

YOU'VE COME A LONG WAY Baby Boomer!

By Hadrian N. Hatfield

Society at large, and the law in general, has changed dramatically in the 60-some years since the first baby boomer was born in 1946. Perhaps nowhere is this more evident or pervasive than in the realm of families and family law, particularly as it relates to divorce and children.



During the age of the baby boomers, society moved from one where relatively few marriages ended in divorce to one where divorce is commonplace. Family law evolved in response. When the divorce rate suddenly soared in the late 1960s and early 1970s, Maryland still determined divorce financial issues by title to property and the "fault" of one spouse. Now equitable distribution and rehabilitative alimony theory predominate.

Maryland courts no longer consider marital fault or the maternal preference in awarding custody of children to one of the parents. Instead, the "best interests of the child" is now the test and psychological evidence is the norm. The availability of joint custody lets parents debate the virtues of a 2-2-5-5 schedule over the benefits of one-week-on, one-week-off.

At one time litigation was practically the only alternative to an agreement forged by lawyers. Now ADR processes abound. No longer is mediation associated with meditation — nor is the general public ignorant of such ADR options as collaborative divorce. And divorce litigants face a cornucopia of services in unified family courts.

We have indeed come a long way.

We may never know whether these societal and legal changes were brought about by the baby boomers, or in response to them. It possibly was some of both — and some of neither. The sheer number of boomers, and thus the number

of boomer divorces and children of divorce, was certainly a catalyst for reform. One observer has described the boomers as "a demographic bulge that as it moves down the decades has been likened to a pig in a python. And now they're reaching the narrow part of the snake." Jerry Adler, *The Games of Their Lives*, Newsweek, Dec. 15, 2007, available at <http://www.newsweek.com/id/78150>.

Other forces, including women's increasing participation in employment outside the home, probably contributed to these changes. See Ira Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 Fam. L.Q. 1 (Spring 2000). The baby-boom generation propelled women into the legal, psychological and other professions closely associated with divorce-related issues. The number of women also grew, albeit to a lesser extent, within local, state and national government.

As all these factors trended to increase, so did our awareness, knowledge, and understanding of divorce-related consequences. Innovation and the number of interventions available to protect families from the negative fallout of separation and divorce also grew. After all, the baby-boom generation is reputed for its challenge of the status quo, independence, and willingness to experiment. Yet boomers hold no monopoly on change. Their parents also are responsible for many of the reforms in family law.

Where these forces will lead

family law in the future remains unknown. But the past may help us better understand the changes to come. The following is a brief summary that highlights how society and Maryland family law changed during the age of the baby boomers.

Divorce Rates and Societal Change

The dramatic rise in divorce rates in the United States correlates closely to the life cycle of baby boomers. The national divorce rate per 1,000 population roughly doubled from 2.6 in 1950 (2.3 in 1955) to 5.0 or more for the years 1976-1985. During this ten-year period, the oldest boomers were between the ages of 30 and 39. The divorce rate peaked at 5.3 in 1981 and never again dropped below 4.0 until early this century. U.S. Census Bureau, *Statistical Abstract of the United States: 2007*, 63 tbl.76 (2007), available at <http://www.census.gov/prod/2006pubs/07statab/vitstat.pdf>.

Baby boomers make up a huge proportion of these figures. For example, in 2005, 14.2 percent of boomers were divorced, compared with only 13.9 percent for those born in the decade before the boomers and 6.7 percent for those born in previous decades. *Demographic Profile — American Baby Boomers* (MetLife's Mature Market Institute, Westport, Conn.) at 3, <http://www.metlife.com/WPSAssets/3444248610113318029V1FBoomer%20Profile%202005.pdf> (last visited Sept. 23, 2008). In other words, "[w]hereas just one-third (33 percent) of the married adults from

the preceding two generations had experienced a divorce, almost half of all married Boomers (46 percent) have already undergone a marital split. This means Boomers are virtually certain to become the first generation for which a majority [of marriages] experienced a divorce." The Barna Group, *Born Again Christians Just As Likely to Divorce as Are Non-Christians*, Sept. 8, 2004, <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=170> (last visited Sept. 23, 2008).

Women and Societal Change

At the same time as the divorce rate surged, women's educational and economic achievements also soared. As the baby boomers moved through adulthood, the percentage of doctorate and professional degrees earned by women increased exponentially.

In 1971, when the oldest boomers were just reaching the age of 25, or college plus three, the percentage of law degrees awarded to women was just over 5 percent, for the first time ever. Three years later, in 1974, that percentage had risen to over 10 percent. In another three years, 1977, it had risen to more than 20 percent. In 1981, it topped 30 percent, and kept rising past 40 percent in the late 1980s, when the oldest boomers were in their early 40s and the youngest just graduating from college. See Diana Furchtgott-Roth & Christine Stolba, *Women's Figures: The Economic Progress of Women in America* 17-20 (1996). By the 2005-2006 academic year, the proportion of law degrees granted to women surpassed 48 percent. Commission on Women in the Profession, American Bar Association, *A Current Glance at Women in the Law 2007*, at 2 (2007), available at

<http://www.abanet.org/women/CurrentGlanceStatistics2007.pdf>.

The proportion of medical degrees and of all first professional degrees awarded to women increased similarly. See Furchtgott-Roth & Stolba, *supra*.

As a result of this educational trend, the U.S. workforce, and family life, changed dramatically, too. According to an AFL-CIO fact sheet, in 1900 women made up 18 percent of the workforce; in 2007 women accounted for 46.4 percent. The proportion of families where the husband worked while the wife stayed home declined from 66 percent in the mid-1900s to only 19 percent in 2005. And where in 1970 only 12 percent of all children lived in one-parent families, by 2006 almost 28 percent lived with one parent. Department for Professional Employees, AFL-CIO, Fact Sheet 2008, *Professional Women: Vital Statistics* (2008), available at http://www.dpeaflcio.org/programs/factsheets/fs_2008_Professional_Women.htm.

This phenomenon extended to the legal profession. In 1980, when baby boomers were between the ages of 16 and 34, women accounted for only 8 percent of licensed lawyers. By 1991, just over 10 years later, that figure had more than doubled to 20 percent. In 2000 it had grown to 27 percent. American Bar Association, *Lawyer Demographics* (2008), available at http://www.abanet.org/marketresearch/Lawyer_Demographics_2008.pdf. And by 2007, women made up 32.6 percent of all lawyers in America. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings* 213 tbl.11 (2007), <http://www.bls.gov/cps/cpsaat11.pdf>.

Of perhaps even greater consequence to divorce policies and

practices, by 2005 women constituted 67 percent of all psychologists. *Professional Women: Vital Statistics, supra*, at 2.

By contrast, with the notable exception of Senator Barbara Mikulski, women in Maryland have been under-represented in legislative and judicial office. From 1995 through 2008, women made up only roughly one-third or less of the Maryland legislature. And by 2001 women accounted for only 23 percent of Maryland judges, and no woman had ever served as a judge in 12 counties. Select Committee on Gender Equality, *Retrospective Report* 122-26 (2001), http://www.courts.state.md.us/gen_derequality.pdf.

This demographic context framed a sea-change in how Maryland addresses financial issues, custody, and the litigation process in divorce. Within only a few years, Maryland family law changed beyond recognition. This legal revolution occurred just as the baby boomers were starting to marry and have children, and before their power developed within the institutions responsible for shaping the law. Yet the consequences still reverberate today.

Property Disposition

In February 1977, Governor Marvin Mandel appointed a Commission on Domestic Relations to undertake an exhaustive review of family law in Maryland and recommend changes. Paula Peters, *Property Disposition Upon Divorce in Maryland: An Analysis of the New Statute*, 8 U. Balt. L. Rev. 377, 378 (1978). Just over one year later, based on the Commission's report, Maryland enacted the 1978 Marital Property Act. *Id.*; see also Md. Code Ann., Fam. Law §§ 8-201 et seq. (2006). The

purpose of this sweeping new law was to "end the inequity in Maryland's old 'title' system of dealing with the marital property of divorcing spouses." *Schweizer v. Schweizer*, 55 Md. App. 373, 377, 462 A.2d 562, 565 (1983) citing Report of the Governor's Commission on Domestic Relations Law at 1 (1982) [sic].

Before this new law, disposition of property in divorce depended almost exclusively on title, and the efforts of the parties were irrelevant in addressing solely titled assets. See *Bender v. Bender*, 282 Md. 525, 386 A.2d 772 (1978). After January 1, 1979, that all changed. Now property distribution is determined by fairness and equity, based on analysis of statutorily enumerated factors. See Md. Code Ann., Fam. Law §8-205 (2006).

Suddenly, what had been an anachronistic system favoring the record-title owner of property became a "framework of the concept that the modern marriage is a joint enterprise." Peters, *supra*, at 410. The oldest baby boomer was not yet 33 years old, and the youngest was barely 14.

Alimony

The Commission, chaired by the legendary Beverly Anne Groner, next tackled alimony. The Governor's Commission on Domestic Relations Laws, *Report on a Proposed Bill Relating to Alimony and Comment on a Proposed Bill Relating to the Decriminalization of Non-support 1* (1980) [hereinafter "*Groner Commission Report*"]. Its report led to another monumental change.

Before, the authority to award alimony was statutory, but the standard governing its award was judicial. *Willoughby v. Willoughby*, 256 Md. 590, 261 A.2d 452 (1970). And

whereas the courts considered factors including the financial circumstances of the parties, "fault" determined alimony in many cases. See *Hughes v. Hughes*, 216 Md. 374, 140 A.2d 649 (1958); *Groner Commission Report, supra*.

Moreover, under the old law, alimony lasted so long as both parties lived, or until the dependent spouse remarried. See Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse*, 22 Fam. L.Q. 225, 235-39 (Fall 1988). Thus, no option other than "indefinite" alimony existed. Another important concept in the old alimony law was that the wife could continue in the lifestyle to which she had become accustomed — so long as the husband could maintain his standard of living. *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971) cert. denied 262 Md. 749 (1971); Bell, *supra*, at 240.

Effective July 1, 1980, the new Alimony Act did away with fault as a consideration. It substituted "the circumstances that contributed to the estrangement of the parties" as one of 12 statutorily enumerated factors for the court to consider. Md. Code Ann., Fam. Law §11-106 (2006). The new law also adopted the "rehabilitative" alimony theory. Under this approach, the purpose of alimony is "to provide an opportunity for the recipient party to become self-supporting." *Groner Commission Report, supra*, at 2.

The new statute, therefore, allows alimony for a fixed period of time so the economically dependent spouse can transition from the joint married state to the separate single one. *Id.* The statute defines exceptions when indefinite alimony is still appropriate. Md. Code Ann., Fam. Law §11-106(c) (2006).

In just three years, Maryland completely re-wrote the rules

governing financial issues in divorce. This occurred right before the divorce rate peaked and the tidal wave of baby boomer divorces that followed.

Custody

Maryland also experienced significant changes in its custody law during the baby boomers' adulthood. The biggest change may be the prominence of psychological elements in custody decisions. See Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes — 1920, 1960, 1990, and 1995*, 31 Fam. L.Q. 215 (Summer 1997). This resulted largely from Maryland moving to the gender-neutral "best interests of the child" test.

In an early sign of this transition, Maryland abandoned the presumption of unfitness for custody of an adulterous parent. *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977). Now adultery is only relevant to custody if evidence exists that the relationship has a detrimental effect on the child(ren). *Swain v. Swain*, 43 Md. App. 622, 406 A.2d 680, cert. denied, 286 Md. 754 (1979).

At about the same time, the pendulum swing of custody preferences halted. Initially, in Maryland, fathers were favored under the common law *pater familias* principle. Later, mothers were favored under the maternal preference principle, at least in practice. See *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978).

The Maryland legislature imposed equilibrium in 1974 when it expressed that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex." See Md. Code Ann., Fam. Law §5-203(d)(2) (2006); see

generally *McAndrew, supra*. With this statutory change, Maryland abolished the maternal preference. See *Kerns v. Kerns*, 59 Md. App. 87, 93 n.1, 474 A.2d 925, 928 n.1 (1984).

Now, instead of presumptions and preferences, a list of factors guides the "judicial prognostication" inherent in determining the "amorphous notion" that is the "best interests of the child." *Montgomery County Dept. of Soc. Serv. v. Sanders*, 13 Md. App. 406, 381 A.2d 1154 (1977).

With this evolution, expert psychological testimony entered its appearance in the custody courtroom. *Mason & Quirk, supra*, at 231-34. Although the ultimate decision remains with the chancellor, the importance of psychological opinions in custody cases was noted in *Shapiro v. Shapiro*, 54 Md. App. 477, 458 A.2d 1257 (1983). And the focus of the mental health testimony itself has shifted from the stability of the parents to the strength of the parent-child bonds. *Mason & Quirk, supra*. Attorneys now routinely turn to psychologists for custody evaluations to help solve cases. Maryland courts have even brought mental health professionals in-house to conduct assessments and evaluations.

Another result of the "best interests of the child" standard is the recognition of joint custody as a parenting option in 1984. See *Kerns, supra*; see also John F. Fader, III & Richard J. Gilbert, *Maryland Family Law* § 6-4 (4th ed. 2006). Just two years later, the Court of Appeals issued the seminal Maryland case on joint custody. *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986). It lists the factors for courts to consider in deciding whether joint custody is appropriate. And joint custody situations in turn led to parenting



coordinators to help parents reduce conflict. See *McCarty v. McCarty*, 147 Md. App. 268, 807 A.2d 1211 (2002).

The ADR revolution

Another critical development in family law practice is the number and extent of available alternatives to traditional litigation. Among these are mediation, collaborative practice, and unified family courts.

Mediation has grown immeasurably in importance and popularity during the age of the baby boomers, especially in family law cases, for good reason. Mediation is far better

sued to resolving disputes where the parties will have an ongoing relationship than is adversarial litigation. See Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 Fam. L.Q. 1 (Spring 2001). The results have been indisputable. See Peter Dillon & Robert Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects*, 66 Am. J. Orthopsychiatry 131 (1996).

The acceptance of mediation as a tool in divorce cases is reflected in the rules of court procedure. See Md.

Rules 17-101 *et seq.* Another example of this acceptance is the Maryland Mediation and Conflict Resolution Office (MACRO). This is a court-related agency created under the leadership of Chief Judge Robert M. Bell to support and promote ADR. Mediation and Conflict Resolution Office, <http://www.marylandmacro.org> (last visited Sept. 22, 2008). The influence of mediation also is apparent in other ADR options that developed in its wake, especially collaborative practice.

Collaborative divorce was created initially by and for family law attorneys. It reflects the growing recognition of how ill suited courts are for resolving most family disputes. Its central premise is that the parties and their attorneys forswear litigation through a formal contract before starting negotiations. Pauline H. Tesler, *Collaborative Law* 7 (2001). It is a startling example of the innovation for which baby boomers are well known, yet its "founder," Stuart G. Webb, was born before the baby boom. Nevertheless, it represents a significant change embraced recently by domestic relations practitioners across the United States and within Maryland. See <http://www.collaborativepractice.com> and <http://www.marylandcollaborativepractice.com/aboutthecouncil.html>.

Unified family courts have brought the judicial system farther into the field of ADR and social policy for family law issues than for any other area of law. Unified family courts are specialized structures that regroup under one user-friendly roof all family law related cases. These courts offer differentiated case management along with an array of social services to address the non-legal needs of the litigants. See Barbara A. Babb, *Symposium Editor's*

Note, 37 Fam. L.Q. 327 (Fall 2003). From the first such court in 1914 Cincinnati to the UFC Coordinating Council of the ABA established in 2002, unified family law courts have gone from promise to reality. See Herbert J. Belgrad, *An Introduction to Unified Family Courts from the American Bar Association's Perspective*, 37 Fam. L.Q. 329 (Fall 2003).

Today, Maryland offers its citizens a variety of targeted services typical of unified family courts through family divisions in the five largest circuit courts and family services programs in the other jurisdictions. Their focus is "to ensure the thorough and holistic treatment of families." Maryland Judiciary — Family Administration, <http://www.courts.state.md.us/family/circuitprograms.html> (last visited Sept. 22, 2008).

Conclusion

The changes in society, law, and practice related to divorce and custody during the age of the baby boomer extend far beyond those discussed above. For example, the growing number of relocation cases reflects an increasingly mobile society. The appearance of same-sex parents and gay-marriage issues in Maryland appellate cases reflects the continued liberalization of society.

The U.S. Supreme Court has had to weigh in on grandparent visitation. Family law practitioners have had to learn about the intricacies of stock options and pensions. Family law has been subjected to "federalization," complete with acronyms such as UIFSA, PKPA, VAWA, DOMA and UCCJEA. It has even undergone "internationalization" through instruments such as the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the 1993 Hague

Convention on Intercountry Adoptions, and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, just concluded in 2007.

Baby boomers have made the consequences of divorce part of their lifestyle. The everyday issues created by the high divorce rates abound. We can even read about them through sources such as ReMarriage magazine, founded and published by a Maryland entrepreneur. See ReMarriage Magazine, <http://www.remarriagemag.com> (last visited Sept. 22, 2008). And now baby boomers are facing the legacy of this society in their own children's reticence to marry. See Ellman, *supra*, at 16.

Aging boomers have moved from hippie, to mommy and daddy, to divorcee, and soon to retiree. In the process they moved family courts from being just referees to being social policy agents and psychology workshops. The immediate goal has been a better, more efficient and more humane justice system. The larger goal of reforming domestic relations law and practice in Maryland is a better functioning society. Maryland family law cases are sure to experience more change in the future based on the knowledge and experience accumulated as a result of this "pig in a python" generation. ♪

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