

CUSTODY AND VISITATION CASES; HOW TO SERVE THE CHILD'S BEST INTERESTS

A Judge and Two Lawyers Explore “Child Development” Principals to Make Child Custody Determinations

The Honorable Diane O. Leasure, Alisa Gross Cummins, Keith N. **Schiszik**

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“At the bottom line, what is in the child's best interests equals the fact finder's best guess.”

Montgomery County v Sanders, 38 Md. App. 406, 420 (1978)

Case law instructs the Courts - and practitioners - that the factors to be considered in deciding the best interests of a child are “the fitness of the parents, character and reputation of the parties, desire and agreement of the parties, potentiality for maintaining family ties, preference of the child, material opportunities affecting the possible future of the child ...” *Montgomery County v. Sanders*. But, what does that MEAN? Even the Court in *Montgomery County v. Sanders* acknowledges that “the Court's prediction is founded upon more complex methods than reading tea leaves.”

So, rather than relying on a methodology that is no more clearly defined than “reading tea leaves”, what is a lawyer, or a Best Interest Attorney (“BIA”), or a Judge, to do in making these life-changing decisions?

There is no “scientific method” to determine a parent's fitness or a child's best interests. Generally, the fact finder's “best guess” is derived from the judge's preconceived notions and unrecognized, sometimes all-too-human biases.

The mental health field, however, has been studying child development for decades. Uniform findings reveal that certain developmental considerations must be attained by every child if they are to become a healthy adult. Those developmental considerations are:

- a sense of personal safety and security
- development of interpersonal skills
- support of intellectual abilities
- a sense of self-worth

The stronger these concepts are established in a child during their youth, the healthier the child will be as an adult.

As a result of these findings, the mental health field encourages the legal field to apply those four considerations in custody determinations. They are good predictors of parental strengths which should be considered in determining which of two parents is better able to meet a child's long-term human needs.

Representing the Parent

How often does a client insist that the other parent's house is a pig-stye, unfit for human habitation? And they always have photos to prove it! Looking at the photos, you see a LOT of clutter, but it might look like your own house on a particularly bad day. Does it REALLY demonstrate that the other parent is a poor parent? Perhaps yes - but perhaps not. Without analyzing the situation from a developmental standpoint, your analysis - and that of the judge - will necessarily be based on personal biases about messy houses. But personal bias does not necessarily prove that the child is negatively impacted by the “filthy house”.

However, if you apply the four developmental principles to this example, you must ask yourself;

1. *Does the mess impact the child's sense of safety?* Perhaps the house is perpetually under construction, and the child's safety is challenged every day. Perhaps the clutter is on the steps, causing risk of a fall down the stairs and serious injury to the child and anyone else residing in the house. Is the kitchen filled with garbage and a likely host to a variety of bugs and critters? Most importantly, does the child FEEL SAFE in his/her environment?

2. *Explore the impact of the mess on the child's Interpersonal development.* Is it so bad that no other children are invited over to visit, play, for sleepovers, or even to just to "hang out"?

3. *Does the mess impact the child's intellectual development?* Perhaps the house is so poorly managed that the child's homework, or desk space, or pencils and supplies disappear into the flotsam. This will undoubtedly make the child's studying and homework far more difficult than should be the case. The child's schooling can directly suffer, along with his sense of self-worth.

4. *Finally, does the messy house impact the child's self of self-worth?* If the child is embarrassed to invite friends to his house, or he is made fun of by his friends, or she thinks she is "poor" because of the condition of the house, then the mess in the house becomes an issue to explore in court.

However, if neither you nor your client can determine that the dirty house impacts the child in any negative way, don't irritate the judge with photos of what is, in reality, only an irrelevant, messy house. Educate your client to the realities of judicial perspective and what is truly important. If you cannot prove a harm, there is no foul and the judge will not give much weight to the photos.

But an even better way to represent a parent who is trying to obtain custody or lots of time with his or her child is to rely on these four developmental principals and present proof of actions by your client which ENHANCE each of these factors for the child.

1. Present testimony that your client is aware of age-appropriate *safety measures* and protects the child, as best he or she can, from what has become a very scary world. For infants it is important to present testimony about their efforts to child-proof the house, use car seats, ban smoking near the child and ensure that the child is current with doctor visits and shots. With older children, present testimony that your client expects to be informed by the child as to where he or she will be spending the night (and checking in with the other child's parent to confirm the plans), establishes dating rules and driving rules, and that the house rules are enforced appropriately.

2. Demonstrate that your client encourages the child's *interpersonal relationships*; play dates and other socialization for young children, movie nights and sleepovers for older kids. Exposing the child to activities and sports are important elements for a child to develop the skills needed to leave home and function independently in later life. Your client should let the Court know about these important factors that they support for their child.

3. Encouraging *intellectual development* allows her child to become as smart, curious, and accomplished in academics or life-skills as possible. Does your client oversee homework, encourage reading, building model airplanes? Does he or she properly oversee computer game use? Or do they just plop the child in front of the TV or play violent video games with their adolescent throughout visitation time?

4. Does your client help his child develop a *positive sense of self-worth*? Is praise a regular part of the child's life - or only parental criticism? Does your client bad-mouth the other parent to the child, or does he work hard to convey positive thoughts about the other parent and extended family? Let your client testify about the supportive actions they take on a daily basis to enhance the child's feeling of self-worth.

Demonstrating to the judge that your client embraces these four developmental concepts parenting skills is a far better tactic than relying on negative diatribes against the other parent.

Think hard about how you can prove that your client is a positive influence on his/her child. Present evidence to the court to prove the parenting style advances these four developmental principals. By focusing on the positive attributes of your client - rather than on the negatives of the other parent - you will be providing subtle evidence regarding which of the two parents is capable of putting the needs of the child ahead of his or her own needs. On a broader scale, you will be demonstrating to your client that a positive mind-set about his or her own abilities, rather than a negative attitude about the other parent - will serve well in court - and will serve the child well throughout his or her life.

Representing the Child

It is no surprise that the parent who expects his counsel to hinge a case on the other parent's "messy home" is the same parent who shares with the child's counsel an arsenal of shortcomings on the part of the other. In the less complex cases, the intended weaponry may come in the form of photographs of the purportedly uninhabitable residence. However, it is far too often that a parent comes with "big guns," making allegations of abuse--verbal, physical and, in the worst cases, sexual. Whatever the allegations, they are all too often sound bytes that may be repeated by your own client, a minor child.

Make no mistake--each of these allegations must be taken seriously and must be thoroughly considered by the BIA, for sometimes the messy house is in fact a safety hazard, and sometimes the six-year-old has been emotionally, physically or sexually abused. The best interest of a child dictates, however, that consideration be given to the aforementioned developmental principals, utilizing not only the allegations of one parent against the other, but perhaps more importantly the information that may be gleaned by collateral sources-- treating therapists, school guidance counselors, teachers, child care providers, doctors, dentists, clergy and, yes, even your six-year-old client.

A practitioner should apply these four developmental principles in the context of representing the child, and seek answers to the following questions:

1. Do the allegations raised by the parents--or even the child--impact the child's sense of safety? Of course, whether the child's sense of safety is a valid measurement depends upon whether the child has considered judgment. A child may make bald statements--sometimes strangely reminiscent of what the BIA may hear from his mother or his father--and yet have no articulable examples to support the statement factually. That said, a child who is being abused and knows nothing other than this abuse may have a limited capacity to understand that the abuse endangers her safety. It is therefore critical to consider this information in the context of information that can be gleaned from collateral witnesses, both testimonial and documentary.

2. How are the child's interpersonal skills impacted by the alleged circumstances? Dialogue with the parents and the children in a less direct way in or to ascertain how the child interacts with others. Does the child play sports. Is she involved in extracurricular activities? What are his hobbies? How does she interact with her siblings? In the worst instances, such as cases of abuse, there is little room to question whether the conduct of the abuser impacts the child's interpersonal development. However, this may be less than readily apparent, as often times the child may thrive in environments outside of their home--environments in which they have more control over and impact upon their success. Again, consideration of all sources of information is essential.

3. Does the allegations impact the child's intellectual development? As with the child's interpersonal development, the impact of the alleged behavior may or not be transparent, particularly in the more complex cases. Does the child thrive in school? Or does she, notwithstanding excellent grades, pluck her eyelashes or cut herself secretly? As may be the case with social activities outside of the home environment, a child may be wildly successful in the academic arena--a setting where he can focus and reap reward for work well done. This is certainly not the case in a home where he is struck for leaving eraser fibers on the desk or failing to prepare dinner for an intoxicated parent. Intellectual development must be explored, therefore, on much more than a cursory basis.

4. How, if at all, is your client's self-worth affected by the alleged circumstances? If the child suffers consequences for behavior over which he has no control, or for which he is not responsible, he may nevertheless blame himself. On the other hand, children often blame themselves for the separation or divorce of their parents, even if neither parent has contributed in any way to this belief. Attempting to get to the root of the child's lack of self worth is essential in evaluating the child's best interest.

While there is no protocol that serves as gospel in terms of representing children, the BIA has several critical tasks. You must first acquire background information in order to establish an appropriate lens through which to consider the balance of the information, Who are the parents? Is it worthy of consideration the attorney the parent has selected as his or her advocate? Who is your client? Age? Gender? Hobbies? Interests? Acquiring this information naturally entails a review of relevant pleadings and other papers filed and an interview with each of the parents. But should it also include additional research? Perhaps a review of public records such as the Maryland Judiciary Case Search database will be helpful. Consider whether there are forms of social media which may be accessible and which may provide additional background. Most importantly, recognizing that the parents will provide the BIA with what each feels reflects favorably upon him or her, evaluate whether the parents have been able to present useful infor-

mation about him or herself and the child in addition to--or even exclusive of-- launching allegations about the other.

The BIA must also consider collateral resources. Who or what are they? Is there a treating mental health professional? Are there relevant medical and/or dental records? What information will the child's school record provide? Which, if any, of the school personnel have valuable information? Does the child attend before- or aftercare and, if so, what can the providers offer? Are there coaches who can provide insight?

With some texture as to the child's interests, strengths and weaknesses, as well as the identity of other third-parties with whom he has relevant involvement, the BIA can formulate a plan for interviewing his client. What is the appropriate forum? Is it appropriate to visit the child in her home--or in each of her homes? Does it make more sense to visit the child in a more neutral environment, such as her school or after-care, or is the BIA's office an appropriate--and not too intimidating--venue. How many times should the BIA meet with the child? What props can the BIA make use of to establish rapport with the child?

As is the case with counsel advocating for a parent, advocacy of a child--and in particular the BIA's stated position recommendations to the court as to the best interests of the child--should be presented in a manner which highlights the developmental principals discussed above supra. If there are concerns about the child's safety, whether "tangible" or "felt" real or perceived, be prepared to present evidence of these concerns, whether by testimony of the parents, witnesses, or the admission of third-party documents. Conversely, if one parent has cornered the market on ensuring the child's safety and sense of safety, establish these facts to the court. For the client who has difficulty with interpersonal relationships, offer an explanation to the court as to the basis for this difficulty, or be prepared to demonstrate which of the parents is best suited to support the child's interpersonal development. On the other hand, for the child who is surrounded by healthy, productive and meaningful relationships, determine how best to establish this fact. Consider the strengths and weaknesses of the child's intellectual development and be prepared to establish the basis for the status quo, as well as any recommendations you may have for changes. Finally, focus the attention of the court on the best means to provide your client with a positive sense of self-worth. In addressing each of these areas of child development, consider the best evidence to support the recommendation you intend to make and be prepared to present that evidence independent of any expectations you may have on the part of counsel for the parents.

Child-Focused Decisions From the Bench

Although many judges are parents, each may not take the bench with a complete understanding of child development principles. This is particularly true as these principles relate to children experiencing tremendous conflict and the changing lifestyle associated with separation and divorce. It is up to the attorneys for the parents and the BIA to "educate" the judge as to each parties' strengths and weaknesses as a parent and how their respective strengths and weaknesses relate to the four developmental principles addressed herein: a sense of personal safety and security; development of interpersonal skills; intellectual abilities; and a sense of self-worth.

Judges universally agree that custody and visitation/child access decisions are among the most difficult they are called upon to make. It is difficult to get a true sense of the family dynamics in a short period of time and when both parties are presumably on their "best behavior". Judges want as much information as possible about each party's parenting style and each child's specific needs because, without exception, they want to render well-reasoned decisions that provide stability for the children and fosters each child's intellectual, social and emotional well-being.

Too many times the focus of a case is on the other side's shortcomings as a parent, rather than enlightening the court as to the positive parenting skills possessed by your own client. Clients should be informed that insisting upon a trial strategy that is predominantly comprised of "bashing" the other parent rarely wins favor with the court and can work against your client.

So, what do judges really want to know?

1. Judges want to know which parent, and it could certainly be both, does the best job of promoting their child's overall safety and security? If a parent is employed outside of the home, the court will naturally want to know what childcare arrangements are in place for younger children and what supervision there will be for middle and high school-aged children. What are the household rules and how are they enforced? What type of parenting style predominates--is the parent permissive with few restrictions on the child's activities or is the parent dictatorial with a "my way or the highway" approach to parenting? Who is permitted to be in the house with the child when she is home alone? If other adults are living in the home, what is their relationship to the

parent and does the child have a comfortable relationship with them? The court wants to be sure that children are well taken care of and that their safety and security is not compromised in any respect.

2. How well does the child interact with other family members and their friends? The court will be interested in hearing about the child's outside activities and which parent is most supportive of the child's interests, including ensuring that they are transported to their activities. This can be taken to the extreme, however, and there are those occasional cases where it is readily apparent that the child's activity schedule is dictated more by a parent's desire to prevent the child from having a meaningful relationship with the other parent than by the child's desire to participate in 15 different activities. The court will also want to know about the child's social network and how easy it is (or is not) for the child to see his friends when he is with the other parent.

3. Which parent assumes responsibility for helping the children with their homework or supports them in other intellectual pursuits? It is not uncommon for one of the parents to have a particular strength in math and the other to have a real gift for creative writing. It is certainly beneficial to the child for both parents to be involved and to reinforce the importance of completing homework assignments on time and helping her with her homework as needed. If it becomes obvious that one parent believes her time with the children should be "fun and games" and that the primary custodial parent should be the one to worry about the homework assignments, the court may not feel comfortable giving access to that parent during the week or for overnights on Sundays. Some history can be extremely helpful to the court, particularly if a parent put no effort into helping with school projects or had no interest in attending parent-teacher conferences prior to the parties' separation.

4. The court will also want to know what a parent has done to help his child develop a positive feeling of self-worth. Does the parent constantly berate or criticize her child or does she make efforts to instill a positive self-esteem in her child? Does the parent share the details of the divorce proceedings with his child and purposely or inadvertently put the child in the middle of the parents' conflict? The court will also want to know if either parent has disparaged the other in front of the children or thrown up obstacles to the other parent having meaningful contact with the children. When the children are with one parent, what contact are they permitted to have with the other parent?

The bottom line is that judges want to have as much information as possible about the family dynamics and each party's parenting style before rendering a custody and visitation decision. So long as a judge addresses all the required factors, these decisions are rarely reversed on appeal and can have long-lasting consequences. Presenting testimony and evidence on the four developmental principles discussed herein can go a long way to helping the judge make well-reasoned decisions that are child-focused and in the best interests of the children.

Rather than relying on "the judge's best guess", or giving them unhelpful information, we propose that you try to link all of the facts presented to the Court, either as Counsel for a parent or as a Best Interests attorney or Child Advocate, to the four touchstones of child development set forth in this article. The concepts will help you organize your case for a clearer presentation to the Court and will allow you to help your client focus on relevant issues, rather than the white-hot anger which is prevalent in divorce cases.

By focusing on child development concepts, you will demonstrate to the Court that your client truly loves their child, more than they hate the other parent. By doing so, the Court will have a far better picture of the relevant, and important, issues which bear on child custody determination, and the Court will therefore be in a much better position to make a decision which will help the child better weather the divorce or separation of their parents.

Judge Leasure is the Administrative Judge of the Circuit Court for Howard County, M.S. in Human Development, and former Chair of the Conference of Circuit Judges. Ms. Cummins is an attorney in Ellicott City, Maryland, a member of the MSBA Family and Juvenile Law Section Council, and a frequent lecturer at continuing legal education seminars around the state. Mr. Schiszik is an attorney in Frederick, Maryland, and former Chair of the MSBA Family and Juvenile Law Section Council, a Fellow of the American Academy of Matrimonial Lawyers, and recipient of the 2011 Beverly Groner Award.

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