Repeal of § 20-124.3:1 of the Virginia Code: Restoration of Judicial Discretion

by Carol Schrier-Polak

Under current Virginia law (§ 20-124.3:1, Virginia Code 1950 as amended) mental health evidence is inadmissible in child custody and child visitation cases absent consent of the parents, abuse or neglect, or a child custody evaluation.

This statute is in direct conflict with § 20-124.3 of the Virginia Code requiring judges to make informed decisions when determining the best interests of children in custody and visitation and to consider all relevant evidence including but not limited to the mental condition of the child, the mental condition of each parent, the relative propensity of each parent to actively support the child's contact and relationship with the other parent, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child. No greater decision affects the lives of children and their parents.

In the 2005 case of *Schwartz v. Schwartz* (46 Va. App. 145), the Virginia Court of Appeals reversed a contempt order entered by the Circuit Court of Fairfax County when, in violation of the current statute, the judge permitted the therapist to testify that the mother, in violation of the court's prior custody order, repeatedly denigrated the father in the presence of the child, continually devalued the father outright, and never made a supportive statement about the father alone or in the presence of the children—all of which the therapist said was unusual. The court of appeals held that the testimony was inadmissible because it was information about a parent. While the trial court stated that the therapist was for the child, the therapist testified that he had been contacted by the attorneys for the parents, was serving as a coparenting coordinator and cotherapist for the parents, and was meeting with and working with the children.

On December 28, 2006, the court of appeals in *Rice v. Cromer* (Record No. 0226-06-2) relied on *Schwartz v. Schwartz* to hold that the therapist for a child who had been abused by her father previously could not testify in a visitation case between the father's parents and the mother since any information related to a child would necessarily relate to a parent.

Both *Schwartz* and *Rice* demonstrate how the current statute prevents a court from hearing all relevant information when determining the best interests of a child.

The Virginia Trial Lawyers Association, The Virginia Bar Association Commission on the Needs of Children, the VBA Coalition on Family Law Legislation, and the Virginia Chapter of the American Academy of Matrimonial Lawyers support repeal of § 20-124.3:1.

By repealing Virginia's current law, Virginia's privilege statutes and the Virginia Health Records Privacy Act (§ 32.1-127.1:03, 1950 Code of Virginia as amended) would regulate custody and visitation cases just as they have been effective in considering the admissibility of health evidence in noncustody-related matters that come before the court.

While the current statue has an exception for experts who have conducted a child custody evaluation, this exception has proved to be ineffective. Courts are refusing to order evaluations because of the lack of qualified custody evaluation experts and the costs involved in conducting a comprehensive evaluation. Recently a number of judges have accepted the position of many mental health professionals that the statute prevents a therapist from speaking with a child custody evaluation expert. Not only does such a position make the statutory exception meaningless, it is in direct conflict with professional standards for custody evaluations that require the expert to obtain relevant information from collateral sources, including but not limited to mental health providers.

In response to a survey of guardians ad litem who represent the best interest of children in Virginia, GALs overwhelmingly believe the current statute undermines the interests of children, protects the adult caregivers, does not preserve families, and often requires children to testify in litigated disputes.

There is no empirical evidence to support the argument of some mental health professionals that parents will not participate in therapy if their records are disclosed in court. In fact, the research demonstrates that patients who have a positive relationship with their therapists will participate in therapy even knowing that their records will be disclosed.

Last year's efforts to repeal the current statute resulted in a tie vote when the bill was heard by the Senate Courts of Justice Committee. While legislation to repeal did not pass in 2007, the General Assembly took notice that many mental health pro-

fessionals, as well as attorneys, feel strongly that the current law regarding mental health records is not in the best interests of children.

In response, legislation to repeal the current statute will again be introduced during the 2008 legislative session.

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