Item 04-02d (5-6c)
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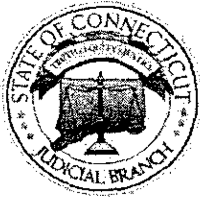

STATE OF CONNECTICUT

SUPERIOR COURT

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December 17, 2018

Hon. Andrew J. McDonald
Chair of the Rules Committee of the Superior Court
Connecticut Supreme Court
231 Capitol Avenue
Hartford, CT 06106

RE: Maureen Martowska's request to revise Practice Book Section 25-60

Dear Justice McDonald:

Thank you for the opportunity to comment further about the above proposal. I also thank your counsel for providing the additional materials recently submitted by Ms. Martowska, Mr. Morera, and Dr. Miller.

As you know, I previously wrote to you about the portion of the proposal which concerns the disclosure of psychological evaluations filed with the court. At the time I was under the impression that this was the only point on which the Committee sought my input, as it was the issue involved in the appeal whose pending disposition was the reason the matter had been tabled. (I have no further comment on that issue at this time.) If I also should have commented at that time on the remaining issue discussed herein, I apologize for my misunderstanding.

The issue which remains, as I understand it, concerns the proposal to eliminate Practice Section 25-60(c), which makes a court-ordered psychological evaluation admissible in evidence in a family matter so long as the author of it is available for cross-examination. For the reasons summarized herein, I oppose the proposal to eliminate that provision.

Public Act 18-177, which became effective on October 1, 2018, is relevant to this discussion. Section 1(c) of the Act concerns court-ordered evaluations by licensed health care providers. The statute requires that when a court orders an evaluation, whether by agreement of the parties or otherwise, it must determine that the parties can afford it and that a qualified, licensed health care provider has been selected to conduct it. The statute further specifically requires that the order for the evaluation include the "professional credentials" of the provider.

Once an evaluation has been ordered, Section 2 of Public Act 18-177 prohibits the court from disposing of the case until the report has been completed and filed with the court. Copies must be provided to all counsel and self-represented parties in order to provide the parties with a "reasonable opportunity to examine it prior to the time the case is heard." The clear intent of the statute is to provide a method of procuring an evaluation by a qualified professional for the specific purpose of having it considered at the hearing of a contested family matter. The statutory underpinning of a court-ordered psychological evaluation distinguishes it from other kinds of proffered items of evidence. In my view, Practice Section 25-60(c) is an appropriate rule that is consistent with the statutory language and intent.

In addition, a recurring theme of the proponents of repeal of Rule 25-60(c) and the professionals they cite concerns the importance of the experience and methodology of the evaluator. The existing statutory and Practice Book framework already contains ample protections in this regard - safeguards which are not present in the case of scientific evidence offered by one party via a purported expert hired by that party. As noted, the statute requires the selection of a "qualified, licensed health care provider." Where the evaluator has been selected by agreement of the parties, neither party should expect to challenge the report's admissibility on the basis of the evaluator's experience and qualifications. Where there is no agreement, both parties have the opportunity to be fully heard at a hearing on whether there should be a court-ordered evaluation. At that time they may raise issues including the need for an evaluation, its usefulness and reliability in their case, and the selection of the evaluator if one is to be ordered. In my opinion neither party is prejudiced by the lack of a second opportunity to litigate those issues at the final hearing of the matter.

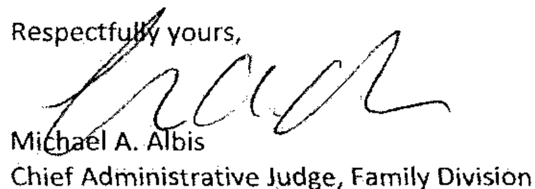
However, upon submission of the report in evidence at the hearing, the parties will still have the opportunity to conduct a thorough cross-examination of the author. The proponents of repeal of the current Practice Book Rule discuss the unreliability or irrelevance of certain kinds of psychological testing for purposes of custody disputes. During cross-examination the parties may inquire about the author's methods, any testing he or she may have conducted, the author's conclusions and the basis for them. The judge may then consider the report in light of

the author's testimony and assign it the weight deemed appropriate. In my experience, psychological evaluation reports include not only the results of psychological testing but also the author's observations and conclusions about the parties' statements and interactions with others and the history of the relationships involved. The admission of the report into evidence pursuant to the rule would not, in my view, preclude a party from asking questions of the evaluator and/or presenting other evidence as part of an inquiry into the reliability of any testing methods employed, similar to having a *Daubert*-type hearing. A judge might then find the portion of a report that describes test results to be less important than others, or find the testing methods to be scientifically unreliable and assign the results no weight at all.

In this vein, the case law relied upon to support the repeal of the rule repeatedly cites the need to prevent a jury, as the fact-finder, from being exposed to unreliable and prejudicial scientific evidence. The cases sometimes refer to the trial judge as the "gatekeeper" who insures that the jury only considers reliable evidence. In family matters, there are no juries. All matters are tried to the court, and judges are both the gatekeepers and the fact-finders. Once an evaluation report has been admitted into evidence pursuant to the present rule, I have full confidence in the ability of a Connecticut family court judge to give the appropriate consideration and weight to the report in light of the cross-examination of the author and the overall evidence in the case.

I would be happy to respond further to any questions or concerns the Rules Committee may have regarding this proposal. Thank you again for the opportunity to provide input.

Respectfully yours,



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Chief Administrative Judge, Family Division

cc: Hon. Patrick L. Carroll III
Hon. Elizabeth Bozzuto
Attorney Joseph J. Del Ciampo