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Recent Developments: Evans v. Evans: Expanding Visitation Rights

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was not substantial when balanced against the compelling interest of both the state and the defendant in the accurate disposition of a case. In *Ake*, the state argued that a requirement to provide a defendant with psychiatric assistance would result in a staggering burden. The Court rejected the argument that such a requirement would place an unbearable economic burden on the state, noting that the federal government and many states currently make psychiatric assistance available to indigent defendants and they have not found the economic burden too great so as to preclude psychiatric assistance. Furthermore, the Court argued that this is particularly true when the obligation of the state is limited to providing only *one* competent psychiatrist.

In applying the third factor—assessing the probable value of psychiatric assistance and the risk of error if it is denied—the Court determined that, when the state makes a defendant's mental condition relevant to his criminal culpability and subsequent punishment, the assistance of a psychiatrist may well be crucial to a proper defense. The Court found this proposition to be reflected in the fact that more than forty states have decided, either through legislation or judicial decision, that indigent defendants are entitled to the assistance of a psychiatrist under certain circumstances. (It is interesting to note that Maryland is *not* one of these forty states.) Additionally, the federal government has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." Criminal Justice Act, 18 U.S.C. § 3006A(e) (1970). Hence, "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses," the Court concluded that "the risk of an inaccurate resolution of insanity issues is extremely high." *Ake*, 104 S.Ct. at 1096. Moreover, the risk of error is particularly great when a defendant's mental condition is seriously in question. Therefore, the Court decided that the need for the assistance of a psychiatrist is readily apparent when a defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be an important factor in his defense. As a result of this finding, the Court held that when a defendant demonstrates to the trial court that his sanity at the time of the offense is to be a significant factor at trial, the state "must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 104 S.Ct. at 1097. The Court warns, however, that this does *not* mean that an indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Consequently, the Court left the determination of how to implement this right to the states.

Finally, the Court held that if a state presents psychiatric evidence as to a defendant's future dangerousness, the indigent defendant has an additional right to a psychiatrist's assistance at the sentencing phase of his trial as well. If this were not true, a defendant could not offer a well-informed expert's opposing view and he would thereby lose an important opportunity to raise questions in the jurors' minds regarding the state's proof of an aggravating factor. Thus, the Court decided that at capital sentencing proceedings, "where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the state so slim, due process requires access to psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase." *Ake*, 104 S.Ct. at 1097.

Justice Rehnquist dissented in *Ake* arguing that the Court's holding should be limited to capital cases. Additionally, the dissent argued that it should be made clear that the entitlement is to an independent psychiatric evaluation and not to a defense consultant.

—Jennifer Hammond

Evans v. Evans: EXPANDING VISITATION RIGHTS

Earlier this year, the Court of Appeals of Maryland held that a trial court is authorized to award visitation rights to the nonadoptive stepmother of a minor child. *Evans v. Evans*, 302 Md. 334, 488 A.2d 157 (1985). This decision reversed an unpublished opinion by the Court of Special Appeals, and concluded that a 1981 amendment to the statute granting equity courts jurisdiction over the custody and visitation of a child did not affect well established law authorizing the courts great discretion to award visitation, provided the best interests of the child are served.

Appellant and appellee were married in June of 1975. For six months prior to the marriage, the appellee's son by a previous marriage was under the care of the appellant. The parties separated in January of 1980, but Jason, then six years old, remained under the appellant's care for seven months following the separation. In August of 1980, Jason went to live with his father. The parties filed cross-complaints for divorce and the appellant requested liberal visitation rights with Jason, which were granted by the Circuit Court for Prince George's County.

On appeal, the Court of Special Appeals examined the 1981 amendment to section 3-602 of the Courts and Judicial Proceedings Article of the Maryland Code, which confers upon the court the authority to consider petitions for visitation rights by grandparents of a child of divorced parents. The Court of Special Appeals concluded that the inclusion of this amendment was a reflection of the legislature's intent to limit the discretionary power of equity courts to determine who should be vested with child visitation rights.

The Court of Appeals based its reversal on an exhaustive review of the relevant statutory and decisional law. It first concluded that the granting of child visitation rights within a divorce decree was well established in Maryland, citing *Prangle v. Prangle*, 134 Md. 166, 106 A. 337 (1919). Although the specific statutory provisions referred only to child "custody" and "guardianship," *Prangle* and subsequent decisions interpreted them to implicitly encompass visitation rights. *See, Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960); *Barnard v. Godfrey*, 157 Md. 264, 145 A. 614 (1929). Furthermore, the current statutory scheme explicitly grants equity courts jurisdiction over child visitation rights. MD. FAM. LAW CODE ANN. § 1-201 (a) (6) (1984).

Secondly, the court traced the history of section 3-602, noting that when section 3-602 was recodified in 1975 it deleted language specifying those who could petition the court for child custody, (i.e. father, mother, relative, next of kin, next friend, or any public official). Following these de-

letions, the statute read: "A court of equity has jurisdiction over the . . . visitation . . . of a child. In exercising its jurisdiction, the court may . . . (4) Determine who shall have visitation rights to a child;" MD. CTS. & JUD. PROC. CODE ANN. § 3-602 (a) (1976). The court stated: "On its face, therefore, section 3-604 (a) (4), prior to the 1981 amendment, constituted the broadest possible grant of authority to courts to determine who shall be awarded visitation rights." *Evans v. Evans*, 302 Md. at 339, 488 A.2d at 159.

The court then addressed the appellee's contention that jurisdiction over visitation must be construed narrowly in view of the 1981 amendment specifically providing for grandparent's visitation rights. The basis for the appellee's argument was that the inclusion of a statutory provision specifically addressed to the visitation rights of grandparents was a legislative recognition of the need to protect these rights. In rejecting their argument, the court of appeals noted a long line of case law previously recognizing the right of grandparents to custody and visitation rights. *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1938).

The thrust of the court's reasoning, however, seems to turn on its examination of the legislative history of the 1981 amendment to Section 3-602 (a) (4). A four year effort had been present in the Maryland Legislature to enact legislation to guarantee visitation rights to grandparents. *Evans*, 302 Md. at 339-43, 408 A.2d at 159-61. However these measures were repeatedly defeated on the grounds that the existing law adequately provided these rights.

The court agreed with the analysis of a 1984 decision by the court of appeals, *Skeens v. Paterno*, 60 Md. App. 48, 480 A.2d 820 (1984), wherein that court stated: "The legislative history contains no indication that the bill was intended as a limitation on grandparental visitation or on anyone else's visitation—in other contexts . . ." *Id* at 60-61, 480 A.2d at 826.

The court's decision in *Evans* reaffirms the longstanding test which has governed Maryland custody and visitation cases, namely, what is in the best interests of the child. *See Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984); *Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960); *Carter v. Carter*, 156 Md. 500, 144 A. 490 (1929). *Evans* makes it clear that the Maryland courts have considerable discretion in determining who shall be awarded child visitation rights, and explicitly are not limited to natural or adoptive parents or grandparents.

—M. Tracy Neuhauser

U.S. v. Johns: THE AUTOMOBILE EXCEPTION ONE STEP FURTHER

The Supreme Court through Justice O'Connor in a 7-2 decision extended the rule of law of *United States v. Ross*, 456 U.S. 798 (1982), which stated that once police officers have probable cause to search a lawfully stopped vehicle, they may open and search closed containers found within the vehicle that may conceal the object of their search. In *United States v. Johns*, 105 S.Ct. 881 (1985), the Supreme Court held that a search is not unreasonable, and therefore not violative of the fourth amendment, "merely" because the warrantless search of closed containers takes place several days after the containers are removed from the vehicles.

In the course of an investigation of drug smuggling operations, custom agents by airborne and surface surveillance observed the rendezvous between several pickup trucks and an airplane at a remote airstrip 50 miles from the Mexican border. At trial the surface agents stated that they could not see what transpired, but were told by airborne units that the trucks approached and parked near the small plane. The officers closed in on the trucks, observed an individual covering the containers with a blanket, and smelled the odor of marihuana. In the back of the trucks were containers wrapped in dark green plastic and sealed with tape. The respondents were then arrested. Neither the containers nor the trucks were searched at the scene but instead they were taken to the Drug Enforcement Administration (DEA) headquarters. The containers were unloaded from the trucks and placed in a DEA warehouse; three days later a warrantless search revealed the marihuana. At trial the respondents were successful in suppressing the evidence, and this was affirmed by the court of appeals, *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983).

The Court summarily disposed of the respondents first contention that the officer's probable cause to suspect contraband went to the containers not the vehicles. This distinction is important; if probable cause went to the containers, the rule in *United States v. Chadwick*, 433 U.S. 1 (1977), would invalidate the warrantless search as outside of the automobile exception first set forth in *Carroll v. United States*, 267 U.S. 132 (1925), but if the probable cause went to the vehicle, the only issue is whether the rule in *Ross*, should apply to a three day delay in an otherwise lawful search. The Court did not disturb the findings of fact of the lower court and agreed that the officers had probable cause that not only the packages, but also the vehicle contained the drugs. *See United States v. Johns*, 707 F.2d 1093, 1097 (9th Cir. 1983).

The Court appeared to break the case into two steps. First, that *Ross*, allowed police officers to open and search closed containers found in the execution of a warrantless automobile search. Second, that *Chambers v. Maroney*, 399 U.S. 42 (1970), allowed vehicle searches at the police station that could have taken place at the place of the vehicle stop. Therefore, the Court simply stated, "as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days later . . . was reasonable. . . ." *Johns*, 105 S.Ct. at 887.

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