PROPOSED COMMENTS CONCERNING THE ADOPTION OF THE FEDERAL RULES OF EVIDENCE

DIVISION 9: FAMILY LAW

FEBRUARY 8, 1984

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The views expressed herein represent only those of Division 9: Family Law of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

DIVISION 9
SUMMARY OF PROPOSED COMMENTS
ADOPTION OF FEDERAL RULES OF EVIDENCE

Division 9, by its Subcommittee, urges the adoption of certain specific rules in the Federal Rules of Evidence which are of considerable importance to practice in the Family Division. It also points out a number of statutory changes which will be required if the Federal Rules of Evidence are adopted. No comment is offered - or intended - on the rules not individually addressed. The rules considered are 405, 607, 613, 703, 704, 706, 803(6), (15) and (19), and 804.

COMMENTS OF DIVISION 9 ON THE PROPOSED ADOPTION OF
THE FEDERAL RULES OF EVIDENCE FOR THE DISTRICT OF COLUMBIA COURTS

A subcommittee of members of Division 9 has reviewed the Federal Rules of Evidence and submits the following comments. This is by no means an exhaustive survey, rather it is an attempt to focus attention on those rules which will either significantly change the present evidentiary rule or have an impact on family law practice in the Superior Court.*

RULE 405. Methods of Proving Character

The Family Division recommends adoption of this rule, which allows character to be proven by opinion and specific instances of conduct in addition to reputation. It recognizes the current use of these techniques in Superior Court to help determine character in custody and neglect cases and it will make the use of these techniques uniform in all cases. This rule, by broadening and simplifying the type of proof available to prove character, will also help ease the burden placed upon pro se parties in family matters that involve proof of character.

RULE 607. Who May Impeach

The Division recommends the adoption of this Rule.

Rule 607 provides that "the credibility of a witness may be attacked by any party, including the party calling him." It represents a 180 degree turn from the traditional common law rule practiced in the District of Columbia. Under present District of Columbia law, a party may impeach its own witness only upon a showing of good faith surprise and damage. D.C. Code (1981 ed.) §14-102; Scott v. United States, 412 A.2d 364 (D.C. 1980).

The District of Columbia rule is based on the theory that a party vouches for the credibility of its own witness. However, as both commentators and the advisory committee on these rules noted, this is a false premise. In reality, a party has no choice over witnesses in that one must call those who happen to have observed the events in question. While we recommend adoption of the federal rule, we note that such a step will require legislative action to repeal section 14-102 of the Code.

RULE 613. Prior Statements of Witnesses

We favor the adoption of this rule because it changes the traditional rule followed in the District, which requires that prior statements be shown to the witness prior to impeachment. Its adoption would allow counsel to impeach more quickly and efficiently.

RULE 703. Bases of Opinion Testimony by Experts

This Rule should be adopted. District of Columbia practice currently requires use of the hypothetical question unless the opinion of the expert is based on personal knowledge or observation. This rule

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would significantly expand the basis upon which an opinion could be formulated, resulting in a decreased use of hypothetical questions.

However, the Division notes that its adoption could increase the Court's reliance on "expert" social worker's testimony based on facts not admissible in evidence, e.g., the social worker will be allowed to base an opinion on reports made by a prior social worker not present in court. This may result in decisions being made upon unsubstantiated allegations that do not have the same degree of reliability as statements made in medical reports.

RULE 704. Opinion on Ultimate Issue

Although current District law apparently provides a loophole in the common-law prohibition against expert testimony on the ultimate issue, see Lampkins v. United States, D.C. App., 401 A.2d 966 (1979), the Division favors the adoption of the rule because it will remove any possible remaining common-law "ultimate issue" impediments to the admission of such testimony.

In the Family law area, this rule will have beneficial effects in each of these two areas. First, it will insure that the current practice of allowing experts to give an opinion as to whether the defendant is the biological father in a paternity case, based upon genetic and blood testing, will continue. Futhermore, the rule will insure that experts are allowed to give their opinion in custody cases as to the ultimate issue of what is in the best interests of the child, i.e., which parent should be the custodian.

RULE 706. Court Appointed Experts

Although a trial judge has the inherent authority to appoint an expert, there is no Domestic Relations Rule specifically providing for such an appointment. See Super. Ct. Crim. R. 28. Adoption of this rule is therefore favored in that it will explicitly recognize the current practice in a number of areas of Family Law such as custody and neglect cases.

It will also allow the Court to make the genetic test expert in a paternity case a court appointed expert which should strengthen the weight of his or her testimony.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

RULE 803(6). Business Records

The major difference between the District of Columbia rule and the Federal rule is that the latter permits the introduction of "business records" incorporating "opinions, or diagnoses." The commentary also notes that the results of tests qualify as a type of business record that can be admitted under the rule. Note, however, that the restriction on the use of litigation records set forth in Palmer v. Hoffman, 318 U.S. 109 (1943) will still apply.

This change will have favorable impact on family cases and therefore the Division favors its adoption. Certainly one effect will be a reduction in the need to call medical experts in certain cases such as custody cases.

The change will reduce the costs involved in a family matter that requires the introduction of medical records and will reduce the amount of time needed to present such matters to the court.

RULE 803 (15). Statements in documents affecting an interest in property

Although there appears to be an ancient case that supports the liberalization of common law contained in Rule 803(15), no recent D.C. cases could be found. The principle effect of this rule will be to explicitly allow the use of documents affecting an interest in property to be used to establish facts contained within the document, without regard to the age of the document. Once again, the practical effect will be to expand the types of evidence that can be used in family cases, at least with respect to property interests, and will result in reduced costs for parties. The Division favors its adoption.

RULE 803 (19). Reputation concerning personal or family history

This rule should be put into effect with some modification.

Since "adoption" is a creature of statute in the District of Columbia, see D.C. Code, 1981 ed., § 16-301, the rule should be modified to delete adoption as a matter that can be proved by reputation. See Fuller v. Fuller, D.C. App., 247 A.2d 767 (1968) (doctrine of equitable adoption rejected).

"Legitimacy" should also be taken out of the rule since Section 16-908 of the District of Columbia abrogates the distinction between an "illegitimate" and a "legitimate" child. Any child born in or out-of-wedlock is a legitimate child in the District.

RULE 804. Hearsay Exceptions; Declarant Unavailable

This rule will require a statutory change with respect to the use of the testimony of a deceased or incapacited person, which is now very limited under Section 14-303 of the District of Columbia Code.

Respectfully submitted,

Hugh O Stevenson

Hugh O Stevenson, Esquire, Chairman[1/]
Family Division Committee on the
Proposed Adoption of The Federal
Rules of Evidence

1. The above comments are the opinion of the Division, incorporating my private opinion as a member of the Bar. These comments do not, therefore, reflect the view of my employer, the Office of the Corporation Counsel.