ILLINOIS STATE BAR ASSOCIATION

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Child Law

The newsletter of the Illinois State Bar Association's Section on Child Law

Thoughts from the Chair

BY DAVID M. HOUSE

An often-overlooked benefit to membership in the Child Law Section Council is access to the section council legislative listserv. During the legislative season, the section council is called upon by the Association to take a position as a section council on proposed legislation impacting the child law practice area. The position of the section council supporting or opposing proposed legislation can be become the official position of the Association. To that end, the legislative listserv allows members of the council to comment on and support or oppose pending legislation in "real time." The ISBA legislative staff does an excellent job of keeping the listserv up to date on pending legislation that might potentially impact our practice area. A typical email from staff will include the Senate or House Bill number, a synopsis of the proposed

Continued on next page

Proposed bill may provide future remedy in aftermath of embryo dispute

BY BRADFORD L. BENNETT

In March 2016, the U.S. Supreme Court declined to hear *Szafranski v. Dunston*, 2015 IL App (1st) 122975, an "embryo dispute" case that had gained a significant amount of notoriety in Illinois due to the nature of the contested issues and the unique arguments of the parties. Introduced last month, HB 6273 seeks to provide guidance with the legal complexities commonplace for those using assisted reproductive technology as exemplified in *Szafranski v. Dunston*. Had HB 6273 been in place at the onset of the dispute, it may have circumvented the need for litigation.

The saga of Szafranski and Dunston started in 2010, when the then-38-year-old Dunston, was diagnosed with cancer and faced with the possibility of being unable to have children due to the effects of chemotherapy. Wanting to preserve her ability to be a mother, she asked her then-

Continued on page 2

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Thoughts from the Chair

CONTINUED FROM PAGE 1

legislation and a link to the text of the bill on the General Assembly website. Members of the listserv can respond to the email with detailed comments or simply stating "support" or "oppose." The replies go to all members of the listserv and to the ISBA legislative staff. Depending upon the relative importance of a particular legislative proposal, the section council may be called upon to vote support or opposition to the bill at the next business meeting.

I am happy to report that the Child Law Section Council has a very active and well represented participation on our listserv. During the most recent legislative session we have reviewed and commented upon such diverse issues as: 1) requiring juvenile confessions to made only in the presence of an attorney; 2) limiting offenses for which a minor may be committed to the Department of Juvenile Justice; 3) proportionate sentencing for minors; 4) educational qualifications for providers of vocational training at DOJJ; 5) enhanced disclosure requirements for adoptive parents under the Adoption Act: 6) use and access to social media accounts in juvenile proceedings; 7) prioritization of urgency of needs for at risk students; and 8) amendments to the Vital Records Act regarding birth certificates involving putative fathers. This is by no means a complete list of pending legislation that members of the listserv have been asked to give comment.

The Child Law Section Council legislative listserv allows practitioners on the section council to add our input so that the ISBA can take a proper leadership role in guiding pending legislation in the vital area of the law impacting the children of our state. ■

Proposed bill may provide future remedy

CONTINUED FROM PAGE 1

boyfriend Szafranski if they could undergo *in vitro* fertilization. He agreed and the process resulted in several embryos, which were then frozen as Dunston underwent cancer treatment. While Dunston survived, her fertility and relationship with Szafranski did not.

Litigation started in 2011, when Szafranski filed a lawsuit in the Circuit Court of Cook County to prevent Dunston from using their embryos to have a biological child. After a trial in 2014, Judge Sophia Hall ultimately awarded sole custody of the embryos to Dunston, in part due to an oral agreement that existed between the parties.

In June 2015, after Szafranski's appeal before the First District Appellate Court, the court issued a 56-page opinion affirming the Circuit Court's ruling. The decision was especially notable because of the aforementioned oral agreement – the Appellate Court found that the parties had entered into a valid oral agreement representing their intent by which Dunston could later use the embryos without the consent of Szafranski. Although the parties later executed an informed consent form at the medical facility performing the *in vitro* procedure, the Appellate Court found that the consent form did not contradict or modify their oral agreement. Rather, the form specifically deferred to any separate agreements reached between the parties. In short, the Appellate Court held Szafranski to his promise to assist Dunston in having a child through *in vitro* fertilization. The issue of Szafranski's status as a father or whether he would be financially responsible for a child born from an embryo was not addressed.

Both the Illinois Supreme Court and

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later the U.S. Supreme Court refused to hear Szafranski's appeal of the Appellate Court's decision, thus ending his five-year battle to prevent Dunston from using their frozen embryos to have a child.

Szafranski and Dunston each hired attorneys at various points both before and after the *in vitro* fertilization, and those attorneys did prepare various written agreements, however none were ever executed (likely against the advice of counsel). It's easy to criticize the parties for not taking the advice of their respective counsels regarding entering into a written agreement.

However, as a family law attorney, I know these scenarios are commonplace. Very few couples choose to have children or enter into the sanctity of marriage or a relationship thinking what could happen if it all falls apart – it's only if they get to that point that hindsight becomes 20/20.

Similarly, most couples do not have the foresight or desire to enter into a premarital agreement before getting married. But as we know, once parties start their divorce proceedings, they have the benefit of the newly revised Illinois Marriage and Dissolution of Marriage Act to provide them the detailed framework on dividing the marital estate, establishing support and allocating the parental responsibilities of the children. Likewise, parties in parentage matters are provided guidance by the Illinois Parentage Act of 2015. Even descendants of individuals who pass away without a will or other estate plan have recourse through the Illinois Probate Act of 1975.

Conversely, Szafranski, Dunston, as well as the Circuit Court could not benefit from a statutory authority in the absence of a written agreement because one doesn't exist. Given how widespread assisted reproductive technology such as *in vitro* fertilization has become, it is surprising that Illinois has very little authority governing it. However, based in no small part due to cases such as Szafranski and Dunston's, that all may change very shortly.

HB 6273 seeks to complete the Illinois Parentage Act of 2015 by the addition of Article 7 entitled "Child of Assisted Reproduction," which was previously reserved. HB 6273 would also repeal all three sections that comprise the Illinois Parentage Act concerning artificial insemination. The bill, introduced by Representative Kelly Burke, and available online, is summarized as follows:

> Amends the Illinois Parentage Act of 2015. Defines "assisted reproduction" and "donor." Creates the Article concerning children of assisted reproduction. Adds provisions concerning: the scope of the Article; parental status of donor; parentage of a child of assisted reproduction; withdrawal of consent of an intended parent or donor; parental status of a deceased individual; inheritance rights of a posthumous child; the burden of proof; limitations on proceedings to declare the non-existence of the parent-child relationship; and establishing parentage in the context of a gestational surrogacy arrangement. Repeals the Illinois Parentage Act.

Should HB 6273 become law, it is only natural to wonder how Szafranski and Dunston's embryo dispute may have turned out differently. Surprisingly, this bill would likely have precluded litigation altogether as a result of Section 704 entitled "*Withdrawal of consent of intended parent or donor*" which states as follows:

> An intended parent or donor may withdraw consent to use his or her gametes in a writing or legal pleading with notice to the other participants. An intended parent who withdraws consent under this Section prior to the insemination or embryo transfer is not a parent of any resulting child. If a donor withdraws consent to his or her donation prior to the insemination or the combination of gametes, the intended parent is not the parent of any resulting child.

Therefore, at any point in time before the transfer of the parties' embryos, Szafranski could have withdrawn his consent with notice to Dunston. By doing so in timely fashion, Szafranski would negate any prior oral or written agreement to the contrary.

Moreover, reading the plain language of the statute, by withdrawing his consent, Szafranski would not be the "parent" of a resulting child. However, while the "*intended parent…may withdraw consent to use his or her gametes*," the proposed statute does not explicitly preclude Dunston from using the embryos or require their disposal. By not being a "parent," Szafranski would likely never acquire any custodial rights or financial burdens associated with parentage, but it remains unclear whether Dunston would still be able to have a biological child using their embryos.

Should parentage of a child of assisted reproduction not be properly relinquished by a donor after insemination or embryo transfer, Section 703(d), possibly modeled after the intent-based oral agreement precedent set forth in *Szafranski v. Dunston*, states as follows:

> If the requirements of subsection (a) of this Section are not met, or subsection (b) of this Section is found by a court to be inapplicable, a court of competent jurisdiction shall determine parentage based on evidence of the parties' intent at the time of donation.

With HB 6273 in its infancy stage, it will no doubt go through the process of several revisions and rounds of fine-tuning. However, as we've seen in the chronicle of Szafranski and Dunston, statutory guidance is essential for those individuals that are planning to utilize reproductive technology such as *in vitro* fertilization. Much like husband and wives in a divorce case, or unmarried parents going through parentage litigation, having the ability to point to a law and say, "this is what our rights are" is a crucial step in eliminating the need for unnecessary and protracted litigation. And who knows, if HB 6273 had been around five years ago it could have saved Szafranski and Dunston years and years of court appearances and struggles with the legal system. Now with HB 6273 in the pipeline, here's to hoping that their saga is the last one of its type. ■

Time to protect children during interrogation

BY ELIZABETH E. CLARKE

This year, 2016, marks an extraordinary event: the 50 year anniversary of the landmark decision of *Miranda v. Arizona*. Illinois Rep. LaShawn Ford just filed House Resolution 1072 to mark this extraordinary milestone. The anniversary comes in the midst of a national debate over the future of our justice system – a debate centered around how to provide racial and restorative justice. One key issue in this national debate is the treatment of our children in the justice system. In this year, the 50th anniversary of Miranda, it's time to acknowledge that children are incapable of "exercising their *Miranda* right" so the right to counsel must be automatic.

Case after case has demonstrated that children are particularly susceptible to falsely confess. Juvenile brains less able to understand rights: Brain research reveals children are less competent than adults to make legal decisions and may not understand Miranda.

- Only 20.9% of minors, as compared to 42.3% of adults, understand the Miranda warnings.
- 63.3% of minors, as compared to 37.3% of adults, fail to understand at least one "critical" word in the standard Miranda warnings.
- Among minors, the least understood warning is the right to consult with an attorney prior to responding to police questioning.
- 62% of minors believe that a judge can penalize them for exercising their right to remain silent.
- 96% of 14 year olds do not have an adequate understanding of the consequences of waiving their rights.

And the "totality of the circumstances" review standard is absurd when applied to children, as we saw in two recent Illinois Supreme Court cases.

In 2014 the IL Supreme Court upheld the "waiver" of counsel by a 15-year-old child welfare ward of the court despite testimony the police misrepresented the evidence against him ("deception is not per se unlawful") and the boy ended up tried as an adult and sentenced to 36 years in prison. *People v Patterson*, 2014 IL 115102.

In 2015, the IL Supreme Court again noted the "use of deception or subterfuge does not alone invalidate a confession…" and upheld the "waiver" of counsel in one (of two) statement by a 9 year old in a homicide investigation. *In re DLH*, 2015 IL 117341.

The *Miranda* decision took note of English law on protections during interrogation, with the majority of the Supreme Court concluding that "*it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described.*" Even the dissent in *Miranda* agreed that the "*English experience is most relevant.*" So it is very relevant to note that in the United Kingdom, the right to a lawyer was established in 1984 under the Police and Criminal Evidence Act. Over the past three decades, the protections have become accepted practice, as documented by University of Warwick researcher Jackie Hodgkins:

> Legal advice is free at the point of delivery and is not means-tested. Lawyers attend the police station in person in nearly all cases where legal assistance is requested, but under a recent reform, where the offence is minor and no interrogation is planned, legal aid is not available other than for telephone advice. Along with the tape recording of interrogations, the introduction of lawyers at the police station was initially opposed by the police, who claimed that it would result in suspects remaining silent or coming up with defences that had been concocted by their lawyer. This was not the experience in practice. The police gradually came to accept the role of the lawyer as a legitimate criminal procedural safeguard and far from being uncooperative, suspects who had received legal advice were just as willing to speak to the police and in many instances, it facilitated the negotiation of an outcome such as a police caution.[1]

Further, since 2008 access to a lawyer during custodial interrogation has been considered an international human right, and nations have rapidly changed their laws and practices to ensure all individuals actually speak with a lawyer. It is time to ensure that all our children have the fundamental protection of a lawyer during custodial interrogation - especially since children accused of serious offenses have to decide whether to cooperate in the context of transfer laws to adult court that are among the most complex in the nation. ■

1. *The Role of Lawyers During Police Detention and Questioning: A comparison Study,* Prof. Jacqueline Hodgson, Univ. of Warwick School of Law, Legal Studies Research Paper No. 2014-6. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433562>.

The Indian Child Welfare Act: No clear Illinois guidance

BY LISA GIESE AND LINDSAY JURGENSEN

The Indian Child Welfare Act (ICWA), a federal law enacted in 1978 that governs child custody proceedings, can be and is often utilized as a tool for parents to circumvent unfavorable state custody laws. ICWA allows Native American tribal governments, rather than any applicable state government or agency, to determine child-related issues pertaining to children of Native American descent. It effectively removes a state's jurisdiction to resolve child custody issues including, adoptions, guardianships, removal, and termination of parental rights, among other things.

ICWA was designed to preserve the Native American culture and family unit by preventing Native American children from being wrongfully removed from their families. At the time the law was passed, a significant amount of Native American children were being placed in non-Native American homes, and the law sought to preserve the Native American culture. As a central concept driving the passage of the law, Congress believed that the state law standard of "best interests of the child," used in family law proceedings, was equally as important as preserving the integrity and stability of Native American tribal nations and cultures by keeping children with their families. Further, Congress determined that the best interests of a non-Native American child were not necessarily identical to the best interests of a Native American child.

In many cases, persons of very distant Native American descent attempt to use ICWA for personal gain to circumvent state custody laws, rather than for its intended purpose. However, Congress did not intend the ICWA to authorize gamesmanship on the part of a tribe – e.g. to authorize a temporary and nonjurisdictional citizenship upon a nonconsenting person in order to invoke ICWA protections.[1]

In order for ICWA to apply in a given situation, a court must determine whether jurisdiction is proper. To do that, it must determine whether the child at issue is an "Indian child" as defined by ICWA, prior to its application. Section 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 5 U.S. Code § 1903(4).

The problem arises when a party to a child custody proceeding asserts that a child is or is not an "Indian child." It can be difficult to determine whether the child is, in fact, a member of an Indian tribe or eligible for membership in a tribe and the biological child of a member of a tribe, as each tribe has its own membership requirements. In some tribes, a child could be eligible for membership even if the child is several generations removed from the initial Native American lineage. For example, a person can be eligible for membership in the Cherokee Nation by tracing his or her bloodline to someone listed on the Dawes Rolls, created by Congress in 1893, regardless of the number of years or generations that have lapsed since then.

Even if a Court finds that the child involved in the litigation is an "Indian child," as defined by ICWA, there are additional jurisdictional requirements that must be met in order for the law to apply. State courts are consistently faced with litigants asserting ICWA jurisdiction as a "trump card" to circumvent state laws. In a 2013 United States Supreme Court case, *Adoptive Couple v. Baby Girl*, a biological father filed suit to stay the adoption of his daughter, after he had previously consented to relinquish his parental rights to the biological mother.[2] After receiving the biological father's consent, the biological mother placed the child for adoption. When the adoptive couple began adoption proceedings, however, the biological father asserted ICWA should govern the case, alleging that he was part of the Cherokee tribe.[3] The Court noted that ICWA was enacted to prevent unwarranted removal of Indian children from their Indian parents and families, and an Indian parent who forfeits custody of the child and has never had continued custody of the child in an Indian family cannot avail himself to the protections afforded under ICWA.[4]

In the opinion, Justice Alito stated as follows:

> The Indian Child Welfare Act … would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context. Nor do § 1915(a)'s rebuttable adoption preferences apply when no alternative party has formally sought to adopt the child.[5]

State courts have been divided on the

appropriate use of a judicially created exception called the "Existing Indian Family Exception," which allows courts to decline to apply ICWA if the Native American family of the child has not had a considerable relationship with their tribe.[6] This exception allows the state court to retain jurisdiction, even if a child is an "Indian child," if a court finds that there was never an "existing family."[7] Certain courts have applied the Existing Indian Family Exception based on premise that it supports the legislative intent of Congress. ICWA's primary purpose is to preserve Native American families, so it stands to reason that if no Indian "family" exists, ICWA should not apply.

This situation arose in a Washington case, *In re Adoption of Crews*, in which a mother voluntarily consented to the adoption of her child, then days later requested the return of her child.[8] Month into the litigation, the Choctaw Nation of Oklahoma confirmed that the child was eligible for enrollment with the tribe and ICWA, then, governed the litigation.[9] In a deposition, the mother testified that she had only researched her heritage to reinstate her parental rights in the adoption proceedings.[10] The state court dismissed the mother's petition to invalidate the termination of her parental rights because it determined that the child was not an "Indian child" under ICWA because the "Certificate of Degree of Indian Blood" had been issued to the mother.[11] On appeal, the appellate court affirmed that the child did not become an "Indian child" until after the court approved termination of the mother's rights.[12]

The *Crews* court noted that the mother and the Choctaw Nation were asking the court to apply ICWA when the child "has never been a part of an existing Indian family unit or any other Indian community."[13] Furthermore, the mother failed to allege that if she regained custody that the child would grow up in an Indian environment. In fact, the mother showed "no substantive interest in her Indian heritage in the past and has given no indication this will change in the future."[14] The *Crews* court found that the child was never a part of an existing Indian family unit or other Indian community.[15] The court ruled that applying ICWA would not further ICWA's purposes and it declined to apply it, despite the child being an Indian child.[16] In fact, it stated, "ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."[17]

Illinois courts have not conclusively ruled on the application of the Existing Indian Family Exception, and so no mandatory authority exists on the issue. However, in the case of *In re: Adoption of S.S. & R.S.*, Justice Heiple noted in his concurrence as follows:

> [T]here is no existing Indian family and the children have never been part of an Indian cultural setting or lived on a reservation, there is no justification for applying the ICWA. It is this rationale that constitutes the existing Indian family exception and Illinois should join the majority of jurisdictions that have adopted the exception and refused to apply the ICWA where children are not part of an existing Indian family.[18]

Additionally, in the case of *In re: Cari B.*, Justice Hutchinson's stated, in dicta, that, "[W]e also believe that under appropriate circumstances a court may find that no Indian family exists for the ICWA to protect."[19]

ICWA was created to protect Native American children and the breakdown of their families, cultures, and societies. However, the jurisdictional and legal protections it offers in child custody proceedings that state laws do not, allow certain litigants to use ICWA as a "trump card" to avoid unfavorable state laws. While certain courts have determined that ICWA cannot apply, even in situations in which an "Indian child" is at issue, Illinois has not addressed the question. However, two recent Illinois opinions, *In re: Adoption of S.S. & R.S* and *In re: Cari B*, provide persuasive authority that the Exception should be routinely applied in Illinois. It is crucial for Native American families, attorneys, and courts to understand the nuances of ICWA and its applicability in order to navigate child custody proceedings involving children of Native American descent. ■

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1. See *Neilson v. Ketchum*, 640 F.3d 1117, 1123 (10th Dist. 2011).
2. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558-2559 (2013).
3. *Id.*
4. *Id.*
5. *Id.* at 2565.
6. Shawn L. Murphy, *The Supreme Court's Revitalization of the Dying "Existing Indian Family Exception*, 46 McGeorge L.R. 629, 636 (2014).
7. *Id.*
8. *In re Adoption of Crews*, 118 Wn. 2d 561, 563, 825 P.2d 305, 307 (Wash. 1992).
9. *Id.*
10. *Id.* at 565, 308.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 568, 309.
15. *Id.* at 569, 310.
16. *Id.* at 569, 310.
17. *Id.*
18. *In re: Adoption of S.S. & R.S.*, 167 Ill. 2d 250, 265 (1995).
19. *In re: Cari B*, 327 Ill. App. 3d 743 (2d Dist. 2002).

What's it really like to be a child's representative? In-depth perspectives from experienced GALs

BY MARC A. BANGSER

Like many others, working in the divorce/family law field wasn't my first area of practice. After clerking for the city and the state, and spending a year as County Attorney in New York, I came back to Illinois and was an Assistant State's Attorney for over seven years. And when I left the State's Attorney's Office, I knew that I wanted to use my litigation experience to continue helping people, which led to a smooth and natural transition to the practice of family law. However, my main focus for leaving the world of criminal prosecution was much simpler – I wanted to help children by doing everything I could to advocate on behalf of their best interests. As former U.S. Assistant Secretary Wade Horn quipped, "Children ought not to be the victims of the choices adults make for them."

As a practicing divorce and family law attorney in Chicago and the surrounding counties, and as a Guardian *Ad Litem* (GAL) in DuPage, Lake and Will Counties, I've had the opportunity to come across some outstanding children's representatives that share the same mentality: To use their considerable skills to do a comprehensive investigation regarding parenting time and decision-making, with as little impact on the minor children as possible, and to assist the judge with the difficult and emotionally-charged cases before them. Four of these outstanding representatives (with a combined 80-plus years of practice in the family law community) took the time to speak with me about their experiences and what they'd like to see changed or altered in the child's representative system, their honest and sage advice for new reps out there as well as several other topics relating to their time as GALs.

(NOTE: Due to the nature of the material discussed in these interviews, the names and/or genders of the interviewees have been changed to protect their identities).

Why did you want to get into GAL/children's representative work?

Jennifer: "I think I always wanted to do GAL work, I've actually worked with kids for 25 years in some way or another – as a government attorney, or a volunteer, etc. Specifically with respect to divorce cases though, I would get nauseated on how parents behaved during divorces. By stepping in and acting as a shield for the child, I thought I would help get the parents to see that there's no 'victor', there are only losers."

Catherine: "Why not? It's an area where you get to practice in family law, but you get to advocate for kids – it's a feel good job. I volunteered my time working with children before I was in law school, and it made sense to continue doing it in an official capacity when I became an attorney. I originally thought that family law/divorce would be more work on behalf of kids, I didn't realize it was a lot more asset-based, like people fighting over curtains and clawing each other's eyes out. But, the reality is the area of family law is mainly a business surrounding divorce."

David: "I wanted to make sure kids didn't get lost in the shuffle. I've been practicing for a while now, and while I was always doing family law, I switched to doing it full time so I could work with families – I think it's the most meaningful type of litigation."

Stephen: "Every divorce attorney has been in that position where you have a client that is just annoying you to no end. But I get it, you're seeing them at their absolute worst – there's not a single person that comes in to see me that's happy to be there. With representing children's interests though, you get a singular focus – giving a recommendation on what's the best situation or solution to a variety of issues, whether it's parenting time, decision-making, or something more specific like whether a parent should be allowed to move out of state with a child. It's a very important position to be in, one that I'm honored to undertake."

What was your first GAL/child's rep appointment, and anything about it still stick in your mind today?

Catherine: "It was a *pro bono* appointment – and I remember that I had two weeks to give a recommendation and testify on temporary removal. As a new GAL I was definitely more worried about doing a good job, about getting cross-examined in a trial or a hearing, about the parents or the attorneys liking or disliking me. But now, after doing this for a while, you're definitely more jaded. I'm more willing to be blunt with people, and I know that there's zero duty to the parents other than saying what needs to be said."

David: "I was nervous and excited, it took a little but I helped resolved the case. I definitely remember the first time I interviewed the child – it was something I had never done before. But I was happy, it came very naturally – most people wouldn't say that, but I was one of the lucky ones that the position fit very well."

Stephen: "The judge came up to me in the hallway and asked if I was up for turning a recommendation around on an emergency situation, basically asking if was able to drop everything and come back to court in the morning. Without sounding too desperate or eager I told him that I could. I had to interview both parents and four children in less than 10 hours, but I got it done. I didn't realize then that not every case was like that, but I will say that there are times that judges will need child's reps to do that – drop everything and get work done in a day, or two. You have to be able to be honest with a judge and say that you just can't sometimes, and they'll understand."

Jennifer: "It was a post-decree case, the dad had alcohol issues and there were possible parental alienation by the mother. I had only been on the GAL list for a short time, I remember I was very excited, I swept right in and got started. Even though it was my first official case, I was well-prepared based on my background and the judge went along with my recommendation."

What's your position on utilizing custody evaluators and psychiatrists, and in what circumstances are they best used in family law/divorce cases?

David: "They're valuable in that they can uncover facts that may have been unknown otherwise, they're tools to help the judge. The fact is, only the judge knows what they're looking for to make a decision if it comes down to it. When there's clearly a mental health issue with a child or party, even though I think I know the answer, I want to have a mental health professional looking at the situation. And the problem with using someone's individual therapist is that they have to keep the trust of their patient – they may not give me the whole story because they have to worry about keeping their patient happy."

Stephen: "Personally I think they're overused, especially attorneys who don't even give a GAL the opportunity to do any kind of investigation before they want to kick it to a [750 ILCS 5] 604.10 or [Illinois Supreme Court Rule] 215. Yes, it's true that GALs aren't mental health professionals, but if you find a GAL that actually wants to put the time in, there are so many collateral people like therapists, school counselors, etc. that can assist with an investigation without having the parties have to incur thousands and thousands for a custody evaluation. If one is going to be appointed by the court after a GAL is already involved, I don't think it should happen without a GAL flat-out telling the judge that they can't do what the judge asked them to without some help."

Jennifer: "I think a custody evaluator has a significant role when there are mental health issues, but honestly, most times the parties are just suffering from an affliction called 'being an a------', which is not a mental condition. I'm not saying that mental health professionals don't have a place, but the parties don't need to spend ten grand to have a psychiatrist tell them and us that they're 'defensive' or 'aggressive'. I'm of the mindset that the evaluators are delicate tools, and sometimes you just need a hammer to get in the ear of these parents. If forced to choose though, I like to use 215's because they're not assessing who's right and who's wrong, but whether there are issues with people that will impede their ability as parents. This allows us to minimize the costs on the mental health aspect, but still allows the GAL to try to facilitate a settlement. There should be as many opportunities for the people to work it out instead of putting it in the hands of a judge who has known the parties for about seven hours. If you go to trial, you will never talk to your ex the same way again, because you fought and left it up to the judge."

Catherine: "I think 215's usually are, because someone is alleging a mental health issue. I'm not as convinced with 604's, I think there are three main instances when they should be used: When there are mental health issues, suspected mental health issues or in suspected abuse situations. But 604's are useful versus just talking to a party/child's individual therapist because the latter isn't a fact finder, a custody evaluator is doing an investigation and is fact finding. The individual therapist is only there to make the child or parent feel better, not to get to the root of what the issues are."

What do you think the child's representative's role is in resolving or helping to resolve the litigation?

Stephen: "I understand the statutory obligation to get the parties a recommendation and get them out of court as quickly as possible, but there's also a statutory obligation to get it right and do what's in the best interests of the child. The judge appoints you because he or she trusts your experience, approach and judgment. I'd rather take my time, get it right, and that extends to telling the judge if I have issues with a proposed custody agreement. It doesn't happen often, but I don't think my responsibility stops once I get an email that an agreement has been reached. It's not like that discharges me from the case, you know? I was brought in to look out for the kids' best interests."

David: "It's best for everyone that they get out of litigation and if the child's rep can help move towards that position, that should be what's beneficial for the child. I'm not saying advocate for an agreement at all costs, but certainly with reasonable steps. I think a rep is misguided if they think that they can't speak out to a judge if they have issues with a fully negotiated agreement, the goal is for the right thing to happen, and for the judge to get it right. That may not make someone happy, but that's not my problem—the child is the most important entity in the case, I'm not going to be quiet about something I think is a detriment to the child whose interests I've been tasked to represent."

Catherine: "It gets a little tricky when the parties are trying to work out an agreement that's not consistent with the best interests of the child. But unless I feel very strongly about it, I'm not going to voice an objection to the judge? I don't think it's my place to get in the way of the parties'

agreement, that's not my role. According to [750 ICLS 5] 506, my role is to make a recommendation when the parties don't have an agreement – my responsibility isn't necessary if there's an agreement, unless the judge asks for my opinion after that."

Jennifer: "[Illinois Supreme Court Rule] 907 addresses this, and I firmly believe that the role of the GAL is to do everything they can to help resolve the situation. And if the parties reach an agreement while I'm in the case, unless it's egregiously against what I've learned, I'm not going to voice my concerns to the judge. In my opinion I become the best interests of the child, but I don't represent them. Some GALs do this, acting like they're the third parent – but the number one goal is to get the kids out of the system."

If you could create a utopic situation for children's representatives, what would be some of the changes you'd like to see take place?

Jennifer: OK, let me preface this by saying I think the system is pretty good. But for starters, some judges or attorneys want us to be on a litigation plan and spell out our fees ahead of time – you have to remember we've been asked to solve a problem with a child or children with two people that generally hate each other. And then we're asked to be the cheapest person in the room. The one thing is that honestly, for the most part the entire child's representative system in Cook County is horrible. It's a money grab, the reps actually become third parents, doing stuff and derailing cases - they forget they're there to solve the case and not litigate it. On that note, since Cook County is the only county that still uses them, I'd like to get rid of 'children's representatives' versus GALs - they can't give recommendations, they can't give opinions, but they can take over a case and create so many problems. I want to like them, but some of them are career child reps and they charge $450 an hour, I cringe, what are we getting for this work?

With respect to GALs, to the attorneys in our cases, we're not the enemy, we're not taking money out of your pocket if we're trying to settle the case – that's part of our job."

Catherine: "Judges need to make important child-related issues a priority over other things - it needs to be expedited. GALs need to work fast, judge's need to utilize us more – judges shouldn't jump to things like orders of protection or motions to restrict visits when you can get a GAL to do an investigation that day. We're all over the courtrooms, in the hallways, and you'll be able to find one that can get started right away. And judges need to instill faith in their GAL – it renders the GAL's role useless if the judge isn't giving them a lot of weight. I'm not saying judges should rubber-stamp a GAL's recommendations, but why have an experience, neutral, and unbiased person if you're not going to utilize the information they give you? And with the attorneys on cases, they should always know more about the case than the GAL, which isn't always the case."

David: "It's very frustrating for me when parents don't take court orders seriously. I know that it isn't criminal court and punishments are different, but if judges don't take violations or inactivity by the parents seriously, there's zero incentive for them to follow the court orders on conditions that they aren't fans of following."

Stephen: "When I was starting out as a GAL years ago, it was basically impossible to get appointed unless the attorneys on a case agreed. The judges were set on who they wanted to bring into a case, and it was always the same two or three people. And when someone asked them to get appointed, the answer was basically the same – 'I have to see you in my courtroom more often, or I have to see how you do on a case.' But how are you supposed to show them that you'll do a good job if you only get status dates on divorce cases, and can't get appointed? It's a huge Catch-22. I'd like to see some of the 'old-school' judges branch out and try different GALs, give others a chance. There are a lot of talented and hungry GALs out there that just need an opportunity to show what they can do."

Lastly, what would be some advice that you would give to those that are thinking about going through the training and getting on the GAL/child's representative list for the first time?

Catherine: "Don't do it for the money, because you'll be taking at least a few cases *pro bono* to start, and that's not the right approach anyway, for business reasons. You should know going in that it's stressful, and that you need to make sure you actually give an opinion - that's what you were appointed to do! If you do a thorough investigation and you're confident in the work you've done, you can't be wrong - don't let yourself get bullied or intimidated by crafty lawyers, stick with your recommendation and stand by your work."

David: "Talk to GALs and child reps that have experience, that's the best way to learn. One of the most important things it to make sure right off the bat that you tell the interviewees that your conversations are not confidential, and that your role is to strictly to act in the best interests of the child. Tell the child that as well, and remember that you're not going to make everyone happy. But as long as you provide all relevant information to the court, you're doing your job."

Stephen: "I was surprised at the level of anger and hostility that you get from parents and their spouses/ significant others, even before you give a recommendation. But especially after the recommendation, at least one side is going to get very irritated if you try to reach out to them at all. But you have to understand that no matter how many times you tell the parties that you don't have the final say, and you're only giving a recommendation and the ultimate determination is up to the judge (or made through an agreement), they'll still say that you're 'tearing their family apart' or 'ruining their lives'. You just have to take it in stride, it's a very difficult job – but if you care about helping children and know that you're doing what's in their best interests with your recommendation, then you can handle whatever comes your way. On the financial side, just be prepared

that the parties are not going to want to willingly pay a second or third attorney to be involved, especially one that they have no control over whatsoever. Fee petitions happen all the time, which is frustrating, but it comes with the territory. Nothing you can do about it most of the time."

Jennifer: "I feel like the mantra out there is people get into GAL work because it's another way to make money, and that if the 'old guard' get all the appointments they are taking money out of other GALs pockets. If you're getting in it for the money, you're doing it all wrong. I know that sounds like I'm trying to protect my appointments, but I'm not, personally I want you to have quite a few years of experience under your belt or have done at least five custody trials before working as a GAL on one of my cases. With new GALs, their logic is not based on experience in family law—and it will have lasting impact. The experience in custody disputes is critical to have, if only to see why you don't do things a certain way. And most importantly, to see how terrible a custody trial can be so one can be avoided at all costs." ■

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

April

Friday, 04/01/16- Teleseminar—Drafting Trusts for the Long-Term. Presented by the ISBA. 12-1 pm.

Tuesday, 04/05/16- Teleseminar—Planning Due Diligence in Business Transactions. Presented by the ISBA. 12-1 pm.

Tuesday, 04/05/16- Webinar—Help! My lnbox is Exploding! Email Management for Lawyers. Practice Toolbox Series presented by the ISBA. 12-1 pm.

Wednesday, 04/06/16- Teleseminar-Live Replay—Insurance and Indemnity in Real Estate. Presented by the ISBA. 12-1 pm.

Thursday, 04/07/16- Teleseminar—Treatment of Trusts in Divorce. Presented by the ISBA. 12-1 pm.

Thursday, 04/07/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 04/07/16- Webcast—Presented by Business Advice & Financial Planning. Co-sponsored by Environmental Law. Environmental Law for the General Practitioner: A Thumbnail Sketch of Environmental Law. 11:30 am – 12:30 pm

Thursday, 04/07/16- Webcast—Presented by Business Advice & Financial Planning. Co-sponsored by Environmental Law. Environmental Law for the General Practitioner: Solid Waste Disposal under the Illinois Environmental Protection Act. 1:00 pm – 2:00 pm.

Friday, 04/08/16- CRO—The Story of a Mechanics Lien Claim: From Client Meeting to Trial. Presented by the Construction Law Section Council; Co-sponsored by the Society of Illinois Construction Attorneys, the Real Estate Law Section Council and the Commercial Banking, Collections and Bankruptcy Section Council. 8:25-3:30 pm.

Friday, 04/08/16- Bloomington, Holiday Inn and Suites—DUI and Traffic Law Updates – Spring 2016. Presented by Traffic Law. 8:55-4:15 pm.

Tuesday, 04/12/16- Teleseminar—Escrow Agreements in Business Transactions. Presented by the ISBA. 12-1 pm

Thursday, 04/14/16- Teleseminar—Governance for Nonprofits. Presented by the ISBA. 12-1 pm.

Thursday, 04/14/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm

Thursday, 04/14/16- CRO—Bankruptcy Basics from the Experts—2016. Presented by Commercial Banking, Collections and Bankruptcy. 8:50 am – 4:30 pm.

Monday, 04/18/16- Teleseminar- Live Replay—Estate & Trust Planning for Non-traditional Families. Presented by the ISBA. 12-1 pm.

Tuesday, 04/19/16- Teleseminar—Director and Office Fiduciary Duties & Liability.

Tuesday, 04/19/16- Webinar—Ethics & Professionalism - Malpractice Pitfalls of Everyday Law Office Computing. Practice Toolbox Series presented by the ISBA. 12-1 pm.

Thursday, 04/21/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only.

12:00- 1:00 pm.

Thursday, 04/21/16- Friday, 04/22/16- CRO—Elder Law Bootcamp 2016. Presented by the Elder Law Section Council. Thursday: 8:30-4:45. Friday: 8:30-4:30.

Friday, 04/22/16—Hyatt Place Champaign/Urbana—Tort Practitioner's Topics of Interest. Presented by the Tort Law Section Council. 1:00-4:45 pm.

Monday, 04/25/16- Teleseminar- Live Replay—Choice of Law and Choice of Forum in Contracts. Presented by the ISBA. 12-1 pm.

Tuesday, 04/26/16- Teleseminar—Employees, Secrets, and Competition: Non-Competes and More. Presented by the ISBA. 12-1 pm.

Thursday, 04/28/16- Webcast—Concealed Carry in Illinois. Presented by Government Lawyers. 11:00 am – 12:00 pm

Friday, 04/29/16- CRO and Live Webcast—Illinois Appellate Practice: What Every Lawyer Should Know. Presented by the ISBA General Practice, Solo and Small Firm Section Council and the Civil Practice and Procedure Section Council. 9:00 am – 4:45 pm.

May

Tuesday, 05/03/16- Webinar—Top 10 Technology Mistakes Your Firm Cannot Afford to Make! Practice Toolbox Series presented by the ISBA. 12-1 pm.

Wednesday, 05/04/16- CRO—US and IL Supreme Court Case Updates/Ethical Considerations for Your Practice and Post Judicial Years. Co-Sponsored by the ISBA and the Illinois Judges Association. 9:00 am – 11:45 am (CLE). 1:00 pm - 4:00 pm (Benefits).

Wednesday, 05/04/16- Sangamo Club—Miranda: It's More Than Words. Presented by the Sangamon County Bar Association; co-sponsored by the ISBA. 12:30-1:30 pm.

Wednesday, 05/04/16- Teleseminar—Ethics and Drafting Effective Conflict of Interest Waivers. Presented by the ISBA. 12-1 pm.

Thursday, 05/05/16- Friday, 05/06/16—CRO—15th Annual Environmental Law Conference. Presented by Environmental Law. Thursday- 8:45 am – 4:45 pm. Thursday reception- 4:45 – 6:00 pm. Friday – 8:30 am – 1:15 pm.

Monday, 05/09/16- Teleseminar LIVE REPLAY—Health Care Issues in Estate Planning. Presented by the ISBA. 12-1 pm.

Tuesday, 05/10/16- Teleseminar—Ethics and Establishing and Ending an Attorney-Client Relationship. Presented by the ISBA. 12-1 pm.

Wednesday, 05/11/16- Teleseminar—Adding a New Member to an LLC. Presented by the ISBA. 12-1 pm.

Thursday, 05/12/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Friday, 05/13/16- Lombard, Lindner Conference Center—A Construction Project Gone Awry: Construction Escrow and Litigation Issues. The Construction Industry: Shortcuts to Disaster. Presented by the Real Estate Law Section Council. Co-sponsored by Construction Law and Commercial Banking, Collections and Bankruptcy.

Tuesday, 05/17/16- Webinar—How to Build a Technology Plan for Your Firm. Practice Toolbox Series presented by the ISBA. 12-1 pm.

Wednesday, 05/18/16- Webcast—ADR Options in the Illinois Federal District Courts. Presented by ADR. 1:00-2:00 pm.

Thursday, 05/19/16- Teleseminar—2016 Retaliation Claims in Employment Law Update. Presented by the ISBA. 12-1 pm.

Thursday, 05/19/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 05/19/16- CRO—Civil Practice Update: Review on E-Discovery. Presented by Civil Practice and Procedure. 8:45 am – 4:45 pm.

Friday, 05/20/16- Teleseminar—Ethics and Virtual Law Practices. Presented by the ISBA. 12-1 pm.

Friday, 05/20/16- CRO and Webcast—Practical Skills for Attorneys New to Estate Planning. Presented by Trusts and Estates. ALL DAY.

Tuesday, 05/24/16- Teleseminar—Joint Ventures in Businesses, Part 1. Presented by the ISBA. 12-1 pm.

Wednesday, 05/25/16- CRO and Webcast—Program title TBD. Presented by Business and Securities Law. 1:00-4:00 pm (end time may change).

Wednesday, 05/25/16- Teleseminar—Joint Ventures in Businesses, Part 2. Presented by the ISBA. 12-1 pm.

Thursday, 05/26/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm

June

Thursday, 06/02/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 06/02/16- Teleseminar—Choice of Entity in Real Estate. Presented by the ISBA. 12-1 pm. ■

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