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Recent Developments: Ake v. Oklahoma: Psychiatrists in the Court Room

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butes of property. The court further noted in its opinion that a professional degree, unlike property, cannot be assigned, transferred, devised, sold, pledged or inherited.

Other arguments supporting the rejection of the appellants proposition included: 1) the too speculative nature of determining the value of a professional degree; 2) that an attempt to characterize spousal contributions as an investment or commercial enterprise deserving compensation demeaned the concept of marriage; 3) the degree of the spouse is personal and represents only the potential for future earnings; and 4) that a graduate degree is best considered when awarding alimony.

The court rejected the opinion of a minority of jurisdictions which hold that "the most equitable solution" to compensate one spouse for the sacrifices which enabled him/her to pursue a professional degree is to allow the supporting spouse to "share in the fruits" obtained by the other spouse.

The court in the past has recognized that the broad definition of marital property includes pension rights. *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981). But, the court distinguished a spouse's property right to pensions from a professional degree. That is, a pension is a contractual right to a current asset which a spouse has a right to receive. However, such rights are plainly distinguishable from a professional degree. A professional degree is an intellectual attainment personal to the holder that cannot be sold, transferred or inherited. As the court stated, a degree/license does not have an exchange value; rather, it represents a potential for "earning capacity made possible . . . in combination with innumerable other factors too uncertain and speculative to constitute marital property." *Archer* at 357, 493 A.2d at 1080.

The court concluded by stating that in its award a chancellor should consider the circumstances surrounding a spouse's acquisition of a professional degree/license as well as that spouse's potential income. Income earned by the acquisition of a professional degree/license by a spouse and the sacrifices of the other spouse in helping to attain such a degree are "factors which may" be considered by the court in making an alimony award. The court presumed that the trial court considered these "factors" in determining the appellant's amount of alimony ($100 per month not to exceed a year). However, the court did not consider the adequacy of this amount since the appellant did not raise that issue on appeal.

– Gordon Daniels

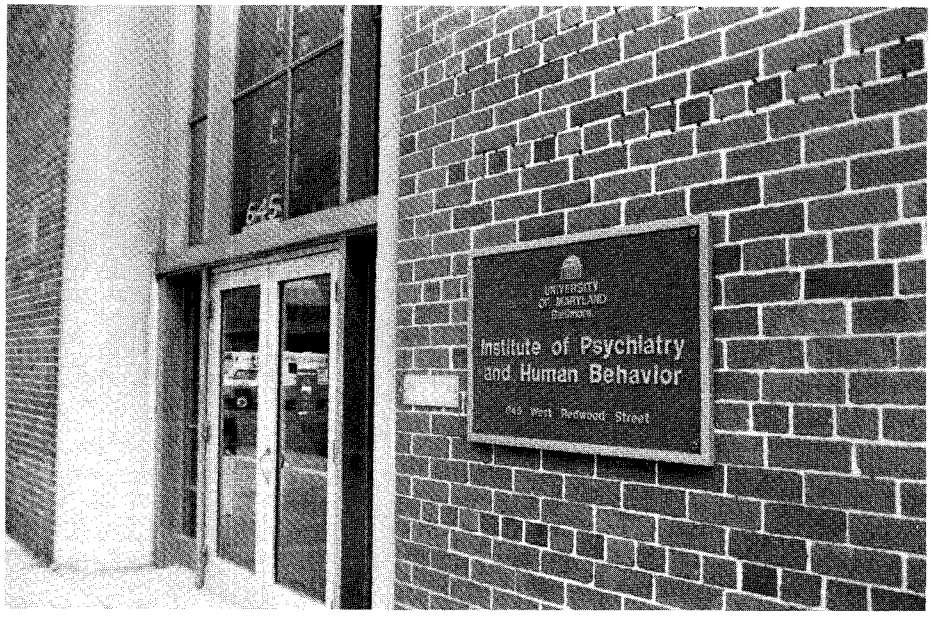
Ake v. Oklahoma: PSYCHIATRISTS IN THE COURT ROOM

In a recent decision, the Supreme Court confronted the issue of whether an indigent defendant has a constitutional right to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition. In *Ake v. Oklahoma*, 104 S.Ct. 1087 (1985), the Court, speaking through Justice Marshall, held that indigent defendants do, under certain circumstances, have a due process right to the assistance of a psychiatrist in the preparation of their defense. The due process clause of the fourteenth amendment requires a state to provide an indigent defendant with access to "competent psychiatric assistance" to aid in the preparation of his defense, if the defendant makes a preliminary showing that his sanity at the time of the crime will be a significant factor at trial. Additionally, the Court in *Ake* held that an indigent defendant also has the right to a psychiatrist's assistance at a capital sentencing proceeding if the state presents psychiatric evidence as to his future dangerousness.

The defendant in *Ake* was charged with murdering a husband and wife and wounding their two children. At arraignment, the defendant's behavior was so bizarre that the trial judge *sua sponte* ordered him to be examined by a psychiatrist. The psychiatrist found that the defendant was incompetent to stand trial and suggested that he be committed. Six weeks later, however, the defendant was found to be competent provided that he continue to be sedated with an antipsychotic drug. When the state resumed proceedings against the defendant, his attorney, at a pretrial conference, informed the court that he would raise an insanity defense. Therefore, the defense attorney requested a psychiatric evaluation, at state expense, to determine the defendant's mental state at the time of the crime, claiming that the defendant was entitled to such an evaluation by the United States Constitution. The state court denied the defendant's request for such an evaluation. Consequently, there was no expert testimony for either side on the issue of the defendant's sanity at the time of the offense. The jury rejected the defendant's insanity defense and he was convicted of two counts of murder in the first degree and two counts of shooting with intent to kill and was subsequently sentenced to death.

In determining whether, and under what circumstances, a state should be required to provide an indigent defendant with competent psychiatric assistance in preparing his defense, the Court employed a three-factor test. The three factors relevant to this determination were (1) "the private interest that will be affected by the action of the State", (2) "the governmental interest that will be affected if the safeguard is to be provided", and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 104 S.Ct. at 1094. The court in *Ake*, applied this three factor test, but considered the first two factors only briefly.

Thus, in considering the first factor, the court found that the private interest in the accuracy of a criminal proceeding is almost uniquely compelling since a criminal proceeding places an individual's life or liberty at risk. In considering the second factor, the interest of the state, the court found that a state's interest in denying a defendant a psychiatrist's assistance



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-