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COMMUNICATIONS FROM COUNSEL TO CLIENT ARE PRIVILEGED, PA COURTS CONFIRM *By Donald Kaufman and Alexis Snyder*

Until recently, under Pennsylvania law, while the attorney-client privilege applied to communications *from the client to the attorney*, it did not necessarily apply to communications *from the attorney to the client*. The Pennsylvania Supreme Court declared in February that the attorney-client privilege protects both communications from a client to an attorney and communications from an attorney to a client. In *Gillard v. AIG Insurance Co.*, the Court clarified Pennsylvania's stance on the attorney-client privilege by expressly finding that the privilege is a "two-way street." *Gillard v. AIG Insurance Co.*, 2011 WL 650552 (Pa. Feb. 23, 2011).

The Gillard case involved an insurance bad faith claim. *Id.* at *1. During discovery, the plaintiff sought production of documents from the files of the insurance company's law firm. *Id.* The insurance company declined to produce documents created by its attorneys, asserting that those documents were protected by the attorney-client privilege. *Id.* The trial court ordered the insurance company to produce the documents, finding that the attorney-client privilege did not cover documents created by the attorney and provided to the client unless the documents revealed prior communications from the client to



the attorney. *Id.* at *2. On appeal, the Superior Court agreed with the trial court that the attorney-client privilege is a "one-way street." *Id.* at *3-4. Both of the lower courts applied a narrow interpretation of the applicable section of the Judicial Code, which states, "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. C. S. § 5928.

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The Supreme Court, however, disagreed with the lower courts. After discussing several inconsistent Pennsylvania cases interpreting the privilege's scope, the Court identified two competing interests: "the encouragement of trust and candid communication between lawyers and their clients, . . . and the accessibility of material evidence to further the truth-determining process." *Id.* at *9. The Court explained that a "derivative privilege" was already employed to protect attorney-to-client communications to the extent that they revealed earlier client-to-attorney communications. *Id.* at *10. The Court "recognized the difficulty in unraveling attorney advice from client input and stressed the need for greater certainty to encourage the desired frankness" in communications between attorneys and clients. *Id.* Ultimately, the Court held that "in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Id.*

The Supreme Court's ruling in *Gillard* will alleviate the concern that, merely because the communication was attorney-to-client rather than client-to-attorney, the attorney's communications may be required to be disclosed in future litigation. ■

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SIGNIFICANT CHANGES TO PA CUSTODY LAW

By Anthony Hoover

A new Custody Act has been enacted that changes the way Pennsylvania courts decide child custody disputes. Passed into law on November 23, 2010, the new Custody Act governs custody proceedings filed after January 24, 2011. Custody proceedings commenced before the effective date will still be governed under the former custody statutes and prior case law.

Many changes were made to the way custody disputes are addressed in Pennsylvania. Below are a few significant changes made under the Act.

Factors Considered by the Court

Before the new Custody Act, most of the factors considered by a court in awarding custody were stated

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in prior case law. Under the new Custody Act, a court is required to consider sixteen factors and give weight to factors which affect the safety of the child. Some of the factors include which party is likely to encourage contact with the other party and the history of drug or alcohol abuse of a party or a member of a party's household.

Effect of Criminal Record

Under the former Custody Act, there were two separate lists of criminal offenses. If a parent was convicted, plead guilty or no contest to an offense in the first list, the court was required to appoint a professional to provide counseling to the offending parent. If a parent was charged with an offense listed in the second list, the court was not required to appoint a counseling professional, but was required to take the offense into consideration.

Under the new Custody Act, there is only one list of criminal offenses, and the list applies not only to parents, but to any party to the action and all members of a party's household. When a party or a household member has been convicted, pled guilty or no contest to an offense, the court must provide for an evaluation to determine if there is a threat to the child. Based on the evaluation, a court may order additional counseling if necessary. If a party or household member is charged with an offense, the opposing party may file for temporary custody, and the court is required to hold an expedited hearing to consider whether there is a risk of harm to the child.

The new Custody Act added several offenses that were previously not listed. Notable new offenses include

terroristic threats, driving under the influence and certain drug related offenses.

Presumption in Favor of Parent

The new Custody Act clarified that there shall be no presumption that custody should be awarded to a particular parent. However, when there is a dispute between a parent and third party, the new Custody Act creates a presumption that custody shall be awarded to the parent and such a presumption can only be rebutted by clear and convincing evidence.

Parenting Plan

The new Custody Act states that courts MAY require litigants to file a Parenting Plan.

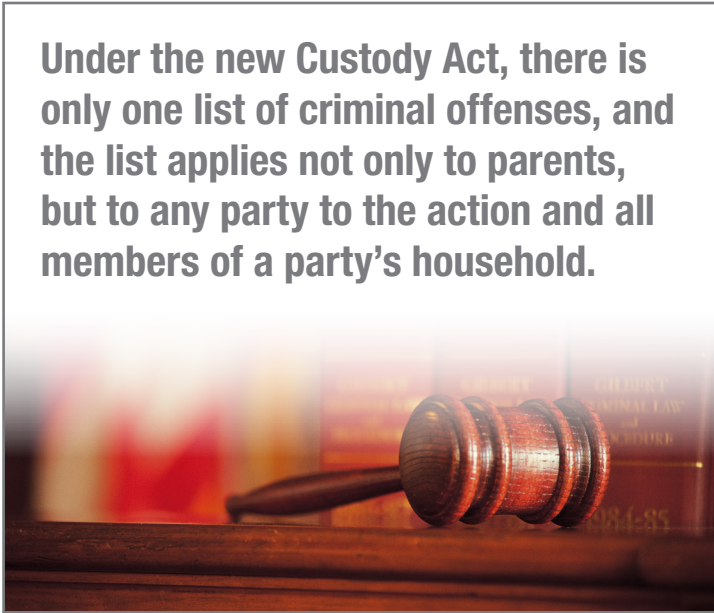
A Parenting Plan requires the parties to discuss basic elements of the child's schedule, such as holidays, routine schedule, and

vacation. Additionally the parties discuss matters including diet, sports and activities, type of discipline, choice of school and religion.

Relocation

Under the former Custody Act, if there was a dispute regarding a custodial parent's relocation with a child, the relocating parent was required to file either a complaint or a petition for modification. The relocating parent would be required to meet the three factors of the 1990 case *Gruber v. Gruber*.

The new Custody Act changes the procedure and the factors required for a parent to relocate with a child. Procedurally, the relocating parent must provide notice to every individual who has custody rights of the child.



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After notice is given, the non-relocating party is given the opportunity to object to the relocation and seek a temporary or permanent order preventing the move.

A significant change from the old Custody Act to the new Custody Act are the factors considered by the court in making the relocation determination. Formerly, the court followed the three factors listed in *Gruber v. Gruber*. Under the new Custody Act, the court will now

consider ten factors to determine whether a parent is permitted to relocate outside of the jurisdiction. ■



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