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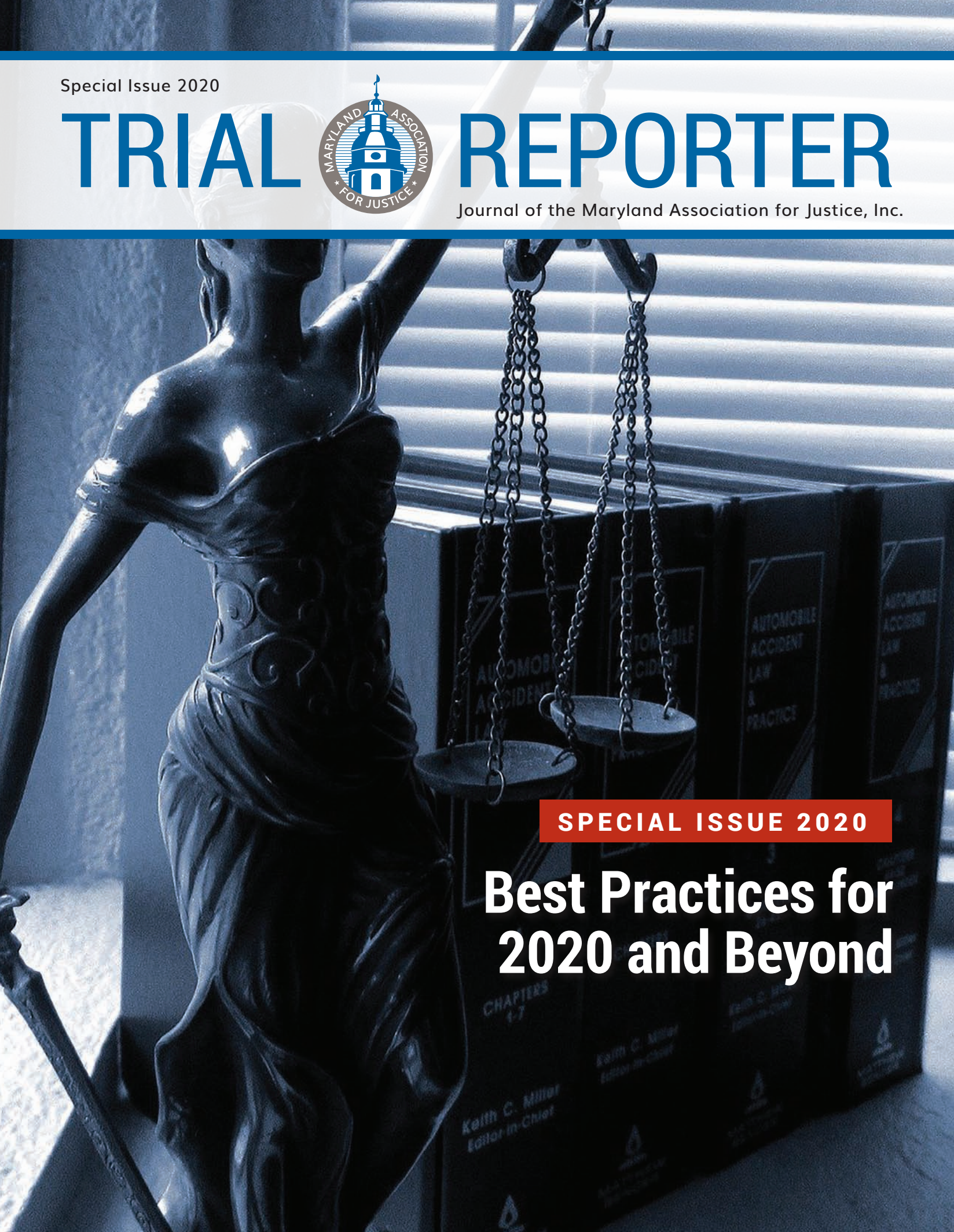

SPECIAL ISSUE 2020

Best Practices for 2020 and Beyond

Family Law 2020: A Look Back, A Look Forward and Seismic Change

By Harry B. Siegel

Maryland family law is historically slow to change. Once every ten years or so, there might be a tweak to child support or a slight change to the marital property statute. Every couple of years, an appellate case might initially appear to be the next big thing in family law before the universe settles back down.

A Look at the Present

Let us first look, not backward, not forward, but through the family law looking glass. Many of us have been hoping for a change of epic magnitude, as the proposed legislation developed by the Commission on Child Custody Decision-Making's Final Report of December 1, 2014, promised tremendous changes to how child custody and visitation would be analyzed by judges and family law magistrates, expanding the factors and providing far better guidance to the bench.

The Commission was formed to study a wide variety of topics relating to the child custody decision-making process in Maryland and to report findings and recommendations to the Maryland General Assembly. Formal draft legislation resulted from the Commission's work that would have moved Maryland's child custody decision-making process into the 21st century.

Sadly, that proposed legislation has stalled within the General Assembly under the weight of political strain and special interest groups, despite the proposed legislation's obvious merits, all stemming from the dedicated work of dozens of professionals, led by the tireless Commission Chair, the Honorable Cynthia Callahan of the Circuit Court for Montgomery County.

Perhaps the Maryland legislators will learn the value of this proposed legislation in the 2020 General Assembly and work to truly service the best interests of the thousands of children's lives impacted by the separation of their parents. However, there is a spoiler alert ahead if you read on.

A Look at the Past

Congress provided us with our look back. In 2019, the new changes to taxation of alimony took effect as a result of the Tax Cuts and Jobs Act. Within this broad sweeping legislation, of note to the family law community, alimony is no longer taxable to the recipient nor tax deductible to the obligor. Essentially, alimony is now like child support, in that it is calculated from post-tax dollars.

What did that change? Did the sky fall? Are judges unable to determine how to calculate alimony? Are family law attorneys and mediators' jobs more difficult? MAJ's Family Law Section even held a statewide seminar in November 2018, with a panel of judges and experts, all opining on the likely effects of the new alimony tax law. Well, guess what? The sky did not fall.

In fact, one could argue that calculating alimony became a bit easier, since the tax implications are somewhat already built in. Essentially, the obligor is paying the taxes and the recipient is getting free post-tax dollars.

There appear to be no reported opinions from either of Maryland's appellate courts, analyzing the impact of the new laws as of the publication of this article. This author believes that an appellate opinion under the new law will look remarkably like prior case law on the issue of the impact of alimony. Perhaps trial courts and appellate judges will be a bit more mindful of the lack of tax impact on the recipient of alimony, as well as more aware of the financial burden of the person paying alimony, that burden being taxation on the income to be used as alimony.

Divorce attorneys will likely be leaning more heavily on financial expert witnesses to explain to judges and magistrates the financial impact on the alimony obligor in appropriate cases. As most family law practitioners are aware, all judges are attorneys. Only a minority of attorneys have strong financial and analytical backgrounds. From this grouping emerges the judges and magistrates making decisions and recommendations regarding the amount and duration of alimony to be awarded in a given case. The bench can always benefit from a well-reasoned financial expert to explain the inner workings of the finances of a family, rendering opinions on the amount

and duration of alimony in any given case.

What has the outcome been in the trenches with judges, magistrates, family law attorneys and mediators? The results vary, of course, but it appears that everyone has become acutely aware that the obligor has lost a valuable tax deduction, so that person's financial situation must be heavily scrutinized as to the ability to pay alimony. On the other hand, all are now aware that for the recipient, alimony is no different from child support, as neither is taxable and both have become post-tax benefits to the recipient.

A Look to the Future

Promising a seismic change within Maryland family law, the future arrived effective December 1, 2019 uttering this simple phrase: parenting plans.

For the past few years, the Maryland Judiciary has been hard at work to solve the problem of uneven parenting plans across the state, which stemmed from many sources. Not all parents wanted a formal parenting plan. Mediators were uneven as to whether they would discuss a parenting plan with parents, and it was clear that it was not the role of a mediator to advocate for a plan within their role of allowing parents to self-determine their agreements.

Likewise, the bench varied, depending on the judge, magistrate and jurisdiction, whether a ruling would include either a formal parenting plan or informally, some or all of the elements contained therein.

As a result, we now have Maryland Rules 9-204.1, entitled Parenting Plans and 9-204.2, entitled Joint Statement of the Parties Concerning the Decision-Making Authority and Parenting Time.

Maryland Rule 9-204.1

Rule 9-204.1(a) first defines three key phrases for parenting plans: decision-making authority (what many of us call legal custody), parenting plan and parenting time (which many of us call visitation or access). This rule then requires, in section (b), that when the parents first appear in court, the court is required to provide them with the instructions and planning tools for crafting a parenting plan.

Subsection (c) sets forth, as a rule, not a statute, the decision-making factors that the parties may consider in crafting a parenting plan. This portion of the rule will prove significant. First, note within the rule that it is not binding upon judges or magistrates. It is merely a tool for the parties to consider. Of course, because of its comprehensive nature, it will become natural for judges and magistrates to become intimately familiar with these factors, which is essentially an enhancement of Maryland case law regarding child custody (i.e., *Montgomery County v. Sanders,* 38 Md.App. 406, 381 A.2d 1154 (1977) and *Taylor v. Taylor,* 306 Md. 290, 508 A.2 964 (1986).

Even more interestingly, note how some of the factors set forth in this rule bear a striking resemblance to the proposed legislation mentioned above, resulting from the work on the Commission on Child Custody Decision-Making's Final Report.

Clearly, this was not by folly. As the Maryland Legislature has been unable to enact the proposed legislation resulting from the Commission, the Judiciary has stepped forward in an effort to assist families and recognize the efforts of the Commission.

Moreover, even though this rule is not "binding" upon the courts, we will likely all learn that judges and magistrates throughout the State of Maryland will be heavily relying upon these factors to aid in determining the best interests of the children over whom the courts are required to exercise *parens patriae*.

Maryland Rule 9-204.2

This is where the revolutionary fun begins in Maryland family law. From this point forward, if the parents fail to reach a voluntary "comprehensive" parenting plan, they are required to file a brand-new document, called a "Joint Statement of the Parties Concerning Decision-Making Authority and Parenting Time" with the court. If it sounds like this is surprisingly similar to a Joint Statement of Assets of the Parties under Maryland's Monetary Award Statute, found within FL Sections 8-201-8-205, that is because it is! The form of the statement has been provided and is available on the Judiciary website.

Section (c) of the rule requires the Joint Statement to be filed with the court at least 10 days before a Settlement Conference and at least 20 days before trial. The process for preparing it is similar to the Joint Statement of Assets and it is further detailed within this rule.

Section (d) of the rule is interesting, of course, as it "requires" the trial judge, prior to rendering its decision, to consider the entire Joint Statement. It then "allows" the trial court to "consider" the factors discussed in Rule 9-204.1(c), a clear indication that the trial court "should" consider those factors without actually "requiring" a review of those factors.

Finally, section (e) affords the court with the ability to sanction a non-compliant party. This process is good. It will help families, at all stages of litigation, identify and work through parenting plans.

There will be challenges. First, the due date of the parenting plan relates solely to the trial. Of course, the court can fix a different date. Let's say a magistrate wants a parenting plan document for a *pendente lite* hearing. There is no provision under the rule for a *pendente lite* parenting plan, but that would not stop the court from creating such an obligation.

Second, what about high conflict cases? Do the same rules apply where there is supervised access, no access?

Third, will this rule apply to final protective orders? It actually could. The two new rules do not limit themselves to any type of a custody action, although it is important to note the placement of the rule—which is not a statute—is within Title 9 of the Maryland Rules of Procedure, which is entitled Family Law Actions and Chapter 2 within the Title is entitled Divorce, Annulment, Alimony, Child Support and Child Custody.

A protective order affords a judge the ability to order both child custody and access for the other parent. In an interim or temporary protective order, will there be a provision requiring the court to provide parenting plan documents to the parties? Will the judge presiding at the final protective order hearing be empowered to enter a parenting plan? Could that judge sanction a party for willfully failing to comply?

The Forms

Within the Maryland Judiciary's website, there is a tab where forms can be located. Each form is titled for easy reference. The forms are found at mdcourts.gov. These forms are fillable and in the context of this article, instructive.

The Maryland Parenting Plan Tool

The first form is found at CC-DR-109, which is its form designation. It is entitled the Maryland Parenting Plan Tool. Essentially, this is the worksheet which becomes the Parenting Plan, which the parties will ultimately execute. It can be filled out by the parties themselves, through a mediator or through counsel. After the initial information regarding the parties and their children, the form is divided into seven distinct sections:

- Decision-Making Authority
- Parenting Time
- Transportation and Exchange of the Children
- Communication Between the Parents and Children
- Child Care
- Disputes (Which Actually Means Dispute Resolution)
- Other Issues

Each section is fully developed with sub-topics to be addressed by the parties. For example, in the first section entitled decision-making authority, there are subsections for the following topics to be discussed and decided upon:

1. Parental Responsibility
2. Communication Between the Parties
3. Information Sharing
4. Schooling
5. Extracurricular Activities

Each sub-topic is further broken down into subparts and that applies to each of the other topics within the form. It is intended to be comprehensive, but it recognizes within its "Other Issues" section that no form can contemplate each and every topic and issue for each and every family.

Notably missing is a serious conversation regarding religious holidays, which only merits two lines within the Holiday Schedule subsection of the Parenting Time section of this document. It will almost invariably require a much longer discussion and more space to make decisions about how religion and religious holidays, events and milestones will be covered by the parents.

This highlights the real church and state issues with which the courts are familiar, but frankly, since this form is supposed to be between the parents, far more attention and focus is warranted than what the form presently lists. As a practice pointer to family law attorneys and mediators, just be aware of this deficiency and do not short-change this topic.

Presumably, this document will then be filed with the court, which makes it public information. This is a major flaw within the Rule, as this document should be a sealed document. Frankly, so should a Joint Statement of Assets, as well as every Separation Agreement executed, as the

ability to misuse these documents clearly outweighs any public need for public disclosure of the contents of these documents. Well, that perhaps is a fight for another day.

The Joint Statement of the Parties Concerning Decision-Making Authority and Parenting Time

This form is found at CC-DR-110, as titled above. It is the functional equivalent to the Joint Statement of Assets, just for parenting plans, pursuant to the terms and conditions set forth above.

Section 1 describes where the parties agree with regard to a proposed parenting plan. This is the easy part of the plan to draft.

Section 2 requires the parties to detail each area where the parties disagree, providing the proposal of each party on each topic. Parenthetically, there is a gratuitous add-on, stating "attach additional sheets if needed," referring to each party's respective proposals, by topic.

The rules, draft forms and even the additional document labeled Maryland Parenting Plan Instructions provide absolutely no guidance as to how to fill out the portion of the Section 2 regarding the parents' respective proposals for areas not agreed upon.

Should a parent just describe what he or she wants? Should rationale be included? Should examples be included? Is this merely a few words? Is it a three-page attachment, fully describing what that parent wants? Is it a fifteen-page attachment, fully describing what that parent wants, why and including examples as well as witnesses who will support the proposal and object to the other parent's proposal? Will this become a cut and paste of Answers to Interrogatories?

Will specific judges and magistrates vary as to how much or how little, detail they each want with regard to the areas of disagreement? Will jurisdictions add better guidance to their local rules?

These are the questions engendered by a new plan that includes no real guidance, except for a simple brochure that appears to be drafted for pro se litigants, mediators and non-contentious cases. In other words, perhaps it is a bit too cookie cutter for now.

The trap for the wary family law practitioner is clear: if you fail to include all relevant details, your client may be stopped from arguing those points; conversely, by including far too much detail, you may raise the ire of the court, who might have been looking for merely a list.

Practice Pointers

Knowledge is power, right? So far, that knowledge is scant regarding the new rules, but many jurisdictions are holding seminars with attorneys, judges and magistrates, explaining how their jurisdiction will likely employ these new rules. Have attorneys from your firm attend CLE's and use listservs to share your jurisdiction's experiences with your colleagues across the state.

The best strategy for now is to ask a lot of questions. Here is a partial list:

a) Will the 9-204.2 form be required for an emergency hearing on custody and access?

b) How about for a *pendente lite* hearing?

c) How much or little detail does the court want on those areas not agreed upon?

d) How should the form be filled out in high conflict cases that involve prayers for relief of supervised visitation, suspended visitation or terminated visitation?

e) What is the role of the Best Interest Attorney (hereinafter referred to as "BIA") or Child Advocate in filling out the form, as the rules fail to mention them altogether? In fact, since the rule targets "parties," does that mean court-appointed attorneys have been specifically excluded from the process? If so, why?

As to the latter issue, the court-appointed BIA or Child Advocate should actively be involved in this process despite their omission within these two new rules. First, the court is likely going to want to hear from them. Second, they are likely to have definite views.

Here is the conundrum that faces the BIA or Child Advocate. That person's opinion should be based upon the evidence adduced at trial and often, that opinion does not exist at the time the Joint Statement is due. So, how can the court appointed attorney fill out the form?

Quite simply. For those areas where the court appointed attorney agrees with the parties, it can be so noted within the Joint Statement. If the court appointed attorney disagrees, it can also be so noted, but with an additional statement to the effect of "your court appointed attorney requires hearing of the evidence before having an opinion on this issue, which shall be addressed in closing argument."

None of this undermines the effectiveness of the court appointed attorney in making settlement

suggestions to the parties, as they will not be admissible in court.

Conclusion

Parenting plans are here to stay. They provide helpful guidance to many families. These new rules are in their infancy. There will be growing pains. There are serious omissions and there is no process for either (a) parents to parent their children as they see fit, as opposed to being forced within the "boxes" created under these rules or (b) parents to amend the plans as issues change with their children from time to time without being forced to spend money to draft a new plan and have it filed with the court.

There remain serious issues surrounding lack of confidentiality that must be addressed by the courts.

Finally, the role of the family law magistrate with the *pendente lite* hearing needs to be addressed quickly by the court or by each jurisdiction individually, so that counsel and parties to litigation can benefit from that guidance (and that is not including the above issue of whether parenting plans will be required at a final protective order hearing).

The court and counsel should continually discuss all issues that arise with the implementation of these new rules to address all of the issues within this article in order to best serve Maryland families.

Biography

Harry B. Siegel has more than 30 years of experience in all aspects of family law at his firm is in Ellicott City, Maryland with a statewide family law practice. His expertise includes divorce, custody, pre and post-nuptial agreements, child support, domestic violence and appellate litigation. The founder and long-time chair of the MAJ Family Law Section, he represents clients and lectures attorneys and other professionals on all aspects of domestic law.