

Maryland Judicial Ethics Committee

Opinion Request Number: 2003-10

Date of Issue: August 27, 2003 (issued July 25, 2003 as unpublished opinion)

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Home Study or Custody Investigation by Court's Social Worker
Not *Ex Parte* Communication

Issue: Do the receipt and consideration by a trial judge of a home study or custody investigation submitted by the court's social worker prior to trial constitute an *ex parte* communication in violation the Code of Judicial Conduct?

Answer: No.

Discussion: The provisions of Md. Rule 16- 813, Canon 3A(5) of the Code of Judicial Conduct, govern a judge when dealing with *ex parte* communications. The Canon provides in pertinent part:

A judge should accord to every person who is legally interested in proceedings, or the person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. ...¹

An *ex parte* communication has been defined as: "a communication about a case that an adversary makes to the decision maker without notice to an affected party. A judicial proceeding, order, or injunction is said to be *ex parte* when is it taken or granted at the instance and for the benefit of one party only and without notice to and contestation by, any person adversely interested." *Anchor Packing v. Grimshaw*, 115 Md. App. 134, 692 A.2d 5 (1997) (citations omitted), *vac'd on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 963 (1998).

The receipt of a completed home study or custody investigation is not an *ex parte* communication *per se* under this definition. Rather, the judge has acquired information outside the record regarding facts of a pending case from a source other than a party, or counsel, in the due course of the trial². Nonetheless such communications do appear to be within the ambit of Canon 3A(5).

There is little doubt that custody and home study investigations, when they are conducted by competent individuals, can be a very useful addition to the fund of available information whenever a court is called upon to decide custody and visitation issues³. The acquisition and use of

¹ *Cf. Caldwell v. State*, 51 Md. App. 703, 445 A.2d 1069 (1982).

² These are actually described as being extra judicial sources. *Boyd v. State*, 321 Md. 69, 77, 581 A.2d 1 (1990).

³ *See, e.g., Denningham v. Denningham*, 49 Md. App. 328, 335, 431 A.2d 755, *cert. denied*, 291 Md. (continued...)

Maryland Judicial Ethics Committee

Opinion Request Number: 2003-10

Date of Issue: August 27, 2003 (issued July 25, 2003 as unpublished opinion)

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 3

such reports are virtually universal and should not be discouraged. Trial courts, in making the very serious decisions regarding child custody and visitation, need access to all of the evidence, and the sources of that evidence, that bear on the issues. These reports and investigations not only provide direct evidence on the issues but also may provide additional sources of such evidence that the court and the parties may wish to be considered. It is no overstatement to say that these reports can play a significant role in the outcome of custody and visitation cases in particular⁴. Such investigations are also necessary in adoption cases, guardianship matters, and proceedings to terminate parental rights⁵. At times and in appropriate cases, judges can attempt to avoid extra judicial communications problems by appointing a guardian *ad litem* for the child or children⁶.

As the language of Canon 3A(5) indicates, a judge is allowed to participate in an *ex parte* communication regarding a pending matter if that communication is authorized by law. The issuance of a temporary protective order under the Domestic Violence statute, Md. Code, Family Law Article § 4-505, is perhaps the most well known judicial proceeding in which *ex parte* communications are permitted by law. As it pertains generally to custody and visitations issues, however, no such statutory permission is specifically granted.

Case law in Maryland provides little procedural guidance regarding the receipt and use of custody and visitation investigation reports. However, an inspection of the cases discloses that the appellate courts have not expressed particular concern about how or when a trial court obtains such reports and investigations, but rather what the trial court does with those documents once they are in the court's possession. There is one constant thread through the pronouncements of the appellate courts; if a trial court considers a home study or investigation report in reaching its decision regarding custody or visitation, the parties must be made privy to that report and must be accorded

³(...continued)

773 (1981); *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977); *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952); and *see* the dissent in *Hosain v. Malik*, 108 Md. App. 284, 339-40, 671 A.2d 988 (1996).

⁴ *See, e.g., Ouellette v. Ouellette*, 246 Md. 604, 229 A.2d 129 (1967), *Goldschmiedt v. Goldschmiedt*, 258 Md. 22, 265 A.2d 264 (1970); and *Howard v. Gish*, 36 Md. App. 446, 457-59, 373 A.2d 1280 (1977). However, there is no general requirement that such investigations be undertaken. *Powers v. Hadden*, 30 Md. App. 577, 587, 353 A.2d 641 (1976).

⁵ They are required by rule if these proceedings are contested. Md. Rule 9-106(b).

⁶ *Auclair v. Auclair*, 127 Md. App. 1, 730 A.2d 1260 (1999); and *see Leary v. Leary*, 97 Md. App. 26, 627 A.2d 30 (1993).

Maryland Judicial Ethics Committee

Opinion Request Number: 2003-10

Date of Issue: August 27, 2003 (issued July 25, 2003 as unpublished opinion)

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 3

an opportunity to cross examine the preparer and to present witnesses to support or rebut the report⁷. Thus in considering such a report before there is a hearing at which its admissibility might be challenged, the court runs the risk that the admission of the report might not survive an evidentiary challenge.

The Committee is of the opinion that if a trial court orders a home study investigation or a custody investigation, the court then may receive that report and shall share it with the parties or their attorneys. The court then may rely on that report in making its determinations at trial subject to the right of the parties or their attorneys to cross examine the author under oath; to present countervailing evidence to discredit the report in any of its material aspects; and, alternatively, to present supportive evidence.

⁷ *Draper v. Draper*, 39 Md. App. 73, 382 A.2d 1095 (1978); and *see Leary v. Leary, supra*; *see also Clayman a/k/a Burch v. Clayman*, 536 So.2d 358 (Fla, 1988); *In re Marriage of Talkington*, 13 Kan. App.2d 89, 762 P.2d 843 (1988).