
To: Members of House Judiciary Committee

From: Family Law Section Council

Date: February 15, 2024

Subject: **House Bill 405:**
Family Law – Custody Evaluators – Qualifications and Training

Position: **OPPOSE/UNFAVORABLE**

The Maryland State Bar Association (MSBA) Family Law Section Council (FLSC) **opposes House Bill 405: Family Law- Custody Evaluators – Qualification and Training.**

This testimony is submitted on behalf of the MSBA’s FLSC. The FLSC is the formal representative of the Family Law Section of the MSBA, which promotes the objectives of the MSBA by improving the administration of justice in the field of family and juvenile law and, at the same time, tries to bring together the members of the MSBA who are concerned with family and juvenile laws and in reforms and improvements in such laws through legislation or otherwise. The FLSC is charged with the general supervision and control of the affairs of the Section and authorized to act for the Section in any way in which the Section itself could act. The Section has over 1,200 attorney members.

Custody evaluations and other assessments in matters before the court in which custody and/or visitation are at issue are important and useful tools in ensuring that the outcome of a case is in the best interests of the child(ren) at issue. Of course, it is critical that the custody evaluator have proper qualifications and training. HB 405’s goal of well-informed, highly qualified custody evaluators is commendable. But, the manner in which HB 405 goes about it is fraught, for the reasons discussed below (listed in the order appearing in HB 405):

P. 2, lines 12-17: qualifications of expert testifying about abuse:

- “Party-retained professional” is undefined, implying that the party has hired the expert. However, the expert may be a person who qualifies as an expert and who was neither hired by a party (i.e. – police officer, CPS investigator) nor court-appointed. Would such witnesses be excluded? Or, would such witnesses not be subject to the requirements of this language?
- This language could be read to exclude witnesses who would otherwise qualify as experts due to their lack of “demonstrated expertise and clinical experience in working with victims of abuse that is not solely forensic in nature.”
 - Specifically, the following experts would potentially not qualify under HB405’s

requirements:

- Non-evaluator medical professionals
 - Emergency responders
 - Police officers
 - Visitation supervisors
 - Didactic experts who testify only about the literature
 - School counselor or teacher, to whom a child discloses abuse
- In result, this language is overly broad – applying to all experts whose testimony touch upon the alleged abuse - not just experts who will render expert opinions about the alleged abuse.

p. 2, lines 19-20 and 21-22:

- While “custody evaluator” is defined, “custody evaluation” is not.
- This is problematic because there are multiple types of evaluations that can be conducted. Existing Maryland Rule 9-205.3 identifies & defines 4 types of evaluations:
 - Custody evaluation
 - Home study
 - Mental health evaluation
 - Specific issue evaluation
- Besides the many contradictions with preexisting law at Maryland Rule 9-205.3 were HB405 passed, the lack of definition of types of evaluations causes confusion because HB405 requires “training” in “psychological testing”. Not all custody evaluations or other types of evaluations involve psychological testing. Does HB405’s requirement of psychological testing training mean all custody evaluators must be qualified to administer psychological testing? And, is psychological testing considered a “custody evaluation” as defined in HB405? What about the other types of evaluations under Maryland Rule 9-205.3?
- Also unclear: the applicability of HB405 to evaluators who perform home studies, mental health evaluations, and specific issue evaluations, since these are not mentioned.
- Additionally, HB405’s proposed §9-109 applies to all custody evaluators, regardless of whether allegations are at issue or not. This problematic issue is discussed below.

p. 3, lines 14-21:

- This section states the required training for all custody evaluators in Maryland (whether abuse is alleged or not). These qualifications change existing ones required by Maryland Rule 9-205.3(2)(A-E).
- Again, line 16 requires training in psychological testing without specifying whether the evaluator is qualified to administer & interpret psychological tests. Not all licensed mental health professionals are trained to administer & interpret psychological tests. Health Occupations §17-310. These ambiguities may significantly reduce the number of qualified evaluators by eliminating those not qualified to administer & interpret psychological testing.
- “Scope of parenting” is not defined in HB405 and has no legal definition in Maryland. Thus it’s open to interpretation and not a useful criteria for determining the mandated training of custody evaluators. Without legal meaning, it would potentially exclude all evaluators.
- Likewise, other criteria in this section do not use common language in mental health fields, creating ambiguity and confusion.

p. 3, lines 11-28, p. 4, lines 1-9:

- Perhaps the most problematic of all, this section requires the court to appoint a custody

evaluator in any type of proceeding involving custody and visitation, when the listed allegations are at issue. Including the catchall “any other issue relevant to a custody proceeding that the court determines requires specific experience, education, training or supervision” (p. 4, lines 7-9).

- First, the number of custody evaluations will increase exponentially. This will far exceed the number of evaluators (court custody evaluators and private), their capacity, and will grind these cases to a halt until an evaluation can be obtained and/or fees (discussed below) raised to pay the costs. Families will be subjected to multiple custody evaluations, potentially around the same facts. How will this work in action in domestic violence protective order cases, with ex parte temporary 7-day orders while custody evaluations take months to complete? Can a parent be deprived of their due process rights under an ex parte order while a custody evaluation is pending?
- Second, the language at p. 3, line 24 (“or licensed health care provider”) is undefined and creates ambiguity & internal inconsistency. The custody evaluator must have training in specific areas, but the licensed health care provider need not?
- Third, the mandate of this section will create nonsensical situations: custody evaluations when a parent is incarcerated and not seeking custody rights; custody evaluations when no party wants an evaluation but these allegations exist; custody evaluations when parents agree on a custodial arrangement and these allegations exist.
- Fourth, a custody evaluation is extremely intrusive. Best practices call for corroboration of parent allegations from collateral sources (third parties). The mandate of a custody evaluation removes autonomy of parents and abuse survivors. Abuse survivors may not want to participate in an evaluation to avoid retraumatization. When a parent is indicated for abuse and a parent has no contact with a child as a result of a protective order and/or conditions of bond, a parent may not want to retraumatize their children with the intrusion of an evaluation. Survivors may experience the evaluation as a continuation of the abuse already endured, which the mandate fails to take into account.
- Fifth, p. 4, lines 7-9 is so broad that every case involving custody and visitation may require an evaluation.
- Sixth, p. 4, lines 5-6 do not accurately reflect statutory law (Family Law §9-107) regarding disability, creating conflict, confusion, and potentially lowering and/or diluting the legal standard re: “disability” and its impact on parenting.
- Finally, the language of this section is overly broad so any case involving custody and visitation requires an evaluation: domestic violence protective order; CPS investigation; CINA/TPR.

p. 4, lines 10-28:

- The list of training subjects is overly narrow, excluding other necessary subjects. The single focus suggests there’s confusion about who determines whether abuse occurred. Not a custody evaluator. Rather, that is for CPS or a judge to determine.
- Some critical omitted subjects (in no particular order): LGBTQ+, resist/refuse & parent/child contact problems, relocation, the law, the legal process & testifying in court, parenting plans & types of legal documents, role & scope of evaluation, parenting time schedules (& age appropriateness), legal decision-making, hypothesis testing, differently abled parents & children, substance misuse, third party custody, to name a few.
- The legislative process is often slow & deliberative, making changes to any statutorily-created list very difficult to make going forward. This advantages families with the challenges listed in this section over families with equally compelling needs (see bullet above). Especially so when

parents & children who have experienced abuse have many legal tools and service providers available to support and protect them through CPS, domestic violence protective orders, and providers for abuse survivors, to name a few. Families with equally compelling needs, other than abuse, have fewer service providers to serve them and HB405 will further tax those resources.

p. 5, lines 1-8:

- A strict reading of this language suggests that any such training shall only be provided by enumerated individuals.
- This is concerning because applying the language of p. 5, lines 1-6, the training could be provided by one single individual, who:
 - does not have experience in other critical areas (not included in HB405) necessary for a custody evaluator (discussed above)
 - does not qualify to be a custody evaluator
 - has never performed a custody evaluation
 - has never testified in court
- This is discordant with the apparent purpose of HB405.
- Additionally, the trainer's experience does not square with the various requirements on p. 4:
 - Neglect of a child (p. 4, line 2)
 - Trauma or toxic stress (p. 4, lines 3 & 24)
 - Alcohol or substance abuse (p. 4, line 4)
 - Medical, physical, or neurological impairment that affects the ability to effectively parent (p. 4, lines 5-6)
 - Any other relevant issue (p. 4, lines 7-9)
 - Coercive control (as some experts view this as a separate from domestic violence) (p. 4, line 21)
 - Implicit and explicit bias (p. 4, lines 22-23)

p. 5, lines 9-13:

- Lines 11-13 can be read to prevent trainers from teaching custody evaluators how certain "theories, concepts, or belief systems" are unsupported by the research and not best practices. As in prohibiting teaching "this theory does not comport with evidence-based research". That is a problem if the purpose is to promote well-informed, highly qualified custody evaluators.

p. 5, lines 14-20:

- This language can be read to change the law that Courts and Judges are to apply in cases.
- The language at lines 18-20 is incongruous vis-à-vis the language and apparent purpose of the remainder of the bill (especially re: culturally sensitive and appropriate for diverse communities).

p. 5, lines 21-26:

- This language is especially troubling because it shows no consideration for how the proposed mandatory custody evaluations will be paid or the family's ability to afford the evaluation.
- HB405 unduly financially burdens family members who have experienced abuse.
- As of the submission of this testimony, the Fiscal and Policy Note has not posted. The FLSC anticipates that the cost of mandatory custody evaluations in the vast majority of domestic violence protective order, CINA/TPR, and custody/visitation cases will be staggering.



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For the reason(s) stated above, the MSBA FLSC opposes **House Bill 405** and urges an **unfavorable committee report**.

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