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Recent Developments: Attorney Grievance Commission v. Winters: Disbarment Warranted Where Attorney's Criminal Activity Is Not Substantially Related to His Drug Addiction

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day). In looking to the statutory language of the Act coupled with a legislative history fraught with expansive modifications, the court concluded that the legislature could not have intended such a narrow reading of the Act.

Consistent with the legislative history, the court in *Keane*, has expanded the parameters of the Maryland Wrongful Death Act to include yet another category of persons for whose death, recovery may be allowed. The court now permits an award of solatium damages for the loss of an unmarried, non-minor child as long as that child has not reached his twenty-second birthday. Although the impact of this decision is somewhat limited, it espouses the court's policy to continually modify the provisions of the Act so that a broad remedial purpose may be achieved.

—Natascha Sethi

***Attorney Grievance Commission v. Winters*: DISBARMENT WARRANTED WHERE ATTORNEY'S CRIMINAL ACTIVITY IS NOT SUBSTANTIALLY RELATED TO HIS DRUG ADDICTION**

An impaired mental condition or addiction to alcohol or drugs may be a mitigating factor in imposing a discretionary sanction, even where an attorney's conduct would otherwise warrant disbarment. In *Attorney Grievance Commission v. Winters*, 309 Md. 658, 526 A.2d 55 (1987), however, the Court of Appeals of Maryland held that an attorney's state convictions for filing fraudulent state income tax returns, conspiring to violate income tax laws, and possessing and distributing cocaine, warranted disbarment where the attorney's criminal activity was not substantially the result of his drug addiction or mental disorder.

In 1975, Richard M. Winters was admitted to the Maryland Bar. In 1978, while his trial practice was substantially expanding, Mr. Winters experimented with cocaine. He determined that cocaine enhanced his ability to work harder and longer. Several months later, Winters acknowledged his drug addiction, when he "changed his practice of using a standard dosage and consumed whatever amount of cocaine he had available." *Id.* at 660, 526 A.2d at 56.

Winters continued to practice law and in cases where his clients paid him cash for his legal services, he intentionally failed to report this as income on his taxes. Winters used this unreported income to purchase additional cocaine, which he began to consume openly. *Id.*

In 1983, Winters was charged and found guilty, in the Circuit Court for Anne Arundel County, of conspiracy to violate Maryland income tax laws and of unlawfully and wilfully filing fraudulent income tax returns for 1979 and 1980. Also, he was charged and found guilty, in federal court for the possession and distribution of cocaine.

Based on these convictions, Maryland's Attorney Grievance Commission, filed a petition for disciplinary action against Winters. The petition alleged violation of the Code of Professional Responsibility Disciplinary Rules 1-102(A). In particular, the petition alleged: 1) violating a Disciplinary Rule; 2) engaging in illegal conduct involving moral turpitude; 3) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; 4) engaging in conduct that is prejudicial to the administration of justice; and 5) engaging in any other conduct that adversely reflects on his fitness to practice law. *Id.* Pursuant to Rule BV9b, the matter was referred to the Circuit Court for Montgomery County for an evidentiary hearing, at which time Winters was suspended from the practice of law in Maryland. That court then filed comprehensive findings of fact and conclusions of law with the Court of Appeals of Maryland. The court of appeals concluded that disbarment was the appropriate sanction in this case.

To begin its analysis, the court of appeals noted that Winters' "serious criminal conduct would normally call for disbarment." *Id.* at 662, 526 A.2d at 57 (citing *Attorney Grievance Commission v. Osburn*, 304 Md. 179, 498 A.2d 276 (1985)). In *Osburn*, this court held that convictions for filing fraudulent state income tax returns and for conspiracy to violate income tax laws warranted disbarment. Moreover, the Standards for Imposing Lawyer Sanctions Rule under 5.11, adopted by the American Bar Association in February of 1986 stated that disbarment is generally appropriate when "a lawyer engages . . . in the sale, distribution or importation of controlled substances." *Winters*, at 662, 526 A.2d at 57. Winters argued, however, that "compelling extenuating circumstances" existed for imposing a sanction less severe than disbarment. *Id.* at 663, 526 A.2d at 57. He asserted that his impaired mental condition, caused by cocaine addiction and a "Narcissistic Personality Disorder" was responsible to a "substantial degree" for the conduct which caused his convictions. *Id.*

Although rejecting Winter's argument, the court of appeals first recognized that "cases indicate that impaired mental condition or addiction to alcohol or drugs may be a mitigating factor in imposing a disci-

plinary sanction, even where an attorney's conduct would otherwise warrant disbarment as a matter of course." *Id.* (citing *Attorney Grievance Commission v. Haupt*, 306 Md. 612, 614-16, 510 A.2d 590, 591-92 (1986); *Attorney Grievance Commission v. Willemain*, 305 Md. 665, 679-80, 506 A.2d 245, 252-53 (1986)). The court stated further, however, that "we have imposed sanctions short of disbarment *only* when the mental impairment or addiction is 'to a substantial degree' responsible for the attorney's improper conduct." *Winters* at 663, 526 A.2d at 57.

When comparing the instant case to ones involving attorneys with alcohol addictions, the court restated what they had previously said in *Attorney Grievance Commission v. Willemain*, 297 Md. 386, 395, 466 A.2d 1271, 1275 (1983):

We have looked at the shortcomings of attorneys in a somewhat different light where we have concluded that the acts giving rise to the charges against an attorney have resulted to a substantial extent from the physical and mental maladies the attorney was suffering, particularly where alcoholism was involved.

Id. at 664, 526 A.2d at 58.

In the evidentiary hearing, moreover, the court of appeals stated that "Mr. Winters has convinced the court that neither his clients nor his practice ever suffered any adverse consequences as a result of his criminal activity." *Id.* The court further stated that "the Court cannot understand how it can logically find that Mr. Winters did properly and competently function as an attorney, while addicted to cocaine, and at the same time find that his addiction and personality disorder caused his criminal activity." *Id.* at 664-5, 526 A.2d at 58.

The court further opined that,

this is not a case where the Respondent suffered a substantial lack of capacity such that he lost control over every aspect of his life. The Respondent instead asserts that he "selectively" lost control over particular portions of his life and the drug addiction is used by Respondent as an attempt to explain away those matters which have led to severe personal consequences, to wit: multiple criminal convictions. It is the finding of this Court that the Respondent was fully able to function in his law practice, in other aspects of his personal life and to stop using cocaine when he decided to do so. Hence, his drug addictions and per-

sonality disorder were not responsible for his criminal activity.

Id.

On appeal, Winters raised exceptions to the lower court's findings. The court of appeals responded that "the lower court's factual findings are prima facie correct and will not be disturbed on review unless clearly erroneous." *Id.* at 665, 526 A.2d at 58 (citing *Attorney Grievance Commission v. Miller*, 301 Md. 592, 602, 483 A.2d 1281, 1287 (1984)). Upon review, the court of appeals found no merit to Winters' exceptions and, agreeing with the lower court's findings, concluded that his criminal activity was not, "to a substantial degree," a result of his drug addiction or mental disorder. Winters thereby was disbarred.

The Court of Appeals of Maryland clearly has indicated that when an attorney's criminal activity is not substantially the result of his drug addiction or mental disorder, disbarment is the appropriate disciplinary sanction.

—Jonathan Beiser

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Newkirk v. Newkirk: IN CHILD'S BEST INTEREST, SIBLING AWARDED CUSTODY OF MINOR CHILDREN OVER PARENT'S PROTEST

In *Newkirk v. Newkirk*, 73 Md. App. 588, 535 A.2d 947 (1988), the Court of Special Appeals of Maryland recently upheld a chancellor's finding that the exceptional circumstances of a custody action warranted that guardianship be awarded to the half-brother of two minor children rather than to their surviving natural parent.

Richard A. and Patricia C. Newkirk were married in 1969. Patricia had two children from a previous marriage, Michael and Derek, whom Richard adopted shortly after their wedding. The Newkirks had two children of their own, James and Meghan, ages 16 and 13 respectively, at the time of the custody dispute. In 1977, the Newkirks were divorced and Patricia was awarded custody of and support for the minor children, James and Meghan.

On September 23, 1985, Patricia Newkirk died of cancer. In her Last Will and Testament, she requested that Derek, the Appellee, act as guardian of James and Meghan in the event of her death. On the day of Patricia Newkirk's death, Richard Newkirk, the Appellant, informed James and Meghan that he was coming to pick them up. Upon his arrival, however, he found that Derek, age 29, had removed the children from the family home. Richard Newkirk then instituted custody proceedings.

Initially, the master recommended that Richard Newkirk be awarded custody of the children. Derek, however, filed exceptions and asked for child support payments which Mr. Newkirk had been making but had subsequently terminated when Mrs. Newkirk died. At a hearing before the Circuit Court for Prince George's County, Judge Levin, the Chancellor, sustained the Appellee's exceptions and awarded custody to Derek, the children's half-brother. The court also ordered Richard Newkirk to pay retroactive child support payments from the time of Mrs. Newkirk's death (\$4,100) and to continue child support payments of \$100 per week.

On appeal, Mr. Newkirk contended that the chancellor abused his discretion in awarding custody to a sibling of the minor children rather than to their surviving natural father.

In rejecting this contention, the Court of Special Appeals of Maryland first addressed the appellate procedure in reviewing child custody disputes.

Initially, it must be noted that when an appellate court reviews the factual findings of a chancellor in a child custody case, it may not substitute its judgment for that of the chancellor on findings of fact. It may only review whether those factual findings are clearly erroneous in light of the total evidence.

Newkirk, at 591, 535 A.2d at 948, (citing *Colburn v. Colburn*, 15 Md. App. 503, 292 A.2d 121 (1972)). If the chancellor has erred as to matters of law, further proceedings may be required, however, his decision may only be disturbed if there has been a clear abuse of discretion. *Id.*

In settling child custody disputes, particularly between a biological parent and a third party, the chancellor must determine what he perceives to be in the best interest of the child. He must evaluate the capacity of the custodial litigants to care for the child, the environments they offer, as well as the personal character of the child. *Id.*, at 593, 535 A.2d at 949. Although the "best interest" standard prevails in Maryland, there is a *prima facie* presumption that the best place for a child is with its natural parents rather than in the custody of a third party. "This presumption is overcome, however, if the parent is unfit to have custody or if exceptional circumstances exist which would make such custody detrimental to the best interests of the child." *Id.* (See Md. Fam. Law Code Ann. sec. 5-201 (1984); *Ross v. Hoffman*, 280 Md. 172, 178-9, 372 A.2d 582, 587 (1977)).

Chancellor Levin found that exceptional circumstances existed which merited the granting of guardianship to the Appellee, Derek Newkirk. Evaluations presented to the chancellor from the Mental Hygiene Consultation Service, the Department of Social Services, and the Juvenile Services Administration all recommended that James and Meghan remain in the custody of Derek, their older half-brother. The reports noted that an excellent relationship existed between Derek and the children and that Derek had taken over the parental role. Placing the children with their father would surely disrupt their lives. Furthermore, one of the evaluations revealed that the relationship between Richard Newkirk and his two adopted sons was a distant one. Richard Newkirk blamed this on his inability to relate to children as a father.

In addition to these reports, Chancellor Levin also interviewed the children. When he spoke with them in his chambers, both children expressed that although they loved their father, they wished to remain with Derek.