MEMORANDUM

TO: JOAN MEIER; ELIZABETH LIU

FROM: SARA SCHROTH, DV LEAP INTERN

SUBJECT: DUE PROCESS AND CUSTODY INVESTIGATION REPORTS; A PARENT'S RIGHT TO READ AND CHALLENGE

QUESTION PRESENTED

Is a court's refusal to allow a parent to view a custody investigation report that is relied on by the court in a custody decision a violation of the parent's due process rights under the U.S. Constitution?

BRIEF ANSWER

Yes. The uniform view that has been taken by courts addressing the issue is that absent consent or waiver, it is error for a court to admit and consider a custody investigation report[1] without affording the parties an opportunity to read and challenge it. Due process requires that if a court bases its custody decision, even in part, on an independent report, the parties, or their attorneys, must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain.

[1] "Custody investigation report" is used by the Maryland Court of Special Appeals in *Denningham v. Denningham* to describe a report prepared by the Court's Mental Hygiene Consultation Service evaluating everyone in the family and filed with the court in connection with the divorce proceedings. 49 Md.App. 328, 335, 431 A.2d 755 (1981), cert. denied, 291 Md. 773 (1981), cert. denied, 455 U.S. 990 (1982). Describing this terminology the Court states, "It is evident ... that this investigation, and the report, was ordered primarily in connection with the issues of custody and visitation; and we shall hereafter refer to it as the 'custody investigation.'" *Id.* at 329, 755. *Van Schaik v. Van Schaik* cites to the "custody investigation report" standard from *Denningham* applying it to a report from a guardian ad litem to the trial judge, filed as confidential with the court. 90 Md. App. 725, 736, 603 A.2d 908 (1992). The type of report is specified throughout the case descriptions in this memorandum, but the term "custody investigation report" is used broadly to describe these evaluative reports because this language is used to describe "the uniform view" of courts in *Denningham. Denningham, supra*, at 336, 759 (citing to cases from Oregon, Illinois, Kentucky, DC, Florida, Minnesota, New York, Wisconsin and Kansas that are also addressed in the memorandum).

DISCUSSION

I. Background & Policy Arguments

In child custody proceedings, custody investigation reports are often requested by the court, allowable by state statute, to assist in the courts custody determinations. Problems arise where the court or evaluator does not wish to expose the contents of the report to a party to the custody proceedings. Courts have weighed the importance of confidentiality of the contents of custody investigation reports versus the parties' right to read and challenge the evidence in the report. On the one hand, whether conducted by probation, social service, or medical agencies, custody investigation reports nearly always contain material that is sensitive and highly personal, material that ought to be kept confidential. *Denningham v. Denningham,* 49 Md.App. 328, 335, 431 A.2d 755 (1981), cert. denied, 291 Md. 773 (1981), cert. denied, 455 U.S. 990 (1982). Medical data, psychiatric opinions, details pertaining to lifestyles and intimate relationships are often recorded, as are the results of interviews with the children whose custody is at issue. *Id.* That is why, in most cases, these reports are submitted to the court under seal and are dealt with differently than other exhibits in the case. *Id.* It is also why the court may, in some instances, have a serious concern about allowing even the parties to see the contents of the report. *Id.*

The counterweight, however, is that these reports consist largely of hearsay declarations – often double – or triplelevel hearsay – as well as opinions of various social workers, medical or paramedical personnel, psychologists, teachers, and the like, which may or may not have a reasonable basis. *Id.* Statements contained in a custody investigation report have no special indicia of reliability. *Id.* at 335-36. They are generally not under oath and often emanate from people having overt or covert bias. *Id.* at 336. In many instances, the statements represent subjective feelings and perceptions rather than objective observations or empiric data. *Id.* Their

usefulness to the court is only as strong as their reliability, and that requires that they be subject to challenge in essentially the same manner as any other critical evidence. *Id.*

As the Court of Special Appeals of Maryland explained:

> We must approach the use of custody investigation reports with a certain balance. The opinions of this Court and the Court of Appeals are replete with statements encouraging chancellors to utilize such reports and attesting to their value in arriving at custody determinations ... Indeed, it is the very reliance placed on these reports that creates the problem.

Denningham v. Denningham, 49 Md.App. 328, 335, 431 A.2d 755 (1981), cert. denied, 291 Md. 773 (1981), cert. denied, 455 U.S. 990 (1982).

II. Legal Standard

Relevant issues addressed by courts when the ability to review or challenge custody investigation reports is raised on appeal, varying by statute and state precedent, include: (1) notice to parties of report or investigation; (2) whether review of report or cross-examination of evaluator was requested or waived by the party; (3) if the report is reviewed and cross-examination is requested, whether cross-examination of evaluator was allowed; (4) whether the failure was prejudicial or harmless error. The standards for providing notice to parties that reports are available for review and the parties' ability to cross-examine the evaluator can be set forth in state statutes for family law or evidence procedures.[2] A survey of relevant state case law

[2] For example, Mass. Gen. Laws ch. 119, § 21 allows any party to call the investigator as a witness and to cross-examine him, and that such reports are admissible only where parties have the opportunity to refute incorrect information.
Ohio Rev. Code Ann. § 3109.04(C) provides that the report of a court appointed investigator shall be made available to either parent or his counsel of record not less than five days before trial, upon written request and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. Ohio R. Civ. P. 75(D) provides that on the filing of a complaint for divorce, where minor children are involved, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action. The report of the investigation shall be made available to either party or their counsel of record upon written request not less than seven days before trial. The report shall be signed by the investigator and the

on this issue follows. Each case was shepardized for negative and more recent case law and any relevant findings are included.

A. Maryland

In 1992, the Court of Special Appeals of Maryland vacated a lower court's custody decision because of a due process violation, where the termination of the father's joint custody rights was based upon a psychological report of the child to which the father had been denied access. *Van Schaik v. Van Schaik*, 90 Md. App. 725, 736, 603 A.2d 908 (1992). In that case, the father had discharged counsel, and the court notified the father's prior counsel of the availability of the guardian ad litem's report, but Mr. Van Schaik's prior counsel did not inform him of the court's notice of the report. Because the report was taken into consideration in the custody determination, the father's lack of notice of the report and ability to review and challenge it was prejudicial. The GAL's argument in favor of confidentiality of the report was her concern that the child would suffer consequences from his father if the report were sent to him. The Court noted that nowhere in anyone's report was there any allegations of any sexual, physical or serious mental abuses of the minor child by either parent. *Id.* at 735, 913. The Court relied on the *Denningham* precedent, as previously cited, holding:

> "Due process" ... requires that if a court bases its custody decision, even in part, on an independent report, the parties -- or their attorneys -- must be given the opportunity to examine the report and must be allowed the opportunity to cross-examine the investigator and to produce outside witnesses to establish any inaccuracies the report may contain. However sensitive the material may be, a party has a right to know what evidence is being

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investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

N.J. Ct. R. 5:8-4 requires: The written report of an investigation made pursuant to this rule shall be filed with the court, shall be furnished to the parties, and shall thereafter be filed in the office of the Chief Probation Officer. The report shall be regarded as confidential, except as otherwise provided by rule or by court order. The report shall be received as direct evidence of the facts contained therein which are within the personal knowledge of the probation officer who made the investigation and report, subject to cross-examination of him.

> considered by the court in judging his cause. A custody case can no more be tried and decided upon secret ex parte evidence than any other proceeding.

Van Schaik v. Van Schaik, 90 Md. App. 725, 737, 603 A.2d 908 (1992). Accordingly, the Court found that the lower court's failure to make the report available to the father was a violation of due process. Given that the lower court based its findings solely on the report and the appellant did not have the opportunity to cross-examine the evaluator, the court found the error was not harmless. *Id.* at 738.

The usefulness to the court of custody investigation reports is only as strong as their reliability and that requires that they be subject to challenge in essentially the same manner as any other critical evidence. *Denningham, supra,* at 759. In *Draper v. Draper* the Maryland Court of Appeals explained, "Certainly, if it is error to deny the right to cross-examine the author of the report, it is even more blatant and grievous error to hide the report entirely from the parties and yet rely on it in making a decision." *Draper v. Draper*, 39 Md. App. 73 (1978). The Court in *Denningham* applied this standard and noted the standard is "the uniform view that has been taken by courts addressing the issue." *Denningham v. Denningham,* 49 Md.App. 328, 336, 431 A.2d 755 (1981), cert. denied, 291 Md. 773 (1981), cert. denied, 455 U.S. 990 (1982). Applying the standard the court set forth that absent consent or waiver, it is error for a court to admit and consider[3] a custody investigation report without affording the parties an opportunity to read and challenge it. *Id*; *see Kightlinger v. Kightlinger*, 439 P.2d 614 (Ore. 1968); *Williams v. Williams*, 130 N.E.2d 291 (Ill. App. 1955); *Lewis v. Lewis*, 534 S.W.2d 800 (Ky. 1976); *Gilmore v. Gilmore*, 341 N.E.2d 655 (Mass. 1976); *Mazur v. Lazarus*, 196 A.2d 477 (D.C. 1964); *Scott v. Scott*, 415 A.2d 812 (D.C. 1980); *Oltmanns v. Oltmanns*, 121 N.W.2d 779 (Minn. 1963); *In Re*

[3] Notably, the Court uses the word "consider" and not "rely" when describing the uniform view that has been taken by courts addressing this issue.

S___ M___ W___, 485 S.W.2d 158 (Mo. App. 1972); *Hosking v. Hosking*, 318 So.2d 559 (Fla. App. 1975). *Cf. Kesseler v. Kesseler*, 225 N.Y.S.2d 1 (N.Y. 1962); *Larson v. Larson*, 140 N.W.2d 230 (Wis. 1966); and *Eastman v. Eastman*, 626 P.2d 1238 (Kan. App. 1981). *See also Cornwell v. Cornwell*, 244 Md. 674 (1966).

It is important to note, however, in *Denningham*, the error in withholding the reports from the appellant father was found to be harmless despite the court's recognition that the error was "of constitutional dimension." *Denningham, supra,* at 337. The court distinguished this case from the cases cited in the opinion, explaining that unlike the cases where the reports relied on include statements or opinions of third parties, the reports withheld here were from interviews with both parents and the children. Furthermore, the court noted that there was a heavy burden for appellant to demonstrate a strong reason affecting the welfare of the children in order for a custody change. Given there was no evidence that the children were not being properly cared for or that their needs were not being adequately met by their mother, the error in withholding the reports from the father was found harmless. *Id.* at 338.

Arguably, however, the case is even stronger for allowing review and cross-examination when the individuals whose statements and opinions are included in the report are those of the parents and children. Considering personal interests will inform responses to certain questions, the need for review of the report and cross examination of the evaluator is heightened to preserve a parent's due process rights. As stated in *Van Schaik v. Van Schaik*, "A custody case can no more be tried and decided upon secret ex parte evidence than any other proceedings." 90 Md. App. 725, 737, 603 A.2d 908 (1992).

B. District of Columbia

In the District of Columbia, the ability to review and challenge custody investigation reports was considered a violation of due process where a report was received and considered by the court after trial, with no opportunity for the parties to read them or to cross examine the persons who prepared them. *Scott v. Scott*, 415 A.2d 812 (D.C. 1980) (reversing the award of custody and remanding the case for further proceedings in accordance with the opinion). The Court explained:

> Under a recognized and established practice, the courts of the District of Columbia sometimes call to their aid experienced and disinterested trained social workers in the Department of Public Welfare to make unbiased examinations of the qualifications of those seeking custody of children and the circumstances of the children themselves, but it has never been the practice to receive such reports after trial with no opportunity for the parties to read them or to cross examine the persons who prepared them. There is an obvious and fundamental unfairness in receiving evidence in this manner for it violates due process requirements.

Id. at 813. Notably, the Court clarified that the same due process violation is present whether the court relied only upon the report and recommendation or whether it merely considered them in arriving at a decision on a custody award. *Id.* (citing *Mazur v. Lazarus*, 196 A.2d 477, 479 (D.C.App., 1964)). The Maryland Special Court of Appeals cites to *Mazur* in *Denningham v. Denningham* as one of the cases informing the "the uniform view" that absent consent or waiver, it is error for a court to admit and consider a custody investigation report without affording the parties an opportunity to read and challenge it. *Denningham*, *supra*, at 336.

C. Oklahoma

In 2007 the Oklahoma Supreme Court found a violation of due process of law where a father's fundamental rights to the care, custody, companionship, and management of his children

were violated by Okla. Stat. tit. 43, § 107.3(A)(2)(e) because it kept him from cross-examining a guardian ad litem in a custody dispute. *Kelley v. Kelley*, 2007 OK 100; 175 P.3d 400 (2007).

Prior precedent relied on included the case of *Malone v. Malone*, where the Oklahoma Supreme Court found the trial court violated a father's right to due process by changing custody after receiving an "in-home" study of the mother's home and not giving the father an opportunity to review the report or cross-examine its authors. 1979 OK 21, 591 P.2d 296, (1979). The court explained:

> Due process requires an orderly proceeding adapted to the case in which the parties have an opportunity to be heard, and to defend, enforce and protect their rights. An action involving the change of custody of minor children from one parent to another is a judicial proceeding and must be conducted in a strictly judicial manner. The decision is to be rendered by the judge only upon evidence properly before him. An investigator may not make a secret report. There is no back door to the courts for witnesses, investigators, or litigants. Reports of experts are aids to the court in contested custody matters. However, it must be borne in mind that they are only aids, and, if they are not woven into the fabric of the record, they should not form the basis for a decision. If such reports are taken into consideration by the court, they must be made available to counsel, and the preparers thereof subject to cross-examination.

Id. at 17-18.

D. Kansas

A 1981 Kansas custody decision was reversed and remanded for failing to make an investigative report available to the father. *Eastman v. Eastman*, 6 Kan. App. 2d 137 (Kan. Ct. App. 1981). The court found the failure a due process violation. *Id.* Defendant father sought review of a lower court's custody decision, which denied him access to the results of an investigative report ordered pursuant to Kan. Stat. Ann. § 60-1607(a)(5) (Supp. 1978) as the result of his post-divorce motion for a modification of custody. The father filed a motion to modify custody and requested a home study investigation on the mother's home, which the trial

court ordered. *Id.* The father attempted to obtain a copy of the report conducted on the mother's home by way of a subpoena duces tecum to the court services director. *Id.* The trial court denied the father's request to review the home study and found that he could obtain the same information by cross-examination of the court services director. *Id.*

The court reversed and held that the trial court abused its discretion in denying the father access to the report. *Id.* The court held that the information contained in the report was relevant and that the parties had a legitimate right to request its production. *Id.* Because the report was relied upon by the trial court, each party should have had the opportunity to challenge the contents, which may have contained misstatements and errors that could have been clarified by the parties if they knew the exact contents of the report. *Id.*

E. Ohio

In *Webb v. Lane*, an Ohio appellate court held that in a proceeding allocating parental rights, the mother was deprived of due process when the trial court adopted the guardian ad litem's final report without permitting her to cross-examine the guardian ad litem (the "court appointed investigator") with respect to the report pursuant to Ohio Rev. Code Ann. § 3109.04(C). 2000 Ohio App. LEXIS 1077, *7 (Ohio Ct. App., Athens County Mar. 15, 2000) (Ohio Rev. Code Ann. § 3109.04(C) provides that the report of a court appointed investigator shall be made available to either parent or his counsel of record not less than five days before trial, upon written request and the investigator shall be subject to cross-examination by either parent concerning the contents of the report).

Additionally, in *Rife v. Morgan*, the termination of a father's parental rights and an award of custody to the maternal grandparents was overturned where the trial court denied the father his

fundamental right to cross-examine a guardian ad litem when it quashed his subpoena for her on due process grounds. 1994 Ohio App. LEXIS 3810, August 31, 1994.

Moreover, in *Asher v. Asher*, pursuant to state statute as opposed to a due process analysis, an Ohio appellate court held that the trial court should not have considered a court-appointed psychologist's investigation report at a child custody trial when it failed to notify the parties or their counsel of the report, but the error was not prejudicial and the father waived the error by failing to object. 1987 Ohio App. LEXIS 9628, *7 (Ohio Ct. App., November 18, 1987) (failing to address father's contention that the trial court's failure to notify was a due process violation and finding the trial court's failure to notify in contravention of the state statute requiring notice).

F. Illinois

In a 2004 opinion, *In re Marriage of De Bates*, the statute allowing for submission of child's representative's report in custody trial, without cross-examination, deprived the mother of due process, but was harmless error where the mother, who had the report prior to the hearing, presented no evidence to rebut the report. 212 Ill. 2d 489; 819 N.E.2d 714; 289 Ill. Dec. 218 (2004).

G. Pennsylvania

In Pennsylvania, in *Coble v. Coble*, a custody award was reversed because the trial court relied on an investigative report and did not give the mother the opportunity to cross-examine the author or rebut the facts presented in the report. 323 Pa. Super. 445; 470 A.2d 1002 (1984). The Court explained:

> It is now well settled that in contested custody cases, reports of investigators and doctors as such may not be received into evidence and may not be considered by the court. The authors of the reports must themselves be produced, sworn and examined as

> witnesses, and must then be available for and subject to cross-examination. *Hall v. Luick*, 314 Pa.Super. 460, 466, 461 A.2d 248, 252 (1983); *Dunsmore v. Dunsmore*, 309 Pa.Super. 503, 505-06, 455 A.2d 723, 724 (1983); *Kessler v. Gregory*, 271 Pa.Super. 121, 125, 412 A.2d 605, 607 (1979); *Wood v. Tucker*, 231 Pa.Super. 461, 463, 332 A.2d 191, 192 (1974); *Commonwealth ex rel. Oncay v. Oncay*, 153 Pa.Super. 569, 570, 34 A.2d 839 (1943). *See also and compare*: *Palmer v. Tokarek*, 279 Pa.Super. 458, 421 A.2d 289 (1980). The right of a litigant to in-court presentation of evidence and the right to confront and cross-examine adverse witnesses are essential requisites of due process. *Shaffer v. Gaal*, 312 Pa.Super. 399, 458 A.2d 1020 (1983); *Wood v. Tucker, supra.*

Id. at 1003. In *Palmer v. Tokarek*, the Court still recognized that the right of a litigant to in-court presentation of evidence is essential to due process, but the case is used as a "see also and compare" because the Court did not overturn the lower court's opinion despite its failure to submit the reports to the parties before relying on them in court. The record disclosed that the trial court conducted an extensive examination of the court appointed psychiatrist who submitted the report as to her credentials and the contents of her report. Counsel for both sides also conducted cross-examinations. The Court of Appeals held that the in-court examination of court appointed psychiatrist who submitted the report fulfilled the requirements of *Woods* and *Rummel* (setting forth the due process requirement for in-court presentation of evidence for court appointed investigators in custody cases). 279 Pa.Super. 458, 421 A.2d 289 (1980).

H. <u>South Carolina</u>

In South Carolina, in *Collins v. Collins*, a litigant in a child custody proceeding had a right to a copy of the report of the guardian ad litem and was entitled to cross-examine the guardian ad litem and any witnesses whose statement formed the basis of the guardian's recommendation. 283 S.C. 526; 324 S.E.2d 82 (1984). The court explained that the ends of justice are better served by permitting cross-examination of a guardian ad litem and held, therefore, that a litigant in a child custody proceeding has a right to a copy of the report of the

guardian ad litem including the guardian's recommendation for custody of the minor. *Id.* In addition, the court held that where the report contains statements of fact, the litigants are entitled to cross-examine the guardian ad litem and any witnesses whose testimony formed the basis of the guardian's recommendation. *Id.* Moreover, the court found that the family court's failure to make the report available or to permit proper cross-examination is reversible error unless this Court finds that the litigant either waived the right of cross-examination or the denial of it was harmless error under the circumstances. *Id.* Accordingly, the appellate court found the court's in-camera receipt of the guardian ad litem's report was harmless error and the case was not reversed.

A more recent case affirming the standard in 1995, *Stefan v. Stefan*, held that the full right of cross-examination is afforded to ensure due process, a guardian's opinion and recommendations may be accepted into evidence. 320 S.C. 419, 423 (S.C. Ct. App. 1995).

I. New York

No recent cases were found from New York. However, a court of appeals in 1962 found the trial court erred when it considered psychiatric reports and refused to permit the parties to view the reports, when no stipulation had been agreed to by the parties regarding the confidentiality of such reports. *Kesseler v. Kesseler*, Court of Appeals of New York, 10 N.Y.2d 445; 180 N.E.2d 402; 225 N.Y.S.2d 1 (1962). (Where a stipulation was made regarding the report of the family counselor attached to the court, but not regarding the psychiatrist or psychologist, the court considered that the court was authorized under the stipulation to consider the report of the family counselor, even though the attorneys for the parties did not see it, but no such stipulation was made for a psychiatrist or psychologist).

J. Massachusetts

In Massachusetts, in *Custody of Two Minors*, the Department of Social Services was not entitled to have the report regarding visitation between the mother and the children admitted at the dispositional hearing because the mother had no opportunity to cross-examine the author of the report. 19 Mass. App. Ct. 552; 476 N.E.2d 235; (1985). The court explained:

> The hearing on disposition potentially involves the separation of parents from their children and require application of the traditional evidentiary safeguards. This is true whether the reports are by court-appointed investigators or by others. Fundamental fairness, as well as due process concerns, requires that a parent be given the opportunity effectively to rebut adverse allegations concerning his or her child-rearing capabilities.

Id. at 238.

Moreover, in *Duro v. Duro*, in a custody proceeding brought by the mother, the court held that the probation officer's report to the probate judge had to be in writing, and the parties had to be afforded the opportunity to cross-examine the officer on the report. 392 Mass. 574; 467 N.E.2d 165 (1984).

K. California

In *McLaughlin v. Superior Court* in 1983, a California appellate court found the local rules of the superior court not allowing for cross examination on a mediator's recommendation report submitted to court constitutionally invalid on due process grounds while mediation was mandatory for child custody contests. 140 Cal. App. 3d 473; 189 Cal. Rptr. 479 (1983). The court explained:

> The reports of investigators should be presented under oath, and an investigator, upon timely demand by any party, must appear like any other witness and testify subject to the rules of evidence and the right of cross-examination. It definitely is not the province of investigators to make a private recommendation to the judge or any recommendation independent of the evidence on which it is based.

Id. at 481.

Moreover in *Ohmer v. Superior Court*, a probation officer who prepared a report used by the trial court to determine a motion for change of custody was a witness against father and due process of law required the trial court to allow father to cross-examine the probation officer who was a witness against him. 148 Cal. App. 3d 661; 196 Cal. Rptr. 224 (1983).

L. Minnesota

In Minnesota, in *Stanford v. Stanford*, the State Supreme Court held that a due process violation occurred when the trial court relied exclusively on a report of a department of court services, which was founded upon hearsay and not subject to cross-examination, when it determined that a mother was unfit to retain custody of her child. 266 Minn. 250; 123 N.W.2d 187 (1963). The court explained:

> The determination of the question of custody should be based on the testimony of witnesses tested by cross-examination rather than merely on affidavits, and if objection is made affidavits may not be considered. The question must be determined on evidence produced in court rather than on information obtained by a private investigation, although under some statutes the report of an investigator appointed by the court may be considered, but the report is advisory only.

Id. At 255

CONCLUSION

Courts across the country have found that absent consent or waiver, it is a due process violation for a court to admit and consider a custody investigation report without affording the parties an opportunity to read and challenge it. Although some courts have been willing to find this error by trial courts harmless, many others have found the errors prejudicial. Attorneys and litigants ought to seek reports in advance of trial, and, if denied, raise due process violation arguments on both the ability to review reports and cross-examine court appointed investigators.