PHILADELPHIA BAR ASSOCIATION
FAMILY LAW SECTION MEETINGS
Meeting of March 1, 2010

Next Meeting: Monday, April 5, 2010, 12:00 P.M., Philadelphia Bar Association,

10th Floor Board Room, 1101 Market Street.

Next Executive Committee Meeting: Thursday, March 18, 2010, 12:00 P.M., Philadelphia Bar Association, 11th Floor Committee Room South, 1101 Market Street.

The Section meeting was called to order at approximately 12;10 P.M. by Shanese I. Johnson, Chair of the Section, and concluded at approximately 1:00 P.M.

I. WELCOME AND INTRODUCTION

Shanese welcomed everyone to the meeting.

II. APPROVAL OF MINUTES

There were no changes to the January minutes and they were approved as written.

III. TREASURER'S REPORT

As of February 28, 2010, the Section's treasury had a balance of net assets in the amount of $18,643. A copy of the report is attached hereto.

IV. ANNOUNCEMENTS

1. The Custody Committee will be putting on a program regarding age appropriate custody orders on March 12, 2010 at 3:00 pm at the 10th Floor Board Room, Philadelphia Bar Association, 1101 Market Street. The featured speakers will be Robert L. Tanenbaum,Ph. D. and Michele Southworth, J.D.

2. William Ringland of VIP, announced that there are 2 new cases that need volunteers. The case list is attached hereto.

3. Kate Tana, Esquire, discussed that there are changes being made at the Adoption Branch of the family court. The major change is that everything must be filed with the adoption petition. If everything is not filed with the petition, the petition will not be accepted. Also, a hearing date will be set when you file. Kate indicated that she will attend a meeting at 2:00 p.m. on March 1, 2010 at the adoption branch where additional changes will be discussed and she will report back to the family law section at the next monthly meeting regarding same.

4. David Hofstein, Esq discussed the AAML proposed order regarding counsel for children which is based on the ABA model that is being submitted to the Rules Committee for consideration.

V. PRESENTATION

Michael E. Bertin, Esquire, of Obermayer Rebmann Maxwell & Hippel LLP, Co-Chair of the Custody Committee, introduced himself and co-chairs, Elaine Smith, Esquire, of Smith & Horwitz, and Kristine L. Calalang, Esquire, of Berner Klaw & Watson LLP, along with Lee A. Schwartz, Esquire, of Spear Wilderman, and John A. Zurzola, Esquire, of Willig, Williams & Davidson, all from the Custody Committee, who discussed: A Year In Review: Custody Cases of 2009. Please see the attachments (case summaries).

VI. COMMITTEE REPORTS

All information relating to Committee reports and meeting dates continues to be disseminated over the List Serve.

Additionally, Michael Bertin announced that the next custody committee meeting would be on March 10, 2010 at the offices of Obermayer Rebmann Maxwell & Hippel LLP.

VII. GOOD AND WELFARE

Meredith Brennan, Esq recently had a baby boy.

Respectfully submitted,

Michael E. Bertin, Esquire
Secretary

ATTACHMENTS:
Presentation handout (Custody Case Summary)
Treasurer's report
VIP case list
Slip Onions

THE CUSTODY COMMITTEE OF THE PHILADELPHIA FAMILY LAW SECTION PRESENTS:

A Year In Review: Custody Cases of 2009:

JURISDICTION, CHILD PREFERENCE, PRIMARY CARETAKER DOCTRINE

by Michael E. Bertin, Esquire, of Obermayer Rebmann Maxwell & Hippel LLP

1. Bouzos-Reilly v. Reilly, 980 A.2d 643 (Pa. Super. 2009) (Klein, Allen, and Colville, JJ.). This case focuses on the proper initial jurisdiction for a court to hear a custody case under the UCCJEA. Family law practitioners know that under the UCCJEA, the appropriate jurisdiction to initiate a child custody action is the "home state" of the child pursuant to 23 Pa.C.S.A. §5402. Pursuant to Section 5402, "home state" is the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of a child custody proceeding. However, what happens when the child is under 6 months of age and has resided with each parent in different states during that time? This is the issue addressed in this case.

In Bouzos-Reilly, the child lived in New York for 88 days after he was born. When the child was 3 months old, Mother moved with the child to Pittsburgh to reside with her family. After approximately 3 months, Mother filed a complaint for custody in Pennsylvania. Father filed a motion to dismiss Mother's action in Pennsylvania, claiming that Pennsylvania lacked jurisdiction and that New York was the Child's home state because Mother's move to Pittsburgh was temporary. Approximately 2 weeks after Father filed his motion to dismiss, the New York judge scheduled a telephone conference "that involved limited argument by the parties' counsel and the PA trial court judge." The PA judge then granted Father's motion to dismiss the custody action. Mother appealed. The PA judge was reversed and the case was remanded for a full hearing to determine whether Mother's move to PA was "indefinite" or "temporary." The Superior Court stressed that: "[s]ince the motion to dismiss was filed in Pennsylvania, it is the obligation of the Pennsylvania court to make its own determination as to whether the move was temporary after hearing relevant witnesses."

The Superior Court stressed that the PA court could not dismiss the action and make the jurisdiction determination without a full hearing. Further, the Superior Court stated: "[i]f it is determined that the move [by Mother] was not temporary, then there is no home state. In that case, there must be a determination under 23 Pa.C.S.A. §5421(a)(2) as to which state is the more appropriate forum based on where there are the most significant connections."

2. A.D v. M.A.B., 2010 Pa. Super. 15 (non-published opinion filed: 12/30/09, published opinion filed: 2/1/10) (Stevens, Bowes, Fitzgerald, JJ.). This case pertains to exclusive continuing jurisdiction (Section 5424) and inconvenient forum (Section 5427) under the UCCJEA.

The facts of the case are as follows: Mother was Father's third Muslim wife, but not his legal wife. Father has eleven children with two other women. The parties had one daughter. After a violent confrontation where Mother suffered a serious wound and Father was convicted of criminal charges as a result thereof, the child was sent to live with maternal grandmother in Africa. Months later, Mother and Child were reunited in Michigan. After hearing argument on Father's modification petition, the court (Judge Matthews of Philadelphia Family Court) found that the proper jurisdiction for the case was in Michigan, based on the allegations surrounding Father's abuse of his other daughters and the circumstances relating to jurisdiction under the UCCJEA.

When Mother reunited with the child after she lived with maternal grandmother in Africa, she filed an action seeking custody of the child (in 2001). The parties entered into an agreement providing Mother with sole legal and physical custody of the Child and permitted Mother to leave PA with the Child. The agreement also provided: "Father may petition for visitation in the future, but he agrees that he shall not do so against Mother until at least two years after the signing of this agreement. . . . In the event that Father does wish to petition to see [Child] in the future, as specified in the time frame above, he may do so in Philadelphia . . . . If for any reason it is necessary for Mother to return to Philadelphia to participate in litigation, then Father agrees to pay for Mother's travel costs."

On February 6, 2008, Father filed a petition to modify the parties' agreement. At that time, Father had no contact with the child for approximately 7 years (since Child was six months old).

At the hearing, Issues arose from the fact that 2 of Father's other daughters were removed from his home by DHS for 2 years after DHS received reports that Father disciplined the girls "by what Father described to the probation officer as spanking." Father admitted that he did not believe his discipline techniques on the daughters were abusive since it was acceptable in his home country of Guinea, in West Africa.

At the hearing, Father argued that he refrained from petitioning to modify earlier because he believed that "all children belong to their mother until they are seven."

This case focuses on exclusive continuing jurisdiction and inconvenient forum under the UCCJEA. On the issue of exclusive continuing jurisdiction, the court analyzed the recent case of Billhime v. Billhime, 952 A.2d 1174 (Pa. Super. 2008) (a case covered in the Custody Update presented by the Custody Committee last year). Billhime focused on whether the court is permitted to transfer a case to another state when exclusive continuing jurisdiction does not lie in the other state. In Billhime, the mother relocated to Florida, and the custody order was entered in PA (where Father resides). After living several years in Florida with the children, the mother petitioned to transfer the case to Florida. The trial court denied the mother's motion and the PA Superior Court reversed the trial court and relinquished jurisdiction to Florida because, *inter alia*, the information relating to the children's welfare was now located in Florida and the children only visited PA several times per year. The present case is more compelling than Billhime, as the Child and Mother had no contacts with PA. Mother and the child had not resided in PA for approximately seven years. Judge Matthews stated: "the center of interest[, including C]hild's physicians, pediatrician, school, friends, family, [and] contacts[,] are in Michigan." Therefore, it was appropriate for PA to relinquish jurisdiction.

Father also claimed that the court also erred in transferring jurisdiction because the parties' agreement contained a "forum selection clause." The Superior Court disagreed that the clause in the agreement was a "forum selection clause" and was instead "permissive"

language. The Superior Court further indicated that even if the language in the agreement was a "forum selection clause" it would not be determinative of where the case should be heard. Under Section 5427 (inconvenient forum), there are 8 factors to consider. Factor 5 pertains to whether there is any agreement of the parties as to which state should assume jurisdiction. The court stressed that Factor 5 is only one of eight factors to be considered, and when weighing all the factors, PA was an inconvenient forum and Michigan was overwhelmingly more appropriate.

Therefore, Judge Matthews was affirmed by the Superior Court when he relinquished jurisdiction of the case and transferred it to Michigan.

3. Gianvito v. Gianvito, 975 A.2d 1164 (Pa. Super. 2009) (Bowes, Donohue, and Popovich, JJ.). This is a case stemming from a Petition to Relocate filed by Mother and a Petition to Modify Custody filed by Father. Mother was the primary physical custodian at the time of the parties' filings. The court ordered a change in physical custody and awarded Father primary physical custody. Mother appealed.

The facts of this case, reflect that Father and his family were always extremely active in raising the child. On appeal, Mother made two arguments: (1) the trial court failed to afford proper weight to Mother's status as the Child's primary caretaker, and (2) that the trial court failed to give proper weight to the Child's preference to maintain the *status quo*.

The "Primary Caretaker Doctrine holds that a trail court is to give positive consideration in a custody dispute to the parent who has acted as their child's primary caretaker." See Klos v. Klos, 934 A.2d 724 (Pa. Super. 2007).

Because of Father's significant involvement in raising the Child, the Superior Court found that the trial court did not err in awarding Father primary physical custody in considering the primary caretaker doctrine.

With regard to the Child's preference, the court relied heavily on the fact the child was 6 years old, and stated in the *in camera* interview that he wanted to live with Mother and Father on a week-on / week-off basis. The court indicated that the Child's stated preference "bespoke her inability to understand the nature of the proceedings and her inability to choose between Mother and Father as her primary caretaker." The court also indicated that a week-on / week-off schedule could not work because of the parties' work schedules and distance between their residences. When considering a child's preference, the weight to be afforded to it varies with the age, maturity, and intelligence of the child, together with the reasons given for the preference. See Wheeler v. Mazur, 793 A.2d 929 (Pa. Super. 2002).

The Superior Court affirmed the trial court's decision.

An interesting fact about this case is that the Superior Court stated: "a party that seeks to modify an existing custody order must demonstrate a substantial change in circumstances what would justify a trial court's reconsideration of the custody disposition . . . Once a substantial change in circumstance has been shown, the trial court must then consider the best interests of the child." This is contrary to the existing law in Pennsylvania regarding child custody. A change in circumstance is not required in order to modify custody. The Superior Court indicated that because Mother did not dispute the issue of whether a change in circumstances occurred, the Superior Court confined its analysis to whether the trial court's decision was in the best interest of the child. See Karis v. Karis, 544 A.2d 1328 (Pa. 1988) and Moore v. Moore, 634 A.2d 163 (Pa. 1993) (no change in

circumstances required for modification of custody, best interest of the child is the standard).

MENTAL HEALTH RECORDS AND CHILD CUSTODY LITIGATION

by Kristine L. Calalang, Esquire, of Berner Klaw & Watson LLP

Gates v. Gates, 967 A.2d 1024 (Pa. Super. 2009).

The litigants are a divorced couple with a 10 year old son. Through court order, Father has primary physical custody of the son, and Mother has partial physical custody. Father filed a petition for special relief, asking that the court order Mother to release her mental health records. He was concerned about inpatient mental health treatment that Mother had received. Father also filed a petition to modify the custody order, but he did not challenge Mother's ability to care for their son. Instead, the modification petition mainly reiterated Father's request for the release of Mother's mental health records.

Mother filed an answer to Father's petition to modify and challenged the release of her confidential information. At the hearing on Father's petitions, Father was able to cross-examine Mother regarding her hospital stay. Mother testified that she was concerned her medication was not working properly and that her doctors required that she stay at the hospital as an inpatient in order to monitor the medication. Mother maintained her opposition to the release of her records. The Clearfield County trial court thereafter ordered Mother to sign a consent for the release of her records.

Mother refused to sign the consent and filed a timely notice of appeal. Father then filed a petition for contempt. At the contempt hearing, the trial court found Mother in contempt for refusing to sign the consent, suspended Mother's custodial rights and ordered Mother to pay Father's attorneys fees. Mother filed a timely notice of appeal to this contempt order, as well.

The PA Superior Court found that Section 7111(a) of the Mental Health Procedures Act (50 P.S. § 7111 et seq.) applies to all of Mother's mental health records. Under this Act, Mother did not waive her statutory rights of confidentiality, regardless of whether she had previously acknowledged the trial court's ability to order her to submit to a mental health exam and regardless of whether she did not specifically invoke the Act when she challenged the release of the records. In addition, the Superior Court found that Mother's refusal to disclose confidential mental health records was justified and that she did not act with wrongful intent and could not be held in contempt of the court order. In fact, the Court stated that Mother would likely suffer irreparable harm if she complied with the court order and released her confidential records. In all, the Superior Court reversed the trial court's ruling in part (the portion directing the signing of the consent form) and vacated the contempt order.

JURISDICTION AND FLAGRANT CONTEMPT OF CUSTODY ORDER

by Elaine Smith, Esquire, of Smith & Horwitz

Harcar v. Harcar, 982 A.2d 1230 (Pa. Super. 2009)

This is a contempt of custody case, involving a mother who took a child to Turkey, even though the family had lived in Pennsylvania for over a year and there was a local Order in place to return the child to Pennsylvania.

The court held that it was an abuse of discretion to refuse to impose sanctions on the mother for what was called "flagrant contempt" of the trial court Order to return the child to Beaver County, PA. These parents were from Turkey, had spent summers in Turkey, but had lived in Pennsylvania, in Beaver County, and the court's ruling that Beaver County was an inconvenient forum, and directing future proceedings to be in Turkey was reversed. The court confirmed the holding of contempt, reversed the refusal to apply sanctions and vacated the Order, declining to exercise jurisdiction.

COUNSELING OF INCARCERATED CUSTODY PETITIONER

by Lee A. Schwartz, Esquire, of Spear Wilderman

Cramer v. Zgela, 969 A.2d 621 (Pa. Super. 2009).

In this case with a rather tortured procedural history, Father, who is incarcerated for first degree murder, in 2004 filed a Complaint seeking "partial physical custody and visitation" of his minor son. The minor son was ten months old at the time Father filed this Complaint in Perry County, PA. Father is serving a life term. Mother opposes these visits.

Initially, the Common Pleas Court denied Father's Petition without a hearing. Father appealed. The Superior Court, in 2005, vacated and remanded that Order for a hearing. The case was transferred to York County since Mother had moved there.

A pre-trial conference was held and Father participated by telephone. An Order was entered after the conference placing the burden upon Father to show that he no longer posed a grave threat of harm to the child. Father attempted to do so.

The Trial Court made several attempts to communicate with the correctional facility (SCI Huntingdon) to attempt to determine who at Huntingdon might have the necessary information regarding Father and to determine what counseling, if any, was available to Father. Mother and Father both participated in the hearing. Thereafter, Father's Complaint was again dismissed.

Father again appealed. By now, it was 2008.

In this appeal, the Superior Court cited 23 P.S. subs.5303 (b) which states:

> "If a parent has been convicted of or has plead guilty or no contest to an offense as set forth below, the court *shall* determine that the parent does not pose a threat of harm to the child before making an order of custody, partial custody or visitation to that parent...." (emphasis added).

Appellant's conviction for first degree murder is one of the enumerated offenses. As such, subsection 5303 C also applies:

> "C. Counseling. In making a determination to award custody, partial custody or visitation pursuant to subsection (b), the court *shall* appoint a qualified professional to provide counseling to an offending parent described in subsection (b) and shall take testimony from that professional regarding the provision of such counseling prior to issuing any order...Counseling, *required* in accordance with this subsection, *shall* include a program of treatment or individual treatment designed to rehabilitate a parent...."

Despite the Trial Court recognizing the applicability of the above statutory language, the Trial Court opined that it was an "insurmountable" problem for it to appoint such a professional and to make such a determination. The Court believed that it did not have the legal authority to order the Department of Corrections to undertake counseling of an inmate or to allow an outside private qualified professional into the institution.

The Superior Court concluded that the Trial Court erred in not appointing a qualified professional as dictated by the statute. In fact, the Superior Court went on to say that the person appointed must be a "qualified" professional, as mentioned in the statute, which is a person who has "expertise tied to the particular offense under assessment". Also, this "qualified professional" is required to testify before the trial court during the custody hearing. It is the qualified professional who must offer testimony "to aid the trial court in its determination under section 5303(b)".

In addition to the counseling aspect mention in the statute, the Trial Court also must elicit testimony from the qualified professional to be assured that:

> "Custody is not being provided to a parent whose past criminal behavior presents a present threat of harm to the child."

The Court went on to state that section 5303 is based upon the "...constitutionally protected liberty interest parents have to visit their children, which is usually not denied or limited unless visitation with the parent poses a *grave* threat to the child" (emphasis added).

During the custody trial, the Court heard testimony from a licensed psychologist employed in the prison that such an evaluation and counseling "could be done". Additionally, although he did not testify, the chief psychologist for the Pennsylvania Department of Corrections attended the custody hearing as an observer. He informed the

Court that he was "interested in learning about these kinds of procedures" and that he wants "...the Department of Corrections to be able to do the best job they can".

The Superior Court therefore directed that the Trial Court should "direct it's request for counseling and evaluation to the prison authorities." The Order denying Father's request was vacated and the matter remanded for proceedings consistent with this opinion.

DISCUSSION

In custody matters where a party is incarcerated and the party incarcerated has committed an offense that falls within subsection (b) of the statute, it is mandatory that this evaluation and counseling occur before a custody determination is made. The trial court, at a preliminary stage, would need to contact the Department of Prisons of make these arrangements. If the Department of Prisons concludes that it is not obligated to accept the appointment, "...they [presumably the Department of Corrections] can raise this matter in another action", according to the Superior Court.

TERMINATION OF PARENTAL RIGHTS

by John A. Zurzola, Esquire, of Willig, Williams & Davidson

1. In re: T.C., S.C., and H.C., MINOR CHILDREN; APPEAL OF: R.C., NATURAL FATHER, Appellant, --- A.2d ---; 2009 Pa. Super. 222; 2009 Pa. Super. LEXIS 4469, (Pa. Super. 2009).

This is a case originating in the Lycoming County Court of Common Pleas, Orphans' Court Division that dealt with termination of parental rights of three children born to a Native American father who was a member of a federally recognized tribe (Lac-Courte-Oreilles Band of Lake Superior Chippewa Indians). The natural mother of the children voluntarily relinquished her parental rights either prior to or at the termination hearing and was not part of the appeal. The timeline leading up to termination of parental rights and the procedural steps are summarized here:

- Male child T.C. born on 2/6/1999, female child S.C. born on 12/21/2000, and male child H.C. born on 2/16/2004.
- A dependency hearing was held on 2/13/06 and children declared dependent with placement (services) in the parents' home.
- An August 2006 hearing reaffirmed dependency in the father's home (mother and father apparently not living together).
- November, 2006 record reveals multiple police incidents involving father and paramour, with father heavily intoxicated and eventually charged with assault, harassment, etc.
- Dependency reaffirmed in December 2006 and children placed in a foster home.
- In May 2007 and November 2007 children reaffirmed dependent and court ordered children to remain in foster home. In November 2007 father was ordered to attend alcohol counseling (father apparently had some sort of unsupervised visitation at this time).

- In February 2008, father involved in a domestic dispute with natural mother where mother slashed father's face and father found to be "heavily intoxicated." After this and in March 2008, father's unsupervised visitation revoked.
- April 24, 2008, Lycoming County CYS filed petition for involuntary termination.
- Trial held on September, 22-23 and 25, 2008.
- Father's rights terminated and he timely appealed.

Father raised the following issues for appeal:

1. Whether the lower court erred in terminating [Father's] parental rights where the expert testimony introduced by the Lycoming County Children and Youth Services did not conclusively satisfy the standard set forth in the Indian Child Welfare Act?

2. Whether the lower court erred in terminating [Father's] parental rights where the Lycoming County Children and Youth Services did not meet its burden under [the] Indian Child Welfare Act of proving beyond reasonable doubt termination was justified?

The case is significant in that the applicable law and elements necessary to prove a case for involuntary termination were not governed by 23 Pa.C.S. § 2511, and instead were decided by Federal law - specifically the Indian Child Welfare Act, 25 USCS §§ 1901-1923 ("ICWA"), as the children were born of a Native American father (mother's heritage was not revealed although the definitions section of the statute seems to consider children born of at least one Native American Parent an "indian child").

The Superior Court first stressed the standard of review and how it relates to the ICWA and the reasonable doubt standard contained in the statute (attached). The court cited cases from other jurisdictions as there was no applicable case law dealing with the ICWA in Pennsylvania. The Court confined their inquiry to § 1912(f) of the ICWA as the Court interpreted father's issues on appeal as only implicating the Lycoming County CYS's burden to prove the factors for termination beyond a reasonable doubt.

The Court did not address a major requirement contained in § 1912(d) which dictates that the CYS had the burden to demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful." I find that the Court's interpretation of father's issues on appeal as not implicating the §1912(d) requirement significant because the record (cited by the Court) did not discuss any specific remedial efforts by CYS even though only 5 months had elapsed from the time that father's unsupervised visitation was cut off and the petition for termination was filed. The Court recognized that an expert merely opined on the CYS's efforts at rehabilitation without detailing them.

The record revealed that the trial court heard testimony from the foster mother, the Court Appointed Special Advocate a licensed psychologist and a director from the Indian Child Welfare agency for the Lac-Courte Tribe, introduced to provide the expert testimony required in § 1912(f). While the expert's testimony largely relied on her

conclusions of the case based upon her supervision of a CYS caseworker and not on her direct involvement with the particular family, the Court found that the trial court's reliance on the expert's testimony was not an error of law and their findings were not "clearly unreasonable".

The court relied on the significant testimony of the witnesses regarding the children's progress scholastically and their improving physical and mental health since being placed as well as the children's (by then) 22 month bonding experience with the foster parents (who meant to adopt them). The Court distinguished the instant matter from the cases (from other jurisdictions) relied on by father arguing that evidence of father's alcohol rehabilitation should have been given more weight as well as the insufficiency of the expert testimony as only having relied on the conclusions of the Lycoming County CYS.

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS(R)

* THIS DOCUMENT IS CURRENT THROUGH ACT 2009-52 OF THE 2009 REGULAR SESSION *
*** JANUARY 13, 2010 ANNOTATION SERVICE ***

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 23. DOMESTIC RELATIONS
PART VI. CHILDREN AND MINORS
CHAPTER 54. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT
SUBCHAPTER A. GENERAL PROVISIONS

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23 Pa.C.S. § 5404 (2009)

§ 5404. Application to Native American tribes

(a) PRIMACY OF INDIAN CHILD WELFARE ACT.-- A child custody proceeding that pertains to a Native American child as defined in the Indian Child Welfare Act of 1978 (Public Law 95-608, 25 U.S.C. § 1901 et seq.) is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act of 1978.

(b) TRIBE TREATED AS STATE.-- A court of this Commonwealth shall treat a tribe as if it were a state of the United States for the purpose of applying Subchapter B (relating to jurisdiction) and this subchapter.

(c) TRIBAL CUSTODY DETERMINATIONS.-- A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter C (relating to enforcement).

NOTES:

UNIFORM LAW COMMENT

This section extends the terms of this Act to Indian tribes. The definition of "tribe" is found at section 102(16) (section 5402). This Act does not purport to legislate custody jurisdiction for tribal courts. However, a Tribe could adopt this Act as enabling legislation by simply replacing references to "this State" with "this Tribe."

If the Indian Child Welfare Act requires that a case be heard in tribal court, then its provisions determine jurisdiction.

History:

Act 2004-39 (H.B. 2083), § 3, approved June 15, 2004, eff. in 60 days.

TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

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25 USCS § 1903

§ 1903. Definitions

For the purposes of this Act [25 USCS §§ 1901 et seq.], except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the

age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689) [43 USCS § 1606];

(4) "Indian child" means 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;

TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
CHILD CUSTODY PROCEEDINGS

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25 USCS § 1911

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes. The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

History:

(Nov. 8, 1978, P.L. 95-608, Title I, § 101, 92 Stat. 3071.)

TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
CHILD CUSTODY PROCEEDINGS

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25 USCS § 1912

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Examination of reports or other documents. Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision

with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures. Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child. No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child. No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

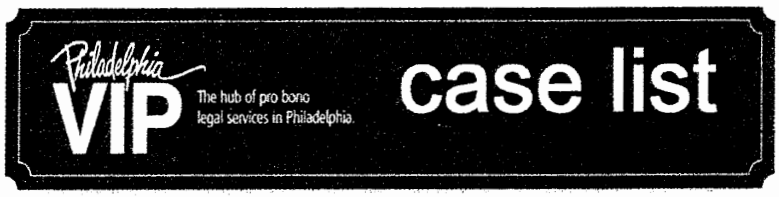
History:

(Nov. 8, 1978, P.L. 95-608, Title I, § 103, 92 Stat. 3072.)

Family Law Section
Statement of Activities
For the Two Months Ending February 28, 2010

	February	YTD 02/28/10
Sources of Funds		
Dues	$932	$3,462
Annual Dinner	0	0
Cocktail Party & Special Events	0	0
Section Lunch Meetings	136	328
Total Income	$1,068	$3,790
Application of Funds		
Annual Dinner	$0	$0
Cocktail Party & Special Events	0	0
Committees/CLE Programs	0	0
Postage	0	0
Section Lunch meetings	273	470
Reproduction	143	283
Newsletter	0	0
Telephone	0	0
List Serv/Website	0	0
Miscellaneous	0	55
Total Application of funds	416	808
Excess/(deficit) of all activities	652	2,982
Balance at beginning of period	15,661	15,661
Net Assets	$16,313	$18,643

Committees	
Adoption	$0
Custody	0
Custody and Divorce Mediation	0
Dependency	0
Divorce/Equitable Distribution	0
Domestic Violence	0
Support and Alimony	0
Total Committee	$0



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LITIGATION: **FAMILY**

Divorce
(66) **100232**
Client has been sued for divorce by her husband. Client and opposing party have been separated for over two years. Client would like to consent to the divorce and needs representation to assist her with negotiating the terms of equitable distribution and alimony. Opposing party was abusive throughout marriage, and is represented. Client would benefit from having counsel.

Guardianship/Conserv.
(59) **100233**
Client seeks assistance in guardianship of her eighty-seven-year-old mother. Client's mother lives in nursing home and suffers from severe Alzheimer's disease. Client needs representation to obtain guardianship to carry out financial and medical responsibilities for client.

RECENT PA. APPELLATE COURT FAMILY LAW SLIP OPINIONS

March 2010

Summarized by David I. Grunfeld, Esquire

1. **A.D. v. M.A.B.**, Phl., 1883 EDA 2009 (Pa. Super. 2/1/10)

Father appealed custody order declining jurisdiction here in favor of State of Michigan. Affirmed - proper finding of inconvenient forum despite provision in earlier order here allowing father to seek modification. Opinion by Fitzgerald joined by Stevens and Bowes.

2. **In Re: S.C.B. and J.G.B.**, Alleg., 840 and 841 WDA 2009 (Pa. Super. 2/17/10)

Mother appealed termination of parental rights. Affirmed - mother's G.A.L. was not present at hearing but she had counsel who did not object, so issue was waived; parental incapacity properly found here, and no expert needed for bonding issue. Opinion by Shogan joined by Bender and Fitzgerald.

3. **In the Interest of: R.J.T.**, Alleg., 269 WDA 2009 (Pa. Super. 2/19/10)

CYF appealed denial by trial court of its motion to change goal from reunification to adoption. Reversed - CYF met burden after 20 months of placement. Opinion by Shogan joined by Popovich. Ford Elliott filed a Dissenting Statement, finding no abuse of discretion and giving parents another chance.

Copies of Pa. Supreme and Superior slip opinions may be downloaded from the Internet on the homepage of the Administrative Office of the Pa. Courts, address www.aopc.org.