

SERVING AS THE BEST INTEREST ATTORNEY IN CUSTODY CASES

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I. The appointment.

A. Can be by motion of one party, by consent of both parties, or by the court sua sponte.

B. Reasons why Judges appoint BIA's

1. Common in high conflict divorce cases when it becomes apparent to the court that the parties are so at odds that the child's needs are not being appropriately considered and protected, or the child is being used as a pawn by either party.

2. Also Common if there are allegations

A. Of physical abuse or neglect or alcohol or drug use;

B. That one party or the other having serious mental, emotional or psychological condition, history or disability;

C. That significant parental alienation has already occurred or is likely or underway.

D. That a child has been or is being exposed to details of litigation or to parents conflict/ disputes/altercations;

E. That a child has a strong preference or viewpoint that needs to be advanced or considered.

Query: If more than one child, and each has a different preference, should separate BIA's be appointed? (Conflict of interest and cost considerations).

F. That the child has emotional or psychological problems;

G. That the child has seen a therapist or mental health professional, whose testimony may be important or helpful to the court.

3. Some judges view the appointment as a way to help the case resolve prior to trial believing that the independent review and pre-trial recommendations of a court-appointed guardian, whose allegiance is to the child, will provide insight as to how the case might be resolved at trial, and how a creative solution might be reached.

4. Other judges view the BIA as the court's "eyes in the field" so to speak; an individual who will ensure that the information necessary for a case to be resolved in a child's best interest is

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assembled, analyzed, and presented at trial, to the extent that the parties advocates may not.

II. Initial steps once appointed

A. Contact Counsel

1. In Writing (Personal Preference)

- a. See sample contact letter
- b. Always do letter if one side is pro se.

2. By Phone

- a. Attempt to do joint phone conference
- b. If not, schedule separate phone conferences as close together as possible.

B. Authorization to communicate with parties

1. If parents are represented, don't communicate directly with them, unless and until their attorneys consent.
2. Confirm your authorization in writing.

C. Request all pertinent pleadings, agreements, documents, and correspondence

1. Be sure the other attorney has copies of any documents (etc.) you have in your possession from the other attorney.
2. REMEMBER there will come a point when you have to justify your position.

D. Request names and contact numbers for any mental health professionals.

E. Request names and contact numbers for the people each party believes would be helpful for you to contact.

F. Request copies of school and medical records (if appropriate).

G. Request from the attorneys information about the current living and access

arrangements for the child. Also obtain contact numbers for both parties.

H. Decide based on preliminary review of information whether your first contact should be with the child, parents, or mental health professional.

III. Communication with Mental Health Professionals

A. Clarify your role. Once they know you are the child's BIA and not the attorney for either parent, they are more likely to relax and speak with you.

B. Offer to fax a copy of the order appointing you before the conversation proceeds to anything of substance. Most will feel more comfortable after receiving and reviewing it.

C. Many will think they need a release from the child's parents before they are allowed to speak with you. The order and some brief explanation will hopefully help them understand that this is not required.

Question: Is it simply faster to just get a release, even if it isn't technically needed?

D. Reassure them that speaking to you does not constitute a waiver of the child's privilege regarding communications; but that you are the one the court entrusts with the authority to determine if any privilege exists and whether it should be waived.

E. Inquire about the following:

1. When did the child first start seeing the MHP
2. With what frequency do they meet?
3. Does the MHP consider himself/herself to be a "treating therapist"
4. How did the MHP first come to be involved
5. Which parent made the first contact
6. What concerns prompted the initial contact
7. Which parent typically brings the child to sessions
8. Has the MHP had the opportunity to meet with both parents/ and see interactions with both.
9. What concerns does the MHP have about the child's condition/ behavior
10. Has the MHP rendered a diagnosis
11. Prognosis
12. Have parents participated in therapy/ treatment/ sessions
13. Medication prescribed
14. Has MHP spoken with others about the child's situation (teachers, doctors)
15. Any concerns about either parent's conduct
16. What has the child said about the home situation
17. To what degree has the child been exposed to parental conflicts

18. How would you describe the child? Is the child outgoing, trusting, shy, withholding, withdrawn etc.?
19. Does the child confide readily/ is the child enthusiastic or reluctant about sessions
20. Has the child said anything that would lead the MHP to believe the child has a preference.
21. Has the child confided anything sensitive to the MHP
22. How would the child most likely respond if aware that the MHP may be called upon to reveal matters discussed in sessions (Most will encourage preservation of the child's confidence for the sake of preserving any ongoing therapeutic relationship, and the child's ability to speak to others in confidence).
23. Has any testing been done
24. Are notes kept of sessions (if so consider obtaining copies before deciding whether or not to waive any privilege the child has).
25. Does the MHP believe the child benefits from sessions, sees value in them and desires to continue.
26. Has the privilege already been inadvertently waived? Has the MHP already discussed with either or both parents any opinions and recommendations concerning the child? Have any particular disclosures by the child already been mentioned to the parents as part of any treatment recommendations?

Note: The list of questions above is fairly basic. Obviously, there are many questions that could be asked of the MHP depending on the facts and circumstances of each particular case.

F. Should you waive the privilege regarding the child's communications with a MHP?

1. Make sure you have spoken with the MHP, child (if age appropriate), and with counsel and/or parents first;

2. Is there a privilege to be waived? Is the MHP one who is covered by the statute (e.g., Psychiatrist, Psychologist, Licensed Social Worker)? Is there a therapeutic or treating relationship?

- a. See *Kovacs v. Kovacks*, 98 Md. App. 289, 633 A.2d 425 (1993) (information reported by a mental health professional who acted as a consultant but not as a treating therapist was not privileged under C.J. Section 9-109. The children were not "patients" of the doctor within the definition of the statute, for purposes of diagnosing or treating any mental or emotional disorder).

- b. What if there is no recognized statutory privilege (for e.g., regarding communications between child and non-LCSW school counselor, or mental health student, or doctor- patient (in Maryland), but professional asserts a privilege? Should a request be made for a *Nagle v. Hooks* attorney to be appointed to provide a level of comfort?

3. Apply a balancing test: Is the potential damage to any present or future

therapeutic relationship outweighed by the need for the information that the therapist can provide to the court?

a. Are there other sources from which the factual information that the therapist may have can be obtained, or is the therapist the only source? (Frequently the opinion the therapist will be called upon to render is based on information the MHP has gathered not just from the child, but from parents, grandparents, neighbors, teachers, school counselors, physicians, and others from whom the court will be hearing anyway). Is there another way of putting the relevant facts and information before the court without waiving the privilege?

4. Should your claim or waiver of the privilege on behalf of the child be in writing? (see sample Report of Best Interest Attorney). As a pleading? If so, how detailed should it be?

5. Can the attorney for the party who feels aggrieved by your claim of the privilege, call you to the stand to challenge your decision or obtain more detail about your reasons?

6. If you waive the privilege, and the MHP will be called to testify, is it your job to prepare the MHP to testify?

a. Caution: you are not the attorney for the MHP; and must be careful not to impart legal advice. If the MHP wishes to have legal representation, separate counsel must be obtained by the MHP (sometimes available through professional associations of which the MHP may be a member).

b. There may be times when it is necessary for the BIA to prep the MHP for deposition and trial testimony.

c. It may also be necessary or desirable for the BIA to call the MHP as the BIA's witness at trial, and conduct the direct examination; in order to ensure that the testimony which supports the best interest of the child is elicited.

G. If more than one MHP is involved, is the waiver of privilege with regard to one a waiver as to all? Experience indicates not.

IV MEETING WITH THE CHILD

A. Where should the initial meeting take place? Consider locations that are age-appropriate and where the child might be more relaxed and comfortable. Possibilities: Each parent's home, your office, a favorite activity or a kid-friendly restaurant (but beware of places with too many distractions);

B. Who should bring the child to the meeting? Frequently parents will perceive some advantage to being the one to bring the child, or to being the one in whose home the first visit

occurs. Do what you can to dispel the notion. Arrange more than one meeting with each parent bringing the child a different time.

C. If there is more than one child, make sure that you meet for some period of time with each child separately, even if your initial introduction occurs with both/all of the children present. Joint sessions can provide insights, but should be complimented by one-on-one time.

D. Explain your role in an age appropriate way.

Note : Important to develop some familiarity with basic principals of child development in order to have some sense of what approach and questions are age appropriate. (Cross reference materials of other presenters).

1. Does the child know what an attorney is? What does he/she think an attorney does?
2. Did either parent explain anything to them already about who you are, or why they were coming to see you today?
3. Let the child know that you are there to help; reassure; address any anxiety or concerns; validate (don't discount) feelings the child expresses;
4. Indicate (if age appropriate) an understanding that this may be a difficult time for them. You know mom and dad are having some problems, they are trying to work things out, both of them love you very much, both would want to be with you all the time if they could, both want to see you and do things with you, but since they live in different houses now they have to work out how they're going to do that... etc.
5. The court has appointed you to look out for their interests because they have an interest in how this whole thing comes out. You're there to make sure that their needs and concerns are protected while mom and dad are working things out.
6. Emphasize that even though you and the court are interested in the child's feelings, it is not the child's responsibility to decide the case. It is the judge's job to do that.

E. Encourage questions and answer them honestly and in an age-appropriate way.

F. Discuss the issue of confidentiality, if age appropriate.

G. Let the child know that it would help you better represent them if you knew more about them. Consider the following potential questions, **but be patient. You probably can't cover much in the first meeting).**

1. How often is the child with each parent now; does the child know and understand the

current access schedule

2. Ask about each parent's home
3. School
4. Daily routine
5. Favorite/ least favorite subjects; teachers; grades and school performance
6. Friends
7. Other adults in their lives
8. Sports, hobbies, activities
9. Neighborhood environment
10. Favorite/least favorite thing about each parents house
11. Who helps with homework if needed
12. If you have a problem and need to talk about it, do you have someone you can talk to; if so, whom?
13. Relationship with siblings;
14. How would you describe each parent to someone who didn't know him or her
15. Favorite/least favorite thing to do with each parent
16. How have you been spending your summers
17. Memorable vacations/ trips
18. Pets
19. If a therapist or mental health professional is involved, consider age appropriate questions to ascertain, how the child feels about going to see the MHP. Does it help to be able to talk to the MHP about problems?
20. Are there any particular problems you're having with either of your parents

Note: Again this list is just meant to convey suggestions. Not all questions are appropriate in all cases, and it may be that several meetings should occur, and a rapport developed before certain areas are broached, if at all. Also, be prepared for the child to ask similar questions of you, as this sometimes happens.

H. Be vigilant for

1. Rehearsed responses/coaching by a parent, examples being:
 - a. Statements by the child that are remarkably similar to those heard from a parent.
 - b. Sophisticated suggestions from the child about how the custody/access issues should be resolved or what the visitation schedule should be.
2. Incidents of Exposure to conflict between the parents
3. Indications that a parent is keeping the child apprized of the details of the litigation or parental disagreements, financial matters etc.
4. "Rescue syndrome" where a parent seeks to victimize himself in the eyes of the child to generate affection and affect the child's preference.
5. Indications of campaigning by a parent
6. Indications of alienating behavior by a parent
7. The "Disneyland" parent who is trying to win the child's affections by creating the

more fun/less rigid environment or by spending liberally on the child.

V. MEETING WITH THE PARENTS

A. Don't meet without their attorneys also being present unless the attorney's permission to do so has been obtained in advance (preferably in writing).

B. Meet with each individually.

C. Try to meet with each parent for approximately the same amount of time, lest you be accused later of showing favoritism. Same with phone contact with parents and with their attorneys.

D. Consider meeting at least once with each parent in your office and conducting one home visit with each.

E. At the initial meeting, make sure the parent understands your role, and that what each says to you is neither privileged nor confidential.

F. At a minimum ask

1. what the parent perceives the issues to be
2. what each parents goals are
3. what each believes the best custody and access arrangement is and why
4. what concerns each parent has about the other
5. what strengths and weaknesses the other party has as a parent
6. what the home environment in each home is
7. what the anticipated daily routine and day care arrangements will be
8. what each parents education and employment situation is and how it will or may be affected under different custody and access arrangements.
9. who else might it be helpful for you to speak with about the children and what's best for them.
10. whether the parent is or has been in therapy and whether the parent would be willing to authorize you to speak with their therapist.
11. Have each parent describe their child and relate any particular concerns (educational, developmental, behavioral etc)
12. What compromises might be possible in their view

Note: Again this list is just meant to convey suggestions. Not all questions are appropriate in all cases.

VI. CONTACTS WITH COLLATERALS

A. Don't just rely on what you hear and learn from the parties, the child and the therapist. Contact others with knowledge of the child's and family's situation.

B. Consider teachers, school counselors, neighbors (parents and even friends), day care providers, domestic help, doctors, coaches, relatives.

C. Most are more willing if you clearly identify yourself as the attorney for the child.

VII. WILL THE CHILD BE INTERVIEWED BY THE COURT, OR EVEN TESTIFY?

A. What should your position be? First and foremost, consider the potential effect on the child.

1. Note that some children will forthrightly say they *want* a chance to talk to the judge. Be sure you understand where this feeling is really coming from.

B. What are the alternatives to having the child come to court?

1. Will a therapist who is thoroughly familiar with the child's feelings and position be testifying?

2. Will the court be hearing from a custody evaluator who has spoken with the child?

3. Can the court simply rely on your representation about what the child's position is, if any?

C. Testimony or interview? Either party may formally call (even subpoena) a child to testify in open court. Courts generally frown on the parent that would go to this length. Either party may request, or the BIA may even make the request for an in-chambers interview of a child. The court may also decide *sua sponte* that an interview should be helpful. Once a request is made, the court has discretion about whether to conduct the interview, and if so, how it should be conducted.

1. May/should it be recorded/transcribed?

2. Should all counsel be present? Just the BIA? No attorneys, just the Judge?

3. Can/should counsel submit a list of suggested questions or areas to cover?

4. May/must the Judge make known to the parties what the child said?

5. When during the proceedings should it take place? Generally at or near the end, so the court has heard the parties' positions first, and knows what the issues are. Maybe even on separate day.

6. Consider who will bring the child. (Perhaps a third party, or you, not a parent).

D. Consult pertinent case law.

1. *Shapiro v. Shapiro*, 54 Md. App. 477, 458 A.2s 1257, *cert. denied*, 296 Md. 655 (1983) (Discretion to conduct in chambers interview of children and circumstances under which interview should be conducted.)

2. *Marshall v. Stefanides*, 17 Md. App. 364, 302 A.2d 682 (1973). (Discretion to conduct in chambers interview of children and circumstances under which interview should be conducted.)

3. *Wagner v. Wagner*, 109 Md. App. 1, 674 A.2d 1 (1996) (Steps to be taken by a party objecting to an in camera interview of children. No abuse of discretion to interview children who were ten and seven years old).

4. *Ross v. Pick*, 199 Md. 341 (1952) (The preference of a child is considered not because of any legal right the child has to decide the question of custody, but because it may be helpful to the court in the exercise of discretion).

5. *Boswell v. Boswell*, 352 Md. 204, 721 A. 2d 662 (1998) at footnote 6 (A child probably should not be asked directly to express his or her preferred decision in the case. Asking a child directly for his or her preference at least gives the appearance that the decision-making burden is shifted from the judge to the child, "a result to be avoided." Skillful questioning rather than direct examination is the better practice).

E. What weight is to be given to the child's statement of preference?

1. Generally depends on child's age, level of maturity, the manner in which the preference is expressed, the reasons given in support of it, and other possible influences or motivations.

a. *In re Barry E.*, 107 Md. App. 206, 667 A. 2d 931 (1995) (When a child is of sufficient age and has intelligence and discretion to exercise judgment as to his or her future welfare, based upon facts and not mere whims, those wishes are one fact that, within context, should be considered by trial judge. However, it could not be left up to unfettered discretion of five-year-old children, who had been declared to be children in need of assistance (CINA), whether to visit with their mother).

F. Preparing the child to for court

1. Find out before the case, whether either party is planning to request that the judge speak with the child.

2. Meet face to face.

3. Go over possible questions or areas.
4. Be understanding, reassuring. Deal as best you can with concerns, anxiety.
5. Consider a court house visit before "the big day".
6. Make sure the child understands that it is not his or her responsibility to decide the case; that the Judge has heard a lot about him or her during the trial and just wants the opportunity to meet and get to know a little bit, and to hear anything he or she may wish to say. Emphasize that it is the judge who has the responsibility of deciding the case.

VIII. OTHER ISSUES

A. Getting paid. (See Sample petition and order) (See also David Goldberg materials)

1. Periodic petitions vs. one "big one" at the end?
2. Bankruptcy issues
3. Should you discount your normal hourly rate?

B. Should you attend depositions?

1. Do you otherwise have liberal, informal access to the parties and witnesses anyway, to ask what you want?
2. Cost considerations.
3. Are demeanor or credibility issues in the case?
4. The position of other counsel about whether you should attend.
5. Opportunity for settlement or settlement discussions.
6. If you don't attend be sure to obtain copies of the depositions.

C. What involvement should you have with the court appointed evaluator?

1. Same end goal: Best interest of the child.
2. Evaluator's office practice is to speak with BIAs.
3. Evaluator's perspective may balance yours and vice versa.
4. If BIA and Evaluator's position are similar, settlement prospects are enhanced.
5. If the Evaluator is to be called by BIA as a witness, BIA should remember to subpoena the Evaluator.

D. Balance your contact with each side. Don't communicate with one to the exclusion of the other. If you impart information to one side, make sure you immediately share it with the other.

Note: Count on both sides to review your fee petitions carefully to see whether you've had a disproportionate amount of contact with one side or the other.

E Can you be called as a witness at the trial?

1. Avoid doing things when gathering information that will potentially make you a witness.

2. Ethical quandary. Dual role of attorney and witness. Privilege issues.

F. When should you make your position known to the parties?

1. At the pre-trial conference? Before? At the trial? Before?

2. Experience indicates that if the BIA's position is made known prior to the Pre-trial/Settlement Conference, in time for the parties and their attorneys to evaluate and reflect on it, the chance of settlement short of trial is increased.

G. When should you make your position known to the Court?

1. At trial, in opening statement? At the close of the evidence? Consider the effect on the course of the trial. Be mindful of the weight the court is likely to give to your position. Consider the consequences if your position is indicated in opening statement, but the evidence/support for your position does not come in at trial the way you anticipated it would. Ask for guidance from the court as to when in the course of the proceedings the court would like to know what your position is.

H. How should you make your position known? Consider not preparing a written report unless the court orders one.

1. When stating your position, consider phrasing points so they are less provocative. (E.g., "It is mom's perception that dad is not always careful with the children," instead of "Mom says dad is not always careful with the children.").

2. Consider whether your position tracks or deviates from that of the Court appointed custody evaluator, and be prepared to support any deviation.

3. Make sure you address the major contentions of each party so that even if you disagree, each will know he or she was heard.

I. What if your assessment of what's best for the child differs from the stated preference of the child?

1. As a Best Interest Attorney, you have the ability to "substitute judgment".

2. Your obligation is to inform the court of the child's stated preference as well as your position of what's in the child's best interests and why.

J. What if you claim the privilege regarding communications between child and therapist, but the Court-appointed custody evaluator wishes to, or actually does converse with the therapist to gather information which then is used as the basis for the evaluator's recommendations?

1. Beware of this potential for a “back-door” circumvention or inadvertent waiver of the privilege, as well as the potential it carries for exclusion of all or part of the custody evaluator’s recommendations due to the untenable position in which it places either or both of the parties. (i.e., unable to fully cross-examine the evaluator about all basis for the recommendation).

K. What can/should your role be at the trial?

1. Are you an attorney for a party? See *Auclair v. Auclair*, 127 Md. App. 1, 730 A.2d 1260 (1999) (children are not parties, in the conventional sense, to their parents’ divorce and custody litigation).

2. Nonetheless, can you make opening statements and closing argument, call witnesses, of your own, introduce exhibits, cross-examine, etc.

3. Remember to subpoena those witnesses whose testimony is vital to support your position on behalf of the child (e.g. MHP’s).

L. What can/should your role be after the trial?

1. Does your role/ authority end when the gavel falls at the end of the case?

a. *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992) (Pertinent portion only) (Appointment of counsel for child continues past date of divorce if conflict as to custody, visitation and support remain.)

2. What if the court directs you to stay involved, monitor, or handle specific issues after the litigation is over?

a. Caution. Consider malpractice and liability potential.

b. Potential Liability concerns should be considered as well even while the litigation is on-going, if the BIA volunteers, or is asked by the court or the parties, to wear other hats (e.g. Parent coordinator).

M. If litigation starts up again, consider having one of the parties file a motion to reaffirm your appointment as BIA. Aside from clearing up any uncertainty, this provides BIA with the opportunity to request an appropriate fee escrow for upcoming round of litigation.