has been left alone to pay this debt; and that her husband left within 2 weeks of their return. Unfortunate Client 2 will argue that his absorption of the child's college expenses is a significant financial contribution to the child which promotes his education and future; and that the absorption of that debt has left him \$80,000 in debt, in a grim economic situation, and he is therefore in greater need for more marital assets; etc. Though the arguments that both clients have are compelling, the attorney and client must remember that these are but a few factors that the Court will consider, and the other factors may either balance the scale or even tip the scale in their spouse's favor.

Third, the attorney and client must be mindful that the amount of a monetary award cannot exceed the amount of marital property owned by the payor. See *Odunukwe v. Odunukwe*, 98 Md. App. 273 (1993). Accordingly, if there is no marital property at all, there can be no monetary award. Likewise, if marital property exists, but it has no value, there can be no monetary award. In the vast majority of cases, the largest asset that the parties own is the marital home. If the marital home is "underwater," the

client may be faced with the brutal reality of keeping the debt and receiving no monetary award.

Conclusion

In conclusion, it is important for all family law practitioners to understand the difference between marital and non-marital debt, and how each type of debt impacts a property case. I find, in practice, that it is one of the most misunderstood concepts in family law, particularly by clients. It is the attorney's role to educate the client as to the client's rights, potential "problems" in their case, and what the client may face in Court if the case does not settle. Contrary to popular belief, not all debt is treated the same by the Court, and it is critical to you and your client that the difference is understood and accounted for in your case strategy.

Lindsey K. Erdmann is an attorney in the law firm of Knight, Manzi, Nussbaum, & LaPlaca, P.A. located in Upper Marlboro, Maryland, focusing her practice in the area of family law. She is also Co-Chair of the Family Law Committee for Prince George's County.



Quotation of the Month

"As I grow older, I pay less attention to what men say. I just watch what they do."

-Andrew Carnegie.

I've heard Judges and Masters say the same thing.

Ricketts, Now What?

By: Master Paul Bauer Eason

It's the same old tune, fiddle and guitar,
Where do we take it from here?
Rhinestone suits and new shiny cars,
It's been the same way for years.
We need a change.¹

In July of 2006, the Court of Appeals of Maryland published its opinion in *Ricketts v. Ricketts*.² At issue, was whether or not a complaint for limited divorce alleging a constructive desertion could survive a motion to dismiss when neither spouse had physically departed the marital home. The facts in *Ricketts* were quite uncomplicated. Mr. Ricketts complained that his wife had ejected him from the marital bedroom and refused to engage in sexual relations. In response, Mrs. Ricketts asserted that a “desertion” requires that the parties live separate and apart and that, “in the absence of a separation, there is no ground for divorce on that ground.” The trial court agreed with Mrs. Ricketts’ argument and dismissed Mr. Ricketts’ complaint. An appeal followed.

In a unanimous twenty-two page opinion written by Chief Judge Bell, the Court held that a constructive desertion can occur when one spouse withdraws to a separate bedroom and refuses to engage in sexual relations (i.e. cohabit) without just cause even though the married couple still resides together. The court cited its prior ruling in *Scheinin v. Scheinin*³ that unequivocally held that, “It is beyond question that there may be a desertion although the husband and wife continue to live under the same roof.”⁴

In *Scheinin*, the husband had moved his “secretary” into the marital home. The wife justifiably protested and insisted that she leave. After the “secretary” departed the residence, Mrs. Scheinin complained that her husband battered and otherwise abused her. Ultimately, Mr. Scheinin told his wife that, “he did not want to have anything more to do with her.”⁵ In response, Mrs. Scheinin moved out of the marital bedroom, “ceasing to live together as husband and wife.” On these facts, “the court granted the wife, a limited divorce on the ground of constructive desertion and awarded her alimony, custody of the children and child support.”⁶

The Court of Appeals also indicated that under a *Ricketts* fact pattern, a custody and visitation dispute could also be maintained notwithstanding the jurisdictional requirements of Section 5-203(d) (1) of the Family Law Article which provides that, “[i]f the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents.” The Court found that language to be “ambiguous” and “not to be read in isolation.”⁷ Obviously, Maryland courts frequently make custody awards in divorce actions where adultery and cruelty are alleged, and both parties are living together. Accordingly, *Ricketts* would not apply to an unmarried couple residing in separate bedrooms and engaged in a custody battle precisely because there are no

“marital duties and obligations” the violation of which could give rise to a cause of action.

Now, as a result of the holding in *Ricketts* and presumably with a Judgment of Limited Divorce in hand, an injured spouse can leave the home without fear that he or she is committing a marital wrong. As the Court indicated in its opinion, “[a] limited divorce which may be decreed for a limited or indefinite period is ‘one from bed and board. It grants unto the injured spouse the right to live separate and apart from the one at fault.’” Even more impressive, in a “*Ricketts* case” out of Montgomery County, the Court granted the wife custody, child support, mortgage contribution, exclusive use and possession and ordered the husband out of the home in thirty days! Clearly the holding in *Ricketts* clarified existing case law and highlighted new opportunities for litigants and their lawyers to avoid the typical standoff that frequently occurs when neither spouse is willing, or financially able, to relocate to new quarters.

But what transpired next was truly interesting. In short order and in what can only be described as a collective exercise of wishful group thinking, lawyers were announcing in my Courtroom that their clients were entitled to a divorce on the grounds of mutual and voluntary separation, “pursuant to the holding in *Ricketts*.” In other words, the parties were still residing under the same roof and there were no allegations of a constructive desertion. A possible explanation for this phenomenon may lie in the fact that many lawyers who practice in Prince George’s County are also admitted in the District of Columbia where “in-house” separations for six months leading to a divorce are permitted and no corroboration is required.

It is also possible that lawyers heard what they wanted to hear, and assumed that the judges and masters would not bother to read the opinion and simply accept their representations as to what the case stood for. It got so bad that I kept copies of the *Ricketts* opinion on the bench for the times when attorneys became overly insistent in misrepresenting its findings. An informal survey on The Family & Juvenile section “List Serve” confirmed that other counties were also grappling with attorney assertions that, post-*Ricketts*, cohabitating couples were eligible for a divorce on the ground of a mutual and voluntary separation. In fact, in some instances, divorces were granted absent proof of a constructive desertion.

With that said, will the *Ricketts* decision open up the floodgates for a surge of “in-house” divorces? Absolutely not. In my twenty-four years of private practice, I do not believe I ever encountered a client who was complaining that their spouse was living in a separate bedroom and refusing to engage in marital

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Ricketts, Now What...

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relations. Typically, by the time the prospective client arrived in my office, the marriage was, “in name only” and both spouses were coming and going as he or she pleased trying to avoid the other and any exposure to having to pay child support and/or alimony that a separation might entail. Inquiries as to whether or not marriage counseling might be helpful in saving or improving the relationship were routinely rebuffed.

So, where do we go from here? *Ricketts*, while helpful, is no silver bullet. Maybe it’s the poor state of the economy. And maybe it is my libertarian leanings, but, it is time to seriously consider amending our divorce statutes to allow for “in-house separations” ultimately leading to an absolute divorce. Yes, our public policy should support the institution of marriage. The stability that a good marriage provides to children and families is incalculable. With that said, we can better support marriage and families when we create good jobs that provide a living wage and when we build affordable housing and decent schools. But, once the marriage has become terminal and toxic, why make the granting of the divorce more cumbersome than need be? You do not support marriage by making divorce difficult.

In the last session of the Maryland General Assembly, Delegate Luiz Simmons from Montgomery County introduced legislation that he described as “a modest step forward” authorizing a court “to grant a limited or absolute divorce on the ground of voluntary separation if the parties are not engaging in sexual relations.” The proposed amendment retained all of the elements of our current one year statute except for the requirement for separate residences. That bill was never voted upon. It needs to be reintroduced and passed in the next session.

But how about beginning a debate as to eliminating all fault grounds in the divorce process? Coincidentally, while vacationing on the Eastern Shore, and stressing over the fact that I had this article to write, I came across the following Letter to the Editor in *The New York Times* regarding that State’s attempt to pass “no-fault” divorce legislation that eloquently speaks to the issue.

To the Editor:

Re “Divorce”, No-Fault Style,” by Stephanie Coontz (Op-Ed, June 17):

Having to establish grounds to get divorced can be viewed as an encroachment on freedom. Consenting adults deserve the freedom to choose when to end their marriages without having to explain themselves to the court, just as they do not have to explain to the state why they are choosing to marry. The crux of the matter in a divorce action in court is not the grounds (reason) for the divorce; it is about how parenting time will be allocated, how assets and liabilities will be divided and how and whether money will flow between the former

spouses once the divorce is final. Those issues must be front and center, ahead of why they have decided not to remain married. Why should any government have the right to tell people they must prove that their marriage is over for specific reasons the state deems worthy? New York has stood alone on this issue. Couples are the best experts in the viability of their own marriages. It is time to allow overstretched matrimonial judicial resources (needed by people in matrimonial litigations) to focus on solving how the business of the divorce will be handled, not the reason it is happening. Empowering couples in the divorce process to make their own choices will with luck lead more couples’ choosing to resolve their divorces with the help of mediators and the support of counsel, as opposed to litigating in the court system.⁸

Exactly my sentiments! Let the discussion begin! And by the way, Mr. Ricketts received his Judgment of Absolute Divorce and many thanks to all of the ListServers for their input and participation. Your identities will forever remain anonymous.

Paul Bauer Eason is a Family Division Master in the Circuit Court for Prince George’s County. Prior to his appointment in 2007, he was a solo practitioner for 24 years.

¹Lyrics from “Are You Sure Hank Done It This Way,” by Waylon Jennings (1975).

² 380 Md. 230, 844 A.2d 427 (2004).

³ 200 Md.282, 89 A.2d 609 (1952).

⁴ *Ricketts v. Ricketts*, 380 Md. 230, 844 A.2d 427 (2004) (quoting *Scheinin v. Scheinin*, 200 Md. 282, 89 A.2d 609 (1952)).

⁵ *Scheinin v. Scheinin*, 200 Md. 282, 89 A.2d 609 (1952).

⁶ *Id.*

⁷ *Ricketts v. Ricketts*, 380 Md. 230, 844 A.2d 427 (2004).

⁸ Cara M. Raich – New York Times Letter to the Editor, June 22, 2010



Status Offenses: An Underutilized Tool for Early Prevention?

By: Richard Maslow

“(e) “Child in need of supervision” is a child who requires guidance, treatment, or rehabilitation and:

- (1) Is required by law to attend school and is habitually truant;
- (2) Is habitually disobedient, ungovernable, and beyond the control of the person having custody of him;
- (3) Departs himself so as to injure or endanger himself or others; or
- (4) Has committed an offense applicable only to children.”

Md. Code Ann. Cts. & Jud. Proc. Art. §3-8A-01(e).

Maryland's juvenile courts, like Gaul¹, are divided into three parts. Most cases handled by Maryland's juvenile courts involve abused or neglected children (children in need of assistance or CINA) or delinquents. The third type of juvenile case is a “child in need of supervision” (hereinafter, “CINS”), a status offense that applies only to minors. This underutilized designation permits the Court to become involved in efforts to rehabilitate a young person before he or she drops out of school or commits a crime.

Allegany County and a few other Maryland counties utilize the CINS section of the law while the majority have not had any cases. Nationally, over 150,000 status offense cases are disposed of by juvenile courts per year.²

A review of statistics reported by the Maryland Department of Juvenile Services' (DJS) intake cases shows that it handled 1,734 CINS cases during FY 2009.³ Based on a survey of Circuit Courts it is clear that most of these DJS intake cases did not result in the filing of CINS petitions. For example, in Allegany County, DJS reported 84 cases in FY 2009 while the juvenile court received only 7 cases. DJS handled 979 CINS cases in Prince George's while there were no court filings. Only 6 Maryland courts reported any CINS cases being filed in FY 2009: Allegany, Carroll, Cecil, Frederick, Garrett, and Wicomico. (A few other counties reported a small number of cases in FY'10 or in the past while most juvenile clerks reported never having received a single CINS petition.) A total of 17 CINS cases were filed in FY 2009 throughout the state.⁴

Maryland statistics for 2006 and 2007 show that the number of CINS petitions were filed has decreased since 2007; 61 in 2006 and 97 in 2007, in Allegany, Carroll, Frederick, Washington and “8 small counties”.⁵

Why should we care about status offenses if so few petitions alleging CINS are filed? When a young person is found to be CINS, the juvenile court may place the child on probation with conditions intended to remedy the existing problems, including orders directed toward the child and parents to participate in re-

habilitative services. CJ§3-8A-19(d)(iii). The court may commit him/her to the custody of the Department of Juvenile Services or the Department of Health and Mental Hygiene. Bringing help to children through a CINS petition injects them into the court process before they lose all interest in school, run away or become hopelessly incorrigible and may help prevent them from committing delinquent (and later, criminal) acts.

Truancy

All children in Maryland between five and sixteen years of age are required to attend school. Md. Code Ann. Ed. Art. §7-301. One-half of the states currently require attendance beyond age sixteen.⁶ Parents can be prosecuted for their parents' failure to send the children to school, and children can be found children in need of assistance for being “habitually truant.” The State Board of Education has defined an “habitual truant” as a one who “is unlawfully absent from school for a number of days or portions of days in excess of 20 percent of the school days within any marking period, semester, or year. A local school system has the prerogative of defining habitual truancy in a more but not less stringent manner (for example, unlawful absences in excess of 15 percent of the school days).⁷ Some local school boards, such as Kent County, have policies of contacting parents after a child has missed even 5 days of school (but have not altered the definition of “habitual truancy”).⁸ Truancy represents a true failure of the incentives for children to attend school and become educated – forgoing the benefits of socialization with peers who attend, the intrinsic achievements from learning and the financial benefits of high school graduation.⁹ “Truancy may be the beginning of a lifetime of problems for students who routinely skip school. Because these students fall behind in their school work, many drop out of school. Dropping out is easier than catching up.”¹⁰

It is sad that in some foreign countries children are still struggling for the right to basic education¹¹ while approximately 15% of students in Maryland do not graduate from high school.¹²

Although more than half of the DJS intake cases labeled as CINS are described as truancy,¹³ the rare use of CINS petitions shows that the juvenile courts have not been used to assist with truancy prevention in most jurisdictions. Some communities have launched special programs for truancy prevention such as the Truancy Mediation Program in Baltimore and the Truancy Reduction Pilot programs in Prince George's, Harford, and in the Lower Shore counties (Dorchester, Somerset, Wicomico and Worcester). See, Md. Code Ann. Cts. & Jud. Proc. Art. Title 3, Subtitle 8C. See, L. Seaton and R. Laird, Jr., “Truancy Reduc-

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tion Pilot Programs in Maryland Juvenile Courts: A Remedial Proactive Approach by the Courts to Help Children”, Family Law News (June 2009) at 16.¹⁴

Montgomery County has taken an inter-agency approach that involves the schools, the State's Attorney, the child welfare agency, DJS, police, and public housing, utilizing a truancy review board. This has now evolved into the new truancy court project that was announced in March 2010.¹⁵

In 2007 the Assembly passed a bill that prohibits a provisional driver's license (a learner's permit) from being issued to anyone under 16 who has more than 10 unexcused absences during the prior semester. This provision has limited effect as it only applies to those between the ages of 15 years, 9 months and 16. See, Md. Code Ann. Trans. Art. §16-105(a)(3).¹⁶

The juvenile courts in jurisdictions without special truancy programs are available to address habitual truancy problems through the currently underutilized CINS petition.

Runaways

Nationally approximately 12% of the juvenile status offenses involve running away.¹⁷ DJS intake statistics show that approximately 24% of the CINS offenses are classified as runaway. Fifty-eight percent of the DJS runaway intake cases involve girls.¹⁸ Runaways who have not also committed a delinquent act present a dilemma to the system as they cannot be placed in secure detention pursuant to Md. Code Ann. Cts. & Jud. Proc. Art. §3-8A-15(h)(1)(i) and the federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5633 (a)(11).

Habitually disobedient

Parents who consider their children to be incorrigible can file a complaint with DJS alleging their child is CINS. However, current statistics show that these parents are likely to have the case resolved at the intake or informal adjustment stages because DJS rarely files CINS petitions in most jurisdictions. This may be unfortunate as a ninety-day informal adjustment process may not be long enough to address the deep-seated family problems which led the parent to seek outside help. A formal CINS adjudication and a disposition ordering the family to participate in family counseling may provide greater assistance. In cases where the parent-child relationship has fractured, a child may be placed in a foster home while the parents and child use the placement as a cooling-off period and a time for counseling.

Crossover Children

Earlier intervention can help prevent a transition from abuse/neglect to delinquency. In some jurisdictions the recognition that

some children are involved in the dependency system (“children in need of assistance” in Maryland) as well as the delinquency system has led the jurisdiction to adopt a collaborative approach involving social services, juvenile services and schools as well as a one-family-one-judge system. Although the focus of CINS and delinquency cases is the misbehaving child, frequently the family is in need of some of the same interventions as families involved in abuse/neglect cases.¹⁹ In fact, many of these children have been abused in the past.²⁰

Conclusion: Advocates for parents and troubled children look for help

Several frustrated parents have appeared before me, saying that nothing happened when they went to the local office of the Department of Juvenile Services asking that something be done for their child before violence occurred. Unfortunately, their child was eventually brought before the juvenile court as a delinquent after she or he had assaulted a parent. CINS petitions might have brought these children before the court sooner.

Will DJS refer more CINS cases to the courts in the future, especially in counties where there are no special truancy projects? Will we see more coordinated early prevention efforts extended to the middle-school years? How many children will drop out of school or families fracture before our agencies respond? A CINS petition is not a panacea -- just an underutilized tool.

Richard Maslow is the Family Law Master in the Circuit Court for Allegany County. He wishes to thank the following for their assistance: Sara Harris, student at the University of Baltimore School of Law; Master Leah Seaton; and, the Clerks of the Circuit Courts of Maryland.

Footnotes:

¹⁴“Gallia est omnis divisa in partes tres” J. Cæsar, Cæsar's Commentaries, Books I-IV as viewed at <http://www.gutenberg.org/file/218/218.txt> on July 22, 2010.

² C. Puzzachara, et al., Juvenile Court Statistics: 2006-2007 72 (2010) (citing 2007 figures). By comparison, there were approximately 1,666,100 delinquency cases nationally for the same period. *Id.* at 6.

³ Md. Dep't. of Juvenile Services, FY 2009 Annual Statistical Report at 18. http://www.djs.state.md.us/pdf/2009stat_report-section1.pdf

⁴ Survey conducted by the author with additional assistance from Judge Karen Jensen, Master JoAann Asparagus, Master Althea Stewart Jones, and Master James Casey.

⁵ C. Puzzachara, et al., Juvenile Court Statistics: 2006-2007 115, 135.

⁶ M. Bush, Compulsory School Age Requirements (2009) as

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viewed at <http://www.ecs.org/clearinghouse/80/44/8044.pdf>

⁷ C.O.M.A.R. §13a.08.01.04C as viewed at <http://www.dsd.state.md.us/comar/comarhtml/13a/13a.08.01.04.htm> on July 28, 2010.

⁸ http://www.kent.k12.md.us/index.php?option=com_content&view=article&id=515&Itemid=206

⁹ In 2008 the disparity in incomes between a high school and college graduate was \$13,000 per year for men and \$20,000 per year for women. <http://nces.ed.gov/fastfacts/display.asp?id=77>

¹⁰ E.Garry, "Truancy: First Step to a Lifetime of Problems", Office of Juvenile Justice and Delinquency Prevention (Oct. 1996).

¹¹ Article 26 of the Universal Declaration of Human Rights of 1948 states, in part, "Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory." United Nations, Official Records of the Third Session of the General Assembly, Part I (A/810), p. 71. These rights were re-stated in Article 12 of the International Covenant on Economic, Social and Cultural Rights as, " 2. (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education..." G.A. res. 2200A (XXI), 21 U.N. G.A.O.R. Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); 993 U.N.T.S. 3; 6 I.L.M. 368 (1967). See, K. Pokharel, "India Mandates Children Go to School: Compulsory Education for All Children Ages 6 to 14 Is Part of Move to Harness Economic Potential" Wall Street Journal (April 1, 2010) ("The number of Indian children not enrolled in school decreased to an estimated 8.1 million in 2009 from 25 million in 2003") http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052702303395904575158083085257338.html

¹² The Maryland graduation rate for 2009 was 85.24%. <http://www.mdreportcard.org> (2010) viewed on July 21, 2010.

¹³ Md. Dep't. of Juvenile Services, supra.

¹⁴ http://www.msba.org/sec_comm/sections/family.newsletter.FamLawJune09.pdf

¹⁵ http://www.montgomerycountymd.gov/Apps/Council/News-Advisories/na_details.asp?NaID=5388

¹⁶ Several states require minors to continue to attend school as a condition of maintaining a driver's license. See, W.Va. Code §17B-2-3a(c)(2)(E) (A driver under age 18 is subject to a condition that she/he "[m]aintains current school enrollment and is making satisfactory academic progress...."). <http://www.legis.state.wv.us/WVCODE/ChapterEntire.cfm?chap=17b&art=2§ion=3A#02>

¹⁷ C. Puzzanchera, supra note 3. The same author in a 2007 report, "Trends in the justice system's response to status offending: OJJDP Briefing Paper," stated that, "The runaway arrest rate in 2005 was the lowest it has been since 1980." Maryland's figures for intake cases designated as runaways has also trended downwards for the period of 1996 through 2009. See, DJS Annual Statistical Reports at <http://www.djs.state.md.us/publications.html>

¹⁸ Md. Dep't. of Juvenile Services, supra note 4 at 32, 35.

¹⁹ K. Adam, "Red Rover, Red Rover, Our Youth are Crossover" (discussing the way the court has addressed crossover problems in Pima County, Arizona). <http://www.casaforchildren.org> Also see, H. Davidson, 27 Child Law Practice 31 (Apr. 2008).

²⁰ "Studies from a number of psychological journals report that between 75-93 percent of youth entered the juvenile justice system annually are estimated to have experienced some degree of traumatic victimization." Justice Policy Institute, "Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense" at 3 (July 2010) http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf



CASE NOTE

In Re Adoption/Guardianship of Alonza D. and Shaydon S. No 42 *September Term 2009, Filed January 19, 2010*

By: Master Karen R. Ketterman

Mr. D. is the biological father of Alonza D. and Shaydon S. This opinion marks Mr. D's second journey through the appellate courts following the termination of his parental rights as to Alonza D and Shaydon S. by the Circuit Court for Baltimore City. The original order granting Guardianship with the Right to Consent to Adoption was issued February 8, 2007 and was based in large part on the length of time the children had been in foster care. Mr. D. appealed to the Court of Special Appeals, which affirmed. The Court of Appeals granted cert, vacated the decision of the Court of Special Appeals and remanded to the Circuit Court for reconsideration in light of *In Re Adoption/Guardianship of Rashawn H and Tyrese H.*, 402 Md. 477, 937 A.2d 177 (2007). The Circuit Court for Baltimore City held a hearing in July 2008 and once again terminated Mr. D's parental rights, finding that the length of time the children had been in foster care constituted "exceptional circumstances" as required by *Rashawn H.* The Court of Special Appeals affirmed. On cert, the Court of Appeals addressed one question:

ISSUE ON APPEAL:

1. Where petitioner's sons were involuntarily taken from his custody and, over his objections, were kept in the custody of a third party for six years, was it error for the lower court to find that this period of separation between father and sons, and the commensurate bonding between the children and the foster mother, was an exceptional circumstance sufficient to overcome the presumption that it is in the best interests of the children to preserve petitioner's inherent rights as a natural parent to the care, custody, and control of his sons?

FACTS:

Alonza D. was born to Mr. D. and Ms. S. on March 13, 2000. His sibling, Shaydon S., was born on July 14, 2001. Mr. D and Ms. S. separated in 2001 and the Baltimore City Department of Social Services became involved shortly thereafter upon receiving a report that the children (who had moved with Ms. S into the home of her brothers) were neglected and living in squalor. The children were not placed with Mr. D because his home was in need of lead abatement. In early 2002 the children were placed in foster care with Ms. B and were adjudicated as Children in Need of Assistance (CINA) on May 6, 2002.

On January 10, 2003 the permanency plan for the children was established as reunification with Ms. S. Mr. D was referred to a parenting program and was described as "a committed father with positive relationship with son-good work history-needs GED and improved parenting skills." Mr. D. did not complete

the parenting class due to a conflict with his work schedule and his feeling that topics related to abuse did not apply to him. Mr. D. was provided with visitation, which he exercised regularly until his parental rights were terminated in 2007.

The permanency plan was changed from reunification to placement with a nonrelative in 2003 and a Petition for Guardianship with the Right to consent to Adoption was filed on March 17, 2004. At that time both children had resided with Ms. B for over two years. Mr. D. moved in with his girlfriend and her four children in February 2006 and received another referral to parenting classes, which he did not attend.

The TPR hearing was held on November 2, 2006.¹ The trial judge made findings regarding the children's safety and welfare and the Department's efforts at reunification with the father. He described Mr. D's relationship with the children as close and positive. He contrasted that relationship with the relationship the children had with the foster care provider, Ms. B. "...they are in a loving relationship with Ms. [B], they feel safe, they are both in school...and they are both living with Ms. [B] as a family..." The judge acknowledged that Mr. D has had regular contact with the children and contact with the foster care provider, but he had not completed parenting classes and had not followed through with lack of follow through on "getting his home ready." Based upon these findings, the Judge terminated Mr. D.'s parental rights stating that the Department had proven by clear and convincing evidence that it was in the children's best interests to grant the Department's petition.

Mr. D. filed a Motion for Reconsideration, which was granted and a second TPR hearing was held on February 8, 2007. At that hearing Mr. D. testified that he was living with his girlfriend and her children in a home with appropriate sleeping arrangements for Alonza and Shaydon and that he had been working regularly earning \$44,000 per year with medical and dental benefits which would be available to the children. He had also made arrangements for day care and school enrollment for the children. Following this testimony, the trial judge adopted all of his previous findings and terminated Mr. D.'s parental rights, emphasizing the time the children had been in foster care.

Mr. D. appealed arguing that the trial court gave too much weight to the bond that had developed between Ms. B. and

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Case Note: Alonza D. and Shaydon S . . .

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the children. A divided panel of the Court of Special Appeals affirmed. The Court of Appeals granted cert and issued a per curiam order remanding the case to the Circuit Court for reconsideration in light of *In Re Adoption/Guardianship of Rashawn H and Tyrese H.*, 402 Md. 477, 937 A.2d 177 (2007).

On July 29, 2008, the Circuit Court held another hearing to consider the termination of Mr. D.'s parental rights in light of *Rashawn H* and whether there was clear and convincing evidence to suggest that Mr. D. was either an unfit parent or that exceptional circumstances existed to allow the parent/child bond to be severed². The judge determined that there was no evidence to suggest that Mr. D. was unfit. He emphasized that the children had been in the care of Ms. B., and out of the care of their father, for six years. He found that the length of time the children had been with Ms. B. constituted exceptional circumstances and that it was therefore in the children's best interests to terminate parental rights.

HOLDING:

1. The Circuit Court erred by failing to make explicit findings that a continued parental relationship would be detrimental to the best interests of the children when concluding that "exceptional circumstances" existed under the standard established in *In re Adoption/Guardianship of Rashawn H.*, to warrant terminating the Petitioner's parental rights.

The court discussed the *Rashawn* case, which requires that the court relate specific findings pursuant to the FL §5-313 factors to a determination of parental fitness or exceptional circumstances that would make a continuation of the parental relationship detrimental.

The Court of Appeals found that the length of time the children had been in care did not constitute exceptional circumstances based upon the reasoning in *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005). *McDermott* was an initial third party custody case, not a termination of parental rights case, but the key finding was that "the mere passage of time during which Mr. McDermott and his son were separated did not give rise to the level of exceptional circumstances overcoming the legal presumption favoring parental custody, especially in light of the fact that Mr. McDermott, as with Mr. D., was a fit parent." If the mere passage of time was insufficient to overcome the parental presumption in a third party custody case, it is certainly not sufficient to justify a complete termination of the parent child relationship that occurs with the granting of a Petition for Guardianship with the Right to Consent to Adoption.

In a dissenting opinion, Judge Harrell states that Mr. D., unlike *Rashawn's* mother, Melissa F., had no physical or developmental burdens hindering his attempts to become an acceptable father to these children. His absence from their lives and lack of support was due to inaction on his part. "He cannot simply 'park' the children with the state and a third party custodian and not expect circumstances to work against him."

PRACTICAL CONSIDERATIONS

Simply using the language of *Rashawn H.* and giving lip service to unfitness or exceptional circumstances is not sufficient when considering a termination of parental rights. Exceptional circumstances or unfitness must be supported by clear and convincing evidence, **and** lead to an explicit finding that a continued parental relationship would be detrimental to the best interests of the children. Whether dealing with a TPR or an initial third party custody case, the court and counsel must remember that parental rights are fundamental. Foster parents or other third party custodians do not stand on equal footing with a biological parent. A bond with a third party and/or time away from a biological parent is not sufficient to impact the fundamental rights of a parent.

One other item noted in the opinion was the fact that the children were not heard in the case. The opinion seems to indicate that evidence from the children or expert witness testimony as to the bond with the father, could have helped the trial judge determine whether continuation of the parental relationship would have been detrimental to the children.

In short, parental rights are fundamental and cannot be infringed upon without very specific evidentiary findings. Keep *Rashawn H.* and *McDermott v. Dougherty* in your trial notebook and you'll be able to ensure that you've addressed every factor and required finding.

Karen R. Ketterman is the Juvenile and Domestic Relations Master for the Circuit Court for Dorchester County. Prior to her appointment, Master Ketterman represented the Dorchester County Department of Social Services.

Footnotes:

¹ The hearing was continued eight times between September 2004 and November 2006 for various reasons.

² Ms. S. had entered into a post adoption agreement and consented to terminating her parental rights before the case was heard on remand.



CASE NOTE

In Re Adoption/Guardianship of Chaden M., Court of Special Appeals, No. 586, September Term, 2009

By: Master Robert E. Laird, Jr.

BACKGROUND/PROCEDURAL POSTURE:

Chaden M. was born on January 14, 2006, the son of April C. and Saint Sydney M.* Chaden was found to be a Child in Need of Assistance, and was put into foster care with the Baltimore City Department of Social Services (“the Department”) on February 28, 2007. On December 1, 2008, the Department filed a Petition for Guardianship with the Right to Consent to Adoption or Long Term Care Short of Adoption (“the Petition”). With the Petition, the Department also filed a Request for Appointment of an Attorney to represent April. On December 3, 2008 the Petition and Show Cause Order were served on April. April was required to file an Objection to the Guardianship by January 3, 2009. On December 3, the Public Defender’s Office entered an appearance on behalf of April. A Notice of Objection to the Petition was not filed by April’s attorney until March 3, 2009. The Department filed a Motion to Strike Late Objection, which was granted by the Circuit Court for Baltimore City following a hearing. The Circuit Court then issued a written order granting the Department’s Petition for Guardianship.

ISSUES ON APPEAL:

- (1) Is there a right to effective assistance of counsel in an action for termination of parental rights?
- (2) Is the failure to file a timely Notice of Objection to a Petition for Guardianship ineffective assistance of counsel?

HOLDING:

- (1) Where a party is entitled to representation in an action for termination of parental rights, the party being represented has the right to effective assistance of counsel.**
- (2) The late filing of a Notice of Objection to a Petition for Guardianship With Right To Consent to Adoption constitutes ineffective assistance of counsel.**

DISCUSSION:

Although the right to counsel is not constitutionally guaranteed in a TPR proceeding, Maryland has created a statutory right to counsel through Parts II and III of Title 5 of the Family Law Article. The Public Defender Act, particularly §16-204 of the Criminal Procedure Article, provides for representation of indigent parents in TPR cases. The Court of Special Appeals cited numerous cases, including *Wilson v. State*, 284 Md. 664, 671, 399 A.2d 256 (1979), for the proposition that “[e]ntitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective.” Although the cases cited all relate to criminal cases, parents deserve the same consideration in a proceeding where their parental rights

may be terminated, since terminating parental rights involves a fundamental and constitutionally protected liberty interest. Thus, where parents are entitled to be represented by an attorney in a TPR proceeding, such attorneys are required to render effective assistance to their clients.

To determine whether effective assistance of counsel was rendered in the instant case, the Court of Special Appeals applied the two pronged test from *Strickland v. Washington*, 486 U. S. 668 (1984). This test requires the moving party to show (1) that counsel made errors so serious that counsel was not functioning as guaranteed by the Sixth Amendment (the performance component), and (2) that such errors prevented the moving party from receiving a fair trial (the prejudice component). In doing so, the court followed the practices of most other state appellate courts that have addressed the issue of ineffective assistance of counsel in TPR proceedings. In reviewing counsel’s performance, the court must be highly deferential, taking into consideration all the facts. There is a presumption the questioned behavior by the attorney fell within the wide range of reasonable professional assistance. To prove that the questioned behavior was prejudicial, the moving party must show there is a “substantial possibility that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Oken v. State*, 343 Md. 256, 284 (1996). Although the trial record does not normally illuminate the acts of counsel sufficiently for the court to determine whether counsel’s actions were appropriate under the *Strickland* test, if the critical facts are not in dispute, direct review on appeal is appropriate without remand for further fact gathering.

In the case at hand, the facts were not in dispute; April’s attorney was 60 days late in filing an objection to the Guardianship. The fact April was in jail in the days immediately preceding the due date were not grounds to excuse the late filing. As failure to file a timely objection is deemed consent, such a late filing prevented April from producing evidence as to why she objected and clearly prejudiced any chance April may have had in contesting the Guardianship. The late filing of an Objection can never be sound trial strategy. The case was remanded to allow April to file a belated objection to the Petition and Show Cause Order.

PRACTICE CONSIDERATIONS:

Although this case is primarily common sense, an attorney representing a client is required to perform at a reasonably professional capacity. It cannot be stated too often, practicing

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CASE NOTE

*In Re Shirley B., Jordon B., Davon. and Cedric B., __ Md. App. __, No. 1533, Sept. Term 2010
(Ct. of Spec. Appeals, file April 27, 2010) available at 2010 WL 16776353
(Petition for Cert. Filed 5/24/10)*

By: Janet Hartge

In a recently issued opinion, the Court of Special Appeals affirmed a juvenile court's finding of reasonable efforts and change in the permanency plans from reunification to adoption. The mother, who had cognitive limitations and needed specialized services, had appealed. The Department of Social Services had made referrals to the appropriate agencies and had attempted to secure the services for 28 months, but the services were unavailable due to a lack of funding. The children, in addition to having special needs, had been subjected to abuse while in their mother's care; and it was uncertain that even with the services, the mother would be able to parent her children.

ISSUE ON APPEAL

Did the trial court, in a CINA proceeding, err in changing the permanency plan of the four children from reunification to adoption and finding reasonable efforts had been made, where the mother was referred to specialized services but those services were not available due to lack of funding?

FACTS

The Prince George's County Department of Social Services began working with the appellant, Ms. B., and her five children in 2005. In addition to lack of supervision, unsanitary living conditions, lack of school attendance, it was alleged that Ms. B.'s oldest child, who was not a party to this case, had sexually abused his younger siblings. He was removed from the home and placed with a grandparent.

The Department did not remove the other children at that time but provided services to the family. A psychological evaluation was obtained on the mother and revealed concerns about her ability to effectively parent her children due to apparent cognitive limitations. Although the Department referred the mother to Division of Rehabilitative Services (DORS) and counseling, she did not follow through with those referrals. The Department assisted her in obtaining housing and welfare benefits (TCA) which the mother then allowed to lapse.

By February 2007, the family situation had deteriorated; and the children were removed after an incident of domestic violence between the parents where Shirley, then age nine, obtained a knife in her attempt to de-escalate the fight between her parents. The juvenile court granted shelter care. The children were found to be children in need of assistance (CINA) in March 2007 with the juvenile court finding: "The home is chaotic with domestic vio-

lence, lack of sexual boundaries and drug use by several people that [were] there most of the time including her father."

The children remained in foster care; in July 2009, the juvenile court changed the permanency plan for the children from reunification to adoption by a non-relative. Prior to this change, the juvenile court had reviewed the permanency plan for the children at several prior hearings.

As of September 2007 permanency planning hearing, the Department had referred the mother to a domestic violence intervention program, to home-based parenting classes, and Melwood, an organization that assisted individuals with disabilities. The court found that the mother had not followed up on the services recommended by the Department. She had not attended the domestic violence counseling and had not started parenting classes. The mother indicated that she had left messages for Melwood but had not received a response.

At the January 2008 permanency planning review hearing, the juvenile court found that the mother had not followed up with the individual counseling and parenting classes. She also had not maintained contact with the Department.

In June 2008, the permanency planning review hearing was held before a master. Evidence was received that the Department paid for the mother to have twelve sessions of counseling with an individual therapist. The therapist, however, did not recommend additional sessions as it was unlikely that additional sessions would make a difference. The therapist stated that there was still an unresolved question regarding the extent that the mother would be able to care for the children independently. The master had recommended changing the plan to adoption, but the mother filed exceptions. The juvenile court sustained the exceptions in December 2008, continuing the plan of reunification.

Between December 2008 and the July 2009 permanency planning review hearing, which was the subject of the appeal, the Department again referred the mother for specialized services to DORS, Melwood and Developmental Disabilities Administration (DDA). Due to a lack of funding, none of these programs was able to provide the mother with services and could not predict when she would be eligible for their services. The Department had sought funding for services for the mother through Community Connections, but those funds had been exhausted by January 2009. The Department also

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In Re Shirley B...

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had provided the mother with a referral to a support group for parents with developmental disabilities and assistance in meeting her own medical needs. The Department had obtained an additional psychological of the mother, and the psychologist also interviewed the children.

All of the children had special needs. Shirley (age 11), Davon (age 9), and Jordon (age 8) suffered from post-traumatic stress due to their abusive and neglectful experiences. All three older children reported being beaten by their father and reported that their mother was unable to stop their father or protect them. Cedric (age 4) and Jordon suffer from severe ADHD. Shirley also related to the psychologist about her mother's inability to protect her from multiple sexual assaults by Shirley's older brother and about her need to assume the role of parent for her younger siblings. Jordon and Cedric were developmentally delayed and had "speech and articulation issues." Shirley functioned in the borderline intellectual range and received special education services.

It was unclear whether the mother was still in a relationship with the father of the children. It was clear that neither parent had follow through with domestic violence counseling. Shirley had reported that her father shared living space with her mother. The mother denied this allegation, but the Department's worker questioned the mother's truthfulness.

The mother had regular visitation with the children. The Department provided the mother with transportation for those visits as she was unable to navigate the bus system. The visits, however, were at times problematic. There were several occasions when the mother struck Davon in spite of being instructed otherwise.

After hearing all of the evidence at the July 2009, the juvenile court changed the permanency plan from reunification to adoption. The mother noted a timely appeal of this decision.

HOLDING

The Court held that even though the Department's efforts to connect the mother with services for specialized parenting and basic living skills were unsuccessful due to lack of funding and availability, their actions had satisfied the reasonable efforts required by the Juvenile Cause Act.

DISCUSSION

Relying upon the language of *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 500-01, 937 A.2d 177 (2007), the CSA acknowledged that there are limits to what a department is required to do to satisfy the reasonable efforts requirement. The opinion examined the permanency planning statute, Md. Code

Ann., Fam. Law § 5-525(f) and Cts. & Jud. Proc. § 3-823(e), quoting extensively from *In re James G.*, 178 Md.App. 543, 943 A.2d 53 (2008). In *James G.*, the Court of Special Appeals reversed the lower court's finding of reasonable efforts where that Department had made only one referral to a vocational program when the root cause of the child's placement in foster care had been his lack of housing and employment.

The CSA distinguished this case from the facts of *James G.* and *In re Adoption/Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 796 A.2d 778 (2002) ("Case 36"). The Court of Appeals in *Case 36* reversed a termination of parental rights where the Department of Social Services had failed to specialized services at the skill level possessed by the parent in that case. That Department had failed to refer the parent to DDA. In *Shirley B.*, the Department sought services from DDA as well as three other agencies, but the services were not available. There was not simply one failed referral. It also was not clear that even with assistance the mother would be able to care for her children and their special needs, especially in light of her inability to attend to her own needs.

The Department, under COMAR 07.02.11.14(A), shall provide services "to the extent that funding and other resources are available" to facilitate reunification. The Department cannot provide those services if they are not available.

The CSA examined decisions from other jurisdictions which had addressed the availability of services as it related to a finding of reasonable efforts. The CSA agreed with Rhode Island that the unavailability of services is a factor to be considering in determining whether a department has made reasonable efforts to reunify. What will constitute reasonable efforts should be evaluated in light of what services are available. The CSA found no abuse of discretion in changing the children's permanency plans.

PRACTICAL CONSIDERATIONS

With increased budget cuts, the lack of services will be a growing problem. In *Case 36*, the attorney for the parent had presented testimony from an expert about the services that were available to assist the parent. In *Shirley B.*, there was no testimony that additional services or programs were available. Practitioners should be prepared to present evidence on this issue.

Various agencies have different levels of qualifications for services. The mother in *Shirley B.*, according to the testimony, was placed in a second "tier" and would not receive services until all the individuals in the first tier had been served. It is important for the practitioner to understand the category of service for

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which the parent is eligible. It may be necessary to challenge that category determination, if there is a basis, in order for the parent to receive services.

DDA has two categories of eligible client populations, DD (developmental disability) and ISS (individual support services). If a client qualifies for DDA services, there three further qualifications for service: crisis resolution, crisis prevention, and current request. DDA can request that an eligible client be assigned a service coordinator. In October 2009, due to budget cuts, DDA had to reduce the number of clients that received service coordinators. A service coordinator can assist in accessing appropriate services for a disabled client.

Since July 2009, the funds, which were called "Rolling Access" and were depleted within weeks of their availability, are now managed under Low Intensity Support Services ("LISS"). The 2010 Legislature (HB1226/SB920) passed legislation which

clarifies the access to these funds. The effective date of this law is June 1, 2010 and will be codified in Md. Code Ann., Health Gen. § 7-717.

It is also critical that the parents apply early, respond to the various programs when contacted, and provide a reliable means of contacting the parents. If the parent does not respond or cannot be contacted, they will lose their opportunity to receive services. Given the length of the waiting lists and the children's need for permanence, parents cannot afford to fail to take advantage of the services when they are offered. Finally, if the parent is eligible, they should apply for other benefits such as SSI.

Janet Hartge is the Assistant Director of Advocacy for Children's Rights at the Legal Aid Bureau and is based in the Baltimore office. Prior to taking this position in Legal Aid, she represented children in CINA cases for over 21 years in Anne Arundel County. Legal Aid represented Shirley B. in this proceeding.

The Beverly Groner Award winner is...



The 2010 recipient of the Beverly Groner Family Law Award is Kathleen M. Dumais.

Kathleen, whose office is in Bethesda, has practiced family law for just over twenty years. In addition to her law practice, for the last eight years Kathleen has been a member of the Maryland House of Delegates. She is the Parliamentarian of the House of Delegates, and has served on the House Judiciary Committee for her entire tenure in the House. There, she has tirelessly advocated for family lawyers, litigants, and the children of those litigants.

Kathleen was instrumental in shepherding the real property transfer bill through the Legislature, almost single-handedly got the Best Interest Attorney bill through the quagmire, and continues to oversee and advocate the enactment of child custody factors legislation. Further, she was a key member of the Department of Human Resources Child Support Guidelines Advisory Committee, working on the behemoth retooling of the Maryland Child Support Guidelines. In the 2010 session, under very challenging circumstances, her efforts resulted in the passage of the long-overdue update and extension of our 20-year-old matrix, more accurately reflecting Maryland's economic realities. This was truly a Herculean task.

Kathleen also speaks around the state on issues regarding family law, attends local and state bar meetings and functions, and looks for ways to improve the practice from a multitude of perspectives. She is also the person to whom the Governor turns when he has questions about family law and domestic violence issues. Her statewide involvement with Maryland family law is unparalleled.

In her free time (ha!), Kathleen spends time with her many nieces and nephews, on whom she dotes.

Many thanks to **Judge Cindy Callahan** for this affectionate profile...

CASE NOTE

In Re Caitlin N. No. 1604, September Term 2008, Filed May 3, 2010

By: Master Karen R. Ketterman

On April 20, 2008, Caitlin N. was taken into custody by the Easton Police Department for attempted possession of a controlled dangerous substance. She was detained at the Waxter Children's Center and the Department of Juvenile Services filed a Petition for Continued Detention in the Circuit Court for Talbot County, sitting as a Juvenile Court, on April 22, 2008. Following a detention hearing on that date, Caitlin was continued in detention. On May 7, 2008, she was conditionally released to her mother with electronic monitoring.

The State filed a Juvenile Petition on May 13, 2008, alleging that Caitlin N. was a delinquent child for having been involved in the attempted possession of marijuana. The Respondent's mother was served with the Juvenile Petition on May 23, 2008, but the Respondent could not be served on that date.

The Office of the Public Defender entered an appearance on behalf of the Respondent on May 22, 2008. On June 10, 2008, Caitlin's attorney filed a "Demand for Presence of Chemist, Analyst, or Person in Chain of Custody" as well as a "Motion to Hold Adjudicatory Hearing within Sixty (60) Days." The Juvenile Court denied the Motion to Hold Adjudicatory Hearing by Order dated June 11, 2008.

On June 26, 2008, Caitlin was served with the Juvenile Petition and the Court proceeded with the adjudicatory hearing on that date. Following testimony from the arresting EPD officer and the Maryland State Police chemist, she was found to be involved. Disposition was held on July 17, 2008 and Caitlin was determined to be a delinquent child and placed on supervised probation.

ISSUES ON APPEAL:

1. Did the court below err in denying Appellant's "Motion to hold Adjudicatory Hearing Within Sixty Days"?
2. Did the juvenile court err in ruling that the State was not required to provide the name of the chemist in discovery?
3. Was the evidence legally insufficient to sustain the finding that Appellant was involved in the delinquent act of attempted possession of marijuana?

FACTS:

On April 20, 2008, Patrolman First Class Larimore conducted surveillance on Caitlin N. and a group of individuals (identified as Mushaw, Horney and Sinclair) in front of 112 N. Washington Street in Easton. PFC Larimore heard Caitlin N. tell Mushaw to "ask him". Mushaw then asked Horney, "Do you have any weed?" to which Horney replied "No, I'm trying to score some myself". Another individual, Sinclair, arrived a few minutes later and PFC Larimore heard Caitlin say, "Hey, do you have any

weed? You should let me buy a gram from you. Would you let me buy a gram?" PFC Larimore then saw Caitlin take an item from her purse, hold it in her hands and attempt to give it to Sinclair. Mushaw and Sinclair discussed how to smoke the weed and Mushaw said that he would buy a soda and empty it so that they could smoke using the can. Caitlin, Mushaw, Sinclair and Horney were then taken into custody and the police recovered a clear Ziploc baggie containing three smaller baggies with green vegetable matter in Sinclair's front pocket. The matter was tested and determined to be 1.8 grams of marijuana. No marijuana was found on Caitlin.

Caitlin remained in detention from April 20, 2008 until May 7, 2008. A juvenile petition was filed on May 13, 2008 and served on Caitlin on June 26, 2008. At the June 26, 2008 adjudicatory hearing, the court denied the respondent's request to exclude the chemist's testimony. Based upon testimony from PFC Larimore and the chemist, Caitlin was found to be involved in the attempted possession of a controlled dangerous substance. At the disposition hearing held July 17, 2008, Caitlin was committed to the custody of her sister under the supervision of the Department of Juvenile Services with standard conditions and special conditions, which included continued mental health treatment and education. She noted a timely appeal.

HOLDING:

1. The denial of the Motion to Hold Adjudicatory Hearing Within Sixty (60) Days was proper. Pursuant to Maryland Rule 11-114(b)(1), the adjudicatory hearing was held within sixty (60) days *after the juvenile petition was actually served on the respondent*. In this case, Caitlin's mother was served with the petition on May 23, 2008, but Caitlin was not served until the day of the Adjudicatory Hearing, June 26, 2008.

Caitlin's attorney argued that she had received formal notice of the allegations at the April 22, 2008 detention hearing and urged the court to find that the sixty-day time period started on that date. Under this scenario, the adjudicatory hearing should be scheduled on or before June 20, 2008. The appellate court disagreed.

Under the plain language of the Rule, the sixty-day time period begins when the petition is served on the respondent, not when the juvenile is put on notice that a petition may be authorized. The court went on to state that, even if there had been a violation of Rule 11-114(b)(1), dismissal would not have been an appropriate sanction under the facts of the case. "We view the appellant's claim as elevating form over substance, because there clearly was no inordinate delay in this case". The adjudicatory

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Case Note: In Red Caitlin N...

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hearing was held only six days after the deadline suggested by Caitlin's counsel.

2. While the State's failure to supplement discovery as to the chemist may have been a violation of Maryland Rule 11-109(a)(3), any error was harmless.

The chemist was produced by the State in response to the written request of Caitlin's counsel and the chemist's report was provided seventeen (17) days prior to trial. Counsel did not request a continuance to prepare cross-examination of the chemist. The Court found that the respondent was not denied her right to confrontation as there was no indication that her ability to question the chemist at trial was limited or restricted by the juvenile court. Therefore, the trial court properly exercised discretion in permitting the chemist to testify because Caitlin had not been prejudiced by the failure to disclose his name in discovery.

3. The evidence was sufficient to support a rational inference that Caitlin engaged in multiple substantial steps toward the commission of possession of a controlled dangerous substance, marijuana.

Pursuant to *In re Timothy F.*, 343 Md. 371, 388 (1996), "evidence is legally sufficient in a juvenile delinquency case if, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements beyond a reasonable doubt." The weight given to the evidence and assessment of the credibility of witnesses is within the sound discretion of the trial court.

In this case, PFC Larimore testified that he watched Caitlin and several other individuals on a well-lit street where he could hear their conversations. He heard Caitlin ask Sinclair if he had any weed, and whether he would let her buy a gram. After asking to buy a gram, Caitlin was seen retrieving an item from her purse and trying to hand it to Sinclair. She was also heard talking with Sinclair and another individual about how they would smoke the

weed. Upon arrest the police recovered 1.8 grams of marijuana from Sinclair.

PRACTICAL CONSIDERATIONS

This case contains a summary of juvenile court purposes and procedures that would be instructive to a new practitioner.

The overall theme of the opinion is "no harm/no foul". Violations of procedural or discovery rules do not automatically require dismissal--or any sanction at all. Citing *Thomas v. State*, 397 Md. 557 (2000), the Appellate Court makes reference to the dismissal of a petition as a "windfall" for a respondent.

Despite the use of the word "shall" in Rules 11-109 (a)(3) and 11-114(b)(1), a violation without articulated actual prejudice is considered to be harmless. When requesting that a sanction be imposed for violation of a procedural rule in the juvenile court, the juvenile's attorney must show actual prejudice to the respondent as a result of the violation.

Karen R. Ketterman is the Juvenile and Domestic Relations Master for the Circuit Court for Dorchester County.



Case Note: Chaden M . . .

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attorneys must ensure that filing deadlines are not missed. An overlooked filing date can mean serious prejudice to your client and embarrassment or worse to yourself.

Master Robert E. Laird, Jr., is the Standing Master for Domestic Relations and Juvenile Causes in the Circuit Court for Somerset

County. Prior to his appointment to his current position, Master Laird represented the Somerset County Department of Social Services in CINA cases for more than fifteen years.

* Saint Sydney M. consented to the adoption and was not a party to the appeal.

CASE NOTE: HENRIQUEZ REDUX

Henriquez v. Henriquez. No. 81, September Term 2009. Maryland Court of Appeals

By: Nick Orechwa

THE PROVISIONS OF MARYLAND FAMILY LAW ARTICLE § 12-103 DO NOT PRECLUDE THE TRIAL COURT FROM AWARDING ATTORNEY'S FEES TO A LITIGANT WHO IS REPRESENTED BY A NON-PROFIT LEGAL SERVICES ORGANIZATION OR A PRO BONO WITHOUT THE EXISTENCE OF A FEE AGREEMENT OR THE PAYMENT OF FEES BY THE LITIGANT TO THE ATTORNEY AND/OR ORGANIZATION

In its September 2007 term the Maryland Court of Special Appeals had occasion to consider the issue of whether the provisions Maryland Family Law Article § 12-203 do not preclude the trial court from awarding attorney's fees to a litigant who is represented by a non-profit legal services organization or a pro bono attorney without the existence of a fee agreement or the payment of fees by the litigant to the attorney or organization. In addition, it examined whether said award should be paid to the litigant or the organization. The case which brought the issue before the court was *Henriquez v. Henriquez*.

In *Henriquez*, the parties appeared before Judge Durke Thompson of the Montgomery County Circuit on Ms. Henriquez's (Wife's) complaint for Absolute Divorce which included, *inter alia*, prayers for custody, support, and attorney's fees. A private attorney represented Mr. Henriquez (Husband) and the House of Ruth represented Wife. At the Wife's deposition, her House of Ruth counsel stated "We don't charge money for our hourly legal services" however, she added that the Wife could be charged for expenses at the conclusion of the trial. On the first day of trial, Wife's attorney introduced into evidence a bill documenting 58.34 hours of work on Wife's behalf at a rate of \$200.00 per hour amounting to a total of \$11,668.00. Husband testified he paid his attorney \$5,000.00 to represent him at trial.

The trial court awarded attorney's fees to the House of Ruth in the amount of \$5,000.00, reasoning that the \$5,000.00 paid by Husband to his attorney "...represents an exceptionally reasonable amount and I make an award of a similar amount to, for counsel fees..." Unhappy with the trial court's ruling on the issue of fees, Husband noted an appeal to the Court of Special Appeals.

In a reported opinion, *Henriquez v. Henriquez* 185 Md. App. 465, 971 A.2d 345 (2009) the Court of Special Appeals affirmed the trial court's ruling. In particular, the Court held that Maryland Family Law § 12-103 contains "no per se bar to awarding attorney's fees to a party who is represented by a non-profit organization that provides the party with free legal representation." Furthermore, the Court affirmed the Trial Court's decision to award the fees directly to the House of Ruth.

In doing so, the Court quite astutely pointed to a plethora of decisions in others states of the union which have held that providers of pro bono legal representation (including non-profits) are eligible to receive attorney's fee awards in family law cases. Unhappy with the decision of the Court of Special Appeals, Husband noted an Appeal to the Maryland Court of Appeals which granted certiorari.

The Court of Appeals affirmed the decision of the Court of Special Appeals. The Court's decision primarily addressed two main issues: 1) Whether Maryland Family Law Article § 12-103 permits an award of attorney's fees to a litigant with pro bono legal representation; and 2) whether the under §12-103 the court is permitted to award the fees directly to the pro bono attorney (or organization) as opposed to the litigant.

With regard to the first issue, the Court engaged in a simple statutory interpretation analysis in order to arrive at its conclusion. The court reasoned:

The plain meaning of Section 12-103 permits the award of attorneys' fees in the present case, because 'counsel fees' are limited only to that which 'are just and proper under all the circumstances.' The only other statutory mandate that restricts a court's award of attorneys' fees is contained in Section 12-103(b), which enumerates considerations a court must weigh before awarding fees

There is no language restricting an award to fee paying clients; in fact the considerations of financial status and need belie the necessity that an attorney must have been remunerated.

The Court rejected Husband's argument that the Black's Law Dictionary definition of attorney's fees is "the charge to a client for services performed for the client..." A dictionary definition, the court held citing case law, is not dispositive of the meaning of a statutory term.¹ To do so the Court reasoned, would require it to insert language into the statute to fill gaps ostensibly overlooked by the General Assembly -- something the courts have ruled time and again they are not permitted to do.

Husband cited a North Carolina case *Patronelli v. Patronelli*, 623 S.E. 2d 322 (N.C. Ct. App. 2006) which denied an award of attorney's fees to a Wife represented by a pro bono attorney in a domestic relations matter and held "counsel fees cannot, by definition, be implicated in the present case where the dependent spouse never incurred counsel expenses." The Court however,

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CASE NOTE

Jason Brandenburg, ET UX. V. David LaBarre, ET UX.

By: Susan Wyckoff, Esquire

In the reported opinion, Jason Brandenburg, et. ux. v. David LaBarre, et. ux., No. 2080, September Term, 2009, filed on June 2, 2010, the Court of Special Appeals of Maryland found that the trial court erred in finding that exceptional circumstances existed and that an award of grandparent visitation rights was not justified as the grandparents had failed to meet their burden of proof that their grandchildren were harmed by the cessation or absence of visitation. The Court reversed the grandparent visitation order and remanded the case for entry of an order denying the petition for visitation.

BACKGROUND AND PROCEDURAL HISTORY:

Jason and Nicole Brandenburg were married on June 2, 1998. As a result of their marriage they had four children, namely: Tyler, born July 7, 1998; Zachary, born September 14, 2001; Matthew, born August 9, 2004; and Jordan, born May 18, 2007. Laura and David LaBarre are the paternal grandparents of the Brandenburg children.

From 2004 until June of 2006, the LaBarres occasionally provided childcare for Tyler, Zachary and Matthew. During this time period, Jason worked full-time for BGE Home and Nicole was employed part-time for various employers. In June of 2006, Nicole became a full-time employee of SunTrust Bank in Annapolis, initially working from 8:30 a.m. until 3:00 p.m., and later until 5:00 p.m. Tyler, Zachary and Matthew would also spend time with the LaBarres on weekends and holidays when possible.

From June of 2006 through February of 2008, Laura provided free childcare for Tyler, Zachary, Matthew, and for seven of the eighteen months, Jordan. There was an eight-week period following Jordan's birth in May of 2007, that Nicole was on maternity leave and Laura did not provide childcare for the children. During this time period, Matthew and Jordan would also spend Sunday night at the LaBarre home. Tyler and Zachary did not spend the night because they were in school from September through June. Laura did not work. David worked full-time for a roofing and siding company, including many Saturdays. David did assist in caring for the children in the evenings and on weekends when they were at his house.

In February of 2008, the parties had a falling out unrelated to the children, which resulted in David telling Jason that Laura would no longer provide free childcare. Jason and Nicole then ceased all contact between the LaBarres and the children.

On April 23, 2008, the LaBarres filed a Complaint to Establish Visitation Rights with the Circuit Court for Anne Arundel County, Case No. 02-C-08-131289. In their Complaint, the LaBarres al-

leged exceptional circumstances. On June 16, 2008, the Brandenburs filed an Answer and later filed a Counter-Claim for Abuse of Process: Bad Faith Proceedings Pursuant to 1-341.

On June 16 and 17, 2009, the case was tried. Closing arguments were heard on August 10, 2009. In addition to the parties, twenty-three witnesses testified at trial.

The LaBarres did not dispute the fitness of Jason and Nicole as parents, but instead argued that exceptional circumstances existed justifying an award of visitation. The LaBarres presented evidence to support their character, the nature of their loving and bonded relationship with their grandchildren, and the care provided on a nearly continuous basis from 2004 until 2008. The Brandenburs presented evidence to support their character, the character of the LaBarres, and the present well-being of the children.

The Brandenburs testified that the LaBarres had provided childcare for the children for the eighteen-month period beginning in June 2006, but that otherwise, the children's interactions with them were occasional. They asserted that their decision to cease contact between the children and the LaBarres was based on the LaBarres' habitual marijuana use; and David's use of alcohol and use of physical discipline on the children. The LaBarres admitted to occasionally smoking marijuana. In addition, the Brandenburs testified that Laura suffered from bipolar disorder for which she was not currently taking medication. Laura admitted that she suffers from bipolar disorder. The Brandenburs also presented testimony that all four children were doing very well since contact with the LaBarres had ceased.

On October 28, 2009, the Circuit Court entered an Order granting the LaBarres visitation with the children one overnight per month and one week each summer. The trial court ordered the LaBarre's to refrain from any use of alcohol or illegal substances during visits and to follow the instructions of the Brandenburs concerning the children's supervision and care. The trial court found the evidence presented by the LaBarres credible, and the evidence presented by the Brandenburs to be lacking in credibility. The trial court found Laura to be in control of her bipolar disorder and that condition and that it did not affect her ability to care for the children. The trial court found that the LaBarres had met their burden of proof in establishing exceptional circumstances and that it was in the best interests of the children to have visitation with their grandparents. The Brandenburs appealed presenting two questions to the Court, which the Court combined into the issue below.

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Case Note: Jason Brandenburg...

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ISSUE ON APPEAL:

Did the circuit court err in finding that exceptional circumstances existed; justifying an award of grandparental visitation rights?

HOLDING:

The circuit court did err in finding that exceptional circumstances existed, permitting the circuit court to substitute its judgment of the best interests of the children for that of the parents.

DISCUSSION:

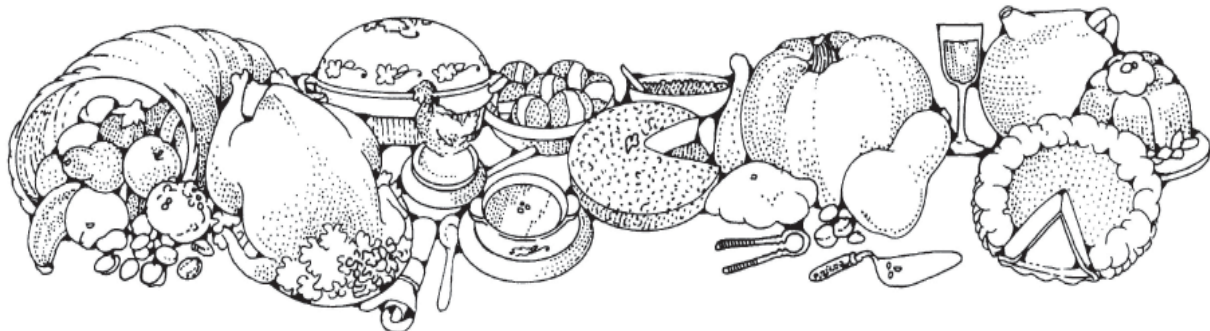
The Court of Special Appeals began its discussion with a review of Koshko v. Haining, 398 Md. 404 (2007). The Court analyzed the affect of Koshko on the standard for visitation determinations pursuant to the Maryland Grandparents Visitation Statute (hereinafter referred to as “GVS”), Md. Code (2006 Repl. Vol., 2009 Supp.), Section 9-102 of the Family Law Article. Maryland’s GVS was enacted in 1981, and amended in 1993, years before Koshko, and years before Koshko’s predecessor, Troxel v. Granville, 530 U.S. 57 (2000). In Troxel, the United States Supreme Court held that to apply a Washington state grandparent visitation statute without deference to a fit parent’s decision to deny or limit visitation is unconstitutional.

In Koshko, the Court of Appeals agreed that the Court of Special Appeals had construed the Maryland GVS to include an application of the parental presumption saving the statute “from per se constitutional infirmity.” Koshko, 398 Md. at 428. However, that was not enough of a safeguard to protect parental rights in grandparent visitation disputes. In addition, the Court of Appeals found that grandparents seeking visitation are first required to show *prima facie* evidence of parental unfitness or exceptional circumstances suggesting current or future harm to the child if visitation is denied before the trial court may analyze a child’s best interests. Id. at 444-445.

On page nine of the Reported Opinion of Brandenburg, the Court stated that “Parents and grandparents do not stand on the same legal footing with respect to visitation. A parent’s right to visitation is rooted in a fundamental constitutional liberty interest, while any right to visitation possessed by grandparents ‘is solely of statutory origin.’” *citing Koshko*, supra, 398 Md. at 423. A finding of current or future detriment to the children “must be based on solid evidence in the record, and speculation will not suffice.” *Aumiller v. Aumiller*, 183 Md. App. 71, at 81-82. In Brandenburg, the Court found that the trial court erred as a matter of law in concluding that the grandparents had met their burden of proof of the existence of exceptional circumstances. The Court stated that the “bar for exceptional circumstances is high precisely because the circuit court should not sit as an arbiter in disputes between fit parents and grandparents over whether visitation may occur and how often.”

The Brandenburs provided testimony that the children were thriving since the cessation of visitation. The LaBarres offered no evidence of significant deleterious effect to the children caused by the termination or nonexistence of visitation. The trial court was not permitted to infer that the children had suffered any harm simply because they had previously spent so much time with the LaBarres. Having no proof offered of a significant deleterious effect the trial court erred in finding exceptional circumstances. In this case, the Court of Special Appeals, reaffirmed the strong constitutional right of parents to make decision for their children regarding grandparent visitation. In Brandenburg, the Court affirmed that without *prima facie* evidence of parental unfitness or exceptional circumstances suggesting current or future harm to the child if visitation is denied, the trial court need not move on to analyze a child’s best interests, and must defer to the parents’ wishes

Susan Wyckoff is a director of the law firm of Council, Baradel, Kosmerl & Nolan, P.A., in Annapolis, Maryland. Her practice focuses primarily on domestic relations law and civil litigation.



Wading into Deep Water:

The U.S. Supreme Court Addresses International Family Law- *Abbot v. Abbot*, 560 U.S. ___, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010)

By: Hadrian Hatfield

In May 2010 the U.S. Supreme Court for the first time addressed the 1980 Hague Convention on the Civil Aspects of Parental Child Abduction (“Convention”). This case examined the key issue of what constitutes a “right of custody” under Article 5 of the Convention.

In so doing the Supreme Court resolved a conflict between the Circuit Courts, expanded the right to return of a child under the Convention, recognized rising Justice Sotomayor, and added to the debate on how much weight should be accorded foreign court decisions. It also highlighted the increasing importance and frequency of Convention issues in family law cases.

The case in question is *Abbott v. Abbott*, 560 U.S. ___, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010). This case stemmed from a mother’s removal of a child from Chile, where the father’s only relevant legal right was to consent before the mother could take the child out of the country. The family had been living in Chile for approximately three years when the mother took the child to Texas, without permission of the father or the Chilean family court. The father started an action in U.S. District Court in Texas for return of the child to Chile under the Convention and ICARA (the implementing legislation in the United States).

The single legal question presented by this case was whether under the Convention the father’s *ne exeat* right was a “right of custody,” or merely a “right of access.” The Convention protects parents who have a “right of custody” from wrongful removal or retention of a child in a contracting state by the other parent. The remedy for such a wrongful removal or retention generally is return of the child to the country of habitual residence. This remedy, though, is unavailable for breach of a mere “right of access.” Thus, in this case, return of the child was not required under the Convention unless a “right of custody” included the father’s *ne exeat* rights.

This legal question made it to the U.S. Supreme Court because the federal circuit courts in the United States had split in their response to this issue. The prevailing view at the U.S. District Court and on appeal to the Fifth Circuit Court of Appeals in this case followed *Croll v. Croll*, 229 F.3d 133 (2000), which held that *ne exeat* rights are not rights of custody under the Convention. At the time, this was the accepted interpretation in the Second, Fourth, and Ninth Circuits. Only the Eleventh Circuit had followed the view espoused by the dissent in *Croll*, written by Judge Sotomayor, that *ne exeat* rights were within the rights of custody protected by the Convention.

The U.S. Supreme Court majority opinion, delivered by Justice Kennedy, relied on a number of bases for finding that *ne exeat*

rights qualify as rights of custody under the Convention. First, the Court looked at the wording of the Convention and at the content of *ne exeat* rights under Chilean law. It determined that the Chilean *ne exeat* right included the right to decide the child’s country of residence, since the legal provision meant that neither parent could unilaterally establish the child’s place of residence. The Court compared this favorably with the Convention definition of “right of custody,” which explicitly includes “in particular, the right to determine the child’s place of residence.” The Court dismissed the argument that a *ne exeat* right does not fit within traditional notions of physical custody by noting that the Convention contains a specific definition for “right of custody” as used in the Convention. It similarly dismissed the argument that since a *ne exeat* right cannot be “exercised” as that term is used in the Convention, that it thus cannot be a “right of custody.” The Court reasoned that the exercise of the right is in the refusal to consent to removal of the child. It also concluded that to rule otherwise would render the Convention meaningless in just those cases where it was most needed.

The Court next relied on the view of the U.S. Department of State, expressed in its amicus brief, that *ne exeat* rights are rights of custody. It noted that the Executive Branch’s view of a treaty historically is entitled to “great weight.” It further stated that the Department of State, as the central authority under the Convention, was uniquely positioned to understand the consequences of different treaty interpretations on other contracting states and on the ability to obtain the return of children wrongfully removed from the United States.

The Court then noted the views of other Hague Convention countries and of international law scholars on the issue. It found that the majority of foreign courts, especially from common-law countries, had adopted the view that *ne exeat* rights were rights of custody. It cited cases from England, Israel, Australia, Scotland, South Africa, Austria, and Germany. Interestingly, the Court also noted that joint custodial arrangements were largely unknown at the time the Convention was drafted, and that the status of *ne exeat* rights was not well understood. In that context, it found the views of the majority of subsequent scholarly articles informative. These supported the observation that joint custody has become common in the time since the Convention was first drafted, and that within this joint custody framework most scholars recognize *ne exeat* rights as being rights of custody under the definition used by the Convention.

Finally, the majority decision concluded that its interpretation of rights of custody was consistent with the objects and purposes of the Convention. It specifically cited the dissenting opinion

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Wading into Deep Water...

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by Judge Sotomayor in *Croll* to support the view that a different interpretation would allow parents to undermine the purpose of the Convention. It also relied on psychological opinions of the harm caused from wrongful abduction of children by parents to illustrate how deterrence of such abductions was a goal furthered by including *ne exeat* rights within rights of custody.

This case is noteworthy for a number of reasons. First, of course, it definitively decides in U.S. jurisprudence that a right of *ne exeat* qualifies as a protected “right of custody” under the Convention. As such, practitioners will surely add petitions for writs of *ne exeat* to the domestic violence petitions already in their Hague Convention arsenals. And in turn, courts throughout the United States likely will face an increased demand for these esoteric writs. More jurisprudence likely will result also from efforts to refine whether a simple award of joint legal custody, without more, provides the right to veto a change of residence.

The case also is noteworthy because the Court demonstrated an understanding for how family law is developing. The

opinion shows the nation’s highest Court considering the evolution of joint custody, and relying on psychological input in custody matters.

The case furthermore will surely add to the debate on the appropriate weight judges should give international law and the judicial opinions of courts from other countries when interpreting U.S. law in the international arena.

And the case illustrates the growing importance and frequency of international issues in family law cases. As such, this first opinion from the Supreme Court interpreting the Hague Convention provides a good introduction for family law practitioners who have only passing knowledge of this essential text.

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Case Note: Henriquez...

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points out that case, from the North Carolina intermediate appellate court was overruled, at least on that point by the North Carolina Supreme Court which held:

At any time that a dependent spouse would be entitled to alimony...or post separation support...the court may, upon application of such spouse, enter an order for reasonable counsel fees *for the benefit of such spouse*, to be paid and secured by the supporting spouse in the same manner as alimony.

Patronelli v. Patronelli, 636 S.E. 2d 559, 560 (N.C. 2006) (Emphasis in the original)

12-103, the Maryland Court of Appeals notes, differs because it contains no mention of “for the benefit of [a dependent] spouse.”

The court also rejected Husband’s argument under *Mason v. Mason* 181 Md. 666, 30 A.2d 748 (1943) that reimbursement for a gratuity (e.g. pro bono legal services) was not permitted in family law cases. In *Mason*, the court noted, the Husband only owned a modest farm and had no other financial means while the Wife was earning some money and living rent free. Whereas in *Henriquez* the Wife was “wholly dependant” and “virtually penniless” which given the Husband had financial ability rendered an award of attorney’s fees appropriate (a determination the trial judge had appropriately made under 12-103(b)).

The second issue the Court of Appeals tackled was whether the trial judge properly awarded attorneys’ fees directly to the House of Ruth. In holding that ruling to be proper, the court held that although 12-103 does not specifically permit an award directly to counsel, the other statutes in the Family Law article, namely 7-107, 8-214, and 11-110 do. As such, they “comprise a family law scheme and are *in pari materia* so that they are construed ‘by reference to other statues dealing with the same subject.’” As such, the court concluded 12-103, must be construed in “harmony” with 7-107, 8-214, and 11-110 to prevent the illogical result of permitting an award of attorney’s fees directly to an attorney in circumstances in family law cases, while not permitting it in others.

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Footnotes:

¹ The Court noted that other dictionaries such as Ballentine’s Law Dictionary have no such mention of a “charge to a client”. “Ballentine’s defines ‘attorney’s fee’ as ‘[a]n allowance made by the court as costs in addition to the ordinary statutory costs.’ Ballentine’s Law Dictionary 109 (3rd ed. 1969).”

²The Court noted that other dictionaries such as Ballentine’s Law Dictionary have no such mention of a “charge to a client”. “Ballentine’s defines ‘attorney’s fee’ as ‘[a]n allowance made by the court as costs in addition to the ordinary statutory costs.’ Ballentine’s Law Dictionary 109 (3rd ed. 1969).”

CASE NOTE

Boemio v. Boemio and the Evolving Use of Alimony Guidelines in Maryland

By: Jim Milko

Lawyers – for the most part – love predictability.

In a broad sense, a fundamental reason for a society to adopt rules of law is to foster predictability and stability in the conduct of its citizens, government, and private entities.

In a more narrow sense, the ability of an attorney to ascertain predictability in legal outcomes aids the practitioner in a variety of ways. For example, the attorney's ability to predict *specific* legal outcomes in a given situation generally instills greater confidence on the part of the client in the legal counsel. After all, how comfortable can a client really feel when her attorney says, "Gee, I really don't have a clue about what's going to happen when we go to Court"? Further, the attorney's ability to predict specific, potential outcomes enables the client to make more informed and rationale decisions regarding his or her case.

Of equal import, there is a direct relationship between the predictability of legal outcomes and the abilities of parties and counsel to reach out-of-court resolutions concerning their disputes. Obviously, as the outcome of a legal dispute becomes more predictable, the field of negotiation narrows and a settlement resolution becomes more likely.

The benefits of predictability are no less germane to the world of family law than to any other legal arena. Indeed, at the very first consult the domestic relations practitioner typically attempts to provide the prospective client with an assessment of how the law might apply to the particular facts of the client's case. Regarding the financial issues raised in any given divorce, the attorney's presentation may go something like this:

With respect to child support, the attorney asks for information regarding the parties' gross incomes, work-related child care, and any other information that is pertinent to the application of the Maryland Child Support Guidelines. The attorney inputs this information into the handy child support programs that we all have on our computers, and *voila!* – the attorney awes the client with her ability to predict the likely child support obligation in the case down to the very dollar!

With respect to marital property issues, the attorney is a bit more circumspect. The attorney explains the concept of marital property to the client. The attorney further explains the process of how the Court identifies marital property, values it, and subsequently considers the appropriateness of a monetary award. Here, the attorney is careful to relate that unlike many states, Maryland law mandates an "equitable" distribution of marital property interests, as opposed to an "equal" division. That being said, however, the attorney likely goes on to convey that

a generally "equal" distribution of marital property tends to be more of the norm than the exception in divorce cases. The attorney then concludes this process by examining the specific marital assets and liabilities in the client's own situation, and she provides the client with some estimate of what a possible marital property award in the case might look like. Although the lawyer's dollar figures in this approximation might be somewhat less specific than with the child support calculation, the client remains nonetheless impressed.

Then the attorney moves on to the subject alimony...

Here, suddenly, the attorney begins to hem and haw. The lawyer outlines the statutory considerations that a trial Judge must weigh in any alimony determination, but she provides no real guidance as to how specifically each of these factors will result in any precise dollar award. She repeatedly refers to terms like "trier of fact" and "judicial discretion". In the final analysis, the attorney is, at best, only willing to offer a caveat-laden, wide-ranging, and vague guesstimate regarding a possible *range* of alimony – in both duration and amount. The client simply stares slack-jawed like a deer in headlights. Predictability, like Elvis, has left the building.

While the above-scenario might be a bit of an exaggeration, it underscores the basic premise: Alimony, in the state of Maryland, is a wildcard. Despite the existence of the mandatory alimony considerations outlined in Section 11-106 of the Maryland Family Law Article and a variety of (sometimes conflicting) appellate caselaw, the best prediction tools regarding an alimony award in any given case may well be the attorney's own practice experience and her familiarity with the predilections of the specific chancellor in the case.

On May 11, 2010 however, the Court of Appeals issued an opinion in the case of Boemio v. Boemio, No. 57, September Term 2009, that may constitute a 'first-step' towards greater predictability concerning alimony awards in the State of Maryland.

Boemio v. Boemio and Alimony Guidelines

Development of the Guidelines

In recent years, the lack of predictability and uniformity with respect to spousal support/alimony awards has been an issue of concern among practitioners, jurists, legislators, scholars, and litigants throughout the United States. As a result, a number of jurisdictions, advocacy groups, and professional organiza-

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A Letter to the Editor

Walter A. Herbert, Jr., Esquire
Editor, Family Law News
Maryland State Bar Association, Inc.
Herbertlaw@att.net

Dear Editor:

Carolyn Thaler answers her question, “Second Parent Adoption- Is it Legal in Maryland?” with the emphatic statement, “... the current law does not permit a second parent adoption”, a resounding “No”. The article in *Family Law News*, April 2010 misses some points that suggest the issue is more debatable than her analysis allows.

There is no dispute with the principle that adoption exists only by virtue of statute. How courts interpret and apply the statute is not so rigidly set.

Thaler asserts that, when some *nisi prius* courts in this State finalize second -parent adoptions by terminating “the parental rights of the biological parent and then allowing the couple to adopt as if they are both unrelated to the child”, it is voidable. She bases her position on the Court of Appeals’ decision in *Green v. Sollenberger*, 338 Md. 118, 656, A.2d 773 (1995), where the Court stated that “the General Assembly never intended for natural parents to be permitted to adopt their own legitimate children.”

The *Sollenberger* case is inapposite. It was a misguided attempt by the biological mother to terminate the natural father’s rights of legitimate children born in wedlock. Even though the father agreed to the adoption, there are strong societal reasons against allowing a natural parent to solely adopt her own legitimate children and thereby terminate the rights of the father, which may not have been in the best interest of the children. The ruling does not justify the leap that Thaler takes when she concludes that the only proper adoption is one by an unrelated person or a step-parent.

Perhaps some judges use such a legal fiction to effect a second-parent adoption, terminating the natural parent’s rights and then granting an adoption by the same-sex partners. I and others have approached the issue differently.

Under Family Law Article § 5-331(b)(2), a single person can adopt even when two unmarried petitioners, one the child’s legal parent, jointly petition to adopt. *In re Adoption No. 90072022/CAD*, 87 Md. App.630, 590 A.2d 1094 (1991). In that case the Court of Specials Appeals ruled that because the adoption law clearly does not require that an adopting person be married, the petitioners, otherwise fit, could adopt in the best interest of the child.

Generally, adoption under the statute entitles the adoptive parent to all the rights and privileges of and is subject to all the obligations of a biological parent and divests the biological parent of all duties, obligations and rights to the child. Family Law Article § 5-341(a)(2)(ii). This divestiture provision protects the adoptive parent from interference by a natural parent, while relieving the natural parent from any legal responsibility for the child. When adoption occurs over the objection of a natural parent, divestiture is particularly important to shield the adoptive parent and child from disruption.

Furthermore, the statute requires that a married couple, living together, must petition jointly, unless the petitioner’s spouse is the child’s natural parent (a step-parent adoption) and the natural parent has consented to the adoption. Family Law Article § 5-331.

Currently, Maryland does not permit same-sex marriage. Yet, the adoption statute does not prohibit adoption by same-sex partners; there is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants.

When same-sex partners file jointly, the rights of the natural or previously adoptive mother are not terminated. Like *In re Adoption No. 90072022/CAD*, the case of the unmarried man and woman where the mother's rights were not deemed forfeited, the court can infer an extension of the step-parent exception for the non-spousal partner of the natural parent. Although Maryland appellate courts have not ruled on this issue to date, other states have read the step-parent exception broadly to include adoption by same-sex partners. *In re B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1272 (Vt.1993); *In re Adoption of a Child by J.M.G.*, 623 A.2d 550 (N.J.1993); *In re Adoption of Evan*, 583 N.Y.S. 2d 997 (1992). These courts interpreted similar statutes in light of the fact that the natural parent intended to continue to raise the child with the partner and in the best interest of the child.

In *Conaway v. Deane*, 401 Md. 219, 932 A. 2d 571 (2007), addressing same-sex marriage, Judge Irma J. Raker in a concurring in part and dissenting opinion discussed statutory benefits that married couples have to which same-sex couples are entitled. Among them, she states,

“Maryland also recognizes ‘second-parent adoptions,’ where a child with one parent is adopted by a second parent without severing the prior existing parental relationship. Id. § 5-331(b)(2) (adoption without prior termination of parental rights). Maryland’s trial courts have granted same-sex couple ‘second-parent adoptions’ and have noted that such adoptions are in the best interests of the child. See *In re Petition of D.L.G. & M.A.H.*, No. 95-179001/CAD, 2 MFLM Supp.21 (1997) (Cir. Ct. Balt. City, June 27, 1996); Letter from Kathryn M. Rowe, Assistant Att’y Gen., Office of the Att’y Gen., Sharon Grosfeld, Delegate, Maryland Gen. Assemb. (June 9, 2000) Thus, sexual orientation is not a factor in adoption proceedings in Maryland and the children adopted by same-sex couples are treated under Maryland law in the same way as children adopted by a heterosexual or married couple.”

Chief Judge Robert M. Bell, (while not agreeing with Judge Raker’s concurring opinion regarding the rational basis test as the standard for review regarding same-sex marriage), joined in the dicta about the legal entitlements of same-sex couples.

The law is slow in catching up with the cultural shift taking place in society. As the composition of contemporary families becomes more diverse, courts are called upon to make decisions about the status of these families. Every adoption case must be examined on its own merits to determine what is in the best interests of the child. If the circumstances warrant a finding that the adoption is in the best interests of the child, a broader rather than narrow interpretation of the law serves those paramount interests.

Kathleen O’Ferrall Friedman

Judge Kathleen O’Ferrall Friedman, after serving 17 years on the Circuit Court for Baltimore City, nine of them as the Judge in Charge of the Domestic Docket, retired in 2002. She issued the 1996 decision in the case of In re Petition of D.L.G. & M.A.H.

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tions have created alimony guidelines and/or formulas that are designed to provide specific alimony recommendations (in both amount and duration) based upon the specific data that is inputted into the guidelines.

While there is a clear trend developing toward the use of such guidelines in reaching alimony awards, this trend has yet to become a torrent. Pennsylvania has adopted a statewide, legislative formula that is utilized by trial courts to calculate the amount of alimony to be awarded in a case, whereas Maine has adopted a formula for establishing the duration (but not amount) of spousal support. A number of other states (including but not limited to Ohio and Massachusetts) are exploring legislation that would create specific alimony formulas/guidelines.

On a more local level, a number of state counties throughout the United States have developed their own alimony guideline formulas for calculating spousal support, including Maricopa County (Arizona), Santa Clara County (California), Johnson County (Kansas), and Fairfax County (Virginia). Generally, these local guidelines are not mandatorily required to be utilized but are nonetheless employed by both practitioners and judges in these (and surrounding) venues as both a tool for settlement negotiation and an aid in decision-making (in addition to any other statutorily required criteria).

Meanwhile, professional organizations have also created alimony formulas to address the issue of uniformity and certainty in support awards. Of these, two of the most influential sets of guidelines are, undoubtedly, those developed by the American Academy of Matrimonial Lawyers (“AAML”) and the Kaufman Center for Family Law. The AAML’s guideline approach is a formula that focuses primarily upon the respective incomes of the spouses and the duration of the marriage at issue (but includes a number of “deviation factors”, the existence of which might suggest a deviation from the basic guideline formula result).¹ The Kaufman Center’s guidelines, on the other hand – which became available for use in 2008 – center upon the claimant’s ability to support herself and the degree to which the marriage impacted that ability.²

For some time, Maryland domestic relations practitioners have increasingly utilized both the AAML and the Kaufman guidelines as a barometer for assessing potential alimony claims (with the Kaufman Guidelines, perhaps, being used on a more prevalent basis due to their easy accessibility via internet). Moreover, it is commonly understood by many practitioners that at least some Circuit Court judges likely utilize the Guidelines off-the-record during alimony cases as a method of ‘double-checking’ their own, independent determinations regarding support under the factors required by Family Law Article sec. 11-106.

Inevitably, it was only a matter of time before a Maryland trial Court – to the chagrin of at least one of the litigants – expressly

relied upon alimony guidelines as a factor in reaching an alimony award. That scenario did occur recently in the Circuit Court for Montgomery County in the case of Boemio v. Boemio.

Boemio v. Boemio

The Boemio divorce involved a two decade-plus marriage in which the Husband earned a six figure salary and the Wife was employed as an administrative assistant (a low paying position which she took, in part, to also provide for the primary care of the parties’ minor children. At the conclusion of a two day trial, the Chancellor, Judge Michael D. Mason, determined that without an award of alimony an unconscionable disparity would exist in the standards of living between the two parties. In addition to clearly considering the factors enumerated in Maryland Family Law Article sec. 11-106(b), the trial Judge also indicated that “for informational purposes only” he had calculated alimony by using the AAML alimony guidelines (something the Judge, at a prior pretrial conference, had informed the parties’ counsel he was going to do). The AAML formula resulted in a permanent alimony award of \$3,816 per month.

In using the AAML Guidelines, the Chancellor indicated that they were not authoritative and were “subject to all of the factors” outlined in the alimony statute. Ultimately, Judge Mason elected to award \$3,000 per month in indefinite alimony. Mr. Boemio appealed, in part contending that the trial Court’s use of the AAML Guidelines improperly influenced the ultimate alimony determination. The Court of Special Appeals affirmed the Chancellor’s ruling in an unreported opinion. Subsequently, the Court of Appeals granted *certiorari* to determine whether the trial court erroneously relied upon alimony guidelines, which were not authorized by statute or rule, in determining the alimony award assessed against Mr. Boemio.

While observing that the trial court clearly considered the factors required by Family Law Article sec. 11-106(b) in reaching its alimony determination, the Court of Appeals also determined that the court’s use of the guidelines had “played a role in its decision.” Consequently, the Court of Appeals determined that it “must decide whether a court’s substantive consideration of these guidelines, along with the FL Section 11-106 factors, is a legitimate exercise of the Circuit Court’s discretion.” Ultimately, the appellate Court answered “that *if* the guidelines reasonably direct the court to a fair and equitable award without supplanting or frustrating any one of the twelve enumerated statutory considerations, a court may refer to them as an aid in translating its statutorily mandated analysis into a dollar amount” (emphasis in original).

In ultimately holding that the trial judge’s use of the AAML Guidelines was proper, the Court of Appeals first bemoaned

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(as observed by various legal scholars) that statutory alimony factors provide scant, actual guidance regarding translating the considerations into an actual dollar award. The Court then proceeded to recite how “[n]umerous courts across the country have resorted to non-legislative formulas [alimony guidelines] as aids in crafting alimony awards.” After praising such guidelines for providing predictability for counsel/clients and for increasing litigant satisfaction, the Court of Appeals proceeded to note both (1) the AAML’s high-standing as an organization created to elevate and improve the practice, standards, and cause of matrimonial law, and (2) the high degree of study and review that went into the AAML’s creation of its alimony guidelines. Consequently, the Court of Appeals concluded that “the AAML recommendations are the product of a careful study by a professional organization of knowledgeable practitioners, which are reasonable in approach, and do not supplant FL Section 11-106 or frustrate its goals. We consider these, and other legitimate and neutral guidelines, helpful to judges making alimony awards in Maryland. Therefore, we conclude that the court did not err in consulting those guidelines after conducting its statutory analysis.”

In dicta, the Court of Appeals, commented at length regarding the Kaufman Guidelines; it observed that those Guidelines were not yet available at the time of the original Boemio divorce hearing, and that the Court was “by no means suggesting that the AAML Guidelines are preferable to the Kaufman Alimony Guidelines.” Furthermore, the Court of Appeals suggested that a trial court might have significant discretion in whether to utilize – and to what to degree – alimony guidelines. Specifically, the Court observed that in the application of the required statutory alimony considerations in Section 11-106(b), a trial court “may wish to consult no monetary guidelines, one particular set of guidelines, or a combination of guidelines.”

The post - Boemio v. Boemio landscape

In one sense, Boemio v. Boemio does not represent a cataclysmic shift in domestic relations law as both Maryland judges and practitioners have for some time been using alimony guidelines – at least as a tacit barometer – in spousal support cases. On the other hand, the Court of Appeals’ blessing of the express use of such formulas by trial judges gives the guidelines a legitimacy and validity previously unknown. In the wake of Boemio, it is foreseeable that the use of such guidelines by both Courts and domestic relations practitioners will become widespread in spousal support cases.

And while the Boemio holding may in fact represent the beginning of a movement toward greater predictability in the area of spousal support, the does raise many unanswered questions:

Which sets of alimony guidelines “reasonably direct the court to a fair and equitable award without supplanting the enumerated statutory considerations?”

The Court of Appeals expressly noted that the AAML Guidelines could be used by the trial court because they were reasonable in approach (to alimony) and did not supplant the required alimony considerations in Section 11-106(b). In making this determination, the Court observed that these guidelines were neutral in application and were “the product of a careful study by a professional organization of knowledgeable practitioners...”. The Court of Appeals expressly opined that there were “other legitimate and neutral guidelines” that might be utilized by a trial court. This statement raises the following question: What other alimony guidelines are those?

In its opinion, the Court of Appeals went to considerable effort to discuss the Kaufman Guidelines and to specifically note that the affirmation of the use of the AAML Guidelines in Boemio did not mean that those Guidelines “are preferable to the Kaufman Alimony Guidelines.” Thus, by implication, one might assume that the Kaufman Guidelines also constitute a proper tool for reaching an alimony award by a trial court when properly used in accord with the required statutory considerations. This begs the question, however, of what other sets of alimony guidelines/formulas might meet the Court of Appeals’ criteria?

An equally important issue is the question of who determines what sets of guidelines are appropriate? Can a trial judge – as the Court of Appeals appeared to do – take judicial notice regarding the extent of the research that went behind the creation of any given set of guidelines, or of the neutrality (or lack thereof) of the group that creates the guidelines, or of the guidelines themselves? Can such a determination be made without either (1) extensive factual – and perhaps expert – testimony regarding the creation and operation of the guidelines, or (2) legislative direction?

Are the parties entitled to advance notice regarding the possibility of a trial court utilizing a particular set of alimony guidelines?

Without any further explanation, the Court of Appeals observed in the Boemio decision that the trial court made counsel aware of its intent to consult the AAML Guidelines in a pretrial meeting. Presumably, this at least provided the parties with some opportunity to (1) run the Guidelines themselves, (2) prepare argument and fact-finding regarding the propriety of the AAML Guidelines both in general and to the case at bar, and (3) offer the Court information regarding the results dictated by other alimony guideline formulas.

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In the wake of the Boemio decision, it is conceivable that a trial judge or litigants may seek to utilize any number of alimony guidelines calculations in a given spousal support case. Reasonable advance notice by both the parties and the Court of such intention is probably a good idea. A party may have a fundamental right to examine the propriety and applicability of the Maricopa County, Arizona alimony guidelines before they are actually used as a tool in a Queen Anne's County, Maryland courtroom.

What if the application of competing sets of alimony guidelines suggest different results?

The Court of Appeals determination regarding the usefulness of alimony guidelines is a step toward greater predictability in spousal support cases. The Boemio holding, however, hardly brings sweeping predictability to the arena of alimony litigation. Unless and until the Legislature mandates the use of a specific and sole set of alimony guidelines in Maryland, a significant degree of unpredictability remains. As any seasoned family law attorney has likely already discovered, the application of both the AAML and the Kaufman Guidelines in the same case can often produce drastically different results.

Thus, the following "practice pointer" should be considered: In any complex alimony case, the attorney should run the AAML, Kaufman, and any other alimony guidelines that might be appropriate to determine what set best favors her client's position. Accordingly, the attorney should be prepared to argue which set, if any, should be utilized by the trial court and why. At times, the attorney may find it advantageous to run various alimony guidelines and offer the "average" of the calculations when that average is in the client's interests.

Conclusion

In Boemio v. Boemio, the Court of Appeals cited, in significant detail, various examples of alimony guidelines in use

throughout the United States, including how those Guidelines specifically operate. The Court went on to clarify that "[w]e do not mention these examples to indicate that the specific numeric formulas are necessarily right for Maryland. We use them to demonstrate that many courts, with statutes setting forth evaluative criteria, have considered it beneficial to utilize monetary guidelines as an aid in reaching their decisions." When this statement is read in conjunction with (1) the various observations by the Court in Boemio praising the virtues of predictability in alimony decisions; (2) the Court's holding that the chancellor's use of the AAML Guidelines was appropriate at trial; and (3) the Court's observation that the use of other sets of alimony guidelines by trial judges may be appropriate as well, the Boemio decision almost becomes a clarion call for the adoption of a single, specific set of alimony guidelines of universal application in Maryland.

Ultimately, that issue is a question for the State Legislature to consider. Until that time comes, however, the domestic relations practitioner now has a new set of tools in his or her litigation and settlement toolbox: The Alimony Guidelines (plural).

Jim Milko is a partner in the firm of Trainor, Billman, Bennett, Milko & McCabe and, for the most part, likes predictability.

Footnotes:

¹An extensive discussion regarding the actual operation of the AAML Guidelines can be found in Mary K. Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrimonial Law. 61, app. A (2008), cited extensively in Boemio v. Boemio.

²The Kaufman Guidelines are provided by The Women's Law Center of Maryland free of charge for use by attorneys and Courts, and can be found at www.kaufmanalimonyguidelines.org.



Legislative Summary for the 2010 Legislative Session

By: Dorothy Fait, Esquire

1. **HB500/SB252 - Child Support Guidelines** - After years of study and a drawn out legislative battle, the revised Child Support Guidelines were passed. This was the first revision in the Guidelines, which were originally enacted more than twenty years ago. The new Guidelines contain an updated grid of the “market basket” numbers which more accurately reflect the cost of raising a child. The Bill also applies to families with incomes up to \$15,000 per month. The enactment of the Guidelines is not grounds for requesting an increase, as the enactment does not constitute a material change in circumstances, as stated in the law. The law provides that it shall “take effect” October 1, 2010.
 2. **HB534/SB329 - Extension of Domestic Violence Protective Order** – This law allows a Court to extend a Protective Order for up to two years if a respondent commits a subsequent active abuse while the original Protective Order is in place.
 3. **HB1382/SB554 - Protection for Domestic Violence and Sexual Assault Victims in Rental Housing** - This law gives protections to victims of domestic violence who live in rental housing. This law provides that if a victim/tenant has a final Protective Order or Peace Order, the victim may terminate the lease without penalty in order to re-locate. Further, a landlord must change the locks to a victim’s apartment upon request of the victim and at the victim’s expense. The law also creates a rebuttal presumption that the victim is not in breach of the lease if the landlord is attempting to evict the victim for the behavior of the abuser.
 4. **HB1149/SB935 - Shielding of Certain Records Upon Denial or Dismissal of a Protective Order or Peace Order** - This law was a compromise effort after controversy over the “expungement” Bill proposed last year to allow a respondent to expunge a Protective Order or Peace Order, if the Order was denied or dismissed. This law allows a respondent, in a case that has been dismissed or denied, to request a Court to remove the notation of a Protective Order or Peace Order from the Maryland Judiciary Case Search website and all other public access records. However, domestic violence advocates, judges, and law enforcement officials would have access to these records.
 5. **HB661 - Arrest for Violation of Protective Order** - This law provides that an officer shall arrest an offender with or without a warrant for a violation of a Protective Order.
 6. **HB905/SB22** - This law allows a respondent in a Protective Order case to transport a firearm for the purpose of surrendering it to law enforcement.
- B. BILLS OF INTEREST THAT FAILED
1. **SB600 - De Facto Parents** - This Bill was a priority of the Family Law Section of the Maryland State Bar Association this year. The Bill sought to correct case law in Maryland regarding the rights of third parties to seek custody or access to a minor child, if that person has had a bonded parent/child relationship with the child. The Bill sought to correct and revise the rulings in *Koshko v. Haining*, 398 Md 404 (2007), and *Janice M. v. Margaret K.*, 404 Md. 661 (2008). The Bill will in all likelihood be introduced again and the Family Law Section will work with the Maryland Judicial Conference to refine language in the Bill, as necessary, to address the judiciary’s concern.
 2. **HB761 - Exemption from Execution on a Judgment - Exception for Child Support and Alimony** - This Bill was corrective legislation to solve a problem presented in a recent Court of Appeals case of *Rosemann v. Salsbury, Clements, Bekman, Marder and Adkins*, 412 Md. 308 (2010). In that case, a personal injury law firm was holding proceeds from a personal injury settlement for their client. The spouse of the client sought to attach those proceeds for payment of child support arrearages. Because personal injury proceeds are exempt from most attachments, the creditor/parent was unable to attach the proceeds. HB761 would have allowed such an attachment. The Bill failed, but in all likelihood be introduced again.
 3. **HB700 - Protective Orders - Burden of Proof** - This Bill would have modified the burden of proof required of a petitioner in a hearing for protective from domestic violence from the standard of “clear and convincing” to the normal civil standard of preponderance of the evidence. Maryland is the only state that requires clear and convincing evidence in a protective order hearing. This Bill has been introduced in years preceding this one and has never passed. In all likelihood, it will be filed again, but perhaps not for a year or two.
 4. **HB808 - Religious Freedom and Civil Marriage Protection Act** - This Bill would have allowed same

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sex marriages in Maryland. During the legislative session, the Maryland Attorney General issued an Opinion requiring Maryland State agencies to recognize same sex marriages from other jurisdictions. This Bill failed in a firestorm of debate over the issue of same sex marriage. However, Bills also failed that would have authorized a constitutional amendment to limit marriage to a man and a woman (HB1079/SB1097); prohibited the recognition of out of state same sex marriages (HB90/SB852); and blocked the implementation of any changes based on the Attorney General's Opinion (HB1532/SB1120).

5. **HB1139 - Family Law - Child Custody Determinations** - This Bill has been introduced several times. The Bill seeks to codify case law in Maryland regarding the various factors a Court is to use in determining child custody. The Bill is usually paired for hearing with Bills that would mandate joint legal and physical custody of children. This year was no exception and HB925 and HB950, proposing mandatory joint custody were introduced again. All of these Bills failed; although, there is constant need to educate the legislature on the problems with any mandatory law requiring joint custody.
6. **HB1185/HB1359 - Marital Property - Military Pensions** - These Bills, introduced late in the session, sought to treat spouses of military members different from other spouses of individuals under any other retirement system with regard to pension division. The Bills would have provided a smaller fraction of payment for a spouse of a military member and would

have provided that a spouse's benefits would terminate upon his or her re-marriage. These Bills were defeated, but in all likelihood will be introduced again.

7. **SB329 - Domestic Violence - Requirement to Advise Respondent of Consequences of Final Protective Order** - This Bill would have provided for a "Miranda" type warning by the Court to a respondent who is contemplating consenting to a final protective order. In that event, a Judge would be required to advise the respondent of all the consequences resulting from the issuance of a Final Protective Order. The Bill failed, but will in all likelihood be introduced again.
8. **HB893 - Hand Gun Permits -Victims of Domestic Violence** - This Bill would have permitted victims of domestic violence to "jump the line" in obtaining a permit for a hand gun. This Bill failed, but since this was the second year this Bill was introduced, it will in all likelihood be introduced again.
9. **HB336/SB577, SB578, SB714 - Removal of Most Grounds for Divorce** - These Bills would have allowed individuals to file for divorce, even if they are living under the same roof. Further, the Bills proposed that the grounds for a voluntary separation absolute divorce be reduced to six months and no fault separation to one year. All the Bills failed, but will in all likelihood be re-introduced.

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