CHILD CUSTODY

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I. INTRODUCTION

This chapter will discuss child custody disputes between birth parents, considerations by the courts in determining custody (including joint custody) and visitation, establishing paternity, appointment of counsel for minors, investigative reports, a parent's relocation, modification of child custody determinations, use of experts, interstate child custody disputes, and child-abduction.

II. LAW AND PRACTICE

A. Jurisdiction

Maryland equity courts have broad and inherent equitable powers to determine child custody, visitation, and support issues. This authority is inherent and does not emanate from the legislature.[1] MD. FAM. LAW CODE ANN. § 1-201 and MD. FAM. LAW CODE ANN. § 5-203 are simply declaratory of the court's inherent power and do not limit the court's authority over minors.[2] (Hereinafter references to the Family Law Article will be cited as FL §____)

B. Definition of Custody

In *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986), the Court of Appeals discussed the meaning of the term "custody." Embraced within the meaning of “custody” are the concepts of "legal" and "physical" custody.

Legal custody involves the right and obligation to make long range decisions about education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare.[3] “Joint" legal custody means that both parents have an

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[1]*Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964, 969 (1986); *Glading v. Furman*, 282 Md. 200, 383 A.2d 398 (1973).

[2]*Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964, 969 (1986); see also *Ricketts v. Ricketts*, 393 Md. 479, 903 A.2d 857 (2006); and *Barnard v. Barnard*, 157 Md. 264, 145 A. 614 (1929).

[3]The parent not granted legal custody ordinarily retains authority to make day-to-day decisions regarding the child's welfare while the child is in that parent's physical care, whether pursuant to an award of visitation or an allocation of physical custody. This authority would include the right to consent to emergency medical care where there is insufficient time to contact the parent having legal custody, and matters of discipline.

equal voice in making those decisions, and neither parent's rights are superior to the other parent's rights.[4] However, it is appropriate for the Court to provide for a "tie-breaker" authority in anticipation of post-divorce parental disputes.[5]

Physical custody involves the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody. "Joint" physical custody is in reality "shared" or "divided" custody, whereby the physical custody of a child is allocated between the parties.[6] There is no difference

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[4] FL § 5-203 provides that parents: are joint natural guardians of their minor child; are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and have the same powers and duties in relation to the child. This section provides that if parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents; and neither parent is presumed to have any right to custody that is superior to the right of the other parent. In *Ricketts v. Ricketts*, 393 Md. 479, 903 A.2d 857 (2006), the Court of Appeals said that this section is ambiguous when read in conjunction with FL §§1-201 (Equity Court Jurisdiction) and 7-102 (Limited Divorce Grounds), and that it would be illogical to permit a decree of limited divorce based on constructive desertion when the parties were living under the same roof and to deny the court the right to determine issues of custody, support, and visitation. In *Hill v. Hill*, 79 Md. App. 708, 558 A.2d 1231 (1989), the court held that under FL § 5-203(d)(1) the court has jurisdiction to extend pendente lite custody and child support awards after the court denied the parties a divorce, where it was clear that the parties had no intention of living together.

There is a presumption that the child's welfare will be best served in the custody of its parents (including an adoptive parent) rather than in the custody of a third party, *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952). The parent has a fundamental constitutional right, while the third party does not. Thus, in *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005) the Court of Appeals held: "In respect to third-party-custody disputes, we shall adopt for Maryland, if we have not already done so, the majority position. In the balancing of court-created or statutorily-created "standards," such as the 'best interest of the child' test, with fundamental constitutional rights, in private custody actions involving private third-parties where the parents are fit, absent extraordinary (*i.e.*, exceptional) circumstances, the constitutional right is the ultimate determinative factor; and only if the parents are unfit or extraordinary circumstances exist is the 'best interest of the child' test to be considered, any contrary comment in *Shurupof [v. Vockroth*, 372 Md. 639, 814 A.2d 543 (2003)], or other of our cases, notwithstanding." *McDermott v. Dougherty*, 385 Md. at 418-19. Exceptional circumstances are those that make parental custody significantly detrimental to the children. In *Shurupoff v. Vockroth*, 372 Md. 639, 814 A.2d 543 (2003) custody was granted to maternal grandparents over natural father after mother's death; and the appropriate standard of proof to rebut the presumption favoring the parent is a preponderance of the evidence). Maryland law does not recognize *de facto* parenthood. A legal parent possesses the constitutional rights to govern the care, custody and control of his or her child. A putative *de facto* parent who seeks visitation rights over the objection of a legal parent is a third party, and, as is required of other third parties who seek visitation rights, must demonstrate exceptional circumstances as a prerequisite to a court's consideration of the best interests of the child. *Janice M. v. Margaret K.*, 404 Md. 661 (2008).

[5] *Shenk v. Shenk*, 159 Md. App. 548, 860 A.2d 408, 415 (2004). The Court of Special Appeals said that the inclusion of a "tie-breaker" does no transform the award into something other than joint custody; it is an example of one of the "multiple forms" of joint custody inherent in the powers of an equity court when dealing with the issue of custody.

[6] The term "split custody" is generally used to describe the situation in which one parent is given sole custody of some of the children of the parties, with sole custody of the remaining children going to the other parent, and cross rights of visitation. Generally, Maryland law frowns upon the division of siblings and, ordinarily, the best interests and welfare of the children of the same parents are best served by keeping them together to grow up as brothers and sisters under the same roof. See *Hadick v. Hadick*,

between the rights and obligations of a parent having temporary custody of a child pursuant to either a visitation award or an order of shared physical custody.

FL § 9-104 provides that unless otherwise ordered by a court, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child.

During all stages of your representation, it is important to focus on your client's real objectives concerning desired allocation of time with the child and allocation of decision-making authority. Often a client may be litigating over a particular title or label, when the real concern is an acceptable residential/visitation schedule or meaningful participation in certain decisions. There is a growing trend to redirect parents toward focusing on their child's needs by developing "parenting plans" and "access schedules" rather than the traditional "custody awards" and "visitation rights." Some courts now require parents to attend "parenting seminars" as a condition of court intervention in a custody dispute.

C. "Best Interest of the Child" Standard

The paramount consideration in any child custody case is the "best interest" of the child. The child's best interest is not considered as one of many factors, but as the objective to which virtually all other factors speak. In *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977), the Court delineated some of the factors to be considered by a court in making its custody determination. While a court considers all of the factors, it will generally not weigh any one to the exclusion of all others. These factors include, without limitation, the following:

1. Fitness of the parents. This factor encompasses the psychological and physical capabilities of both parents,[7] and could include any conduct and characteristic of a parent which may reflect on the parent's ability to care for a child and which may have an adverse impact on the welfare of a child. An adulterous parent is no longer presumed "unfit" to be custodian.[8]

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90 Md.App. 740, 603 A.2d 915 (1992), and cases discussed therein; cf. *Viamonte v. Viamonte*, 131 Md. App. 151, 748 A.2d 493 (2000), wherein the Court of Special Appeals affirmed the trial court's award of custody of the parties' 5 year old child to the father, thereby separating the parties' child from his half-siblings. The loss of contact with his half-brother was less important than the continuity in the same preschool program and a custodial parent who had a flexible work schedule that enabled him to manage the challenges of raising the parties' young child.

[7] *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986). The assertion of parental fitness in a child custody case does not waive psychiatrist-patient privilege under §9-109(b) of the Courts & Judicial Proceedings Article. *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (2000). The *Laznovsky* opinion contains an excellent legislative history analysis of the privilege statute.

[8] Although the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it; rather it should be weighed, along with all other pertinent factors, only insofar as it affects the child's welfare. *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977); see also *Swain v. Swain*, 43 Md. App. 645, 406 A.2d 680 (1979). In *Robinson v. Robinson*, 328 Md. 507, 615 A.2d 1190 (1992), the Court discusses the consequence of a parent asserting a Fifth Amendment privilege against compelled self-incrimination with respect to questions relating to adultery. See *North v. North*, 102 Md. App. 1, 648 A.2d 1025 (1994), concerning the effect of a parent's homosexuality on a custody determination. These cases provide a framework for addressing the

2. Character and reputation of the parties.

3. Desire of the natural parents and agreements between the parties.[9]

4. Potentiality of maintaining natural family relations.

5. Preference of a child where the child is of sufficient age and intelligence to form a rational judgment, but such child's wish is certainly not controlling. See Section II.D. for further discussion of this factor.

6. Material opportunities affecting the future life of the child.[10]

7. Age, health[11] and sex of the child. The "maternal preference" doctrine whereby a child of tender years was presumptively better off with the child's mother was abolished in Maryland.[12]

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issue: that a parent's homosexuality should be deemed relevant only to the extent it adversely affects the child. Prohibiting overnight visitation to a father who lived in a homosexual relationship was erroneous, absent evidence of actual or potential harm to the children. *Boswell v. Boswell*, 118 Md. App. 1, 701 A.2d 1153, aff'd 352 Md. 204, 721 A.2d 662 (1998).

[9] Although an agreement to relinquish or abandon parental rights may reflect the actual desires of a parent as opposed to the contrary desires the parent may express during litigation of the issue, note that under FL § 8-103(a) the court may modify any provision of an agreement between parents with respect to the care, custody, education or support of any minor child of the spouses, if the modification would be in the best interests of the child.

[10] This does not mean that a parent who is poor or otherwise not able to provide many of the comforts of life is thus not to be granted custody. This factor is not so significant absent related facts showing parental unfitness, such as a child not being properly taken care of by its parents within their means or where the financial situation (e.g., parent unable to hold down a job) has made the custodial situation completely unstable.

[11] Absent probative evidence of adverse impact, or probative evidence of the probability of some adverse impact, an inference should not be made that a parent's commitment to a handicapped child is detrimental to that parent's other children. *Hadick v. Hadick*, 90 Md. App. 740, 603 A.2d 915 (1992). The trial court had inferred (without evidence supporting such inference) that because the father was devoted to taking care of his handicapped daughter that he would not be sufficiently committed to taking care of his two sons, and this would be harmful to them and not in their best interests.

[12] FL § 5-203(d)(2); *Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984); *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978). However, in *McAndrew* the court opined that

> *"this is not to suggest that the best interest of the child may not require a consideration of the biological and psychological differences between the parents (or other potential custodians) to the extent that they bear upon their ability to provide the care needed by the child at that time ... A parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female*."

See also *Giffin v. Crane*, 351 Md. 132, 716 A.2d 1029 (1998) reversing trial court's use of gender to decide custody.

8. Residences of parents and opportunity for visitation.

9. Length of separation from the natural parents.[13]

10. Prior voluntary abandonment or surrender.[14]

In *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986), the Court of Appeals reaffirmed the continuing relevance of the foregoing factors, expounded on some of such factors, and discussed additional factors which are particularly relevant to determining the appropriateness of a joint custody award:

11. Capacity of the parents to communicate and to reach shared decisions affecting the child's welfare.[15]

12. Willingness of parents to share custody.[16]

13. Fitness of parents, i.e., psychological and physical capabilities of both parents.

14. Relationship established between the child and each parent.

15. Preference of the child. The reasonable preference of a child of suitable age and discretion should be considered.[17] See Section II.D. for further discussion of this factor.

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[13] Concerning custody, "ties of blood weaken, and ties of companionship strengthen by lapse of time" rather than "absence makes the heart grow fonder." Thus, an extended absence from one parent combined with the stability provided by the custodial parent may be a difficult circumstance to overcome. In *Montgomery County Department of Social Services v. Sanders*, the appellate court rejected the concept that the age of the child and time apart from its natural parents were the primary considerations in making a custody determination. Although not given presumptive status, psychological evidence concerning the effects of such separation and the child's formation of ties to a "psychological parent" are an important factor. See *Ross v. Hoffman*, 33 Md. App. 333, 364 A.2d 596 (1976).

[14] Voluntary abandonment or surrender refers to mental, as well as physical, abandonment or neglect. A parent's dropping out of his or her role as a parent during the formative years of a child's life will adversely affect such parent's pursuit of custody.

[15] This is clearly the most important factor in determining whether an award of joint legal custody is appropriate and is relevant also to a consideration of shared physical custody. If the parent's track record is one of inability to effectively communicate on matters involving the child and there is no strong potential for effective communication in the future, joint custody is not warranted. See also *McCarty v. McCarty*, 147 Md. App. 268, 807 A.2d 1211 (2002). Moreover, if the evidence demonstrates the parents do not share parenting values and each insists on adhering to irreconcilable theories of child rearing, joint legal custody is not appropriate. See also *Hughes v. Hughes*, 80 Md. App. 216, 140 A.2d 1145 (1989).

[16] However, this does not give a parent veto power over the possibility of joint custody. A caring parent who believes that sole custody is in the best interest of the child may aggressively advance that position throughout litigation, but still be willing and able to fully participate in a joint custody arrangement if that is the decision of the court.

[17] However, the court must be sensitive to the presence of the "lollipop" or "rescue" syndromes,

16. Potential disruption of child's social and school life.

17. Geographic proximity of parental homes.

18. Demands of parental employment.

19. Age and number of children.

20. Sincerity of parent's request. (Has one parent requested joint custody merely to gain bargaining leverage over the other in extracting favorable financial or property concessions?)

21. Financial status of the parents. The court must consider the financial burden of maintaining two homes for a child.

22. Impact on state or federal assistance.[18]

23. Benefit to parents, to the extent that any such benefit to the parents is likely to redound to the ultimate benefit of the child.

24. Other factors. A trial judge should consider all other circumstances that reasonably relate to the issue of joint custody.

25. Another factor that has appeared in Maryland custody cases is a parent's religion and the child's religious upbringing to the extent it impacts the child's physical or emotional welfare.[19]

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and that sometimes a child may express a preference for joint custody because the child hopes to reunite the parents. The court should also be sensitive to the effect of a parent's conduct that may be alienating a child from the other parent.

[18] Aid to families with dependent children and eligibility for medical assistance may be affected by the award of joint custody. The necessary showing of "absence" of a parent may be challenged when there is an award of joint custody that includes shared physical custody. Under current standards eligibility may be established in the presence of joint physical custody, provided joint legal custody does not also exist.

[19] The court may not weigh the merits of different religions or non-religious upbringing. In a custody case a court "may consider evidence of the religious views or practices of a party seeking custody, along with other factors impacting on the child's welfare, to the extent that such views or practices are demonstrated to bear upon the physical or emotional welfare of the child." There has to be a clear showing that a parent's religious practices have been or are likely to be harmful to the child, before the court will interfere with those religious practices. A clear showing requires more than simply the general testimony that the child is "confused" or "upset" by conflicting religious practices. A factual finding of a causal relationship between the religious practices and the actual or probable harm is required. See *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257 (1992); *Bienenfeld v. Bennet-White*, 91 Md. App. 488, 507, 605 A.2d 172, *cert. denied*, 327 Md. 625, 612 A.2d 256 (1992); and *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621(1963).

26. Evidence of abuse[20] by a party against: the other parent of the party's child; the party's spouse; or any child residing within the party's household (including a child other than the child who is the subject of the custody or visitation proceeding) may be considered as a factor bearing on the welfare and best interests of the child, FL § 9-101 & 9-101.1. *In Re: Adoption No. 12612*, 353 Md. 209, 725 A.2d 1037 (1999): court must specifically find no likelihood that parent may abuse or neglect child whose custody/visitation is within court's control. "The focus is not on a particular child but on the party guilty of the previous abuse or neglect." Neglect or abuse of "a" child in the past, as stated in FL § 9-101, refers to the abuse or neglect of any child in the past, not only the child at issue in the current proceeding. See also FL § 9-101.2 regarding the consequences on custody/visitation of a parent's conviction of murdering the other parent, another child of the parent or family members residing in either parent's household.

D. Child's Preference

The preference of the child or children is a relevant factor for the court to consider when awarding custody. *Ross v. Pick*, 199 Md. 341, 353, 86 A.2d 463 (1952); *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420, 381 A.2d 1154 (1977). In *Ross*, 199 Md. at 353, the Court of Appeals stated:

"[T]he child's own wishes may be consulted and given weight if he is of sufficient age and capacity to form a rational judgment . . . but we adopt a rule that there is no specific age of a child at which his wishes should be consulted and given weight by the court. The matter depends upon the extent of the child's mental development. The desires of the child are consulted, not because of any legal rights to decide the question of custody, but because the court should know them in order to be better able to exercise its discretion wisely. It is not the whim of the child that the court respects, but its feelings, attachments, reasonable preference and probable contentment."

See also *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993). *Note* that FL § 9-103 permits a child sixteen years or older to file a petition on his or her own behalf to modify court-ordered custody (where a material change in circumstances must be demonstrated). *Auclair v. Auclair*, 127 Md. App. 1, 730 A.2d 1260 (1999).

E. Court Interview of Children

The court seeks to balance the right of the parents to present evidence as to what they deem to be in the child's best interest as against possible psychological impact to the child. The trial court has the discretion to interview a child outside of the child's parents' presence, with or without the consent of the parents, and with or without the presence of counsel. However, the interview must be recorded by a court reporter unless the parties affirmatively waive the court reporter's presence on

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[20] "Abuse" has the meaning set forth in the Domestic Violence Act, FL § 4-501. See also Volodarsky v. Tarachanskaya, 397 Md. 291, 916 A.2d 991 (2007), which held that FL § 9-101 requiring a court to deny custody and restrict access rights to a party in custody proceedings if "the court has reasonable grounds to believe" that the party abused or neglected the child and the court does not specifically find that there is no likelihood of further abuse does not establish a new standard of proof. The Court must believe the party abused or neglected the child by at least a preponderance of the evidence in order to have the requisite "reasonable grounds to believe."

the record. Immediately following the interview, the court reporter shall read the record of the interview to counsel and the parties. This reporting of the content of the testimony should be outside the child's presence. *Marshall v. Stefanides*, 17 Md. App. 364, 302 A.2d 682 (1973).[21] While parties can waive recording testimony, it is not the preferable practice. *Denningham v. Denningham*, 49 Md. App. 328, 431 A.2d 755, cert. denied, 291 Md. 773 (1981), 455 U.S. 990 (1982), and may preclude judicial review as there is no record. See *Lemley v. Lemley*, 102 Md. App. 266, 649 A.2d 1119 (1994); *Shapiro v. Shapiro*, 54 Md. App. 477, 458 A.2d 1257, cert. denied, 296 Md. 654 (1983); and *Wagner v. Wagner*, 109 Md. App. 1, 674 A.2d 1 (1996).

F. Appointment of Counsel for Minors

FL § 1-202 (a) provides that in an action in which custody, visitation rights or the amount of child support is contested, the court may appoint an attorney as a "child advocate" to represent the minor child or appoint an attorney who shall serve as a "best interest" attorney to represent the minor child, and impose the costs of such appointed counsel against either or both parents. The attorney appointed to represent the minor child may not represent any party to the action.[22] FL § 1-202 (b) specifies that "A lawyer appointed under this section shall exercise ordinary care and diligence in the representation of a minor child." The *Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases* are included with these materials. [23]

The primary roles that counsel for the child could fulfill:

1. "Best Interest Attorney." The Best Interest Attorney representation of the child requires the attorney to make an independent assessment of the child's best interest, and to advocate for that determination even if it is not what the child desires. The "Best Interest

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[21] See *Nutwell v. Prince George's County Department of Social Services*, 21 Md. App. 100, 318 A.2d 563 (1974) – The "record must affirmatively show the waiver" of recorded testimony of a child's interview); see also *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993) (trial judge did not abuse his discretion in declining to interview children; the children's preferences were clearly before the court for its consideration – Mr. Leary presented no evidence to establish that the children's preferences were misrepresented to the trial court by counsel for the children); and *Shapiro v. Shapiro*, 54 Md. App. 477, 458 A.2d 1257, cert. denied, 296 Md. 654 (1983).

[22] The provision for appointed counsel for minor children is also applicable to disabled adult children. *Stern v. Stern*, 58 Md. App. 280, 473 A.2d 56 (1984). This section does not permit the trial court to appoint counsel to represent, during divorce proceedings, the interest, if any, of children with respect to other issues such as replevin, conversion, or the return of property. *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 909 (1992). In *Garg v. Garg*, 393 Md. 225, 900 A.2d 739 (2006), it was held that the trial court did not abuse its discretion in deferring mother's request to appoint an attorney pending resolution of the jurisdictional issue raised by the child's father.

[23] Although a case such as *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993) provides some helpful discussion of the various traditional roles appointed counsel may be called upon to perform and the need for the court to specify counsel's role, the *Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases* supersedes the *Leary* discussion in many respects and should be consulted for definition of the various defined roles and applicable training and standards.

Attorney" term replaces prior designation as *guardian ad litem*;[24]

2. "Child's Privilege Attorney," who performs the traditional waiver role (to decide whether to waive the patient-psychiatrist/psychologist privilege, or any other statutory privilege, for the child), appointed in accordance with *Nagle v. Hooks*, 296 Md. 123, 128-29, 460 A.2d 49 (1983).[25] The term "Child's Privilege Attorney" replaces the "Nagle v. Hooks Attorney" designation;

3. "Child Advocate" Attorney, who is court-appointed to provide independent legal counsel for a child and who "owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client."

If you believe that counsel for a child should be appointed, it is important to make sure the court's order clearly defines what the role of appointed counsel is to be – privilege waiver, pure best interest representation, or child advocate.[26] It is not improper to appoint one attorney to represent multiple children of the parent where there is no conflict between what is best for the children.[27]

Note: Where a Best Interest Attorney [formerly guardian *ad litem*] has been appointed, the children are not entitled to a separate advocate, and children are not entitled to intervene in their parents' divorce litigation, even though they have an "interest" in the outcome. *Auclair v. Auclair*, 127 Md. App. 1, 730 A.2d 1260 (1999).

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[24] The purpose of FL § 1-202 is to afford the court an opportunity to hear from someone who will "speak on behalf of the child." See *Levitt v. Levitt*, 79 Md. App. 394, 403-05, 556 A.2d 1162, cert. denied 316 Md. 549, 560 A.2d 1118 (1989). The 2006 amendments to FL § 1-202 and the adoption of *Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases* followed the case of *Fox v. Wills*, 390 Md. 620, 890 A.2d 726 (2006), which held that an attorney appointed pursuant to this section is not entitled to any type of immunity from a malpractice suit.

[25] The parents, jointly or severally, may neither agree nor refuse to waive the privilege on a minor child's behalf. The case of *Nagle v. Hooks*, 295 Md. 127, 460 A.2d 49 (1983) holds that the court must appoint a guardian to act for a minor child to exercise the privilege of non-disclosure where the minor child is too young to personally exercise the privilege of non-disclosure. See MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (2006 Repl. Vol.) concerning the privilege against disclosure of communications between patient and psychiatrist or psychologist, and § 9-121 concerning the privilege regarding communications between licensed social worker and client. Thus, if you intend to introduce a mental health expert's testimony concerning a child, it is necessary to obtain any requisite Child's Privilege Attorney appointment pursuant to *Nagle v. Hooks* and obtain a waiver of any applicable privilege so that the therapist may testify. See also *Kovacs v. Kovacs*, 98 Md. App. 289, 633 A.2d 425 (1993).

[26] In *John 0. v. Jane O.*, 90 Md. App. 406, 601 A.2d 149 (1992), the appellate court was asked to decide whether the child's appointed counsel failed to advocate the position adopted by the child. However, from the record provided, it was not clear whether the court had defined what role it wanted counsel to play. Counsel took the middle ground, presenting the court both the child's position and what counsel, based on a review of all the evidence, believed was in the best interest of the child. Absent firm guidelines from the legislature or other sources, the court opined that the best solution to the question would appear to lie in precise clear cut orders by the court after input from counsel.

[27] See *Koffley v. Koffley*, 160 Md. App. 633, 866 A.2d 161 (2005).

G. Investigative Reports

The court may appoint an investigator, such as a social worker, psychiatrist, psychologist, or trained investigator, to submit a report with or without recommendations to the court. Child custody reports often consist largely of hearsay declarations - often containing double- or triple-level hearsay - as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers and the like which may or may not have a reasonable basis. Generally these reports are not under oath and often emanate from people having some bias, whether overt or covert. Where the trial judge bases the custody decision, even in part, on an independent report, the parties and/or their attorneys must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and produce outside witnesses to establish any inaccuracies that report may contain. However sensitive the material may be, a party has a right to know what evidence is being considered by the court in judging his cause.[26]

H. Expert witnesses[27]

Evidence offered by social workers, psychologists, and psychiatrists may be necessary in some custody cases. The admissibility of expert testimony "is a matter largely within the discretion of the trial court, and its action will seldom constitute a ground for reversal." *Radman v. Harold*, 279 Md. 167, 173 (1977). In *Montgomery County v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1978), the court, quoting *Ross v. Hoffman*, 280 Md. at 191, 372 A.2d at 594, cautioned that "reliance upon 'the auxiliary services of psychiatrists, psychologists and trained social workers . . . should not be too obsequious or routine, or the experts too casual'." The determination of what is in a child's best interest is the court's decision and the court may not delegate the decision-making authority to a mental health professional.[28]

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[26] See *Denningham v. Denningham*, 49 Md. App. 328, 335-36, 431 A.2d 755, cert. denied 291 Md. 773 (1981), cert. denied 455 U.S. 990 (1982); *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993); *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992); and *Draper v. Draper*, 39 Md. App. 73, 91, 382 A.2d 1095 (1978). In *Draper*, the Court of Special Appeals held that a court-appointed investigator from the Department of Social Services occupied a position of an officer of the court. At either party's request, such a witness may be called as the court's witness subject to cross-examination by both parties when presenting his or her report to the court. In *Draper*, the report contained references to discussions with the parties to the case, the child and relatives. A parent who believes an investigator's report and testimony concerning a child's preference is unreliable could cross-examine the reporter regarding the opportunity to speak with the child, i.e., the number of meetings, the length of interviews, whether any undue influence was used by either parent, and whether the child's preferences were motivated by any improper reason; and a parent's counsel could also call the child as a witness. *Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993).

[27] See Marc J. Ackerman, Ph.D. and Andrew W. Kane, Ph.D., Psychological Experts in Divorce Actions (Aspen, 3d ed. 1998).

[28] *Shapiro v. Shapiro*, 54 Md. App. 477, 458 A.2d 1257 (1983). Although the trial court did not abuse its discretion in denying visitation to a mother whose past abusive conduct made her child fearful, it made an error of law when it committed the decision whether to permit visitation in the future to the child's therapist. *In re Mark M.*, 365 Md. 687, 782 A.2d 332 (2001). Nor may the decision-making authority of a third-party arbitrator be binding on the court - the court must exercise its independent judgment as to the children's best interests. *Kovacs v. Kovacs*, 98 Md. App. 289, 633 A.2d 425 (1993).

I. Non-expert witnesses

Some prospective witnesses include teachers, school guidance counselors, child care providers, neighbors, parents of the child's friends, coaches, relatives, or a "significant other." After you have explored the circumstances with your client, you may find it helpful to have your client prepare a list of such prospective witnesses including the names, addresses, telephone numbers, and a brief summary of such person's relationship to the client and the matters to which the client believes such witness may have personal knowledge. The sample witness interview outline included in the forms may assist you in interviewing witnesses and preparing them for trial.

J. Mediation

The Court may order mediation of child custody and visitation disputes pursuant to Rule 9-205; mediation as to custody or visitation is appropriate and would likely be beneficial to the parties or the child; and a properly qualified mediator is available to mediate the dispute. Mediation will not be ordered when there is a genuine issue of physical or sexual abuse of a party or child.

K. *Pendente Lite* Determination

In some Maryland jurisdictions, *pendente lite* hearings on issues of custody, visitation, and temporary use and possession of a family home and family-use personal property are referred to a master for a hearing pursuant to Maryland Rule 9-208. In some jurisdictions contested custody issues are scheduled for a prompt merits hearing and a *pendente lite* custody hearing is not scheduled.

L. Emergency Relief

Under appropriate circumstances, such as spouse abuse or child abuse, threatened child abduction, or other serious circumstances, a parent may be able to obtain an emergency order granting temporary custody and related relief such as use and possession of a home. In an appropriate situation the court could enter an injunction awarding temporary custody of a child.[29]

Moreover, FL § 4-501 through § 4-511 should be consulted to determine whether your client is eligible to obtain temporary custody pursuant to an interim or temporary protective order for protection from abuse under the Domestic Violence Act. Your client (including certain unmarried clients) may now be eligible to seek an interim or temporary protective order and, following a subsequent hearing or consent of the parties, a final protective order for a period not

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[29] FL §1-203(a)(2) authorizes the court to issue an injunction "to protect any party to the action from physical harm or harassment." In *Magness v. Magness*, 79 Md. App. 668, 558 A.2d 807 (1989), an *ex parte* order awarding custody of the parties' children to the wife provided that the children would stay, pending a *pendente lite* hearing, with their mother who had been their primary caretaker up until that time. The order basically did nothing more than preserve the *status quo* and merely kept the domestic situation stable until such time as a hearing could be had. The court declined to decide whether the *ex parte* injunction violated Mr. Magness' due process rights. The context was a volatile domestic situation in which an affidavit showed the mother's reasonable fear. See also *Cote v. Cote*, 89 Md. App. 729, 599 A.2d 869 (1992); and *Winston v. Winston*, 290 Md. 641, 431 A.2d 1330 (1981).

to exceed 12 months which may include custody of a child, emergency family maintenance, temporary use and possession of a home, and certain other relief under FL § 4-506.

M. Use and Possession of Family Home and Family-Use Personal Property

Pursuant to FL § 8-206 through § 8-213, the court may, under certain circumstances, award exclusive use and possession of the family home (including leased premises) and family-use personal property to a spouse who is awarded custody of a natural or adopted child (not stepchild) who has a need therefor. An award of use and possession is intended to enable any child of the family to continue to live in a familiar environment and community. The court may grant such an award *pendente lite* and thereafter for a period not to exceed three years from the date on which the court grants an annulment or a limited or absolute divorce. See *John 0. v. Jane O*., 90 Md. App. 406, 601 A.2d 149 (1992). Because of legislative enactments to Article 1, §24 of the Maryland Code and FL §5-203 in 2002, concerning extension of a parent's obligation to pay child support past a child's attaining age 18 if enrolled in high school, the use and possession statute should be construed to allow a use and possession order to similarly extend until the child's high school graduation. *Kelly v. Kelly*, 153 Md. App. 260, 836 A.2d 695 (2003).

N. Modification of child custody awards[31]

Pursuant to FL § 8-103(a), a trial court has discretion to modify any agreement between the parties which concerns custody or visitation, if the modification is in the children's best interests. See also *Kovacs v. Kovacs*, 98 Md. App. 289, 633 A.2d 425 (1993).

The party seeking a modification of a child custody order has the burden of demonstrating why the court should modify custody. *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978). The principle that an existing custody order ordinarily should not be modified in the absence of a showing of changes affecting the welfare of the children has two bases: Preventing relitigation of the same issues and the preservation of stability in custody cases. The question of changed circumstances may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

Where a party is offering nothing new and is attempting to relitigate the earlier custody determination, the absence of a showing of a change in circumstances will be dispositive. There should be sufficient evidence of changes relating to the welfare of the children to justify a full consideration of whether modification of custody is required, and the parties should not simply be attempting to relitigate issues earlier resolved.

However, to determine that a modification is appropriate, the trial court is not required to wait until the changes have already caused identifiable harm to the children. It is sufficient if the trial court finds that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the future best interest

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[31] Following an order awarding custody *pendente lite* or where *de facto* custody exists with one parent prior to the court's ultimate decision, a final award of custody is not a "modification" so there is no requirement of a change in circumstances, and the standard is and continues to be what is in the best interest of the child. *Kerns v. Kerns*, 59 Md. App. 87, 97 (1984); *McCready v. McCready*, 323 Md. 476, 593 A.2d 1128 (1991); *Kovacs v. Kovacs*, 98 Md. App. 289, 633 A.2d 425 (1993).

of the children. The benefit to a child of a stable custody situation is substantial, and must be carefully weighed against other perceived needs for change. See *McCready v. McCready*, 323 Md. 476, 593 A.2d 1128 (1991); and *Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991).

Additionally, the "purpose underlying the material change requirement is the same, whether the requested change is in custody or in a visitation schedule . . . ."[22]

In *Schaefer v. Cusack*, 124 Md. App. 288, 722 A.2d 73 (1998), the Court of Special Appeals reversed the trial court's provision for an automatic change of custody at a future date. Custody of the parties' preschool child had been awarded to the mother with a change of custody to the father to occur 30 days following the child's completion of fifth grade. The Appellate Court found that ordering a change seven to eight years in the future was incomprehensible and contrary to existing law concerning modification of custody.

O. Default Proceedings in Custody Matters.

In *Flynn v. May*, 157 Md. App. 389, 852 A.2d 963 (2004), the Court of Special Appeals held that the trial court abused its discretion when it ordered change in minor child's primary physical custody from mother to father without permitting mother's witnesses to testify or other evidence to be offered following entry of Order of Default against mother. "We nevertheless note that it is impossible for us to conjure up a hypothetical in which a judgment by default might ever be properly entered in a case of disputed child custody. We are not hereby transforming our dicta into a holding. We are, however, unabashedly adding deliberate weight to the dicta. Our comments are not random, passing, or inadvertent." *Id*. 157 Md. App. at 411-412. Thus, even where an Order of Default has been entered, the Court's obligation to consider the child's best interests requires a hearing be held on the custody matter – a party does not get a default judgment for the requested relief merely because the other side has not properly responded. See also *Wells v. Wells*, 168 Md. App. 382, 896 A.2d 1082 (2006).

P. Parent's Relocation

Changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody. The result depends upon the circumstances of each case. The issue of stability may cut both ways in such a determination. For example, continued custody in the parent who is the primary caretaker would offer an important form of stability in the children's lives. However, permitting the children to remain in an area where they have always lived, where they may continue their association with their friends, and where they may maintain frequent contact with their extended family also provides a form of stability. *Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991). See also *Goldmeier v. Lepselter*, 89 Md. App. 301, 598 A.2d 482 (1991), *cert. denied,* 325 Md. 249, 600 A.2d 419 (1992). Additionally, it has been held that the surreptitious relocation of a custodial parent in such a manner as to preclude all visitation was sufficient to support a change in custody. *Shunk v. Walker*, 87 Md. App. 389, 589 A.2d 1303 (1991).

In *Braun v. Headley*, 131 Md. App. 588, 750 A.2d 624 (2000), the Court of Special Appeals affirmed the trial court's decision that mother's relocation to Arizona was a material change in circumstances, justifying change in custody to father. One factor to be considered in custody

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[22] *McMahon v. Piazze*, 162 Md. App. 588, 875 A.2d 807 (2005).

decision is "potential for maintaining natural family relations." Here, the court found mother's unwillingness to foster a good relationship between child and father. If mother moved to distant state, easier for her to undermine father's relationship with child, and harder for father to overcome this obstacle. Court held that the standard set forth in *Domingues v. Johnson* for deciding custody disputes involving parental relocation does not interfere with custodial parent's right to travel. There is no Supreme Court indication that the constitutional right to travel is paramount over state's interest in preserving best interest of children. The State's duty to protect minor child's interests have been recognized by Supreme Court as "duty of highest order."

In any custody or visitation proceeding the court may include as a condition of a custody or visitation order a requirement that either party provide advance written notice of at least 45 days to the court, the other party, or both, of the intent to relocate the permanent residence of the party or the child either within or outside the State. FL § 9-106.

Q. Custody/Visitation Rights and Restrictions

A parent whose child is placed in the custody of another person has the right of access to the child at reasonable times. *Radford v. Matszuk*, 223 Md. 483, 164 A.2d 904 (1960). "The *parens patriae* power of the equity courts is plenary to afford minors whatever relief may be necessary to protect their best interest." *Wagner v. Wagner*, 109 Md. App. 1, 41, 674 A.2d 1 (1996).

Review Hearings/Conditions on Custody. See *Frase v. Barnhart*, et al., 379 Md. 100, 840 A.2d 114 (2003): Trial Court's conditions imposed on custodial parent to move to certain housing and to require sibling visitation to occur at place of 3rd parties who were hostile to her were impermissible conditions, and it was error to subject her to continuing review hearings. In *Koffley v. Koffley*, 160 Md. App. 633, 866 A.2d 161 (2005), the appellate court held that for good cause the trial court may hold a case open for a reasonable period of time to consider additional evidence which it found necessary to make a proper determination. But, it is not permissible for the trial court to make findings that dictate a particular result and then, leave its ultimate determination in abeyance by ordering a review hearing. Review hearings are discouraged and new petitions must be filed to support a request for modification. "It is procedurally impermissible for a court, without a new or amended petition, to alter a custody arrangement based on a later review of circumstances known or predicted to exist at the time of the initial determination." *Koffley*, 866 A.2d at 166 (2005).

Make-up Visitation. If the court determines that a party has unjustifiably denied or interfered with visitation granted by an order, the court may take certain additional remedial measures to provide "make-up" time or ensure future compliance. FL § 9-105.

Abuse or neglect: Pursuant to FL § 9-101, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court is required to determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party. Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.[33] "Abuse" must be

[33] See *Hanke v. Hanke*, 94 Md, App. 65, 615 A.2d 1205 (1992), where the court held that where there is a factual basis for a parent's fear that the other parent is sexually abusing the child, it is improper

established by "clear convincing evidence," *Arnold v. Naughton*, 61 Md." App. 427, 486 A.2d 1204 (1985). Evidence of abuse by a party against: the other parent of the party's child; the party's spouse; or any child residing within the party's household (including a child other than the child who is the subject of the custody or visitation proceeding) may be considered as a factor bearing on the welfare and best interests of the child, FL § 9-101 & 9-101.1. *In Re: Adoption No. 12612*, 353 Md. 209, 725 A.2d 1037 (1999): court must specifically find no likelihood that parent may abuse or neglect child whose custody/visitation is within court's control. "The focus is not on a particular child but on the party guilty of the previous abuse or neglect." Neglect or abuse of "a" child in the past, as stated in FL § 9-101, refers to the abuse or neglect of any child in the past, not only the child at issue in the current proceeding.

Denial of visitation was upheld in *Painter v. Painter*, 113 Md. App. 504, 688 A. 2d 479 (1997).

Outside presence of paramour: Visitation rights may be conditioned upon a parent "not to be in the company of" a boyfriend or girlfriend. [34] See also *North v. North*, 102 Md. App. 1, 648 A.2d 1025 (1994), concerning the restriction of visitation of a parent who is Human Immuno-deficiency Virus (HIV)-positive. The trial court's restriction on overnight visitation was vacated and remanded as the restriction did not demonstrate how it would protect the children from harm, nor did the restriction follow logically from the facts and was not reasonably related to court's objective. See also *Boswell v. Boswell*, 118 Md. App. 1, 701 A. 2d 1153, aff'd 352 Md. 204, 721 A.2d 662 (1997), where it was held that the trial court erred in ordering a restriction on a father's visitation based on his sexual orientation absent evidence of actual or potential harm to the children.

Counseling: It is permissible to condition custody/visitation upon continued participation in family counseling if such condition is in the best interests of the children, *Kennedy v. Kennedy*, 55 Md. App. 299, 462 A.2 1208 (1984).

Abstention from Alcohol. In *Cohen v. Cohen*, 162 Md. App. 599, 875 A.2d 814 (2005), the Court of Appeals held that a court may impose a condition (e.g., Father's right to custody conditioned upon his abstention from the use of alcohol) although the condition had not been requested or pled by the other party so long as the condition is in the child's best interest and there is sufficient evidence to support it.

Geographical Restriction. In *Schaefer v. Cusack*, 124 Md. App. 288, 722 A.2d 73 (1998), the trial court was found to have improperly imposed a requirement that the parties not live more than 45 miles from each other.

R. Visitation Rights of Grandparents/Siblings

FL § 9-102 provides that an equity court may consider a petition for reasonable visitation

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for a judge to order that child be surrendered to the alleged abusing parent for visitation without "stringent safeguards" satisfactory to "all parties," even if the judge does not agree that there is an appreciable risk of further abuse. See also *John 0. v. Jane O.*, 90 Md. App. 406, 601 A.2d 149 (1992).

[34] *Deckman v. Deckman*, 15 Md. App. 553, 292 A.2d 112 (1972): Such a condition imposed upon either party's right to have custody of the children must be based upon adequate proof that it is reasonable to believe that the association of the restricted parent with certain persons in the presence of the children would be contrary to their best interests.

of a grandchild by a grandparent; and if the court finds it to be in the best interests of the child, grant visitation rights to a grandparent. The statute applies to intact family situations also, there is no presumption in favor of grandparent visitation. In *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007), the Court of Appeals held that "there must be a finding of either parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child, absent visitation from his or her grandparents, as a prerequisite to application of the best interests analysis. Accordingly, we overrule the portions of *Fairbanks, Maner, Beckman, Herrick*, and *Wolinski* that are inconsistent with this holding." The Court of Appeals in *Koshko* noted in footnote 23 that "At any evidentiary hearing on a petition, the petitioners must produce evidence to establish their *prima facie* case on the issue of either parental unfitness or exceptional circumstances as well as evidence sufficient to tip the scales of the best interests balancing test in their favor."

A natural parent's proposed schedule of visitation is entitled to a rebuttable presumption that it is in the best interests of the child. *Wolinski v. Browneller*, 115 Md. App. 285, 693 A.2d 30 (1997). In *Brice v. Brice*, 133 Md. App. 302, 754 A.2d 1132 (2000), the Court of Special Appeals reversed a trial court's order establishing a visitation schedule between the paternal grandparents and the child that was against the mother's wishes. Under the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed. 49 (2000), application of FL § 9-102 violated mother's constitutional due process right, i.e. her fundamental right to rear her child, where there was no showing she was unfit and mother did not oppose some visitation with the paternal grandparents. The appellate court did not invalidate the Maryland statute. The Court of Special Appeals, in *In re: Tamara R*., 136 Md. App. 236, 764 A.2d 844 (2000), analyzed *Troxel v. Granville* and applied the principles to a sibling visitation matter. "We conclude that the state's interest in the protection of a minor child who has been removed from her parent's care is sufficiently compelling to justify overriding her parent's opposition to visitation with her sibling, if there is evidence that denial of sibling visitation also would harm the sibling whom the separated child seeks to visit." In *Herrick v. Wain*, 154 Md.App. 222, 838 A.2d 1263 (2003), the Court of Special Appeals affirmed a Circuit Court for Montgomery County Order granting maternal grandmother visitation; trial court had considered surviving father's concerns and the evidence rebutted presumption that father's preferred schedule was in child's best interest. See also *Frase v. Barnhart*, et. al., 379 Md. 100, 840 A.2d 114 (2003).

Both parents are necessary parties to the grandparents' action, pursuant to Maryland Rule 2-211.

S. Interstate Custody Disputes

Interstate custody cases are governed by two statutes: the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Federal Parental Kidnapping Prevention Act (PKPA). Both statutes apply in all such cases, except that UCCJEA alone reaches international cases. Although the UCCJEA and PKPA statutes are similar, they are not identical, and where they are in conflict, the PKPA prevails. The UCCJEA attempts to bring the act into conformity with PKPA.

Maryland has enacted its version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at FL § 9.5-101 through 9.5-318, applicable to "cases filed to establish or modify child custody or motions or other requests for relief filed in child custody cases on or after the effective date of this act."

T. Child Abduction. See FL § 9-301 – § 9-307

If a child has been removed from Maryland by a parent of the child, and no proceeding is pending in another state, Maryland courts will have jurisdiction under FL § 9-302 under the circumstances set forth therein. See *Rypma v. Stehr*, 68 Md. App. 242, 511 A.2d 527 (1986).

Moreover, in Maryland, if a child under the age of sixteen is abducted within this state by a relative who is not the lawful custodian, or if the child is detained for forty-eight hours after the lawful custodian demands that the child be returned, the abductor is guilty of a misdemeanor, and if the child is removed from this state, the abductor is guilty of a felony and the penalties upon conviction are greater if the abduction lasts more than 30 days. FL § 9-304, 9-305, 9-307. See *Khalifa v. State*, 382 Md. 400 (2004) (Grandmother convicted of several counts of abducting, harboring and detaining a child outside of Maryland). Pursuant to FL § 9-306, one who violates the aforesaid provisions may file a petition alleging "a clear and present danger to the health, safety, or welfare of the child" and seek to revise, amend, or clarify the custody order. If the petition is filed within ninety-six hours of the act, a court finding of "clear and present danger" is a complete defense to any action brought for violation of FL § 9- 304 and 9-305. See *Gharjari v. State*, 108 Md. App. 586, 673 A. 2d 709 (1996), re prosecution of non-custodial parent for child abduction.

Additionally, in a situation involving an international child abduction, you should become familiar with the Convention on the Civil Aspects of International Child Abduction, opened for signature, October 25, 1980, S. Treaty Doc. No. 11, 99th Cong., 1st Session (1980), otherwise known as the *Hague Convention*. Parties to the Convention have agreed that, subject to certain limited exceptions, a child wrongfully removed or retained in one of these countries shall promptly be returned to the other member country where the child habitually resided before the abduction or wrongful retention. The Convention imposes treaty obligations to return an abducted child below the age of sixteen if application is made less than one year from the date of the wrongful removal or retention. After one year, the court is still obligated to order the return of the child unless the person resisting return demonstrates that the child is settled in the new environment. A court may refuse to return the child under certain limited circumstances. See *Rodriguez v. Rodriguez*, 33 F. Supp. 2d. 456 (1999) re application of grave risk of physical or psychological harm exception provisions. See also *Belay v. Gettachew*, 272 F.Supp.2d 553 (U.S.D.Md, 2003): a parent who wrongfully removed a 5-year old daughter from Sweden to U.S.A. and concealed the child is estopped from asserting the Article 12 defense that the child is well-settled in her new surroundings.

Also see International Child Abduction Remedies Act (ICARA), which is federal legislation that implements the 1980 Hague Convention into United States law. In *Cantor v. Cohen*, 442 F.3d 196 (4th Cir., 2006), the Court held that ICARA does not confer jurisdiction upon federal courts to hear child access/visitation claims. Except for the limited matters of international child abduction or wrongful removal claims, which are expressly addressed by Hague Convention and ICARA, other child custody matters, including access/visitation claims, are best addressed by the state courts that are experienced in handling these types of legal matters.

For more information see *International Parental Child Abduction*, United States Department of State Bureau of Consular Affairs (4th ed. 1990). To obtain the further information call (202) 647-3666, or write to CA/OCS/CCS, Room 4817, Department of State, Washington,

DC 20520.

U. Establishing Paternity

FL§§5-1001 through 1048, codifies laws relating to paternity. If a child is born out-of-wedlock, paternity must be established before child support is ordered by the court. Pursuant to §5-1006 a proceeding to establish paternity of a child under this subtitle may be begun at any time before the child's eighteenth birthday; provided, however, the time is extended to before the child turns 21 with respect to a child who is a dependent on a parent because of a mental or physical infirmity. An action is initiated by filing a complaint to establish paternity. FL § 5-1010. In most cases, the complaint must contain an oath of the mother in support of the pleading. FL § 5-1010(d). Finally, the complaint must have the consent of the State's Attorney unless not required under FL § 5-1010(e)(2).

At any time before the case is called for trial, the defendant may file a written answer. FL § 5-1012(a). If he has not done so by the court date, or he files a written answer admitting the complaint and is not represented by counsel, the Court shall read or explain the complaint to the defendant to ensure that he understands it. FL § 5-1012(d). In cases brought by the State, the State's Attorney or other designated person may request blood or genetic tests. FL § 5-1021. On the motion of a party or on its own motion, the Court may order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as the father. FL § 5-1029. Blood or genetic test results can be admitted into evidence if the defendant is excluded or the probability of paternity is 97.3 percent or higher. FL § 5-1029(f)(1). A laboratory report received into evidence establishing a statistical probability of the alleged father's paternity of at least 99.0% constitutes a rebuttable presumption of his paternity. FL § 5-1029(f)(4). If an individual fails to submit to a blood or genetic test ordered by the Court, that refusal, properly introduced in evidence, shall be disclosed to the Court and may be commented on by counsel. FL §5-1029(g).

Paternity must be proven by a preponderance of the evidence.[37] FL § 5-1027(a). If the Court determines the defendant is the father, the Court will sign an order which establishes paternity and sets the amount of support.[38] FL § 5-1032 through 5-1033.

In the paternity proceeding, the defendant may also be ordered to pay for the mother's medical and hospital expenses for pregnancy and funeral expenses of the child, if applicable, and counsel fees. FL § 5-1033. The Court may order payments made to any person and may include in its order provisions for custody, visitation and other matters related to the general welfare of the child. FL §§ 5-1033 through 5-1035.

A court may modify or set aside a declaration of paternity if a blood or genetic test

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[37] Unmarried parents may execute an Affidavit of Parentage which shall constitute a legal finding of paternity, subject to certain rights to rescind the affidavit. FL § 5-1028(e). The Affidavit is to be completed on a standardized form developed by the Department of Human Resources. FL § 5-1028(b).

[38] If support is in arrears at the time the child is emancipated, the support order may be continued until the arrearage is paid. FL § 5-1032(c). Child support may continue for an adult child if that child is destitute and, due to a mental or physical handicap, cannot be self-supporting. FL § 5-1032(b)(2). See also FL §§ 13-101 through 13-109.

establishes the definite exclusion of the individual named as the father in the order. FL § 5-1038. See *Jessica G. v. Hector M*., 337 Md. 388, 653 A.2d. 922 (1995), *cert. denied*, 516 U.S. 829 (1995); and *Tyrone W. v. Danielle R*., 129 Md. App. 260, 741 A.2d 553 (1999), aff'd sub nom. *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389(2000). Once a paternity declaration was vacated, the child support order resulting from the paternity declaration also became invalid and the putative father ceased to be legally obligated for arrearages emanating from child support orders resulting from the vacated paternity declaration. *Walter v. Gunter*, 367 Md. 386, 788 A.2d 609 (2002).

III. BIBLIOGRAPHY. Some suggested references for further reading are:

John F. Fader, II and Richard J. Gilbert, *Maryland Family Law* (Lexis, 4th ed. 2006)

John F. Fader, II and Mark E. Smith, *Maryland Domestic Relations Case Finder* (Michie 1993)

Maryland Divorce and Separation Law, (Daniel F. Thomas ed., MICPEL, 8th ed. 2003)

William D. Paton and William C. Staley, *Family Law Manual Maryland* (Hanford 1993)

IV. FORMS

The forms provided are samples only and are for illustrative purposes. However, no form should be relied upon as a substitute for independent research, knowledge of the applicable laws, a consideration of the context in which the form is to be used, and the attorney's own professional responsibilities.

CUSTODY WITNESS INTERVIEW OUTLINE

1. a. Name
   b. Address

   c. Married
   d. kids
      i. gender
      ii. ages
   e. occupation

2. know parties

3. how long known each

4. what context do you know them

5. know the child(ren)

6. last time seen Father (F) or Mother (M) or kids

7. when

8. where

9. seen either parent interact w/ children
   a. when
   b. where
   c. what doing
   d. how children's appearance (clothing, cleanliness)
      - know where kids get their clothing

10. visit F at his place of residence
    a. when
    b. frequency
    c. appearance
    d. kids present

11. visit M at her place of residence
    a. when
    b. frequency
    c. appearance
    d. kids present

12. what seen F do w/ kids

13. what seen H do w/ kids

14. who cares for kids' medical/personal (female) problems
    --attentive to needs

15. ever left your kids w/ F or M
    a. would you
    b. why or why not

16. while F & M lived together, describe F's participation in family affairs

17. while F & M lived together, describe M's participation in family affairs

18. what activities does F engage in w/ kids

19. what activities does M engage in w/ kids

20. how does F supervise/discipline kids

21. how does M supervise/discipline kids

22. hours kids keep when w/ F or M

23. how would you describe F's relationship w/ kid
    --affection demonstrations

24. how would you describe M's relationship w/ kid
    --affection demonstrations

25. M’s strengths as parent

26. concerns about M’s parenting

27. F’s strengths as parent

28. concerns about F’s parenting

29. from your observations of the parties do you think F is a fit and proper custodian of the kids

30. do you think M is a fit and proper custodian of the kids

31. would you change your opinion if you learned F/M had [committed adultery] [used drugs] [_________]

32. [... or that F/M had exposed the kids to any alleged paramour or used drugs in the kids' presence or ______________________]

33. ... or that F had physically abused M while they lived together

34. why does this change your opinion

SAMPLE INTERROGATORIES: FROM DISCOVERY SECTION MATERIALS

[Child Custody]

56. If you contend that placing the children in your sole, shared, or joint custody will be in their best interest, specify the facts and circumstances upon which you rely. (Standard Domestic Relations Interrogatory No. 21.)

57. Describe the child care plan you intend to follow when the children are with you. Include in your answer a description of the place where the children will reside, specifying the number of bedrooms, bathrooms, and other rooms, the distance to the school which the children will attend, and the **identity** of all other **persons** who will be residing in that household. **Identify** all **persons** who will care for the children in your absence, state the hours during which they will care for the children, and the location where the care will be provided. (Standard Domestic Relations Interrogatory No. 22.) {NOTE: Although not part of Standard Domestic Relations Interrogatory No. 22, you may want to also ask "the actual cost of the child care expense."}

58. Describe in detail the health and well-being of your child since her date of birth.

59. Describe in detail all developmental and recreational activities you have engaged in with your child since January 1, (Year), including in your answer the dates you engaged in such activities and the names of any and all persons present during such activities.

60. If there are currently or have been in the past disagreements between you and Plaintiff/Defendant as to major issues affecting the welfare of the minor child, state all pertinent facts concerning such disagreement(s), including but not limited to the nature of the disagreement, the position taken by each of you, and how, if at all, said disagreement was resolved.

61. If you contend that you and Plaintiff/Defendant do not agree on the children's education,

child care, religious training, discipline, or medical care, state how you differ from each other, and state the facts and circumstances that support your contention.

62. State the specific custody and access schedule you contend is in the best interest of the minor children including but not limited to when the minor children would spend time with each parent, and explain why the schedule would be in the best interests of the minor children.

63. If you or anyone in your household (or anyone who has cared for your child(ren) has been arrested for or convicted of any alcohol- or drug-related offense, or of any other criminal offense, since ____________________, state as to each charge the date of arrest, the charge, the court and case number, the trial date, the disposition, and the disposition date.

64. State with particularity and in detail what conversations you have had with the minor child(ren) relative to the issues in this case and the substance of said conversations, specify who initiated said conversation. Include in your answer what, if anything, the minor child(ren) has communicated to you or anyone else about her preferences about her living arrangements, about the relationship between the minor child(ren) and the other parent, about the relationship between the minor child(ren) and you and, specifying form (written or oral), the substance of the communication, date, time, place, and who was present.

[Use and Possession]

65. If you contend that the residence at (Address) is not the "family home" as defined by Section 8-201(c) of the Family Law Article, state the facts upon which you base said contention.

66. If you claim that any tangible personal property located at the "family home" is not "family use personal property" as defined by the Section 8-201(d) of the Family Law Article, state the facts upon which you base said contention.

67. If you claim that any automobile being used by either you or your spouse is not "family use personal property" as defined by Section 8-201(d) of the Family Law Article, state the facts upon which you base said contention.

68. State all facts upon which you rely in support of your contention, if any, that the court should award you the sole possession and use of the family home and family use personal property.

69. If you contend that the child does not have a need to continue to reside with your spouse in the family home in the State of Maryland, state the facts upon which you base said contention.

[Custody - Out of State Removal]

70. With respect to your proposed move from the Maryland-Washington, D.C. Metropolitan Area, please state: (a) the date you intend to move and the place to which you intend to move; (b) where you intend to reside, including in your answer the names and ages of all persons who will reside at such residence, the number of bedrooms, the number of bathrooms and the size of the yard; (c) the child-care plan which you would provide to your minor children during periods of time she may be with you, stating the names, ages and qualifications of all persons who would care for her, the hours during which you would utilize their services, the cost of such services, and the location where they would care for her; (d) the facts, circumstances and reasons for such move; (e) a detailed and specific visitation schedule to which you believe you and any other person(s) should be entitled if Plaintiff is awarded custody, and a schedule to which you believe Plaintiff should be entitled if you are awarded custody.

[Custody - Complaint Allegations]

71. State all facts upon which you rely in support of your allegation in Paragraph (#) of your (Name of Pleading) that ______________________________.

72. State all facts upon which you rely in support of your allegation in Paragraph (#) of your

(Name of Pleading) that you have been the parent who has provided your child's religious upbringing including, without limitation, a detailed description of your involvement in the (Type) faith during the past five years including, without limitation, the dates, place and occasion of each instance of church/synagogue attendance by you during said period.

SAMPLE CUSTODY/VISITATION PROVISIONS: FROM MARITAL SETTLEMENT AGREEMENTS SECTION MATERIALS

3. Custody of Minor Child.

A. [Sole Custody] The Wife shall have sole custody of the parties, minor child, ___________________, with reasonable rights of visitation reserved to the Husband.

{A. [Joint Custody] The Husband and Wife shall have the joint custody of the parties' minor child, ____________. Said minor child shall reside primarily with the Wife, subject to the Husband's right to have said child with him at all reasonable times including the specified times hereinafter set forth. {The Husband and Wife shall have the joint legal and joint physical custody of the parties' minor child. Said child shall reside one-half of the time with each party in two week cycles as follows: the minor child shall reside with the Husband from Sunday morning through Wednesday afternoon and with the Wife from Wednesday evening to Sunday morning of the first week of the cycle, and said child shall reside with the Husband from Sunday morning through Thursday afternoon and with the Wife from Thursday evening to Sunday morning of the second week of the cycle, and said residential schedule shall continue for subsequent two week periods; provided, however, each party shall be entitled to have the minor child reside with said party for two consecutive, uninterrupted weeks each summer.} The parties further agree that all important parental decisions material to the health and medical care, education, religious upbringing, welfare and general well-being of the child shall be jointly made by both parties, with a view towards arriving at a harmonious policy calculated to promote such child's best interests. The parties agree that they shall not unreasonably or arbitrarily withhold or delay their consent with respect to any of the matters they are to determine jointly. {Religious upbringing: The parties expressly agree

that they desire that their child receive a _____________ religious upbringing, and each party agrees that he or she shall actively encourage and foster such religious upbringing. Visitation in paramour's presence: The parties believe that it would be detrimental to the children if a party spends time with the children in the presence of a person of the opposite sex who is not a relative or a mutually agreed upon au pair. Accordingly, until the parties' absolute divorce each party agrees not to expose the children to any such unrelated person or to permit any such unrelated person to stay overnight during a period of time when such party has the children with him or her. School District:

The parties expressly agree that the minor children shall continue to attend school in their current school district of Montgomery County, Maryland unless and until the parties mutually agree otherwise.} Notwithstanding the foregoing, the day to day decision making with respect to the parties' child's health and medical care, welfare, and general well being, shall be invested in the parent responsible for said child at a time such a decision must be made. With respect to the minor child's health and medical care, the parties shall consult with each other, with a view towards arriving at a joint decision with respect to such care, except that no such prior consent or consultation with the other party shall be required where impracticable in the case of emergencies.

B. Each party hereto agrees to keep the other informed of the whereabouts of the minor child when with the Wife or Husband respectively and they mutually agree that if either of them has any

knowledge of any illnesses or accidents, or other material circumstances affecting the child's health, education or general welfare, the Husband or the Wife, as the case may be, will promptly notify the other of such circumstances. The Wife shall furnish the Husband with copies of said child's report

cards, evaluations, school reports and notices of meetings and events which are submitted by the school to her as she receives them from whatever school said child is attending.

C. The parties shall exert every reasonable effort to maintain free access and unhampered contact between the minor child and each of the parties, and to foster a feeling of love and affection between the child and the other parent. Neither party shall do anything which may estrange the minor child from the other party or injure the said child's opinion as to the Wife or the Husband or which may hamper the free and natural development of the minor child's love and respect for each of his parents.

D. The Husband shall have reasonable and liberal time with the child, including without limitation the following:

(1) Overnight visitation every other weekend, commencing at 6:30 P.M. on Friday evening, and ending on Sunday evening at 6:30 P.M. If the Monday following weekend visitation is also a legal holiday on which the child is not required to attend school, the weekend time period shall extend through and including Monday evening at 6:30 P.M.

(2) Four weeks each Summer, at least two of which may be consecutive. {Four weeks overnight visitation each Summer, for no more than two consecutive weeks at a time, separated by two consecutive weeks to allow for the Wife's vacation plans. The husband will discuss with the Wife the summer weeks he intends to visit with the children on or before June 15th each year. Both parties will make a sincere effort to develop a mutually acceptable schedule. If the parties are unable to agree on such schedule, the party who had first preference in the preceding year will have second preference in the current year.}

(3) One-half of the child's Christmas and Easter

school holidays, including equitably dividing Christmas Eve\Christmas Day each year. {One-half of the children's Christmas school holiday vacation period, with Christmas Day in his one-half period alternate years.)

(4) Father's Day.

(5) The Husband's birthday.

(6) Meaningful period of time on the child's birthday.

(7) One weeknight evening each week during the school year and two weeknight evenings each week during the summer for dinner and, following such dinner, overnight visitation during the summer.

(8) Alternate Thanksgiving Days.

{Visitation - older kids: The parties recognize the need for flexibility in scheduling the exercise of such visitation in view of the minor child's age and activities, and the Husband agrees to consider the minor child's desires and seek consensus with said child concerning scheduling of visitation periods.}

E. {Out of State Relocation - Restriction} The parties have established the foregoing residential arrangements to reflect their belief that they constitute the best arrangements to meet their child's need to have a continuing and close relationship with both parties, and their recognition that an arrangement that provided for less contact between the child and each of the parties would not be in the child's best interests. Neither party shall remove the minor children outside the State of Maryland {more than twenty-five (25) miles from the center of Rockville, Maryland} for the purpose of changing said children's residence, unless that party first obtains the express written consent of the other party to do so, or, in the absence of such written consent, obtains an order of the

appropriate Maryland court authorizing such relocation. The parties agree that such court approval must be sought and obtained prior to the actual relocation of the child and shall not be sought or obtained on an ex parte basis. {Out of State Relocation - Advance Notice: The Wife agrees to give the Husband advance notice of not less than ninety (90) days of any intended relocation outside the State of Maryland with the party's minor child.}

{E. Out of State Relocation - Permitted: The parties acknowledge that the Wife and children intend to establish a permanent residence in the State of Florida upon the sale of the jointly owned family home, and the Husband expressly consents to the Wife and minor children's relocation to Florida. In the event the parties should reside in the same state in the future, the visitation schedule shall be as stated herein. The parties shall make a good faith effort to revise the Husband's visitation schedule with the children, keeping in mind the best interests of the children. The Wife shall prepare the children for such visits and have them ready at the time the Husband arrives. The exercise of visitation privileges by the Husband shall not conflict nor interfere with the school schedule of the children, nor with the bona fide plans previously made for other activities, and all such visitation shall be exercised with due regard for the health and general welfare of the said children. The Husband shall pay all transportation and other incidental expenses of such visits and shall be responsible for transporting the children to and from the Wife's residence. During the period that the parties' children are with the Husband, the Wife shall have reasonable telephone access with the children.}