



520 West Fayette St., Baltimore, MD 21201
410-685-7878 / 800-492-1964
Fax 410-685-4016 / tdd 410-539-3186
msba.org

To: Members of the Senate Judicial Proceedings Committee

From: Family & Juvenal Law Section Council (FJLSC)

Date: March 10, 2022

Subject: Senate Bill 889
Family Law – Child Custody Actions – Considered Judgment of Minor Children

Position: OPPOSE

The Maryland State Bar Association (MSBA) FJLSC opposes Senate Bill 889 - Family Law - Child Custody Actions – Considered Judgment of Minor Children

This testimony is submitted on behalf of the Family and Juvenile Law Section Council (“FJLSC”) of the Maryland State Bar Association (“MSBA”). The FJLSC is the formal representative of the Family and Juvenile Law Section of the MSBA, which promotes the objectives of the MSBA by providing 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 the family and juvenile laws and in reforms and improvements in such laws through legislation or otherwise. The FJLSC 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.

Current Legal Background:

In a court case involving custody or visitation rights¹, a Court may appoint a lawyer to serve as a child advocate attorney or a best interest attorney (FL §1-202)². Existing Maryland Rule, 9-205.1 sets out factors for the Court to consider when appointing child counsel and requirements of Orders appointing child counsel. The Rules’ Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access (found in the Maryland Rules’ Appendix to Title 9, Chapter 200) define the role of the Child Advocate Attorney (Guideline 1.2), considered judgment (Guideline 2.1), scope of work and responsibilities (Guidelines 2.3), and alternatives if a Child Advocate Attorney determines her client does not have considered judgment (Guideline 2.3).

A Child Advocate Attorney is one who advocates the child’s position, with the same duties of loyalty, confidentiality, and competency as are due adult clients. The Guidelines set out a process for determining considered judgment (Guideline 2.1). Considered judgment means that the child client understands the risks & benefits of the child’s own legal position and can reasonably communicate their

¹ Language mirrors that of the code.

² The law does not reference Child Privilege Attorneys, which are another type of child counsel in contested custody cases.

own wishes. This includes whether the child sees his/her own interests as distinct from the parents' interests.

If a Child Advocate Attorney determines the child client does not have considered judgment, the Guidelines invite the Child Advocate Attorney to petition the court either to amend the role to Best Interest Attorney or appoint a separate Best Interest Attorney. (Admittedly, the Guidelines do not speak to the duty of loyalty, which may weigh against doing either so the child's position is not undermined, but may invite the Child Advocate Attorney to withdraw instead.)

Problems with SB889:

SB889 is replete with problems. This written opposition focuses on but a few critical ones:

Rebuttable Presumption: SB889 is unclear about how & who will determine considered judgment.

1. Is age the determining factor? Meaning: every child age 13+ years old will automatically have a Child Advocate Attorney appointed?
2. Or, will the Court hold a considered judgment hearing to determine if the child has considered judgment and, if so, to appoint an advocate attorney?
3. Or, will parents bear the responsibility of requesting a child advocate attorney?

If SB889 intends #1 (every child & automatic), then per the Guidelines, the appointed Child Advocate Attorney must decide if the child client has considered judgment. If the child does not, then what? Convert to Best Interest Attorney? Appoint a separate Best Interest Attorney? Withdraw?

Overly Broad: SB889 would mandatorily apply in all actions involving child custody or child access. So, not only in contested child custody cases. But also in domestic violence protective order cases. And (while perhaps unintentionally), perhaps CINA and TPR cases which also involve "custody".

Families with multiple siblings: Because conflicts of interest may exist among siblings (See Guideline 3) and siblings' positions may differ, SB889 sets the stage for each child to have separate Child Advocate representation. This invites siblings testifying against each other & building cases against one another. This imposes a huge expense for families with resources and multiple qualifying children. Or, this overtaxes already stretched pro bono and family law fund/reduced fee child counsel attorneys.

Cost: As written SB889 invites that every child in Maryland will be represented by a Child Advocate Attorney. Who will pay the cost of this? Families? The State?

Child's Treatment as a Party: Page 2, lines 3-4 treats children ages 13+ years old as parties in their parents' contested custody cases. This opens the door for children to be deposed, to participate in discovery (Interrogatories, Requests for Production of Documents, Requests for Admissions), and to engage in motions practice. SB889 increases the likelihood that children will be compelled to testify because if a party, a child can be subpoenaed and forced to testify (despite the "may" as written).

Forced Participation: SB889 forces children ages 13+ to participate, even if they do not want to. This flies in the face of considered judgment.

The FJLSC urges an unfavorable report. For more information or if any questions, please contact Lindsay Parvis (lparvis@jglaw.com or 240-399-7900).