Legally Speaking

Newsletter Vol. 7, No. 1

Schiller DuCanto & Fleck LLP

Chicago
Lake Forest
Wheaton

Family Law. Unparalleled.

The Law Can Frustrate the Best Interests of a Child

The end of a marital or other relationship that involves the need to determine a parent's custodial rights and access to children can be one of the most traumatic events any individual will ever experience. In a legal proceeding involving issues of child custody, such as the form of custody, who makes major decisions for the child, parenting time/visitation, who has access to information concerning the child, etc., the Court is required by statute (1) to resolve such issues in accordance with the *best interests* of the child.

In making its *best interest* determination, the Court is required to consider certain factors that include: "*the mental and physical health of all individuals involved*". (2) The Court is prohibited from considering a parent's conduct that does not affect the parent's relationship with the child. (3)

Timothy M. Daw

Senior Partner
tdaw@sdflaw.com

Because the Court is required to consider the mental health of everyone (including the child or children), whether a parent or a child has been diagnosed with a mental illness and/or is receiving mental health treatment seems to be a relevant and material question that needs to be investigated and considered. Ultimately, the Court may determine that what is learned regarding the parties' or the child's mental health neither affect nor has a significant impact on the parent/child relationship. However, to get to this determination, common sense would suggest that access to this information should be allowed. The law and common sense are not always in sync.

> **In making its *best interest* determination, the Court is required to consider certain factors that include the following: '*the mental and physical health of all individuals involved.*'**

The Illinois Mental Health and Developmental Disabilities Confidentiality Act ("IMHDDCA") (4) severely restricts the ability to gain access to such records or information of a parent or a child, depending on the age of the child. Even if records are obtained, the IMHDDCA restricts what can be done with the records. Anyone violating the restrictions contained in the IMHDDCA is subject to civil and criminal penalties.

Therefore, in trying to obtain or prevent access to these records, the attorney needs to be familiar with the intricate provisions of the IMHDDCA and its restrictions.

It would be impossible to go through all of the issues that must be dealt with when working through the provisions of the IMHDDCA in the limited confines of this article. The following are some general highlights:

- The IMHDDCA states that all records and communications are privileged and may not be disclosed unless specifically authorized under the IMHDDCA. (5)
- Whether a person is even the recipient of mental health care or treatment is in and of itself privileged. (6)
- For a child under 12, either parent may obtain these records and consent to the disclosure and redisclosure of the information from the therapist. (7)
- For a child over the age of 12, the child or either parent can authorize the release of the records and the disclosure and redisclosure of information if the child has been informed and the therapist "*does not find*" there is a compelling reason to deny access. (8)

Continued on page 2

IN THIS ISSUE

1 The Law Can Frustrate the Best Interests of a Child
By Timothy M. Daw

2 The Who, Why and What of Appointing "Parenting Coordinators"
By Meighan A. Harmon

3 Lessons from *Lonvick* in Custody Litigation
By Leslie S. Arenson

Michele M. Jochner Selected to "Women Making an Impact"

Michele M. Jochner was selected as one of 17 "Women Making an Impact" by *Chicago Lawyer* magazine. Michele received this distinction because of her approach towards mentoring others. She continually guides young lawyers throughout their careers and we are proud to have her as a member of our firm.

The Who, Why and What of Appointing "Parenting Coordinators"

In many high conflict cases involving the care and custody of children, "Parenting Coordinators" assist the parties in coming to agreements. This article will address who Parenting Coordinators are, why they are appointed to cases, and what role they play in the case.

Who

Parenting Coordinators are professionals appointed by the Court (and sometimes by agreement of the parties) in high conflict cases to act in a quasi-judicial role to assist in resolving ongoing disputes between parents in matters related to custody, visitation and parental decision making. The parties submit their disagreement to the Parenting Coordinator who then fashions a resolution that the parties can either agree upon or the Court can consider.

The required qualifications for a Parenting Coordinator vary widely depending upon the jurisdiction. For example, in Cook County, the minimum qualifications of a Parenting Coordinator mirror those of a mediator with the Marriage and Family Counseling Services, namely a Master's Degree in Social Work, Psychology, Counseling or Juris Doctorate degree, or an equivalent in a related field, and at least five years of post-decree experience in mental health mediation or a related field. The Association of Family and Conciliation Court (AFCC), an organization leading the charge in the use and appointment of Parenting Coordinators, has published its own *Guidelines for Parenting Coordination*, which recommend that Parenting Coordinators have specialized mental health training, mediation experience and specific training in parenting coordination.

Understanding the background and training of the proposed Parenting Coordinator is essential to determining whether or not such an appointment is likely to be helpful in any given case. Arguably, Parenting Coordinators with more legal than mental health training will be more focused on providing for outcomes consistent with what would likely happen in court. On the other hand, mental health professionals may be more likely to approach conflict through an understanding of the parties' and children's psychological and emotional needs.

Why

Courts tend to appoint Parenting Coordinators in high conflict custody cases for two reasons: First, to alleviate the glut of ongoing post-decree litigation in which parties find themselves in the court system for months and often years after the divorce decree is finalized, and second, because Parenting Coordinators often have the mental health background and are more equipped to spend the time necessary to get to the root of the emotional issues that are driving the constant litigation, the goal being that Parenting Coordinators may be better able to find solutions to conflict that will get the parties out of the system once and for all.

What

Parenting coordination is essentially a quasi-judicial process in which the Court appoints a Parenting Coordinator as a binding arbitrator of minor disputes between the parties relating to scheduling issues, children's activities and the like. Other times, the Parenting Coordinator is simply placed in a position to be an adviser to the Court after collecting information regarding the dispute between the parties. Depending upon the jurisdiction, the proceedings before the Parenting Coordinator may be confidential in nature and the finding of the Parenting Coordinator may be admissible in court. Moreover, in the vast majority of cases, the cost of the parenting coordination is borne by the parties themselves.

In Cook County, the Court may appoint a Parenting Coordinator when it finds any of the following: (1) the parties failed to adequately cooperate and communicate with regard to issues involving their children, or have been unable to implement a parenting plan or parenting schedule; (2) mediation has not been successful or has been determined by the judge to be inappropriate; or (3) the appointment of a Parenting Coordinator is in the best interests of the child or children involved in the proceedings. Moreover, in Cook County, communications with the Parenting Coordinator are expressly not confidential.

Although Parenting Coordinators are frequently used in Illinois, it should be noted that they are not used in all jurisdictions.

Meighan A. Harmon
Senior Partner
mharmon@sdflaw.com

In fact, some jurisdictions, including the State of Pennsylvania, have banned the appointment of Parenting Coordinators. While many view the use and appointment of a Parenting Coordinator as a necessary adjunct to the judicial process that will alleviate the glut of ongoing custody litigation, others view the use of Parenting Coordinators as an inappropriate and improper delegation of judicial decision making and, ultimately, a denial of legal due process to the parties. Other objections to the use of the Parenting Coordinators include the fact that there is wide variation in the training and competency standards for people who are appointed to serve in this role, the significant cost added to the parties' litigation expenses for the use of Parenting Coordinators, and the fact that the profession is largely unregulated as of yet.

Should you, or your ex-spouse, be interested in having the Court appoint a Parenting Coordinator to your case, it is imperative that you and your family law attorney have a discussion regarding the potential benefits and detriments to the appointment.

The Law Can Frustrate the Best Interests of a Child *(Continued from cover)*

- For a parent, the information can be disclosed with or without limitations pursuant to a consent that complies with provisions of the IMHDDCA. (9)
- Without the consent, in a proceeding pursuant to the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), the information can only be disclosed if "*…the recipient or a witness on his behalf first testifies concerning the record or communication.*" (10)
- Without the consent, in a proceeding outside of the purview of the IMDMA, i.e. a parentage proceeding, there is a multi-part stringent test that requires an *in camera* proceedings and extraordinary findings in order for the information to even be obtained. (11)
- Even if there is a consent, the therapist can object to the release of the information. (12)

While the Court is required to consider mental health information that affects a parent's relationship with a child under the IMDMA, the IMHDDCA can frustrate the gathering and submission of such information. An alternative is to have an evaluation done pursuant to the provisions of the IMDMA (13) or the Illinois Supreme Court Rules. (14) Even in these situations, the professional will also try to get the information through the use of consents. Absent the information, the Court may have to make the custody decision without what could be the most reliable information.

(1) 750 ILCS 5/602(a).

(2) 750 ILCS 5/602(a)(5) (Emphasis added).

(3) 750 ILCS 5/602(b).

(4) 740 ILCS 110. HIPPA also creates parallel restrictions.

(5) 740 ILCS 110/3.

(6) *See* 740 ILCS 110/2- within the definition of "Communication" or "Confidential Communication" there is a provision that clearly states this includes "*…information which indicates that a person is a recipient*". *See Norskog v. Pfiel,* 314 Ill.App.3d 877, 882 (1st Dist. 2000).

(7) 740 ILCS 110/4(a)(1), (5)(a).

(8) 740 ILCS 110/4(a)(3), (5)(a) (Emphasis added)

(9) 740 ILCS 110/5.

(10) 740 ILCS 110/10(a)(1) (Emphasis added); See *In re Marriage of Lombaer,* 200 Ill.App.3d 712, 721 (1st Dist. 1990).

(11) 740 ILCS 110/10(a)(1).

(12) 740 ILCS 110/3(b), 10(b).

(13) 750 ILCS 5/604(b).

(14) Illinois Supreme Court Rule 215(a). There is some controversy whether this is an appropriate vehicle to use in a custody matter.

Lessons from *Lonvick* in Custody Litigation

Many people assume that a trial court will always award a stay-at-home parent primary custody of the parties' minor children. However, in an unpublished decision, the Second District of the Illinois Appellate Court confirmed that a stay-at-home parent will not always be awarded custody.

In *In re Marriage of Lonvick*, the parties heavily contested the issue of custody of their six-year-old child. The father had a master's degree in computer science, was employed as a senior database administrator at a large company, volunteered at the National Ski Patrol, and was in good health. The mother had a bachelor's degree from Columbia College in art and design, was in good health, and had not worked outside of the home since the birth of their child.

Leslie S. Arenson

Associate

larenson@sdflaw.com

The mother made allegations of abuse against the father dating back to the beginning of their marriage. The father alleged the mother had been abusive to him, that the mother withheld the child from visitation periods and that she de-registered the child from activities in which he had previously participated. After a trial at which numerous third party witnesses testified regarding the mother's allegations of abuse and the parties' interaction with the child, the trial court awarded the working father sole custody of the child and granted the stay-at-home mother reasonable visitation. The Second District affirmed the award.

The *Lonvick* case is an important reminder to custody litigants that while it can be difficult to put emotions aside during a custody case, they must be particularly aware of how their actions affect their case. Some litigants believe that the focus of the case should be the denigration of the spouse in hopes that he or she will make concessions or that a Court will penalize the spouse due to *allegations*. A domestic relations attorney must be aware, involved and vocal in their client's decisions that can impact custody. The attorney must be careful in advising the client as to the effects and ramifications of pursuing certain issues. The attorney has a responsibility to investigate, advise and counsel a client, as opposed to merely repeating to a judge what a client states; this goes to the very heart of a healthy attorney/client relationship. The attorney and client should be working together to achieve the client's overall goals.

In *Lonvick*, the court found that the mother unilaterally removed the child from activities in which he been previously involved and refused to produce the child for visitation periods with the father. It is possible the court found her actions to be impulsive, immature and indicative of her inability to handle the responsibilities of joint custodianship. An attorney could strategize with the client regarding the timing and appropriateness of such actions. It is important to make sure that spontaneous decisions do not have long-term consequences.

Further, the mother alleged that the father abused her. The only evidence of the abuse came from the mother's testimony, which if true, demonstrated that there was an isolated incident of abuse that resulted in no injury. The mother never sought medical attention or an order of protection. The father, however, presented evidence that the mother had been physically abusive to him in the presence of a witness who also testified. The trial court found the mother incredible and that she took actions contrary to the best interests of the child.

As a practical matter, it is important for an attorney to perform an independent investigation when a client lodges allegations of abuse. The attorney will be able to assess what, if any, evidence will support the client's claims and how likely the trial court is to find the allegations credible. Moreover, the attorney should determine whether and in what context certain themes, such as domestic violence, should be presented to the court. The timing and method of presentation greatly affects the court's reception of the information.

Although each case is unique in light of the personalities, backgrounds and traditions of each family, generally speaking, the best advice in a custody dispute is to maintain the status quo as it relates to the child's contact with the other parent, community, and activities, and to *genuinely* support the relationship with the other parent (absent extenuating circumstances). Not only is this best for a custody case, it is generally best for the child in question.

It is imperative for attorneys to take the lessons learned in *Lonvick* and apply them to their practice. In my practice, I am accessible to my clients and I invite them to seek my input before making decisions relating to their child that will impact his/her custody case and, of course, their child. I help them to look objectively at the situation and make informed decisions, as opposed to decisions that may be motivated by fear or insecurities.

Allison B. Adams 3rd Place ABA Essay Winner

Allison B. Adams was the 3rd place winner of the American Bar Association's family law essay contest for law students with her article titled "War of the Wiretaps: Serving the Best Interests of the Children?" Schiller DuCanto & Fleck LLP congratulates Allison on this award.

IN THE NEWS

Jennifer Dillon Kotz has been recognized for her 2014 Super Lawyers distinction in three North Shore publications including Winnetka Talk, TribLocal Winnetka & Northfield and Winnetka Patch.

Michele M. Jochner was interviewed by the ABA owned magazine, Law Practice Today, in an article titled "The Effects of Mentoring on the Duty to Supervise" for the December 2013 issue.

Timothy M. Daw was quoted in the January/February 2014 issue of West Suburban Living magazine in an article titled, "Dealing with Divorce."

Michele M. Jochner was appointed by the Illinois Supreme Court to serve on the Minimum Continuing Legal Education (MCLE) Board.

Donald C. Schiller was mentioned in the article "I Want You As My Lawyer!" in the December 2013 issue of Vanity Fair Spain.

Shannon R. Burke, Deborah A. Carder, Timothy M. Daw, Charles J. Fleck, Meighan A. Harmon, David H. Hopkins, Joshua M. Jackson, Michele M. Jochner, Claire R. McKenzie, Karen Pinkert-Lieb, Donald C. Schiller and **Anita M. Ventrelli** have authored the Illinois Institute of Continuing Legal Education supplements for their Family Law Series.

Donald C. Schiller was ranked as one of the Top 10 Lawyers You Don't Want To See in Divorce Court by AskMen.com

Donald C. Schiller was quoted in the Chicago Daily Law Bulletin article "More marriages, more legal work."

Schiller DuCanto & Fleck LLP was mentioned in the Chicago Daily Law Bulletin article titled "Pro bono project makes an impact, celebrates three years," for their participation in funding a position at the Domestic Violence Legal Clinic to support pro bono lawyers.

Donald C. Schiller was invited to speak at the American Academy of Matrimonial Lawyers Annual Conference on November 8, 2013.

Timothy M. Daw spoke at a Guardian Ad Litem Training Session on "Mental Health and Developmental Disabilities Confidentiality Act and Disclosure of Information," on November 16, 2013.

Burton S. Hochberg spoke on "Business Valuation for Lawyers," at IIT Chicago-Kent College of Law on November 21, 2013.

Brett M. Buckley is the co-chair for the Chicago Bar Association Young Lawyers' Section Family Law Committee and moderated a panel titled "Reproductive Technology: New Families, New Issues" on January 16, 2014.

DePaul Latino Law Student Association

Schiller DuCanto & Fleck LLP and Senior Partner Anita Ventrelli hosted an alumni event for the DePaul Latino Law Student Association at our Chicago office.

The event was attended by current students, professors, lawyers and judges. Layla P. Suleiman Gonzalez, Executive Director at Illinois Latino Family Commission and Director of Human Services at Loyola University Chicago, was presented with the Distinguished Alumni Award.

Timothy M. Daw, Co-Editor / Shannon R. Burke, Co-Editor / Justine E. Long, Layout/Design

SCHILLER DUCANTO & FLECK LLP

CHICAGO
LAKE FOREST
WHEATON

sdflaw.com

200 North LaSalle Street
30th Floor
Chicago, IL 60601-1089

(312) 641-5560 Phone
(312) 641-6361 Fax

225 East Deerpath Road
Suite 270
Lake Forest, IL 60045-1973

(847) 615-8300 Phone
(847) 615-8284 Fax

310 South County Farm Road
Suite 300
Wheaton, IL 60187-2477

(630) 665-5800 Phone
(630) 665-6082 Fax