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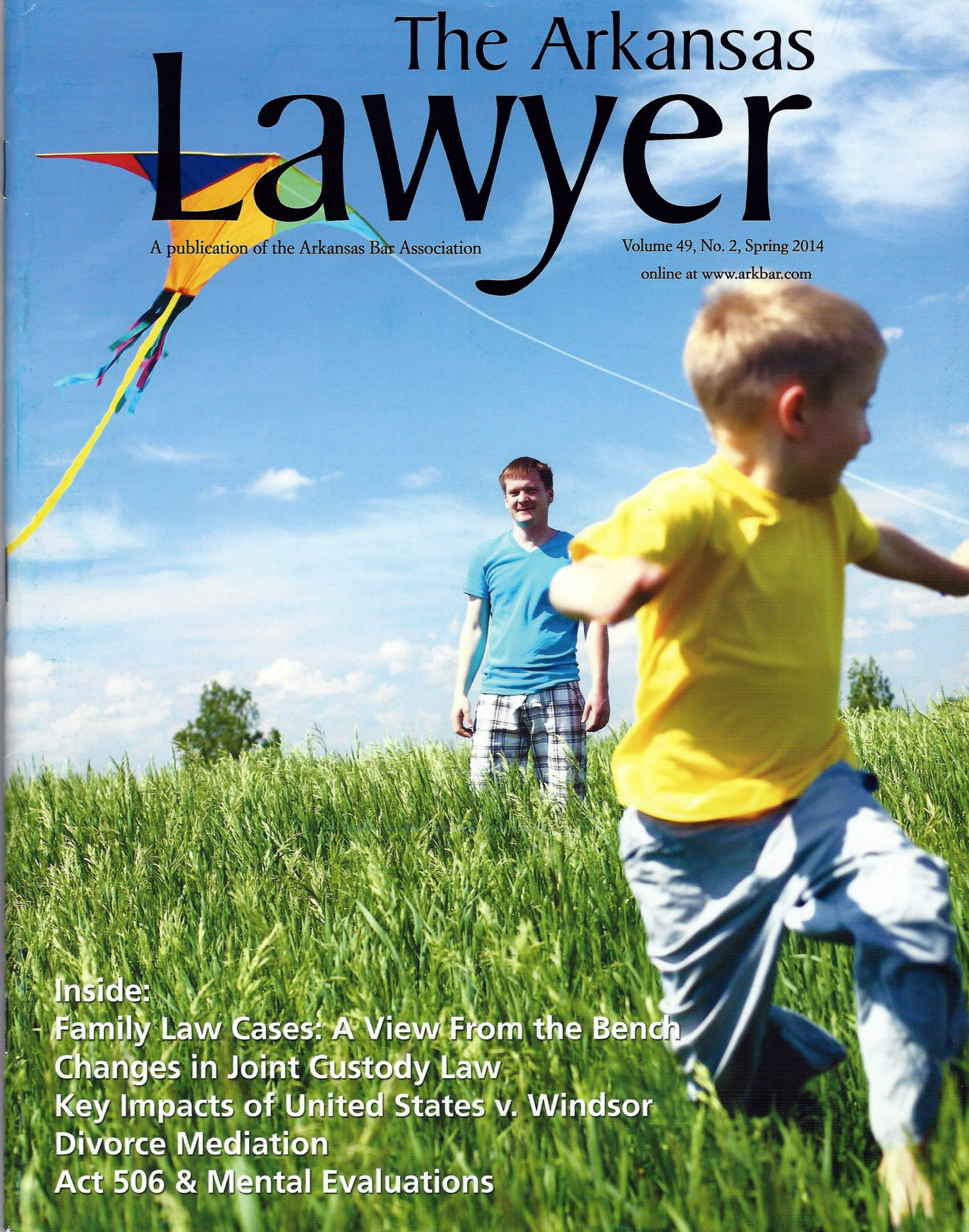

Inside:

MENTAL EVALUATIONS

How Act 506 Changes Mental Evaluations Under Ark. Code Ann. § 5-2-305

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WHAT IS ACT 506?

Act 506, passed by the 89th General Assembly, is a revision of Ark. Code Ann. § 5-2-305, which governs mental examinations of criminal defendants—both fitness to proceed and criminal responsibility examinations—and bifurcates them. A fitness to proceed examination assesses the present ability of a defendant to understand the proceedings against him or her and to assist in his or her defense. A criminal responsibility examination assesses the capacity of the defendant to understand the nature of his or her act at the time of the alleged offense and to conform his or her conduct to the requirements of the law. Section 5-2-305 was enacted in 1975 and attempted to differentiate between the two types of mental examinations. However, in the years since its enactment Arkansas attorneys and judges largely ignored the bifurcated examinations and elected to obtain a combined examination that addressed both fitness and capacity during the same evaluation. As a result, Arkansas has had a de facto unitary examination system that mixed the two types of examinations together.

WHAT IS WRONG WITH A SINGLE EXAMINATION SYSTEM?

The combined examination process slowed the forensic examination system, leaving many mentally ill defendants to languish in jails and causing judges and attorneys to ignore important ethical and constitutional concerns. In some cases, a combined examination order resulted in violations of a defendant's constitutional rights. These problems and the manner in which Act 506 addresses them will be discussed more fully in this article.

HOW THE ACT CAME ABOUT

More than 10 years ago, the ACLU of Arkansas sued the director of the Department of Behavioral Health Services (DBHS) in the Eastern District of Arkansas for violating the constitutional rights of pretrial detainees in the case of *Terry v. Hill*.[1] The basis of the lawsuit was the claim that DBHS was perpetuating a system that caused unconscionable delays in performing mental evaluations of people held in custody. Judge Stephen Reasoner

held that DBHS had violated the Fourteenth Amendment to the United States Constitution, finding that the delays amounted to punishment of the detainees, because during the delays those with mental illness went untreated. Timeliness of evaluations and treatment improved for a few years, but by 2009 it became evident that DBHS was unable to consistently meet its obligations under both the settlement agreement and the law. Eventually, the ACLU threatened to petition the court to reopen *Terry v. Hill*. In response, DBHS admitted that the "system was broken" and that it did not have the resources to cope with the burgeoning number of court-ordered evaluations.DBHS asked the ACLU to join with it in finding ways to change the system so that the agency could fulfill the requirements of the *Terry v. Hill* agreement. A large group of stakeholders, including judges, defense attorneys, prosecutors, and mental health professionals, came together, and after a great deal of debate, achieved a broad consensus on three significant points:

1. The quality and speed of the forensic examination system could be improved by providing for a true bifurcated examination process in Arkansas as is the case in the overwhelming majority of other states.

2. Limits should be placed on the defense bar's ability to request criminal responsibility examinations by DBHS when a DBHS examiner had previously concluded that, in the examiner's opinion, the defendant does not have a disease or defect.

3. DBHS was not collecting sufficient data to support its contention that the system was failing to meet the demands placed upon it and to determine where failures were occurring.

HOW BIFURCATED EXAMINATIONS WILL SHORTEN THE WAITING TIME

A combined examination could move an individual case through the system faster if, in fact, both examinations are necessary for a particular defendant; however, both fitness and criminal responsibility examinations are rarely necessary. Routinely ordering both forensic examinations leads to an unnecessary expenditure of time and money. Under Act 506, defense attorneys must file a notice of intent to pursue a disease or defect defense in order to request a criminal responsibility examination at the state's expense. Nationally, less than one percent of felony defendants pursue a defense of mental disease or defect, and it is expected that with the bifurcated examination process, requests for criminal responsibility examinations in Arkansas will be in line with the nationwide rate. Also, language added by Act 506 restricts a defendant's ability to request a criminal responsibility examination from DBHS if DBHS has already concluded that the defendant is both fit to stand trial and does not suffer from mental disease or defect. Therefore, with the bifurcated process, requests for criminal responsibility examinations should occur in only five or 10 percent of all criminal cases. Yet, even if defense attorneys ask for a criminal responsibility examination in every case in which a defendant is found to have a mental disease or defect in the fitness examination, less than 20 percent of all cases will require both examinations. This should reduce the waiting time for both types of examinations.

ETHICAL OBLIGATIONS ARE BETTER ADDRESSED BY THE BIFURCATED PROCESS

Simultaneous examinations create a long list of troubling legal and ethical issues. Defense attorneys have an ethical duty to insure that their clients are fit at every stage of the legal process. A defendant has a constitutional right to be fit before a case can proceed against him. If the defense attorney reasonably suspects that the defendant is unfit, he or she is ethically required to request a medical opinion on fitness and to defer all other decisions concerning possible defenses and strategies in the case until there has been a determination of fitness. A defense attorney's ethical obligations with regard to raising a constitutional right are very different than his or her obligations when raising a statutory affirmative defense. The client's approval is not required in order for an attorney to raise the client's constitutional right to fitness and to request an examination; the client need not even be consulted. An attorney need only have a good faith basis for his request. On the other hand, if an attorney is considering filing a notice of intent to proceed with a statutory affirmative defense, such as the mental disease or defect defense, the attorney has an ethical obligation to consult with his client concerning the risk of pursuing the defense, just as he or she would have with any other defense or strategy. However, a defense attorney may not waive a client's constitutional rights without that client's consent. In most cases, only the client can make decisions related to the waiver of constitutional rights. An attorney cannot ask a client to do this if the attorney believes the client to be unfit. The defen-

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dant must understand that by undergoing a criminal responsibility examination, he will be waiving his right to remain silent and that his statements may be used against him, that he may be required to waive his right to have his attorney present at all questioning, and that he will likely be required to submit to questioning by an examiner employed by the state. The defendant must also realize that if he or she raises the defense of not guilty by reason of mental disease or defect, he or she will often have to be willing to waive the right to a speedy trial and that medical records, school records, work records and other records are likely to become accessible to the prosecutors and admissible in court in ways that would not otherwise occur. Not guilty by reason of mental disease or defect is a high risk defense that is rarely successful and, in most cases, requires the defendant to admit committing the acts in question. Moreover, given the defendant's rights that are likely to be affected by undergoing a criminal responsibility examination, any defense attorney who genuinely believes that his client is presently unfit must question whether he or she can ethically permit a combined examination.

Forensic examiners have faced similar ethical concerns regarding the determination of criminal responsibility in defendants who are not competent at the time of the evaluation. While defendants are informed of the limitations of confidentiality within the context of a forensic evaluation, unfit defendants are often unable to adequately understand that information they provide to examiners may be used against them. Further ethical concerns relate to the fact that an acutely ill defendant in a mental state inconsistent with competency could potentially provide factually incorrect but incriminating information regarding the alleged crime. Bifurcation of the two types of examinations addresses, at least in part, these concerns.

HOW A BIFURCATED SYSTEM BETTER PROTECTS A DEFENDANT'S CONSTITUTIONAL RIGHTS

The most troubling constitutional issue prior to the passage of Act 506 was that it permitted a prosecutor to request a criminal responsibility examination over the defendant's objection. Many prosecutors routinely requested a criminal responsibility examination if the defendant raised the issue of his or her fitness. Some judges regularly ordered a criminal responsibility examination *sua sponte* if the defendant raised fitness. The criminal responsibility examination process is directly focused on the facts surrounding the alleged crime and will necessarily produce statements that may be inculpatory. In contrast, fitness-to-proceed examinations are focused on the present; there is usually no need for an examiner to question a defendant in detail about the facts surrounding the alleged crime. A bifurcated examination process lessens the opportunity for a defendant's Fifth Amendment right against self-incrimination to occur. While there are always risks to be considered, the risk of asserting a constitutional right to fitness should be sufficiently low so as to encourage defense attorneys to err on the side of raising the issue of their client's fitness in all cases in which there is a genuine question in the mind of the attorney. In addition to creating a bifurcated process that minimizes the risks of inculpatory statements, Act 506 provides that the court may only order a criminal responsibility examination when a defendant has given written notice of his intent to rely on the mental disease or defect defense. This insures that a defendant is permitted to raise the issue of fitness without being forced to also submit to a criminal responsibility examination.

A BIFURCATED SYSTEM MAINTAINS THE COURT'S AUTHORITY TO DETERMINE FITNESS

Fitness is not just a medical diagnosis but a question of fact, law and science. The examining psychologist or psychiatrist may render an opinion as to a defendant's fitness to proceed but may not make that determination. The determination of whether a defendant is fit to proceed is entirely within the province of the court. With a bifurcated system, because the two types of examinations are separate with separate reports, the examiner will render an opinion as to fitness in his or her report (and with testimony if requested to do so), but it is the court that will make the determination after a hearing if a finding of fitness is contested, or on the basis of the report if the finding of fitness is not contested. Only after there is a ruling by the court that the defendant is fit will the examiner be allowed to do an examination of criminal responsibility if such is requested by the defendant. When a combined examination is ordered, the court has effectively and impermissibly abdicated the court's role in determining fitness.[2]

A WORK IN PROGRESS

The stakeholders who labored to pass Act 506 view Arkansas's forensic examination system as a work in progress and are committed to studying its effect and to making modifications to the law as needed. To aid in this effort, Act 506 significantly expands the data DBHS is required to record. DBHS must now maintain a database of all mental examinations performed pursuant to § 305 that includes a variety of information.[3] The database is to be designed to permit future assessments of the system and to allow the stakeholders to address any shortcomings.

CONCLUSION

The post-Act 506 practice of law will require adjustment on the part of defense attorneys, prosecutors, forensic mental examiners, and judges. However, for the reasons discussed in this article, changes to the old, combined system were necessary both to streamline the examination process, shorten the waiting time for those in custody to obtain forensic mental examinations, and to protect the constitutional rights of defendants.

ENDNOTES:

1. *Terry v. Hill* is 232 F.Supp. 2d 934 (2002).
2. This occurs because the court defers to the examiner's decision concerning the defendant's fitness when the examiner decides without the court that a defendant is fit and proceeds to do a criminal responsibility assessment.
3. The name of the judge ordering the examination, the attorney requesting the examination, the name of the examiner conducting the examination, the result of the examination, if found not fit to proceed whether the defendant was restored to fitness, and if found not guilty by reason of mental disease or defect, his or her progress through his or her commitment and conditional release. ■