DV LEAP

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April 22, 2011

Gerald S. Hartman, Esq.
Vice President
Barbara MacDowell and Gerald S. Hartman Foundation
Drinker, Biddle & Reath, LLP
1500 K St. N.W.
Washington, D.C. 20005

Re: DV LEAP Six-Month Grant Report

Dear Mr. Hartman:

DV LEAP is very grateful to the Barbara McDowell and Gerald S. Hartman Foundation for its support of our work on the case of *E.J. v. D.J.* in the D.C. Court of Appeals.

Background

As we noted in our proposal, victims of abuse are surprisingly often denied protection and their legal rights at trial. Because appeals of these unjust outcomes are so rare, trial courts have operated with little accountability. Few litigants can afford an appeal, which is why DV LEAP was launched – to provide *pro bono* representation for appeals in domestic violence cases, both in the District of Columbia, around the country, and in the Supreme Court. In our background research we learned that of all published custody/abuse appeals as of approximately 2000 (almost all of which had awarded joint or sole custody to the batterer) 2/3 of these decisions were reversed on appeal. Two other studies also found that appeals courts are remarkably effective at remedying injustices in civil and criminal domestic violence appeals.

Consistent with these studies, DV LEAP has been successful in 10 out of 12 of its cases in the D.C. Court of Appeals. Unfortunately, the *E.J.* appeal was not one of our successes.

The Funded Litigation - *E.J. v. D.J.*

In the proposal we sought support for work on two cases which followed on to a major victory we had previously achieved, in *Wilkins v. Ferguson.* In *Wilkins,* the D.C. Court of Appeals, in its first decision construing the domestic violence provisions of the DC custody statute, emphatically held that child safety is the first priority in custody litigation with abuse allegations, and that the provisions mean exactly what they say – when they create a presumption against custody or unsupervised visitation to a batterer.

Our two consolidated appeals in *E.J. v. D.J* presented a more challenging case factually but included the failure of the trial court – as in *Wilkins* - to even invoke or apply the key statutory provision, D.C. Code Sec. 16-916(a-1). The first of the two appeals involved the trial court's mis-application of the domestic violence provision of the D.C. custody statute, in which it found that the presumption against *joint* custody was rebutted by the fact that one child was "alienated" from her father – despite evidence that the child's hostility was at least in part caused by the father's abusive behaviors to herself and her mother. This kind of misuse of "alienation" theory is increasingly common in family courts across the country, but it was the first time to our knowledge that a D.C. court had so explicitly endorsed alienation as a reason for ignoring past abuse. DV LEAP's appeal on this issue first challenged the trial court's complete failure to even invoke the other domestic violence provision (a-1) in the statute, which requires courts to assess safety of mother and child once an intrafamily offense has been found, and shifts the burden of proof to the perpetrator. It also challenged the misuse of alienation theory to rebut the presumption against joint custody. The DV LEAP brief also explicitly described how alienation theory is misguided and misused in cases like these.

The Court of Appeals nonetheless chose to uphold the trial court's ruling on the merits, stating that the court's careful listing of all of the "best interests" factors in the custody statute indicated the thoroughness of its opinion, that its rebuttal of the joint custody presumption applied equally to the other (stronger and more specific) dv presumption and that the court did not need to expressly analyze either. Finally, the Court held that the best interest factors were impliedly part of the rebuttal analysis, even though the trial court expressly mentioned only "alienation" in explaining why the presumption was rebutted.

The second part of the case, which the Court of Appeals consolidated with the first, concerned the appointment of a "parenting coordinator" ("PC") (who is expected to work with the parties to resolve continuing disputes) despite the lack of any authorizing law, rule or guideline. As noted in our proposal, parenting coordinators often play a problematic role in domestic violence cases, by minimizing the abuse and expecting/demanding that the parents work together and collaborate as parents. DV LEAP's arguments challenged the constitutionality of the delegation of authority to the PC, the appointment of a PC over objection of one litigant, the appointment in a domestic violence case, and the requisition of the mother's child support funds to pay the PC.

Despite some powerful arguments and very well-researched briefs and argument by DV LEAP's pro bono partner at Jones Day, the Court of Appeals also upheld the PC appointment, holding essentially that no authority is necessary, that the PC's power was limited to "day to day" decisions surrounding the child (which did not reflect either the trial court's order or the PC's actual decisions in the case), and that the other issues were waived below and did not qualify as "plain error."

We do not believe it is a coincidence that one of the appellate judges, and by far the most vocal, was a fairly new Superior Court judge sitting by designation with the appellate court. Her hostility to the parenting coordinator challenge was palpable, and her strong inclination to defend the trial court's decision process and authority was also notable. However, DV LEAP believes that the dominant problem this appeal presented was that DC courts, like those around the country, are strongly inclined to defer to so-called "experts" in custody battles of this sort. Unfortunately, these "experts" too often lack expertise in abuse and, as in this case, minimize and dismiss obvious reasons for a child's "alienation" that flow from abusive conduct by the father, while over-emphasizing a mother's hostility or, as in this case, *fear* (which may legitimately flow from her victimization) as the source of the children's problems.

Sadly, we suspect that the remaining PC on the case is going to recommend a complete custody switch from the mother to the father on the grounds that her "alienation" of the older child cannot be "cured" while she still has custody. To date no one has really listened to this child, who is clear that she is angry at her father because he has lied about what he has done, and because he shook her in anger on their first unsupervised visit (notably, the same kind of abuse he inflicted on her mother). Unfortunately, the trial court seems poised to do whatever the PC recommends. We are assisting the mother with finding counsel, but because her employment has been somewhat disrupted by this economy, and so much of her child support has gone to the PC's, she lacks the funds to retain a private lawyer, while as an employed professional she cannot receive legal aid.

Work Performed

As described in our proposal, this grant was received at the time when a reply brief in the PC appeal, and preparation for and delivery of oral argument in both consolidated appeals, remained to be completed. We also anticipated distributing the briefs for use by advocates around the country. (We also previously worked with amici based in NY, who developed a supportive amicus brief which was signed on to by the D.C. Coalition Against Domestic Violence and other local groups.)

Substantial work was provided both by DV LEAP's Director, who handled the "merits" appeal, and by our *pro bono* partner, Kerri Ruttenberg, Esq., at Jones Day LLP, who handled the PC appeal. Ms. Meier both prepared intensively for the argument and assisted Ms. Ruttenberg in her preparation in some depth. Both arguments were mooted (Ms. Ruttenberg's by phone; and Ms. Meier's twice in person) with some of DV LEAP's longstanding *pro bono* partners from Arnold & Porter and Bingham LLP, both individuals with experience in our custody/abuse litigation. We were also pleased to receive some assistance from the Appellate Project at Legal Aid Society (the prior Director mooted Ms. Meier). Or course both counsel delivered oral argument, and have engaged in follow-up, including careful analysis with our consultants of whether a *cert petition* to the Supreme Court was viable. (We concluded not.)

Despite the unfavorable outcome of this appeal, DV LEAP's appellate briefs have already been quite useful elsewhere. One leading expert in the domestic violence field wrote the following about the merits brief:

I just have to tell you that I think this brief is stunning in how articulate it is, how thoroughly it covers each of the points typically made in these cases, and how brilliantly it shows the absurdity of each of the pro batterer arguments. This is terrific. I hope we can get it to every attorney in the country who represents protective mothers... it is an incredible resource. The framing of the arguments is absolutely perfect. I am in awe. The brief is also an amazing training tool. We have to get it to people who teach family law, and to domestic violence legal clinics." -- Lundy Bancroft

The parenting coordinator brief – written primarily by Ms. Ruttenberg with assistance from Professor Meier, also received high marks from one of the more critical lawyers in our field, Liz Kates, from Florida, who posted it on her website and thought it would be very helpful to others seeking to challenge Parenting Coordinator appointments.

We are disappointed to not have better news about this case – but we, perhaps not surprisingly, do have more plans: We are going to explore within the domestic violence community developing a proposal to amend the custody/dv statute to make its requirements more explicit so that courts cannot again essentially interpret it away in deference to the trial judge. We may also try to organize with the community on parenting coordinator policy.

Notably, we just accepted and placed with *pro bono* counsel, yet another case in which the DC Superior Court judge failed to apply the domestic violence protective provisions in the custody statute. This appeal will give us another chance to minimize the harm from the *EJ* opinion and to try to bring the Court of Appeals back on board with the *Wilkins* decision and this important statute.

Sincerely,

Joan S. Meier,
Executive Director
DV LEAP

Enclosures