FINAL REPORT OF THE CUSTODY AND PARENTING SUBCOMITTEE

On March 3, 2003, Judge Serpentelli referred to our Subcommittee a proposal by the New Jersey Chapter of the Association of Family and Conciliation Courts, for a Rule amendment, which would empower courts to designate a parenting coordinator/monitor for mid and high conflict custody situations. The Association's Subcommittee dealing with this issue includes Judith Greif, Mathias Hagovsky, Sharon Ryan Montgomery, David Brozinsky, Edwin Rosenberg, Ron Silikovitz, and Marcy Pasternak.

The Subcommittee notes that the designation of parenting coordinator/monitors occur in many counties, even though there is no Rule approving it. One term of art that has come into play in recent years is "therapeutic mediator." It is our experience that some judges who have designated "therapeutic mediators" believe such a designation excuses compliance with confidentiality required by *R.* 1:40-8.

More recently, it is our experience in different counties that the term therapeutic mediator has been replaced by therapeutic monitor and that such appointees are charged with making non-confidential recommendations to the parties and to the Court if they are unable to assist the litigants in resolving the case.

Our Subcommittee has reviewed the submission from the New Jersey Chapter of the Association of Family and Conciliation Courts and discussed the concept and the Rule proposed by the New Jersey Chapter. Although we uniformly agree that the Court should have formal authority to designate therapeutic parenting monitors, we do not agree with the specifics of the Rule that has been proposed by the Association.

We have communicated with and had a dialogue with the Association. A copy of our communication to the Chair of the New Jersey chapter, which summarized our concerns about the Chapter's initial proposed Rule recommendation, is attached hereto as **Exhibit A**.

We attempted to coordinate with that body a specific Rule amendment with which both that Association and our Subcommittee would be in accord. Our efforts in this regard were not fully successful. The Chapter labels the person to be designated as a "parenting coordinator." We prefer the term "parenting monitor." We have used the word "monitor" instead of "facilitator" or "coordinator" because we believe it more accurately describes the function of the appointee, namely, to monitor and make recommendations, which either parent may bring to the Court's attention on application, pursuant to the Rules. We also omitted from the proposed Rule the word "therapeutic." We believe that word might cause participants to believe that their communications were privileged and confidential.

Both our Subcommittee and the Chapter are unequivocally clear that the parenting monitor shall have no authority to make binding decisions. He or she shall have authority only to make recommendations, which may be brought by either party to the Court for its approval or rejection. We further agree with the Chapter that any person so designated must be qualified by experience or training and that the Rules should so provide.

Following further dialogue between Chapter representatives, it became clear they were not in favor of precluding the Court from appointing attorneys to fill the position, even if there was no consent, so long as they were qualified by training or experience.

The Subcommittee is divided on whether attorneys licensed to practice in New Jersey should be able to be designated as parenting monitors. Our Subcommittee no longer has five active participants, since one of the judges assigned has been reassigned out of the Family Part and does not participate. At our July meeting, two of our participants believed that attorneys should be able to be designated to serve as parenting monitors. One other member of our Subcommittee felt that the appointment of such attorneys should be allowed, providing the litigants consented to the use of an attorney admitted in New Jersey, rather than a mental health professional. One member felt that attorneys should not be able to be designated to serve as parenting monitors because they are not mental health experts and, by and large, do not have the training or experience to deal with such disputes.

We believe the parenting monitor concept is important. If the parties are left only to mediation, then the insights gained into the family dynamic during an unsuccessful mediation are lost to those in the system who must make decisions in the absence of the parties' ability to mold a resolution.

A parenting monitor will not be a mediator. The information obtained from the parenting monitor process may be considered by judges in making decisions. Of course, the parties involved will be aware of the non-confidential nature of their communications with the monitor, as the Rule specifically references the non-confidential nature of these communications. We feel that the use of such a monitor, will diminish the need for extensive psychiatric evaluations, although full evaluations will still be available.

We also specifically have not attempted to catalogue the kinds of disputes or issues that may be considered by a parenting monitor. We have also not attempted to

draft a proposed Order to be used when designating a parenting monitor. We understand the Chapter is considering adopting a boiler plate general Order of Appointment. We do not believe it appropriate to catalogue in great detail the myriad of issues that a parenting monitor may consider. We believe this is best tailored to the individual facts of a particular case, both by the Court and the parties. An Order appointing a monitor should be tailored to the needs of each case.

We think designation of a parenting monitor now occurs frequently as a matter of *de facto* practice. We believe the adoption of a Rule will help create uniformity for this practice.

COURT EXPERT REPORTS SUBMITTED TO THE COURT

Pursuant to R. 5:3-3(e), reports of Court appointed experts are to be provided to the Court and the parties "upon completion."

A Court appointed expert's opinion is entitled to no greater weight or preference than any other expert's opinion. It seems inappropriate in the extreme for a Judge to have access to one expert's report without having access to all experts' reports. We all concurred that although reports are hearsay, it is customary as a matter of convenience for the Court to have copies of all experts' reports, as testimony proceeds. The current Rule, which has been in place for many years, allows the Court to have its experts' reports before trial, not just at the time testimony is commencing.

The judges on our Subcommittee felt the availability of such reports was helpful to them during the *pendente lite* phase of the case, particularly if there are issues or allegations that may have to be acted upon before trial. Logically, and as a matter of fundamental fairness and due process, if the Court's experts' report is going to be

available to it before trial, then all experts' reports should be available to the Court, *pendente lite*, since the Rule is clear that the Court is not to entertain "any presumption in favor of its expert's findings."

RECOMMENDATIONS FROM EXPERTS

Our Subcommittee has discussed the Supreme Court's reference back to the Practice Committee of its proposed amendment to *R.* 5:3-3 pertaining to disputes between parenting experts. In its referral back to the Practice Committee on July 24, 2002, the Court's representative noted:

> The Court did not approve the proposed amendment to Rule 5:3-3, relating to experts in custody/parenting disputes. After considering the Committee's recommendation, the Court elected to refer the matter back to the Practice Committee for further consideration of its proposal that experts in these matters be required to confer with each other when they differ in their conclusions. (emphasis supplied)

See **Exhibit B** annexed hereto.

The Subcommittee notes that the proposed Rule amendment approved last term by the Practice Committee did not require experts to confer with each other if they reached different conclusions. The proposed Rule amendment only gave the trial court the power to require such conferences. It did not require the Court to do so.

Nevertheless, the Subcommittee considered the referral back in the context of discussions before this full Committee last term and further in the context of the Bar Association's opposition to the proposed Rule amendment last term.

Before discussing that portion of the proposed Rule that was referred back by the Court, we reiterate our approval of two sections of last term's proposed Rule amendment to *R.* 5:3-3 that were never in dispute. You will recall that the first sentence of the proposed Rule directed mental health experts to "conduct strictly nonpartisan evaluation

to arrive at their view of the child's best interests, regardless of by whom they were engaged." That proposed amendment emanated from last term's Subcommittee research and investigation into the standards and protocols used by all of the mental health organizations whose members perform parenting evaluations. Last term's Subcommittee presented in its report to the full Committee, copies of all the protocols of mental health groups to demonstrate that the standard of each group required experts to perform investigations and give opinions based solely upon what they perceived to be the child's best interests, regardless of who engaged them. Copies of these protocols are again annexed hereto again as **Exhibit C**. Therefore, our Subcommittee believes that this sentence of the Rule amendment should be reiterated without modification. There was no opposition to that section of the Rule amendment in the Subcommittee or the full Committee and the Bar Association did not oppose that section of the proposed amendment.

Moreover, we note that there was no opposition to that section of the proposed Rule amendment that directed mental health experts performing evaluations "to consider and include reference to criteria set forth in *N.J.S.A.* 9:2-4, as well as any other information or factors they believe pertinent to each case." Since no one could reasonably dispute a Rule direction to experts to consider statutory custody criteria, as well as other information they believe pertinent, we recommend again adoption of that section of the proposed Rule amendment. It is important that this be noted specifically because it is our experience that expert reports frequently do not comment on the statutory custody criteria.

Finally, we fully discussed that portion of the Rule amendment this Subcommittee accepted last term, which was referred back by the Supreme Court. The Subcommittee still believes that the ability of the courts to ask experts to confer to determine if a common recommendation is possible, is an important tool of which courts should not be deprived. However, the Subcommittee also agrees that the proposed Rule needs to be revised to assure, that in the event the experts either do make a common recommendation, which is not accepted by a litigant, or do not make a common recommendation, neither the unacceptable common recommendation, nor the identity of the party rejecting the recommendation, nor the experts' communications about these issues, can be evidential in any subsequent trial, except with respect to the issue of counsel fees. In other words, in these scenarios, we believe that all such discussions should remain confidential, until the Court has made a substantive parenting determination and is then considering counsel fee applications.

We have carefully reviewed the reasons that have been articulated for opposition to the Rule amendment accepted by the Family Practice Committee last term. They are:

1. Such an amendment would cause the Judiciary "to transfer its decision making authority to experts, against the wishes of the litigants or their attorneys."
2. A common recommendation made by the experts would be communicated to the court as substantive evidence thereby discrediting the experts' reports submitted in anticipation of trial and the common recommendation would be used as fodder to discredit an expert on cross examination if one or both of the parties did not agree to the common recommendation."

3. Attorneys would be placed in "an ethics bind, as it frustrates the attorney's duty to their client."
4. In any event "a Court expert could be appointed during the proceedings to reconcile the opinions of the experts."

See **Exhibit D** attached hereto.

The Rule we propose would not transfer authority to experts. Experts do not make decisions. Judges still make decisions and clients still have the right to oppose any opinion given by experts, even if the experts agree. Neither the common recommendation, nor the identity of the litigant who rejected the recommendation would be known to the Court until after its determination. Discussions between the experts also would not be evidential.

Second, we do not believe that our proposed Rule would create an ethics bind for attorneys and frustrate their duty to their client, since their obligation would be to represent their client's interests and to implement the client's perspective. If clients did not wish to accept the common recommendation, they would have a right to present their case for trial and they would have the right to ask a judge to make a decision. Their lawyers would be required to do so. The identity of the rejecting party would not be revealed before determination of parenting issues.

Third, we do not believe the role of Court experts is to reconcile conflicting opinions of private experts. Such efforts and negotiations would open everyone up for impeachment, if either expert changed from the position set forth in their report. We believe a Court should appoint an expert if it needs assistance with respect to guidance about the issues involved. The Court expert should not have extra judicial authority to

reconcile the opinions of private experts. Moreover, a Court expert's opinion is entitled to no greater weight then any other expert's opinion, unless substantiated and accepted by a judge after rationally reviewing at trial the evidence that supports the opinion.

Our proposed Rule recognizes a problem articulated by the Bar, regarding the impeachment of an expert, who changed his opinion following consultation with the other expert. Certainly, if the Court knew that a common recommendation had been made, and the matter did not conclude and was tried to conclusion, an expert who changed his initial recommendation, could be discredited on cross examination or otherwise impeached.

The Subcommittee discussed whether or not this concern could be addressed in the context of a proposed Rule amendment that nevertheless, gave the Court the discretion to direct the experts to confer in an attempt to reach such a recommendation. We believe the solution to this problem was not to "throw out the baby with the bath water."

We believe it is unwise to disregard a vehicle, which could be very helpful in managing conflict, reducing the number of cases that are tried to conclusion, and increasing the number of cases that are able to be harmonized by agreement. We believe that the vast majority of litigants, if faced with a common recommendation from two experts, probably would be positively impacted to the point of substantially increasing the chances for resolution. But we agree that if the consultation does not result in resolution, and either or both litigants wish to reject a common recommendation, that they should have the right to do so, without the Court learning of either the

recommendation, the identity of the rejecting party or of the discussions between the experts.

We believe the solution to this dilemma is to attempt to craft a Rule that enables the Court to ask the experts who make disparate recommendations to confer to determine whether a common recommendation is possible. However, if the experts do reach a common recommendation and a litigant does not accept it, or the experts cannot reach a common recommendation, then the Court is not to be made aware of that recommendation, or of any discussions between the experts, or of the identity of the rejecting litigant, until after the parenting determination has been made. The Court should not learn of these events until the counsel fee phase of the case, after the Court has made a parenting determination. In these circumstances, the common recommendation should be placed in a sealed envelope, along with the position of each client, with respect to its acceptance or rejection, and should be reviewed by the Court post-judgment following decision, in connection with the issue of counsel fees.

Our propose Rule amendment to *R.* 5:3-3, which adds a new section (b), is as follows:

> (b) Custody/Parenting Disputes: Mental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of by whom by they are engaged. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case. If the mental health professionals reach different opinions concerning the parenting/custody arrangements that are in the best interests of the children, the Court may direct them to confer in an attempt either to reach a resolution of all or a portion of the outstanding issues, or to make a common recommendation. Neither the refusal of either party to accept any common recommendation by the mental health professionals, nor the discussions of the experts shall be communicated to the Court in any fashion, and shall not be introduced into evidence, except as otherwise set

forth herein. In the event the mental health professionals reach a common recommendation concerning any parenting issue, and either litigant does not accept that recommendation, then that recommendation, along with the position of each litigant, with respect to its acceptance or rejection, shall be placed in a sealed envelope and submitted to the Court during the trial and reviewed by the Court only in connection with its decision concerning counsel fees. The Court shall not review the recommendations or the litigants' positions concerning the recommendation, until it has made its final determination with respect to all parenting issues.

TIME PERIODS FOR MEDIATION, EVALUATION AND TRIAL

A reference was made to our Subcommittee at the March 31, 2003 Family Practice Committee meeting, based upon a recommendation from the General Procedures and Rules Subcommittee.

The Family Law Section addressed this issue to the General Procedures and Rules Subcommittee at its meeting on February 26, 2003. The Bar noted that a referral to mediation, by virtue of *R.* 5:8-1, in effect, stays the commencement of parenting evaluations for a sixty (60) day period of mediation, unless the parties otherwise agree.

The Bar's concern is that mediation does not usually commence until thirty days after issue is joined because it is at that point that a Case Management Conference has been scheduled and a determination has been made whether custody or parenting is a genuine and substantial dispute. If evaluations are stayed for 60 more days, then, in effect, three months of the sixth month period after which custody trials are supposed to commence pursuant to *R.* 5:8-6 has expired, without forensic investigation. There was concern expressed that evaluators, therefore, would not have sufficient time to perform their investigations and complete their reports in accordance with these time tables and the requirement that a trial occur in six months.

Last term, our Subcommittee met with mental health professionals who had similar concerns for different reasons. The mental health professionals we met with believed that it was a disservice to litigants in parenting disputes to rush them through the litigation process because the family needs time to grieve its death. The mental health professionals advised the Subcommittee that pushing parenting disputes through the system would only polarize the parties because emotions in most cases would still be too frayed. They suggested mediation proceed for six months before evaluations commenced. They uniformly expressed the view that compelling litigants to conclude custody cases within six months was contrary to the families and children's best interests.

Our Subcommittee discussed the timetables for mediation and evaluation and the clear emphasis by mental health professionals that litigants and children were not served by compelling them to rush to a decision about parenting issues in the midst of heightened emotions at the commencement of the case.

Moreover, the Subcommittee firmly believes that respect for our system is undermined by having in place a Rule that cannot be complied with because there simply is not sufficient time to accomplish the work that is necessary to be done.

We believe the system is better served by allowing more flexibility for completion of evaluations and scheduling of custody/parenting trial dates. This is best done by the judge assigned to the case, who can control its course, through periodic Case Management Orders. In other words, the Subcommittee concludes that setting mandatory trial dates for custody disputes, within six months of issue being joined, simply creates a false expectation that most often cannot be implemented. Moreover, the attempt to do so and to push litigants to process these disputes when their emotions are most frayed, only

results in their increased polarization, which is contrary to the best interests of their children.

Therefore, the Subcommittee agrees with the Bar that trial judges should not mandate and inflexibly schedule and commence trials on parenting disputes, six months after issue is joined. The current Rule has a safety valve with respect to the period of mediation and allows the Court, on good cause, to extend the mediation period for longer than two months. The current Rule requires the conclusion of mediation periods to be set forth in Case Management Orders that are entered. The Subcommittee believes similar flexibility is required with respect to completion of evaluations and fixing of firm trial dates, all of which must be tracked in Case Management Orders that are reviewed from time to time.

We have drafted an amendment to *R.* 5:8-6, which allows the Court, on good cause shown, to extend the time period for commencement of a custody trial, as necessary to accommodate reasonably the needs of parenting evaluators to commence and complete forensic investigations, so that proper presentation can occur at trial. The proposed Rule amendment as follows:

> Where the Court finds that the custody of children and parenting time/visitation are genuine and substantial issues, the court may schedule a hearing date six months after the completion of mediation contemplated by R. 5:8-1, or six months after the first Case Management Conference, if there is no mediation. The court may, in order to protect the best interests of the children, conduct the hearing in a family action prior to a final hearing of the entire family action. As part of the hearing, the court may on its own motion or at the request of a litigant conduct an in camera interview with the child(ren). In the absence of good cause, the decision to conduct an interview, it shall place its reasons on the record. If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted. A stenographic or recorded record shall be made of each interview in its entirety. Transcripts thereof shall be provided to counsel and the parties upon request and payment for

the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody. Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody. Hearings on pendente lite disputes about custody and parenting time/visitation plans will occur only if the Court deems them necessary.

If the parties engage in mediation, then the Court may extend reasonably the time period for commencement of trial to allow completion of necessary forensic evaluations. Ordinarily, unless good cause is shown to the contrary, the time period for mediation and evaluation should not be longer than six months from the first Case Management Conference. If there is no mediation, then unless good cause is shown to the contrary, the time period for contemplation of forensic evaluations should be no longer then four months from the first Case Management Conference. All Case Management Orders will identify scheduled completion dates for mediation and forensic evaluations.

R. 5:8-1 is amended as necessary to reflect these *R.* 5:8-6 changes.

TECHNICAL CORRECTIONS TO R. 5:8-1 and 5:8-6

R. 5:8-5 references the need to prepare "custody and parenting time/visitation plans when there is a custody dispute." *R.* 5:8(A) and *R.* 5:8(B) discusses appointment of counsel for children and Guardian Ad Litems, "where custody or parenting time/visitation is an issue."

However, neither *R.* 5:8-1 nor *R.* 5:8-6 have the same reference. The reference in those Rules is simply to custody disputes, not to "custody and parenting time/visitation disputes."

The Subcommittee proposes amending the first sentence of *R.* 5:8-1, to add after the word "custody" the language "and parenting time/visitation disputes." It further proposes amending *R.* 5:8-6, by inserting the same language after the word custody on the first line of that Rule. The Subcommittee also believes that *R.* 5:8-6 should be amended to make clear that a trial court need not conduct a full hearing, pendente lite, on

a parenting dispute. These changes are contained in the proposed Rule amendment referenced, *supra*, pages 13-14.

R. 5:8-1 - INVESTIGATION BY FAMILY DIVISION - - CLARIFYING THE RULE OF PROBATION DEPARTMENTS

A hold over issue from last term was consideration of that provision of *R.* 5:8-1, which directed, when issues of custody are genuine and substantial, that investigation of the character and fitness of the parties be conducted by the Probation Department of the county of venue. *See* Rules of Court, 2002. The Court is not required to do this, but it has the discretion to do so. Rules 5:8-2 through 5:8-4 related to the filing of such reports with the Court and the ability to issue periodic reports and to continue the investigation after an award of custody is made.

This issue was reserved because members of our Subcommittee last year believed it inappropriate for Probation Officers to be conducting best interests evaluations, which is what the phrase "character and fitness of the parties" connotes.

Since the reservation of that issue in our last report, the Rule was amended to direct that such investigations were to be "made by the Family Division." *See R.* 5:8-1, Rules of Court, 2003. The factors to be considered - - the character and fitness of the parties - - were the same, but the investigation was to be under the auspices of the Family Division.

However, although the new Rule directs that the investigation be conducted by the Family Division, the last sentence still sets forth that probation should conduct the investigation. That sentence provides:

> Such investigation of the parties shall be conducted by the Probation Office of the County of the home state of the child, not withstanding that one of the parties may live in another country or state.

Moreover, provisions of *R.* 5:8-2 through *R.*5:8-4 continue to refer to the Probation Department, directing them to make periodic reports to the Court as to the status of custody (*See R.* 5:8-2). Thus, the Probation Department appears to continue to be involved in connection with investigation of the character and fitness of the parties.

The Subcommittee unanimously believes that Probation Departments are inappropriate vehicles to conduct best interest evaluations or to make recommendations concerning the best interests of children. Probation Departments are aptly suited to report on physical evidence pertaining to home surroundings and housing. We do not believe they are qualified to make best interest recommendations.

Many of us have had experiences where Probation Departments have conducted such investigations and at the same time, mental health professionals have performed an evaluation of the same family. The results sometimes are in conflict. In one case, as Probation Department basically went along with a child's wishes who was a teenager, despite serious allegations of inappropriate parental alienation. The mental health professional's recommendation, instead of proposing that custody go with the father, suggested that all contact between the father and the child should be suspended because of the father's inappropriate behavior and malicious motives.

We understand that the Administrative Office has issued a directive that Probation Offices are not to do best interest evaluations or make such reports to the Court. We do not believe the Rule is sufficiently clear with respect to this issue, since even the new

Rule, which requires investigations to be made by the Family Division, seems to leave implementation of that function to the Probation Department.

Therefore, we believe that the Rule must be specifically amended to make clear that best interest investigations are to be performed only by appropriately trained mental health professionals. Probation Departments have the capacity to report on physical evidence pertaining to home surroundings and housing, but not to conduct forensic psychological evaluations. The proposed amendment to *R.* 5:8-1 is as follows: We simply propose adding one sentence as follows:

> Probation Officers not qualified as mental health professionals by licensure, experience or training, should not make best interest recommendations to the Court regarding the character and fitness of the parties.

That sentence should be added as the last sentence to *R.* 5:8-1. In addition, the first sentence of *R.* 5:8-2 should have added to it the phrase: "Subject to the provisions of *R.* 5:8-1 regarding best interests evaluations."

ISSUES RESERVED

CRITERIA FOR DIFFERENTIATING BETWEEN THE DUTIES OF ATTORNEYS AND GUARDIANS FOR CHILDREN

Our Subcommittee is concerned about the absence of clear criteria for defining and distinguishing between the functions to be performed by counsel for children and Guardian Ad Litems. Although *R.* 5:8(B) does catalogue the functions of a Guardian Ad Litem, *R.* 5:8(A) is not nearly as defined.

Ivette Alvarez has prepared an insightful preliminary report about this issue. It is attached as **Exhibit E**. The conclusion of the report is that further refinement and study

is necessary. Many questions need to be answered. For example, the New Jersey Rules make no distinction between an impaired and unimpaired child, and do not require that counsel for the child or the law guardian make a determination on this issue. Most notably, the AAML takes the position that counsel for the unimpaired child is to follow the "child client's instructions whether in his or her own best interest . . ." In contrast the New Jersey Rule calls for the child's counsel to act as an independent legal advocate for the best interest of the child. This statement is problematic and goes to the very heart of the matter. Is the role of counsel for the child in New Jersey a client centered one as required by the ethics and professional practice rules, or somewhat lesser hybrid of the role of the traditional advocate and the role of the guardian ad litem? Are the appointments interchangeable and therefore a duplication of services?

Our Subcommittee simply has not had time to carefully discuss these issues sufficiently to be able to propose an appropriate Rule amendment. We believe guidance with respect to the use of attorneys for children is required, but we reserve for next term and more recommendations concerning this issue.

We similarly believe the issue of use of audio and video taping during evaluations should be further investigated. We were unable to do so this term.

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March 31, 2003

VIA TELEFAX ONLY

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Re: **Subcommittee - Custody & Parenting Time**

Dear Phil:

I apologize for delay in responding to your letter to Judge Serpentelli, which he referred to me on March 3, 2003.

I have carefully reviewed the proposed Rule regarding appointment of a "parenting coordinator".

I very much am in favor of the concept of a parenting coordinator, but I prefer the use of the term monitor because it suggests a more expansive role and also a reportorial function, which distinguishes it from the mediation referral.

I think the concept of a parenting monitor with reportage responsibilities is very important. The direction of dysfunctional, high conflict individuals to mediation is likely to be unsuccessful. However, the nature of the process results in time being spent and the information obtained from the interactions being useless to the system because it cannot be revealed to judges who must make decisions.

The parenting monitor procedure overcomes that problem. The Rule makes clear that there is authority to do that, which has become a *de facto* practice among many judges. Some judges designate these interveners as therapeutic mediators, which I think causes confusion. A mediator is a mediator and what is said should be private and a monitor is something else again. The roles need to be distinguished and I think the concept of a proposed new Rule makes wonderful sense.

I have carefully reviewed the proposed Rule forwarded with your letter to Judge Serpentelli and have drafted certain revisions. Let me summarize the rationale of my proposed amendments.

1. I do not believe attorneys qualify to provide this kind of assistance, because they are not necessarily trained in child issues or psychologically sophisticated.

2. I have defined mental health professionals to be a social worker, psychologist or psychiatrist. I deleted the reference to "qualified by experience or training" because I believe to become professionals and receive such licensures, you must be qualified to deal with issues of children and conflict in families. I am aware that some may believe that I have too narrowly limited those qualified and that certainly is an issue that should be discussed.

3. I do not believe we need to limit the circumstances that give rise to designation of a parenting coordinator, as you set forth in the third sentence of the proposed Rule, when deciding whether a monitor should be appointed. I believe the Court should be able to appoint a monitor when it believes such a designation is in the best interests of the children. Moreover, I do not think the monitor's role should be defined as "bringing the parties to an agreement", but rather should be to assist in resolving the dispute in the best interests of the children by working with the parties and making recommendations.

4. I deleted language that implies the parenting coordinator makes any determinations and that the parties have to file an application to the Court to contest same. I have simply provided that a parenting monitor is authorized to propose a resolution and further provides that neither parent is required to accept the monitor's recommendation, but that if the parties do not resolve the dispute, either may bring the parenting monitor's recommendation to the attention of the Court on application pursuant to the Rules. I have further provided explicitly that which is implicit, namely that there will be no confidentiality attached to communications to, with, and from the parenting monitor.

5. I further have clarified the cost contribution by indicating the Court can determine same pursuant to the parties' respective financial circumstances and

that the Court shall consider the need, ability to pay, and good or bad faith of the parties.

6. I have deleted from the Rule the specific delineation of areas in which the parenting monitor can make recommendations to the parties and the Court. I believe that delineation of some areas may work to effectuate a limitation. On the other hand, it may be that in certain instances, a therapeutic monitor should not attempt to intrude and on basic personal decisions such as the selection of a therapist for the child or a college. I think it is best that the therapeutic monitor's role is left expansive with his primary responsibility being to address any issues that he believes pertain to the best interests of the children.

I am most interested in any comments you may have about the proposed changes. My Supreme Court Family Part Practice Parenting Subcommittee is having a meeting Tuesday night. I have forwarded your material and the proposed amendments I have suggested for the Rule on monitoring to the Subcommittee members. We plan to discuss the issue and, of course, my views do not necessarily reflect anyone else's view.

You may recall that when we spoke on the phone, I referenced the Subcommittee's work last term which led to the then Practice Committee's recommendations to the Court of a Rule relating to procedures to be followed by mental health professionals when performing parenting/custody evaluations and which also gave the Court the power and authority to direct mental health professionals who came to disparate recommendations to consult to determine if a common recommendation could be made.

I enclose herewith for your review a memo from our Subcommittee to the Supreme Court that attempted to respond to criticisms by the New Jersey Bar Association regarding the proposed amendment to R. 5:3-3(d). The proposed Rule amendment is set forth in the enclosed memo. (It is also available in the 2000-2002 full Practice Committee Report). Although the Supreme Court did not accept this amendment, it did not reject it outright. It referred the issue back to our Subcommittee for further review, which we are in the process of completing.

I am most interested in any comments or reactions you have to the proposed Rule amendment and regarding any other justifications, rationale or argument that you can conceptualize that would meet some of the criticisms and could be used to further support the proposal. Of course, if you disagree, please let me know why. Maybe I am missing something, but I do not see a reasonable basis to oppose this proposed Rule amendment to R. 5:3-3(d).

An associate in my office is beginning the process of contacting the American Bar Association Family Law Section to determine what position that organization has taken

with respect to the recommendations out of the Wing Foot conference requiring that experts who have disparate recommendations on custody must confer. She also will be conducting research on a broader scale nationally to determine other jurisdictions that may employ or similar procedure.

I look forward to communicating with you over the next month to discuss these issues and to share thoughts and opinions. I will let you know my Subcommittee's reaction to the Rule amendment pertaining to parenting monitors. Of course, the individual views of the Subcommittee members do not reflect the opinion of the Family Part Practice Committee.

Very truly yours,

JOHN E. FINNERTY

JEF:at
Enclosures
cc: Hon. Bradley J. Ferencz, J.S.C.
Hon. Sheldon R. Franklin, J.S.C.
Jane R. Altman, Esq.
Ivette Ramos Alvarez, Esq.
Paula Andrews

Cassidy

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STATE OF NEW JERSEY

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July 24, 2002

Hon. Eugene D. Serpentelli, Chair
Supreme Court Family Practice Committee
Ocean County Courthouse
118 Washington Street
Toms River, New Jersey 08753

Subj: 2000-2002 Family Practice Committee Report –
Supreme Court Action on Recommendations

Dear Judge Serpentelli:

This letter is to advise you of the Supreme Court's actions on the rule recommendations contained in the 2000-2002 Family Practice Committee report. I have enclosed for your information a copy of the Court's July 12 omnibus rule amendment order; the amendments set forth therein become effective September 3.

Subject to editorial revisions, the Court approved the recommended amendments to the following Rules: 5:4-2, 5:5-2 (also modified to change reference to "County Clerk" to "Family Division Manager"), 5:5-4 (note that the Court did not adopt the suggested comment), 5:7-4, 5:7A, 5:8-1, 5:8-6, 5:17-4, 5:19-2, and 5:22-2. The Court approved the adoption of recommended new Rule 5:9A. The Court approved as well the recommended revisions to Appendices IX-A and IX-B.

The Court also adopted a housekeeping amendment to Rule 5:25-1 so as to conform the language in the rule to the provisions of L. 2001, c. 408, the Balanced and Restorative Justice Act (as recommended by the Conference of Family Presiding Judges).

The Court did not approve the proposed amendment to Rule 5:5-3, relating to experts in custody/parenting disputes. After considering the Committee's recommendation, the Court elected to refer the matter back to the Practice Committee for further consideration of its proposal that experts in these matters be required to confer with each other when they differ in their conclusions.

The Court did not act on the recommended adoption of new Rule 5:9-4 or the related amendment to Rule 5:12-4, relating to termination of parental rights matters. The Court asked that the Committee revisit those recommendations in light of the

Court's decision in In the Matter of the Guardianship of J.N.H., A Minor, A-97-01, decided June 26, 2002.

Consideration of any non-rule recommendations contained in the Committee's report and supplemental report will be in the fall.

Please feel free to share with the 2000-2002 Committee members the results of the Court's consideration of the Committee's report and recommendations. Thank you.

Very truly yours,

Richard J. Williams

/sdb
enclosure
cc: Chief Justice Deborah T. Poritz
John P. McCarthy, Jr., Director
Harry T. Cassidy, Assistant Director
Margaret Mahon, Committee Staff
Steven D. Bonville, Special Assistant

Board of Psychological Examiners
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Specialty Guidelines for Psychologists Custody/Visitation Evaluations

LAW-PS New Jersey Department of Law & Public Safety CONSUMER AFFAIRS

INTRODUCTION

These guidelines are designed to recognize responsible standards for work of psychologists in custody/visitation evaluations.

The New Jersey State Board of Psychological Examiners wishes to express its appreciation to the committee members who contributed to this document.

Frank Dyer, Ph.D., Committee Chairperson

Jane F. Rittmayer, Ed.D., Chairperson (1991-1993), New Jersey State Board of Psychological Examiners

Susan Cohen Esquilin, Ph.D.

Madelyn S. Milchman, Ph.D.

James Boskey, Esq.

Amy C. Goldstein, Esq.

Toby Solomon, Esq.

Completed: 1993

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Guidelines

1. RESPONSIBILITY

A. Psychologists provide comprehensive, objective, and impartial custody/visitation evaluations in order to provide information to the court or to attorneys which assists in making decisions as to custody/vistitation arrangements that will best provide for the needs of the minor child(ren) involved.

B. Psychologists understand that their client is considered to be the child(ren) and their evaluations are conducted in compliance with the legal standard of the best interests of the child. Psychologists comply with this standard regardless of the specific contractual relationship under which they are providing services.

C. Psychologists maintain scientific objectivity and avoid bias by making every reasonable effort to collect data from all relevant sources regardless of the specific party(ies) requesting services from the psychologist.

D. Psychologists' responsibility encompasses their own conduct and the conduct of those whom they directly supervise.

E. Psychologists conducting a custody and visitation evaluation make a reasonable effort to ensure that their services and the products of their services will be used in a forthright and responsible manner.

F. Psychologists are aware of their responsibility for the welfare of the families they evaluate.

Commentary

1. RESPONSIBILITY

B. Due to the potential problems posed by the adversarial process, and in order to avoid bias or the appearance of bias, psychologists carefully consider the nature of the contractual agreement when they agree to conduct a custody/visitation evaluation.

1. Most Preferred Practice: Psychologists make a reasonable effort to secure a court appointment by the judge. If the judge does not contact the psychologist, the psychologist can request the contacting attorneys or clients to attempt to arrange a court appointment.

2. Preferred Practice: If a court appointment is not obtained, psychologists make a reasonable effort to be jointly selected by the attorneys representing the parties in the case.

3. Acceptable Practice: If not court-appointed or selected by all attorneys, psychologists participate in a custody determination on behalf of one adversary,

while maintaining their obligation to serve the best interest of the child.

D. Psychologists recognize the obligation to train office staff who have contact with clients in a custody evaluation to understand and administer all policies and procedures, be able and willing to answer all administrative questions, and be able to schedule appointments. If such training is not feasible, psychologists recognize the obligation to instruct office staff to refer all calls to the psychologist who deals with them directly.

F. Psychologists use discretion in undertaking the evaluation of a family which has already been evaluated. Multiple evaluations, particularly of children, can be sources of stress. Psychologists seek to minimize unnecessary stress by using alternative procedures when appropriate. Psychologists asked for a second opinion use their professional judgment and may, in appropriate circumstances, select such procedures as case record review rather than re-examining the child(ren) or family.

Guidelines

2. COMPETENCE

A. Psychologists who provide custody evaluation information to the court must be licensed. Permit holders may not be utilized as evaluators in custody cases.

B. Psychologists who provide custody evaluations to the legal system have a level of general expertise in the following areas: child growth and development; parent-child bonding; scope of parenting; adult development and psychopathology; family functioning.

C. Psychologists recognize that allegations of acts of abuse by either parent or allegations of impairment of either parent require specialized knowledge and assessment skills above and beyond the general expertise required in custody evaluations. If the allegations involved fall outside the area of expertise of the psychologist, the psychologist recognizes the obligation to obtain the necessary training and/or supervision in this area or to decline to perform the evaluation. Allegations involving the following areas require additional education or training, knowledge, and experience: physical, sexual, or psychological abuse of spouse or children; neglect of children; alcohol or substance abuse which impairs the ability to parent; medical/physical/neurological impairment of either spouse's caretaking ability. Any and all such allegations should be taken seriously and evaluated independently

regardless of the source or circumstances in which they arise.

D. Psychologists recognize the need to maintain scientific objectivity and to resist allowing personal values and beliefs to influence the evaluation. They identify the problems to which a child is exposed as a product of lifestyles and/or values which are different from those of the psychologist or from the dominant culture related to ethnicity, race, religion, socioeconomic status, or sexual orientation. Psychologists recognize the obligation to acquire specific current scientific knowledge regarding diverse populations, especially as it relates to child-rearing issues.

E. Testing Expertise

Psychologists employ only those test procedures which they are competent to administer and the construction/interpretation of which they understand.

F. Legal Knowledge

1. Psychologists conducting custody and visitation evaluations possess a reasonable level of knowledge and understanding of the legal standards which govern their participation as experts.

2. Psychologists conducting custody and visitation evaluations possess a reasonable level of knowledge and understanding of the legal standards governing decisions regarding custody and visitation.

3. Psychologists conducting custody and visitation evaluations remain subject to all laws governing psychologists in their work. This is true even if the psychologist is court-appointed.

G. Consultation

Psychologists recognize the need to seek consultation as appropriate to ensure that their work meets professional standards of service.

Commentary

2. COMPETENCE

B. General expertise

1. Knowledge of child growth and development. Psychologists possess current scientific knowledge and assessment skills pertaining to cognitive, personality, social, physical and skill development. Psychologists are competent to identify developmental dysfunction.

2. Knowledge of parent-child bonding. Psychologists possess current scientific knowledge and assessment skills pertaining to attachment processes. Psychologists possess knowledge and assessment skills regarding the quality of bonding, effects of disrupted

attachments/separations, rebonding, changes in bonding, and the relationship of the child's sense of time to separation issues.

3. Knowledge of the scope of parenting. Psychologists possess current scientific knowledge and assessment skills pertaining to the extent of parent involvement, parental capacity to provide for the child's physical needs (food, clothing, shelter, safety, health) and psychological needs (general welfare/happiness, love, security, affection, valuing the child, attunement/responsiveness, moral development, individuation, autonomy/independence, intellectual stimulation/academic support, peer/family socialization).

4. Knowledge of adult development and psychopathology. Psychologists possess current scientific knowledge and assessment skills pertaining to parents' intellect, personality, and emotional dysfunction. Psychologists assess only those functions which relate directly to the capacity to parent.

5. Knowledge of family functioning. Psychologists possess current scientific knowledge and assessment skills pertaining to family systems/alliances, and availability and appropriateness of social support systems available to each parent.

C. Expertise Related to Allegations of Abuse or Impairment

1. Psychologists conducting evaluations in which allegations of domestic violence or child abuse arise possess current scientific knowledge and assessment skills pertaining to the nature, types, and psychological *sequelae* of domestic violence and of child abuse. Current scientific knowledge about victimization, trauma responses, and special syndromes pertaining to these areas is particularly helpful.

Psychologists recognize that psychological and legal issues often combine to produce denials of the extent or impact of allegations regarding many of these special issues by the alleged perpetrators. Psychologists recognize that many of these allegations involve incidents occurring only in private. In addition, abuse within a family suggests the presence of intimidation which can affect the results of the custody evaluation, especially in, but not limited to, such areas as: the child's stated custodial preference, the personality and functioning of the alleged assailant and victim, and the nature of appropriate visitation arrangements. Therefore, psychologists recognize that specialized assessment techniques may be necessary.

2. Psychologists recognize the obligation to evaluate thoroughly all allegations which call into question the safety of each child in each home. A child is unsafe if he/she is subject to abuse, neglect, unsafe conditions, and/or is a witness to the abuse of others. Psychologists recognize the fact that allegations of domestic violence, child abuse and neglect, alcohol and substance abuse, and impairment made after a separation should not result in disregarding such allegations simply as retaliatory. Further, it must be recognized that such allegations are, on occasion, made by an accused abuser to retaliate against the accuser. Psychologists recognize the need to evaluate the motives of all parties making abuse allegations.

Psychologists recognize that, even after a thorough evaluation, unanswered questions regarding allegations of abuse may remain. Psychologists recognize that under these circumstances they are obligated to advise the court as to the continuing uncertainty.

D. Psychologists do not allow their own values and opinions concerning child-rearing to contaminate their clinical evaluations. Psychologists draw conclusions only on the basis of what can be legitimately inferred from evaluation data and on the basis of what is known in the scientific literature.

E. Testing Expertise

Psychologists do not rely solely upon the results of computerized narrative reports of assessment devices without exercising an independent capacity to interpret scores yielded by the measure. Psychologists should not rely on formulae or recommendations contained in computerized narrative reports in a mechanical manner without incorporating them into an independently formulated clinical context, including diagnoses where applicable.

Further, psychologists recognize that there are currently a number of scales and other procedures on the market that purport to be able to identify the appropriate parent for placement of a child in divorce/custody disputes. Psychologists do not rely on conclusions generated or suggested by these instruments without assessing them against their own independent findings based upon other sources of data. Psychologists recognize that the ultimate responsibility for interpreting the meaning of test results and their relevance to parental capacity rests with the psychologist and not with the formulators of the computerized narrative report or custody assessment procedure, regardless of how authoritative the output of such instruments may appear.

F. Legal Knowledge

(See Appendix for status of rules, statutes, and case law as of 1993.)

1. Two roles are possible for a psychologist conducting a custody/visitation evaluation: assistant to the fact-finder or expert witness. As assistant to the fact-finder, the psychologist gathers data not otherwise available to the court and relates the data to the questions presented in the custody issue(s). As expert witness, the psychologist interprets evidence already presented, relating that interpretation to the questions at issue.

2. Psychologists notify the Division of Youth and Family Services when a suspicion of child abuse, physical or sexual, or neglect arises in the course of an evaluation. Similarly, psychologists remain subject to duty-to-warn obligations if an imminent danger exists to any identifiable person.

G. Psychologists recognize that referral to and/or consultation with other specialists is appropriate in cases where the diagnostic and/or clinical issues fall outside the scope of the psychologist's expertise. Such specialized areas include, but are not limited to: neuropsychology, medication management, physical disabilities, educational problems, medical problems.

Guidelines

3. RELATIONSHIPS

A. Role of the Psychologist

The psychologist has an obligation to clarify with all parties, attorneys, and the court the nature of the contractual agreement and his/her role as an objective evaluator, irrespective of the contractual arrangement.

B. Dual Relationships

Under no circumstances should a treating psychologist agree to assume the role of evaluator. Under special circumstances, usually under a court order and with the consent of the client, a psychologist whose initial involvement with the case has been as an evaluator may agree to function subsequently as a therapist. If the psychologist/therapist is required to report back to the court, the nature of all arrangement and limitations on confidentiality must be explained to all parties.

C. Communication

All communication with parents or attorneys is conducted in such a manner as to avoid bias or other impropriety or the appearance thereof. A psychologist appointed by a court or designated jointly by the parties

assures that both parties are kept informed of significant written or verbal communication to them presented by either party or party's attorney.

Commentary

3. RELATIONSHIPS

A. Role of the Psychologist

Psychologists inform the contracting attorney(s) that their role is to serve the best interest of the child(ren), regardless of who contracts for the services. Psychologists inform attorneys that no guarantees can be made to support his/her client's goals.

Psychologists obtain a copy of the court order, if there is one, prior to beginning the evaluation.

B. Dual Relationships

If the psychologist is now or has been a therapist for any member of the family, the psychologist does not assume the role of evaluator in a custody case. It is ordinarily a conflict of interest to become the therapist for any member of the family during or after completion of the evaluation.

Psychologists resist testifying in court in any custody case where they are or have been the therapist for any member of the family, except with the consent of that individual. If a subpoena to testify is issued by a judge, the psychologist avoids making recommendations regarding custody or visitation. Psychologists appointed as evaluators contact treating therapists, wi client permission or court order, to obtain as mu information as possible about the family in question.

C. Communication

Court-appointed psychologists avoid or strive to limit communication with attorneys unless mandated by the court. Communication from the psychologist to the attorney during the course of the evaluation is limited to the psychologist's request for information or notification of delay in the process. Any substantive communications from attorneys to the psychologist are in writing with notice given to the other party.

If selected by both attorneys without court appointment, psychologists communicate any substantive information to both attorneys simultaneously, either in writing or through a conference call. If retained by one party, psychologists restrict all communication to that party.

Psychologists recognize the obligation to use their discretion in providing feedback to anyone involved in the evaluation. Psychologists understand that feedback, when provided, should be shared with both parties.

Guidelines

4. THE COURSE OF THE EVALUATION

A. Informed Consent

Psychologists recognize the obligation to explain thoroughly the purposes and procedures of the custody evaluation to the parties and/or their attorneys before beginning the evaluation. If court-appointed, and cooperation from the parties is not forthcoming, the psychologist should inform the court and seek resolution of the problem before proceeding.

B. Fees

1. Psychologists recognize the obligation to set fees in a manner which is consistent with (1) providing adequate compensation for the level of service needed to comply with professional standards and (2) to avoid financial exploitation of the client. Psychologists make a reasonable effort to provide continuity of service to cases which return under changed financial circumstances.

2. Psychologists make all parties involved fully aware of their fee arrangements.

3. Psychologists recognize that contingency fees are unethical, giving the appearance of bias and potentially jeopardizing the psychologist's neutrality.

4. Psychologists provide complete documentation for all fees, itemizing time, charges, and services as appropriate.

C. Scheduling Appointments

1. Psychologists recognize the need to conduct and complete a custody/visitation evaluation in a timely manner.

2. Psychologists recognize the obligation to balance contacts with parents in such a manner that impartiality is ensured and bias or the appearance of bias is avoided.

D. Delivery of the Evaluation/Report

The final report is delivered to the party(ies) who contracted with the psychologist. If the evaluation is conducted pursuant to a court order, the report is delivered to the court. If the evaluation has been conducted pursuant to attorney request, it should be delivered to the requesting attorney.

Commentary

4. THE COURSE OF THE EVALUATION

A. Informed Consent

Psychologists recognize that their initial involvement in the case creates the parameters of the evaluation. Psychologists enter the case in such a manner as to convey respect for the parties involved, interest and compassion for their situation and honesty in communication(s) with them. Psychologists are aware that the therapeutic effect of the evaluation experience upon the family can be profound, even though they are not playing the role of treating therapist.

It is advised that psychologists provide a set of written guidelines for the parents which will assist them in understanding the nature of the custody evaluation and the implications of their agreement to participate. These guidelines should include, but are not limited to, the purpose, procedures and methods, charges, limits of confidentiality, special policies pertaining to issues such as cancelled and/or missed appointments, and other relevant matters. Psychologists protect all involved parties by having attorneys review the guidelines, and by signing the guidelines and obtaining both parents' signatures.

B. Fees

1. Psychologists decline a case and make appropriate referrals if mutually satisfactory fee arrangements cannot be made in advance.

2. Psychologists accept payment of fees by retainer or by a pre-arranged fee schedule. Psychologists understand that retainer fees protect them from non-payment and they may decline a case if retainer arrangements cannot be made. If a partial retainer is accepted, psychologists clearly inform the judge, attorneys, and/or parties of the schedule for payment of the remainder and of the contingent relationship between complete payment and final delivery of services. Psychologists inform judges, attorneys and parties that payment in excess of the reasonable estimate is expected if delivery of services unforeseeably exceeds that anticipated. Psychologists inform judges, attorneys and parties that unused fees will be refunded as soon as possible upon completion of the evaluation.

If payment by fee schedule is accepted, psychologists provide a complete explanation of the expected per-visit payment or other scheduled costs. Psychologists may require payment for the report prior to its delivery.

Psychologists may bill the estimated amount for court testimony in advance of scheduled court appearances when possible. Psychologists can require payment for court testimony prior to the scheduled court appearance when possible. When prior payment is not feasible, psychologists may require payment in a form which protects the psychologists' fees such as cash.

certified check, money order, attorney's check or credit card.

C. Scheduling Appointments

1. Psychologists accept cases only when there is time in the psychologist's schedule to move through the process efficiently.

If neither parent has contacted the psychologist to begin the evaluation within thirty (30) days after the psychologist has received notification of court appointment, the psychologist notifies the court/attorneys in writing.

Psychologists understand that time frames must be adjustable to the complexity of the data collection process. Psychologists recognize the obligation to observe appropriate and realistic time guidelines to avoid undue prolongation of the process, and to notify the court/attorney(s) of any unusual or excessive delays. Psychologists recognize the obligation to schedule appointments with as much regularity as the case permits and in a sequence which the psychologist finds most helpful in gathering the data. Psychologists recognize the obligation to discuss problems in following the sequence directly with the parent(s) prior to notifying the court/attorney.

Psychologists recognize the obligation to complete the written report in a timely manner. Delays of more than one month from the final session are considered excessive unless there are extenuating circumstances.

2. The scheduling of contacts with each parent is dependent upon the content of the evaluation, and reflects the specific questions in the case and the time needed to obtain the necessary information. Therefore, while the scheduling of contacts with each parent does not automatically provide each parent with equal time, psychologists have a clear rationale for any significant disparities between the parties in time allocation.

D. Delivery of the Report

Psychologists who are court-appointed submit the report to the judge who signed the court order. Psychologists who are court-selected send the report to both attorneys. Psychologists who are employed by one attorney send the report to that attorney only.

Guidelines

5. ASSESSMENT TECHNIQUES

A. Psychologists employ a range of assessment procedures, which may or may not include testing, adequate to reasonably address the specific referral questions unique to each case. Assessment procedures should take into account all factors deemed significant to the welfare of the children. Excessive testing should be avoided.

B. Psychologists pay special attention to the reliability, validity, and general technical adequacy of the psychometric instruments they employ. Projective tests may be employed which are generally accepted by the psychological community. The use and limitations of any tests not generally accepted should be noted and justified in the circumstances.

C. Psychologists obtain all releases necessary for the collection of all relevant data in writing before proceeding with the evaluation.

D. The onus of demonstrating the adequacy and appropriateness of evaluation procedures which are not well recognized in the discipline rests on the psychologist.

E. When allegations of abuse or impairment arise, psychologists use special assessment techniques to address these questions.

Commentary

5. ASSESSMENT TECHNIQUES

A. The procedures a psychologist uses include, but are not limited to:

1. direct observations of parents, child(ren), pertinent extended family members, and others critical to the case in individual, joint, and family modalities indicated;

2. interviews of parents, child(ren), pertinent family members, and others in individual, joint, and family modalities as appropriate;

3. psychological testing of all appropriate parties, as indicated by the specific needs of the case, to assess the parties' intellectual ability, personality functioning, parenting ability, and special needs;

4. home visits;

5. special techniques including naturalistic observations which allow assessment of the functioning of the parent(s) beyond the home;

6. special techniques including naturalistic observations which allow assessment of the functioning of the child beyond the home, including school;

7. collection of collateral information from additional parties and/or professionals through multiple means including, but not limited to, direct interviews, review of reports and records, and consultation;

8. evaluations done by specializations within

B. Psychologists maintain active control over records and the release of information. Psychologists reveal only that information which is directly relevant to the issues before the court and only to those persons directly involved in the case.

C. A treating psychologist recognizes the obligation to obtain permission from the client or the client's guardian, or to obtain a court order before releasing any treatment records of clients involved in a custody determination.

Commentary

6. CONFIDENTIALITY

A. Completion of custody/visitation evaluations and reports necessitates obtaining consent to release the psychologist from confidentiality and privilege. Information obtained during the evaluation is released because the psychologist undertakes (1) the responsibility to serve the best interests of the children by communicating all relevant data in a custody evaluation to the court and (2) the responsibility to maintain objectivity by obtaining relevant data from multiple sources and corroborating statements by discussing them with (an)other source(s). Therefore, psychologists explain these responsibilities to attorney(s) and clients in language which is understandable to the clients, at the beginning of the evaluation.

Psychologists understand that the need to disclose normally privileged information may interfere with the objectivity of the custody evaluation by inhibiting the free and complete disclosure of information. Psychologists understand that such inhibitions may arise from personal and social as well as legal reasons since disclosure of normally privileged information can have legal and personal consequences. If asked by clients to conceal information, psychologists warn clients that any information deemed relevant by the psychologist must and will be revealed and advise the clients of their right to privacy. Under these circumstances, psychologists advise clients that they may seek further consultation with their attorneys prior to proceeding with the evaluation. Psychologists respect the client's right to refuse to disclose. Psychologists decide whether such refusal is relevant to the issues before the court and should itself be reported.

Psychologists recognize that unique issues pertain to limitations of the child(ren)'s confidentiality. Psychologists recognize that disclosures of child(ren)'s normally privileged statements to private parties involved in the case may pose special risks to the safety and well-being of the child(ren). Psychologists exercise extreme caution in revealing children's disclosures of abuse to alleged abusers and/or to other parties who may support, collude, or otherwise increase the risk of abuse. Psychologists balance this need for caution with the conflicting need to allow the accused a fair opportunity to explain children's allegations. When necessary, psychologists enlist the assistance of the court or the Division of Youth and Family Services in protecting the child(ren) before waiving the child(ren)'s confidentiality. Alternatively, psychologists explain the need for an incomplete evaluation to the court until it is possible to ensure that adequate protections are in place. Psychologists recognize a particularly significant obligation to avoid using evaluation procedures which would make the evaluation a threatening experience to the child(ren). Psychologists assess the likely impact of evaluation procedures on the children's sense of safety and security by considering the special vulnerability of children and their limited understanding of the nature of the proceedings and protections offered by the legal system. Psychologists understand that the existence of objective precautions does not in and of itself ensure the child(ren)'s sense of safety and security.

Psychologists recognize that disclosures of abused spouses' normally privileged statements to private parties involved in the case may pose special risks to the safety and well-being of domestic violence victims. Psychologists exercise extreme caution in revealing spousal disclosures of abuse to alleged abusers and/or to other parties who may support, collude, or otherwise increase the risk of abuse. Psychologists balance the need for caution with the need to allow the accused a fair opportunity to explain the allegations. Psychologists advise the alleged victim in advance when his/her confidentiality will not be maintained and respond to all requests for special procedures with respect and caution.

B. Psychologists provide judges, attorneys and the parties to the custody evaluation with access to the results of the evaluation, but make every effort not to reveal notes, test books, and raw test data to persons untrained in their interpretation.

C. An attorney's subpoena alone is not sufficient to authorize disclosure of protected information, except to the Office of the Attorney General or the State Board of Psychological Examiners. Other than these exceptions, a treating psychologist resists releasing notes and

case files which contain material that can be misinterpreted by untrained people. When asked for such material, a treating psychologist makes a reasonable effort to substitute a report instead.

Guidelines

7. DOCUMENTATION

Psychologists maintain adequate documentation of their contacts with clients and of the clinically significant information derived from these contacts and from which their conclusions are drawn.

Commentary

7. DOCUMENTATION

Psychologists maintain detailed written records. In addition, psychologists may choose to use audio or video recording depending upon their understanding of the requirements of the specific case or situation.

Guidelines

8. REPORTS AND RECOMMENDATIONS

A. Psychologists advise all parties of the limits of the evaluation results.

B. Psychologists restrict all statements and conclusions drawn to (1) the party or parties directly evaluated, and/or (2) hypothetical statements based on current accepted scientific knowledge and practice.

C. In their reports and testimony, psychologists consider all reasonable custody hypotheses. Psychologists explicitly distinguish between the data and their interpretation of its relevance to the custody issues.

D. Psychologists recognize the obligation to formulate conclusions based on a reasonable degree of psychological or scientific certainty or probability.

E. Psychologists are careful to make only those recommendations which are clearly based upon inferences from scientific knowledge, or to qualify their recommendations. The scientific basis of the recommendations should be made explicit.

F. In cases involving abuse allegations, psychologists may advise the court as to scientific knowledge available concerning issues of child protection and treatment.

Commentary

8. REPORTS AND RECOMMENDATIONS

A. Limitations of the evaluation instruments, problems with reliability, and the impact of forensic contexts on evaluation data are explained to all parties. Psychologists advise the court and/or attorneys when some questions in a custody evaluation cannot be answered despite a thorough attempt to do so. Psychologists advise the court and/or attorneys regarding the factors which are responsible for the lack of clarity (e.g., age, emotional status of child, parties' refusal to disclose), and the circumstances under which further clarity may be obtained in the present or future.

B. Psychologists do not make statements and/or draw conclusions about parties not directly evaluated.

C. Psychologists formulate all relevant custody hypotheses and actively search for data which both confirm and refute each one regardless of the specific party(ies) requesting services from the psychologist. Psychologists present fairly all data which supports and refutes each custody hypothesis.

D. Reasonable psychological certainty is defined for purposes of these guidelines as certainty that is based on either substantive clinical observations, empirical research results, well-accepted theoretical propositions, or an integration of all three, and that is clearly not speculative. Psychologists recognize that custody evaluations differ from clinical assessments in that psychologist is held to a more stringent standard professional certainty or probability than is the case for a working clinical hypothesis in the ongoing treatment of a psychotherapy patient. Psychologists recognize that qualification as an expert witness constitutes an explicit recognition by the court that the psychologist's capacity to deliver an opinion in the matter under consideration exceeds that of the lay public. Psychologists therefore recognize that offering clinical hypotheses as though they were scientifically valid conclusions is inappropriate. Psychologists recognize the obligation to weigh carefully all conclusions and recommendations against the standard of reasonable psychological or scientific certainty or probability.

In cases involving allegations of abuse, psychologists may further draw only those conclusions about the occurrence of abuse which are founded on adequate scientific evidence.

E. Psychologists distinguish between recommendations as to the ultimate legal issue, which are the

Practice Directorate

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Guidelines for Child Custody Evaluations in Divorce Proceedings

Correspondence may be addressed to the Practice Directorate, American Psychological Association, 750 First Street, NE, Washington, DC, 20002-4242.

Introduction

Decisions regarding child custody and other parenting arrangements occur within several different legal contexts, including parental divorce, guardianship, neglect or abuse proceedings, and termination of parental rights. The following guidelines were developed for psychologists conducting child custody evaluation, specifically within the context of parental divorce. These guidelines build upon the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* (APA, 1992) and are aspirational in intent. *As guidelines, they are not intended to be either mandatory or exhaustive. The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations.*

Parental divorce requires a restructuring of parental rights and responsibilities in relation to children. If the parents can agree to a restructuring arrangement, which they do in the overwhelming proportion (90%) of divorce custody cases (Melton, Petrila, Poythress, & Slobogin, 1987), there is no dispute for the court to decide. However, if the parents are unable to reach such an agreement, the court must help to determine the relative allocation of decision making authority and physical contact each parent will have with the child. The courts typically apply a "best interest of the child" standard in determining this restructuring of rights and responsibilities.

Psychologists provide an important service to children and the courts by providing competent, objective, impartial information in assessing the best interests of the child; by demonstrating a clear sense of direction and purpose in conducting a child custody evaluation; by performing their roles ethically; and by clarifying to all involved the nature and scope of the evaluation. The Ethics Committee of the American Psychological Association has noted that psychologists' involvement in custody disputes has at times raised questions in regard to the misuse of psychologists' influence, sometimes resulting in

psychological and developmental needs of the child, and the resulting fit.

In considering psychological factors affecting the best interests of the child, the psychologist focuses on the parenting capacity of the prospective custodians in conjunction with the psychological and developmental needs of each involved child. This involves (a) an assessment of the adults' capacities for parenting, including whatever knowledge, attributes, skills, and abilities, or lack thereof, are present; (b) an assessment of the psychological functioning and developmental needs of each child and of the wishes of each child where appropriate; and (c) an assessment of the functional ability of each parent to meet these needs, including an evaluation of the interaction between each adult and child.

The values of the parents relevant to parenting, ability to plan for the child's future needs, capacity to provide a stable and loving home, and any potential for inappropriate behavior or misconduct that might negatively influence the child also are considered. Psychopathology may be relevant to such an assessment, insofar as it has impact on the child or the ability to parent, but it is not the primary focus.

II. General Guidelines: Preparing for a Child Custody Evaluation

4. The role of the psychologist is that of a professional expert who strives to maintain an objective, impartial stance.

The role of the psychologist is as a professional expert. The psychologist does not act as a judge, who makes the ultimate decision applying the law to all relevant evidence. Neither does the psychologist act as an advocating attorney, who strives to present his or her client's best possible case. The psychologist, in a balanced, impartial manner, informs and advises the court and the prospective custodians of the child of the relevant psychological factors pertaining to the custody issue. The psychologist should be impartial regardless of whether he or she is retained by the court or by a party to the proceedings. If either the psychologist or the client cannot accept this neutral role, the psychologist should consider withdrawing from the case. If not permitted to withdraw, in such circumstances, the psychologist acknowledges past roles and other factors that could affect impartiality.

5. The psychologist gains specialized competence.

A. A psychologist contemplating performing child custody evaluations is aware that special competencies and

knowledge are required for the undertaking of such evaluations. Competence in performing psychological assessments of children, adults, and families is necessary but not sufficient. Education, training, experience, and/or supervision in the areas of child and family development, child and family psychopathology, and the impact of divorce on children help to prepare the psychologist to participate competently in child custody evaluations. The psychologist also strives to become familiar with applicable legal standards and procedures, including laws governing divorce and custody adjudications in his or her state or jurisdiction.

B. The psychologist uses current knowledge of scientific and professional developments, consistent with accepted clinical and scientific standards, in selecting data collection methods and procedures. The *Standards for Educational and Psychological Testing* (APA, 1985) are adhered to in the use of psychological tests and other assessment tools.

C. In the course of conducting child custody evaluations, allegations of child abuse, neglect, family violence, or other issues may occur that are not necessarily within the scope of a particular evaluator's expertise. If this is so, the psychologist seeks additional consultation, supervision, and/or specialized knowledge, training, or experience in child abuse, neglect, and family violence to address these complex issues. The psychologist is familiar with the laws of his or her state addressing child abuse, neglect, and family violence and acts accordingly.

6. The psychologist is aware of personal and societal biases and engages in nondiscriminatory practice.

The psychologist engaging in child custody evaluations is aware of how biases regarding age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status may interfere with an objective evaluation and recommendations. The psychologist recognizes and strives to overcome any such biases or withdraws from the evaluation.

7. The psychologist avoids multiple relationships.

Psychologists generally avoid conducting a child custody evaluation in a case in which the psychologist served in a therapeutic role for the child or his or her immediate family or has had other involvement that may compromise the psychologist's objectivity. This should not, however, preclude the psychologist from testifying in the case as a fact witness concerning treatment of the child. In addition, during the course of a child custody evaluation, a psychologist does not accept any of the involved

participants in the evaluation as a therapy client. Therapeutic contact with the child or involved participants following a child custody evaluation is undertaken with caution.

A psychologist asked to testify regarding a therapy client who is involved in a child custody case is aware of the limitations and possible biases inherent in such a role and the possible impact on the ongoing therapeutic relationship. Although the court may require the psychologist to testify as a fact witness regarding factual information he or she became aware of in a professional relationship with a client, that psychologist should generally decline the role of an expert witness who gives a professinal opinion regarding custody and visitation issues (see Ethical Standard 7.03) unless so ordered by the court.

III. Procedural Guidelines: Conducting a Child Custody Evaluation

8. The scope of the evaluation is determined by the evaluator, based on the nature of the referral question.

The scope of the custody-related evaluation is determined by the nature of the question or issue raised by the referring person or the court, or is inherent in the situation. Although comprehensive child custody evaluations generally require an evaluation of all parents or guardians and children, as well as observations of interactions between them, the scope of the assessment in a particular case may be limited to evaluating the parental capacity of one parent without attempting to compare the parents or to make recommendations. Likewise, the scope may be limited to evaluating the child. Or a psychologist may be asked to critique the assumptions and methodology of the assessment of another mental health professional. A psychologist also might serve as an expert witness in the area of child development, providing expertise to the court without relating it specifically to the parties involved in a case.

9. The psychologist obtains informed consent from all adult participants and, as appropriate, informs child participants.

In undertaking child custody evaluations, the psychologist ensures that each adult participant is aware of (a) the purpose, nature, and method of the evaluation; (b) who has requested the psychologist's services; and (c) who will be paying the fees. The psychologist informs adult participants about the nature of the assessment instruments and techniques and informs those participants about the possible disposition of the data collected. The psychologist provides this information, as appropriate, to children, to the extent that they are able to understand.

10. The psychologist informs participants about the limits of confidentiality and the disclosure of information.

A psychologist conducting a child custody evaluation ensures that the participants, including children to the extent feasible, are aware of the limits of confidentiality characterizing the professional relationship with the psychologist. The psychologist informs participants that in consenting to the evaluation, they are consenting to disclosure of the evaluation's findings in the context of the forthcoming litigation and in any other proceedings deemed necessary by the courts. A psychologist obtains a waiver of confidentiality from all adult participants or from their authorized legal representatives.

11. The psychologist uses multiple methods of data gathering.

The psychologist strives to use the most appropriate methods available for addressing the questions raised in a specific child custody evaluation and generally uses multiple methods of data gathering, including, but not limited to, clinical interviews, observation, and/or psychological assessments. Important facts and opinions are documented from at least two sources whenever their reliability is questionable. The psychologist, for example, may review potentially relevant reports (e.g., from schools, health care providers, child care providers, agencies, and institutions). Psychologists may also interview extended family, friends, and other individuals on occasions when the information is likely to be useful. If information is gathered from third parties that is significant and may be used as a basis for conclusions, psychologists corroborate it by at least one other source wherever possible and appropriate and document this in the report.

12. The psychologist neither overinterprets nor inappropriately interprets clinical or assessment data.

The psychologist refrains from drawing conclusions not adequately supported by the data. The psychologist interprets any data from interviews or tests, as well as any questions of data reliability and validity, cautiously and conservatively, seeking convergent validity. The psychologist strives to acknowledge to the court any limitations in methods or data used.

13. The psychologist does not give any opinion regarding the psychological functioning of any individual who has not been personally evaluated.

This guideline, however, does not preclude the psychologist from reporting what an evaluated individual (such as the parent or child) has stated or from addressing theoretical issues or hypothetical

questions, so long as the limited basis of the information is noted.

14. Recommendations, if any, are based on what is in the best psychological interests of the child.

Although the profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts, psychologists are obligated to be aware of the arguments on both sides of this issue and to be able to explain the logic of their position concerning their own practice.

If the psychologist does choose to make custody recommendations, these recommendations should be derived from sound psychological data and must be based on the best interests of the child in the particular case. Recommendations are based on articulated assumptions, data, interpretations, and inferences based upon established professional and scientific standards. Psychologists guard against relying on their own biases or unsupported beliefs in rendering opinions in particular cases.

15. The psychologist clarifies financial arrangements.

Financial arrangements are clarified and agreed upon prior to commencing a child custody evaluation. When billing for a child custody evaluation, the psychologist does not misrepresent his or her services for reimbursement purposes.

16. The psychologist maintains written records.

All records obtained in the process of conducting a child custody evaluation are properly maintained and filed in accord with the APA *Record Keeping Guidelines* (APA, 1993) and relevant statutory guidelines.

All raw data and interview information are recorded with an eye toward their possible review by other psychologists or the court, where legally permitted. Upon request, appropriate reports are made available to the court.

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Practice Parameters for Child Custody Evaluation

ABSTRACT

These practice parameters are presented as a guide for clinicians evaluating the often delicate and complex issues surrounding a child custody dispute. The historical basis of child custody and the various judicial presumptions that have guided courts are reviewed. The differences between performing child custody evaluation and engaging in traditional clinical practice are emphasized. Issues that are common to all child custody disputes are presented, including continuity and quality of attachments, preference, parental alienation, special needs of children, education, gender issues, sibling relationships, parents' physical and mental health, parents' work schedules, parents' finances, styles of parenting and discipline, conflict resolution, social support systems, cultural and ethnic issues, ethics and values, and religion. In addition, special issues that complicate custody evaluations are discussed, including infants in custody disputes, homosexual parents, grandparents' rights, parental kidnaping, relocation problems, allegations of sexual abuse, and advances in reproductive technology, such as frozen embryos, oocyte donation, and artificial insemination. An outline is provided that describes the complete evaluation process, from assessing referrals and planning a strategy through conducting clinical interviews, writing the report, and testifying in court. J. Am. Acad. Child Adolesc. Psychiatry, 1997, 36(10 Supplement):57S–68S. Key Words: child custody, forensic psychiatry, joint custody, court, parenting, practice parameters, guidelines.

Because evaluating the needs of children and adolescents in child custody disputes is complicated and requires specialized knowledge and techniques, practice parameters can be helpful to clinicians and, ultimately, the families they evaluate. These parameters take into account that well-meaning, ethical, and competent clinicians may approach this work in different ways. However, certain methodologies and clinical and ethical boundaries have emerged over time and are presented in these parameters. The recommendations in these parameters are basic principles that should be considered by clinicians who perform custody evaluations and consult with judges and attorneys. Just as competent clinicians may vary in their approaches to evaluation, diagnosis, and treatment, qualified forensic evaluators may differ in their methods. Although these parameters are not meant to be followed exactly, they contain principles that should be followed when performing child custody evaluations, which are often complicated.

LITERATURE REVIEW

Medline searches were conducted in 1993 and 1996 for the term "child custody" in the titles of articles. Therefore, only papers primarily concerned with child custody have been cited.

Historical Development

Approximately one in two marriages in the United States ends in divorce, affecting about 1,000,000 children per year. Approximately 10% of divorces involve custody litigation. Thousands of children, therefore, are at the center of often protracted legal battles.

A number of authors stress the importance of understanding the historical basis of the custody dispute (Derdeyn, 1976) and evaluating the clinician's role of undertaking a comprehensive evaluation, rendering a readable, helpful report, and, if necessary, testifying in court. Haller (1981) stresses the importance of preparing a strategy for the evaluation and warns against evaluations that assess or support only one party to the dispute. Benedek and Benedek (1980) discuss the role of the expert and the importance of clinician education in the specifics of child custody evaluation. Benedek and Schetky (1985) discuss child custody assessment and the "best interests" presumption. Weithorn (1987)

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provides a comprehensive legal context for the clinician and Ackerman (1994) provides a guide for psychologists that includes pertinent information for child and adolescent psychiatrists and other clinicians. Nurcombe and Partlett (1994) provide an excellent overview of child custody and the role of the clinician. In a section on ethical issues, they stress the importance of the evaluator functioning as an expert and not as an advocate or adversary.

During the 1970s, joint custody, in which both parents are granted equal rights to and responsibility for their children, was touted as almost a panacea for the negative impact of divorce on children. Many saw this arrangement as a way to avoid protracted litigation and its presumed deleterious effects on families. Steinman et al. (1985) describe factors that might predict which joint custody arrangements succeed and which fail. Although their statistics (one third of joint custody families live successfully, one third have difficulties, and one third fail) may not be accurate, her observations make sense: joint custody arrangements can work reasonably well if the divorced parents are psychologically healthy, able to set aside their anger, frustration, and disappointment with each other, and willing to tolerate each other's style of parenting. Atwell et al. (1984) review the psychological and interpersonal effects of joint custody on children, and Tibbits-Kleber et al. (1987) discuss the history and legislative ramifications of joint custody plans. They catalog the advantages and disadvantages of joint custody and outline the role of the clinician in counseling and evaluating families regarding this custody option. They rightly differentiate the needs (or rights) of parents who seek joint custody from the overriding needs and interests of the children who must live with the arrangement.

Several organizations have published standards and guidelines for evaluating child custody disputes: The American Psychiatric Association Task Force on Clinical Assessment in Child Custody (1981), the American Psychological Association (1994), and the American Association of Family and Conciliation Courts (1994). The standards of the American Psychiatric Association and the American Psychological Association provide excellent reference sections that list guidelines from other organizations.

The examination and handling of child custody disputes mirrors the social forces and mores of the times (Mason, 1994). Beginning in ancient Rome and continuing until well into the 19th century, children were considered property and, therefore, awarded to the father, because women were accorded very few legal rights. In the 1800s, the courts adopted the concept of *parens patriae*, a moral (and then legal) duty to protect those citizens who are unable to protect themselves. As natural philosophy evolved into psychology and child development, and as psychoanalytic concepts elucidated the importance of childhood experiences, the courts became increasingly concerned with protecting family members. Courts in Great Britain and the United States became more involved in family disputes, especially when children were at risk (Weithorn, 1987). In short, family law as it is practiced today is a relatively recent phenomenon (Derdeyn, 1976).

Judges have used different conceptual models over the years in their decisions regarding children in custody disputes. Kelly (1994) describes the history of how parents and courts have made decisions regarding custody and access. Recognizing the findings from psychoanalysis on the importance of the mother–infant relationship, the courts adopted the "tender years" doctrine, which held that in deciding a custody dispute, courts should assume that young children need to be with their mothers.

Although the tender years presumption was not uniformly defined, judges across the country, in their custody decisions, spoke of the special relationship between a child and his or her mother. Except in extreme cases of maternal unfitness, courts generally awarded custody of young children to the mother. In cases with children older than 7 years of age, however, fathers often sought and gained custody.

The tender years presumption predominated well into the 20th century, and many would argue that judges unofficially cling to it today. Nevertheless, the prevailing legal test in all states is "the best interests of the child" (Finlay v. Finlay, 1925). In general, however, "best interests" means that judges must determine which arrangement best fulfills the needs of the specific children involved. The argued benefit of this approach is to place the judicial magnifying glass on the children, making them the most important part of the process. The concept represents the full embodiment of *parens patriae*.

However, the best interests concept remains an ambiguous one. In practice, it refers to whatever fosters the positive development of the child, but it can be interpreted by judges in a variety of ways, ranging from financial suitability to psychological attachment. It has been argued that the "best interests" concept perpetuates the adversarial system by inviting parties to dispute what constitutes a child's best interests. In addition, as Goldstein, Solnit, and Freud (1973) argue, the use of the word "best" creates the impression that there is a good solution, and the courts must recognize what it is. These authors have postulated an alternative judicial presumption, which, they argue, goes beyond the "best interests" dictum. The concept of the "least detrimental alternative" suggests that all children in custody disputes are harmed to some extent, and the best solution is that which seems to harm them the least.

Many have argued that families are better served by mediation rather than litigation. Some families voluntarily

submit to mediation. In certain jurisdictions, mediation is mandatory. Miller and Veltkamp (1995) argue that mediation may help to protect the best interests of children. Emery, Matthews, and Kitzmann (1994) have found that fathers are more satisfied and more compliant with child support orders *1 year after mediation* than *1 year after litigation*.

The courts, meanwhile, hearing litigated cases not settled successfully, have turned to clinicians to assist in the determination of best interests. In their review of the court records of 282 disputed child custody cases, Kunin, Ebbesen, and Konecni (1992) have found that only two factors directly affect judges: child preference and the recommendations of the evaluator. Assuming that the psychological well-being of a child is as important — if not more so — than the economic well-being, courts routinely ask psychiatrists, psychologists, and social workers for their opinions about custody and rely heavily on these opinions.

THE ROLE OF THE EVALUATOR

Performing a forensic evaluation expands and complicates the clinician's familiar role of diagnosing and treating psychiatric illness and raises the important issues of competence, agency, and ethics. It is extremely important for the clinician to understand the differences in roles and to keep these roles separate. Wearing "two hats" — therapist and forensic evaluator — with a family is inappropriate and complicates both the therapy and the evaluation (Bernet, 1983).

Competence as a forensic specialist (Gindes, 1995) is crucial because a well-trained clinician with a background in evaluation, diagnosis, and treatment must demonstrate additional important skills, including an engaging interview style, an understanding of family and interpersonal dynamics, a breadth of knowledge of child and adult developmental issues, and familiarity with family law and legal process in the local jurisdiction. The clinician should have obtained continuing education on divorce and custody, should know when to consult with a colleague or mentor, should be aware of local laws and court procedures, and should maintain integrity and sensitivity to ethical issues.

Treating clinicians are advocates or agents for children and, ideally, are partners with parents or guardians in the therapeutic alliance. In contrast, the forensic evaluator, although guided by the child's best interests, reports to the court or attorney involved rather than to the parties being evaluated. Therefore, the aim of the forensic evaluation is not to relieve suffering or to treat the child but to provide objective information and informed opinions to help the court render a custody decision. Forensic evaluators must be mindful of this role and convey this, in full, to all parties before beginning the evaluation.

Ethical issues are frequently encountered in forensic evaluations. The potential evaluator must consider whether he or she has biases or prior involvement with any of the parties involved in the case that might alter the professionalism of the evaluation. The evaluator must have sufficient time to complete the evaluation in a timely manner and adequate scheduling flexibility to work with the judicial system. Although the fees for forensic evaluations are usually higher than for clinical treatment, fees should not be exorbitant but should be within the community standard. The evaluator, in almost all circumstances, should not refer any of the parties to himself or herself for treatment after the custody evaluation to avoid a conflict of interest.

AREAS FOR ASSESSMENT

A number of issues are common to many, if not all, custody disputes and frequently arise during the evaluations. If these issues are not raised by the families, the clinician should initiate discussion about them. Collecting data on these issues provides a sound basis for the evaluator's opinions and recommendations.

Continuity and Quality of Attachments

The assessment of the quality of the attachments between the parents and the children is the centerpiece of the evaluation. In the opinion of most courts, the concept of "the best interests of the child" has as much to do with the parent–child relationship as with the validity of each parent's plans for the child. The evaluator should assess the parent–child connections, recognize and protect the opportunities for the child to maintain continuity with attachment figures, and consider how these attachments should enter into the forensic recommendations (Rutter, 1995).

Preference

The child's stated preference of where he or she would rather live also may be an issue (Alexander and Sichel, 1991; Schowalter, 1979). Judges tend to give more weight to stated preference when the child is 12 years of age or older. Small children infrequently volunteer a preference. When they do, the evaluator should assess its meaning and whether the child came to this opinion freely or was rehearsed or heavily influenced by a parent (Yates, 1988).

Parental Alienation

There are times during a custody dispute when a child can become extremely hostile toward one of the parents. The child finds nothing positive in his or her relationship with the parent and prefers no contact. The evaluator must assess this apparent alienation and form a hypothesis of its origins and

meaning. Sometimes, negative feelings toward one parent are catalyzed and fostered by the other parent; sometimes, they are an outgrowth of serious problems in the relationship with the rejected parent. This phenomenon, which some have called a "syndrome," whereas others have objected to that characterization, has been addressed by Benedek and Schetky (1985) and by Dunne and Hedrick (1994). Courts have great difficulty interpreting these dynamics and turn to evaluators for guidance.

Child's Special Needs

The clinician should evaluate the child's physical and mental health, noting the presence of chronic conditions that require special care. The clinician also should assess the ability of each parent to understand and respond constructively to the child's disorder. For example, how well can each parent provide special care, such as at-home behavioral and environmental intervention for attention-deficit hyperactivity disorder (ADHD) or physically challenging conditions such as blindness? Do the parents frequently argue about choice of physicians, treatment, and ongoing care? What or whom is the source of the conflicts?

Education

The child's educational needs should be assessed, as well as parental conflicts about the child's education. Contentious issues may require sorting by the evaluator. The evaluation should address each parent's educational plans for the child and whether these plans accommodate special educational needs. Is one parent more sensitive to and realistic about these special needs than the other?

Gender Issues

The evaluator may be called on to provide an opinion about the impact of the child's or parent's gender on the custody decision. Attorneys or parents may attempt to use gender considerations to bolster their case, for example, making the argument that a daughter should stay with a mother and a son should stay with a father. Such conclusions are not supported by adequate studies and raise the controversial issue of separating brothers and sisters after divorce (R.E. Emery, personal communication). Because each family is unique, it is inappropriate to quote a particular developmental study as support for a particular point of view for a specific family. More to the point is each parent's relationship with the children and his or her sensitivity to the gender role-model needs of the child. For example, how is a single mother planning for her son to interact with adult males as he develops?

Sibling Relationships

The evaluator should assess the sibling relationships and each parent's sensitivity to them. Commonly, siblings going through divorce and a child custody dispute lend emotional support to each other, even if they do not frequently discuss the conflict. Children often are quite willing to state that they wish to remain with each other. Separation of siblings is rarely recommended as a solution to custody disputes, and judges are loathe to order it unless the peculiarities of a case warrant it.

Parents' Physical and Psychiatric Health

The evaluator should note each parent's health status, including any physical ailments or unhealthy habits, such as cigarette smoking, that could have adverse consequences for the child. Although parental smoking, for example, has been an issue in a number of custody cases, evaluators should assess the parent's insights and choices, as well as impact on the child.

The evaluator should assess whether either parent abuses drugs or alcohol. Sometimes, one parent accuses the other of drug or alcohol abuse, and it often is impossible for the evaluator to determine the truth. In other cases, the evaluator's clinical skills allow the child to reveal the presence of substance abuse. The clinician must then determine the impact of possible parental substance abuse on the child.

Another common issue arises when one parent has (or is alleged to have) a psychiatric illness. Herman (1990a, 1990b) emphasizes that the issue is not a diagnosis per se but, instead, is the effect of psychiatric impairment on the parent–child relationship. Malmquist (1994) argues that only when issues of parental fitness are raised in a custody dispute should a parent's psychiatric records be released. This approach is echoed in a Task Force Report published by the American Psychiatric Association (1991). Malmquist also points out that both judges and clinicians vary in their handling of records of prior psychiatric treatment.

Parents' Work Schedules

The evaluator must assess how each parent views his or her work and how it interfaces with time spent with the child. Commonly, couples have settled on an arrangement early in the child's life in which one parent spends more time with the young child at home. A history of this arrangement should not automatically weigh favorably for one parent and especially should not be a sole determinant of custody. The clinician should assess how each parent's work schedule impacts meeting the child's development needs. The evaluator should assess the child-care plans put into effect by each

parent. How have they worked for the child? What are each parent's attitudes toward child care?

Parents' Finances

The evaluator should consider the financial situations of each parent and how this might affect the child. Frequently, the financial details of the divorce are separated from the custody issue by the court and are not investigated to any great degree by the clinician. Nevertheless, he or she should have general knowledge of the family's financial circumstances to assess how these will affect the child.

Styles of Parenting and Discipline

The evaluator should assess each parent's parenting style to determine how good a fit there is between each parent and the child. Parenting styles may become obvious during the joint parent-child interviews. Sometimes, however, parenting style is difficult to assess except through what one parent charges about the other. Inferences should be fully explored whenever possible.

Assessments of parenting styles also may include each parent's opinion about the child's connection with the other, as well as each parent's prediction of how these relationships would change after the custody dispute. The evaluator might uncover parental jealousies or distortions or, alternatively, positive and generous points of view about the child's relationship with the other.

The evaluator should inquire about each parent's philosophy and practice of discipline. A litigating parent usually exaggerates the harshness or permissiveness of the other parent's manner of disciplining. The clinician must wade through the inevitable distortions to determine which disciplinary approaches seem most helpful to the child.

Conflict Resolution

The evaluator should examine how family members resolve conflicts. The clinician may observe major or minor disputes — especially between siblings — and witness how each parent attempts to resolve the problem. Even during play sessions, dynamics may emerge that mirror how conflict is handled in common family scenarios.

Social Support Systems

The evaluator should take into account social supports — grandparents, other family members and friends, and the child's own social network — whose availability to the child depends on the custody arrangement. What would the impact be on the child if these supports were or were not readily available? If a parent has a psychiatric illness or other disability, can that parent make use of supports that would enhance the his or her relationship with the child?

Cultural and Ethnic Issues

Cultural issues should be noted, especially if the litigating parties come from different cultural backgrounds. Cultural differences — once appealing to each of the parents — can become yet another contentious issue in a divorcing family. The evaluator should assess the availability of cultural and ethnic influences and their importance to the growth and development of the child.

Ethics and Values

The evaluator should consider how the parents' ethics and value systems affect the child. The parents' values may be similar or glaringly different. The evaluator must guard against imposing his or her own values on each parent. When one party's ethics are clearly suspect, however, as in someone with antisocial tendencies or personality disorder, the evaluator's task is to advise the court about how this pattern of behavior will affect the child.

Religion

Religion is frequently a contentious issue in child custody disputes. When parents of different religions marry and then divorce, conflict develops about which religion the child will adopt. Conflict can be particularly acute when the religions are quite different, such as Jewish and Catholic. In some families, conflict centers on whether there should be any religious training or exposure at all. Religion is an emotional venue in which parents frequently act out. For example, the child is taken to one house of worship with the mother and another with the father. The evaluator must assess the significance of the religious issue within the context of the family. It may be helpful to point out that children can be exposed to more than one religion as they grow without detriment, but ongoing parental conflict over this issue can cause harm.

SPECIAL ISSUES IN CHILD CUSTODY DISPUTES

Infancy

When an infant is the focus of a custody dispute, applying the "best interests" standard to the case may be difficult because of the difficulty of assessing accurately the child's attachment to each parent. The evaluator should nevertheless assess the parents' attachment to the child and the appropriateness of each parent's plan for the child considering his or her developmental needs.

Social Phenomena

A number of social phenomena affect child custody disputes. Herman (1990a, 1990b) writes that these phenomena complicate an already difficult process, requiring the expertise

and sensitivity of a qualified clinician. Such issues include homosexual parents, stepparents' and grandparents' rights, parental kidnapping, relocation problems, allegations of sexual abuse, and advances in reproductive technology, such as frozen embryos, oocyte donation, and artificial insemination. These issues perplex judges and jurists, who are increasingly likely to seek guidance from clinicians.

Homosexuality. It is estimated that several million parents in the United States are homosexual. In the past, homosexuality was an automatic impediment to gaining custody, and in parts of the country, it still is. Hutchens and Kirkpatrick (1985) express judicial concerns regarding parental homosexuality and stress the importance of educating the court about social science research in this area. Kleber et al. (1986) and Pennington (1987) found no detriment to children having lesbian mothers, whereas Bozett (1987) found that children of homosexual fathers may be distressed by their father's gay identity.

Grandparents. Grandparents have been exercising their political clout for the last 25 years and now are able to sue for custody — even against natural parents — throughout the country. Angell (1985) discusses reasons the courts have been reluctant to grant this right to grandparents, and Derdeyn (1985) reviews pertinent case law.

Child Sexual Abuse. Allegations of child sexual abuse are a common component of child custody disputes. Various authors, including Green (1986), debate the extent of false allegations arising during such disputes. Whatever the frequency of false allegations, sexual abuse charges do arise and additionally complicate the evaluator's work. The allegations — whether true or not — place the child at emotional risk (Bresee et al., 1986). Penfold (1995) opines that, under such circumstances, the evaluator must testify with caution, humility, and a mind open to all possibilities.

Reproductive Technology. Advanced reproductive technologies have introduced additional complexity into the arena of custody disputes. For example, in a custody dispute over frozen embryos, it is difficult to evaluate the right of a divorcing woman to have the embryos implanted and, therefore, born against the husband's right *not* to be forced into fatherhood. Kermani (1992) argues that regardless of the type of reproductive technology, the principle of the best interest of the "child" must prevail. Because reproductive technologies are complex and evolving rapidly, unless the clinician has significant training or experience in this area, it may be best for him or her to seek the opinion of an expert in this field.

CLINICIANS AS EXPERT WITNESSES

Judges, jurors, and attorneys assume that a clinician, legally considered an expert witness, possesses the *skills* necessary to perform an adequate custody evaluation. These parties should be made aware that evaluators need specialized knowledge and skills to perform the complex work of forensic psychiatry.

The evaluator should be familiar with legal and ethical considerations, working with attorneys, and preparing for court (Appelbaum and Gutheil, 1991). The evaluator should know basic family law and legal procedures in his or her state, including the statutory and case law criteria that the courts use to determine custody. The evaluator also should know if there is a presumption in favor of joint custody or if joint custody can be awarded at all; if lawyers are usually appointed for the children; and if family-relations clinics are available to the courts. The additional knowledge allows the evaluator to communicate effectively with professionals outside of the more familiar world of mental health. And, without adequate knowledge of the legal system, evaluators may find the courts an intimidating workplace.

A colleague or mentor who is well acquainted with forensic work can be an invaluable aid and can enhance the evaluator's competence and confidence when performing complex and emotionally charged evaluations.

Unless a child has his or her own attorney or guardian ad litem, protection can come only from the court. The court, however, may be too distracted by other issues to see that every child's interests are protected. Furthermore, judges vary in their sensitivity to the needs of a child in litigation and in understanding and appreciation of psychiatry.

The legal system, with its adversarial approach to settling disputes, is alien to most clinicians and can be challenging and even frightening. The clinician must bear in mind that the custody evaluation is an opportunity to communicate behavioral and psychological findings to those in the legal system. The successful evaluator can bring the worlds of psychiatry and the law together in the service of the child.

THE EVALUATION PROCESS

The child custody evaluation, with certain exceptions, is composed of several phases: preparing strategy, performing the clinical evaluation, writing the report (except when told not to), and sometimes, testifying in court (Herman, 1992; Nurcombe and Partlett, 1994). Before beginning the process, the evaluator should decide whether to accept the case and then formulate a strategy for conducting the study. After the study is completed, the evaluator writes the report and may, depending on the vagaries of the case, prepare to testify in court. Although the evaluation may take 1 to 3 months, it may be more than 1 year before the court hears the case. Each of the phases of the child custody evaluation includes a number of important steps and opportunities for choices by the clinician. These are described in the outline section below.

DEVELOPMENT OF THESE PARAMETERS

Conflict of Interest

As a matter of policy, some of the authors of these practice parameters are in active clinical practice and may have received income related to treatments discussed in these parameters. Some authors may be involved primarily in research or other academic endeavors and also may have received income related to treatments discussed in these parameters. To minimize the potential for these parameters to contain biased recommendations due to conflict of interest, the parameters were reviewed extensively by Work Group members, consultants, and Academy members; authors and reviewers were asked to base their recommendations on an objective evaluation of the available evidence; and authors and reviewers who believed that they might have a conflict of interest that would bias, or seem to bias, their work on these parameters were asked to notify the Academy.

Scientific Data and Clinical Consensus

Practice parameters are strategies for patient management that are developed to assist clinicians in psychiatric decision-making. These parameters, based on evaluation of the scientific literature and relevant clinical consensus, describe generally accepted approaches to assess and treat specific disorders or to perform specific medical procedures. The validity of scientific findings was judged by design, sample selection and size, inclusion of comparison groups, generalizability, and agreement with other studies. Clinical consensus was obtained through extensive review by the members of the Work Group on Quality Issues, child and adolescent psychiatry consultants with expertise in the content area, the entire Academy membership, and the Academy Assembly and Council.

These parameters are not intended to define the standard of care nor should they be deemed inclusive of all proper methods of care or exclusive of other methods of care directed at obtaining the desired results. The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all the circumstances presented by the patient and his or her family, the diagnostic and treatment options available, and available resources. Considering inevitable changes in scientific information and technology, these parameters will be reviewed periodically and updated when appropriate.

OUTLINE OF PRACTICE PARAMETERS FOR CHILD CUSTODY EVALUATION

1. The forensic evaluation.
   A. The referral process.
      1. Referrals come from a parent, a child's or a parent's attorney, a judge, a judge's clerk, or a family relations officer. Referrals coming from a noncustodial parent, who wants the child interviewed during visitation, should be refused. It is unethical, and usually illegal, to interview a child without the permission of the custodial parent.
         a. Cases for complete evaluation should be accepted only if the evaluator is court-appointed or agreed on by both parties. The psychiatrist should conduct the evaluation as a neutral, impartial advocate for the best interests of the child to maximize credibility with the court.
         b. The clinician may work for one party to act as a consultant, to review documents, or to critique the evaluation of the court's expert. Evaluators in this category should *not* claim to be neutral. [redacted]
         c. If contacted initially by a parent, the clinician should explain the basis for accepting the case, avoid discussing details of the case with that parent, and ask to speak with the parent's lawyer.
      2. When discussing the referral with lawyer(s) or the court, the clinician should clarify the questions they want the evaluation to answer and determine whether he or she can legitimately provide an opinion. The clinician should provide his or her credentials, consider whether time, distance, and court scheduling allow him or her to perform the evaluation, and make sure that there are no conflicts of interest. Even the perception of a conflict of interest in the court harms the expert's credibility in the case and reputation in general. Potential conflicts include the following: being the therapist for any family member; being the therapist for one of the attorneys or his or her family member; or having a social or professional relationship with one of the parents, such as being on the same hospital staff or attending the same house of worship. As soon as the evaluator becomes aware of a possible conflict of interest, lawyers on both sides should be alerted, during a conference call, if feasible. Sometimes, neither side may object to a specific situation if the evaluator is responsible about reporting and monitoring it.
      3. The structure and payment of fees should be considered and discussed carefully. If the evaluation is being performed on a private basis, a

full or partial retainer may be requested at the start. Some clinicians prefer the fee to be paid intermittently during the course of the interviews. It might not be possible at the start to determine the number of sessions required to complete the evaluation or whether a deposition or court testimony will be required later. The clinician may charge by the hour (estimating the number of sessions anticipated) or with a flat fee. The fee should cover all clinical interviews, document reviews, telephone consultations, preparation of the final written report, and all meetings with attorneys. Requesting the fee in full at the start of the evaluation eliminates unnecessary distraction later on, because tensions and emotions often run high during custody disputes. Court time should be billed separately and in advance of testimony, because it often is unclear at the start of the evaluation whether testimony will be required.

B. Structuring the evaluation.
   1. Request legal documents from both sides, reading not for the truth of the contents but, instead, for insight into what the parties are charging and counter-charging. Evaluators should read medical, educational, or psychiatric records that could provide information on the parenting of the children. Parents' records should be obtained when parental mental health is an issue.
   2. Decide which parties to interview and for how many sessions. Parties include parents, child(ren), each parent with the child(ren), and stepparents or potential stepparents.
      a. Consider interviewing extended family, friends, neighbors, and alternative caregivers, such as baby-sitters. Inform all interviewees that because of the forensic nature of the evaluation, they automatically waive their rights of confidentiality and privilege. Collateral interviews may uncover objective information about issues relating to the child or alliances that develop within a household during a custody dispute. Grandparents, for example, may be unduly influencing a parent, fueling additional conflict. Interviewing the grandparent(s) may provide insight into this phenomenon.
      b. Consider whether a visit to one or both homes would be helpful.
      c. Decide which other professionals familiar with the parties should be contacted, including therapists (for children or parents) and school personnel.

C. Interviewing parents.
   1. Consider meeting with the parents together, if they are willing, to gain insight into their relationship. Honor their objection if they refuse.
   2. At the start of each first session, explain to the parent that confidentiality and privilege are waived because of the legal nature of the process. Parents must be told that what they talk about during sessions and telephone calls, and what they write in letters to the evaluator, may be referenced or quoted. Also, their right of privilege, which would normally prevent an expert from testifying about the sessions in court, is waived. Some clinicians ask parents to sign informed consent. Evaluators should document that waiver was explained to and accepted by the parents. Also, the evaluator should remind parents that his or her role is to provide the court with an opinion — *not* a custody decision.
   3. Be comprehensive. The clinician must see a parent a sufficient number of times to render an informed opinion. If one parent is seen more than the other, be prepared to explain the reason. Give each parent enough time to express his or her point of view and schedule extra time when necessary.
   4. In the first session, have each parent explain what is going on — as if the clinician has no prior knowledge of the case. Consider what the parent focuses on rather than whether an event or charge is true. Obtain the following:
      a. Description and history of the marriage and separation.
      b. Each parent's perception of his or her relationship with the children.
      c. Each parent's understanding of and sensitivity to any special needs of the children.
      d. Each parent's specific plans for the future if custody is awarded.
      e. Each parent's history, including family of origin, social, and psychiatric or psychotherapeutic experience, if any.
   5. Note whether the parent is focused on the child or instead spends most of the session attacking or being distracted by the other parent.
   6. Other sessions should focus on the developmental history of the child and the schedule or usual routine of the child. The evaluator should explore any allegations parents make against each other. Parents can be asked how they have con-

tributed to the conflict and what they actually like in the other.

7. It is not necessary to render a *DSM-IV* diagnosis in a custody dispute. The process is an evaluation *of parenting, not a psychiatric evaluation.* However, some clinicians give diagnoses, if appropriate, after obtaining a complete psychiatric history and recording results of a mental status examination.
8. In most cases, psychological testing of the parents is not required. Psychological tests, such as the Minnesota Multiphasic Personality Inventory, the Thematic Apperception Test, or the Rorschach, were not designed for use in parenting evaluations. Their introduction into a legal process leads to professionals battling over the meaning of raw data and attorneys making the most of findings of "psychopathology" but may have little use in assessing parenting. When the psychiatric health of a parent or child is a legitimate issue, the evaluator may request psychological testing of *each parent to help support an opinion* and provide relevant data. This may add to the degree of certainty of the parenting assessment. Certain tests have been advanced as having specific utility in assessing variables specific to a custody evaluation. These include the Bricklin Perception of Relationships Test (Bricklin, 1995) and the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (Ackerman, 1994). Use of these *tests is controversial at present. Their role in a* custody evaluation should be adjunctive and they should never take the place of a comprehensive evaluation.
9. In general, the clinician should refuse to listen to tape recordings made by one parent of the other, especially if the tape was made secretly. When such a request is made, the clinician can explore *the parent's motivation for recording the tape* and requesting that the evaluator listen. Evaluation sessions do not need to be audiotaped or videotaped.

D. Interviewing the child(ren).
   1. The clinician should interview the child early in the course of the evaluation. Interviews with children should consider diagnoses when appropriate, level of attachment with adult figures, expressed preferences, and evidence of indoctrination by parents.
   2. If possible, siblings should be seen together at first. This arrangement allows them to be supportive of each other and helps lessen anxiety.
   3. Each child should be seen at least one or two times alone. Arrange for the child to be brought by each parent at least once.
   4. Explain to the child the purpose of the evaluation and the role of the clinician. Even a 3-year-old has heard of "the judge" and can understand that the clinician's role is to help the judge figure out where everyone in the family will live. Explore the child's perception of the family's situation and what he or she thinks is going to happen.
   5. The clinician should develop a warm, comfortable relationship with the child using age-appropriate materials for communication. For younger children, a dollhouse can be emotionally evocative, helping the clinician access the child's inner world. The child also can be asked to draw a family or use puppets to tell a story.
   6. Children as young as 3 years of age usually can be interviewed alone if they can separate from the parent. Occasionally, even a precocious 2½-year-old may be seen alone.
   7. In general, evaluators should be cautious about asking the children, especially young children, where they prefer to live. Some states, however, require the evaluator to ask about a child's preference. If the child volunteers a custodial preference, explore the context for the preference. Are there indications that the child has been coached? What does the child believe life would be like with each parent?

E. Interviewing parents and child(ren).
   1. The joint session of the parent and child should be unstructured and should occur after the child's initial visit to the office. This session also might be conducted as a home visit. The evaluator should allow the parent and child to interact as they prefer. Some evaluators ask each parent and a child of appropriate age to perform a task together. This can show how they work together and how responsive to the child the parent can be.
   2. The clinician should allow for and discuss parental anxiety over being "graded."
   3. The clinician should look for patterns of interaction, ease of the relationship, signs of anxiety, ability of the parent to respond to child's lead, patterns of discipline, and approval and enhancement of the child's self-esteem.

F. Interviewing others.
   1. Interview any stepparent(s) or potential stepparent(s) at least once. Ask about the relationship with the children. Look for sensitivity to the chil-

dren's needs and realistic assessment of future problems.

2. Consider interviewing other important caregivers, such as a primary baby-sitter, but in general, keep interviews with collateral sources limited. The most important people to see are the immediate family.
3. It may be critical to talk to the child's and parents' therapists, with consent. Avoid seeking a forensic opinion. Instead, obtain the therapist's impressions of the child and the parents. The forensic evaluator, when speaking to therapists, should be mindful of respecting the therapeutic relationship and should intrude as minimally as possible.

II. The written report.

A. In the preparation of the report (Herman, 1992; Nurcombe and Partlett, 1994), the evaluator puts weight on a number of factors that will enter into the final recommendations. These factors can serve as a framework against which the clinical material can be placed. The factors include the following:
   1. Continuity. Which arrangement seems to offer the most stable and permanent situation for the child?
   2. Preference. How has any stated preference of the child been taken into account? Why has the evaluation agreed or disagreed with preference?
   3. Attachment. What is the quality of the relationship between the child and each parent?
   4. Sensitivity and respect. How attuned to the child is each parent and how well does each respect the child?
   5. Parent–child gender. What, if any, is the impact of gender in the parent–child relationship?
   6. Physical and mental health of each parent.
   7. Level of conflict between the parents and the impact on the child.

B. Before writing the report, the evaluator should consider the impact of various outcomes on the family and recognize that after divorce, no outcome is optimal.

C. The report should be free of technical jargon, because it is designed to assist professionals who are not clinicians.

D. The report should be concise but detailed enough to provide necessary information and to hold the interest of those who read it.

E. It may be helpful to put the report in the form of a letter, addressed to the referral source, as a reminder to the clinician that it will be read by a responsible person.

F. Begin the report with a brief summary of how the case was referred and the questions that were to be addressed by the evaluation.

G. List individuals seen and the dates and lengths of sessions. List collateral sources of information, such as telephone interviews with therapists and reviews of legal documents.

H. Some clinicians begin the report with their conclusions; others save the final opinions and recommendations until the end. This is a matter of personal preference. However, the conclusions should be explicit and easily located within the report.

I. Discuss information derived from the clinical interviews with the various parties and consider including direct quotations. Present clinical impressions of the parties along with the process from the interviews. Present the strengths and weaknesses of the parties.

J. Avoid inflammatory statements or comments that could be interpreted as a value judgment.

K. *DSM-IV* diagnoses are not necessary. If parties are given diagnoses, the clinician should explain the ramifications (if any) of the diagnosis for custody. Otherwise, providing a diagnosis confuses the court and provides fodder for attorneys.

L. A "Conclusions and Recommendations" section should contain the formulation of the case with specific and detailed recommendations for custody, visitation (if that is an issue), and any other comments or recommendations. For example, the evaluator might recommend therapy or additional evaluation for the child(ren) or for the parents before or after the litigation is over.

M. The report should be neat, readable, and free of spelling and grammatical errors.

N. The reader should be able to see how the clinician reached his or her conclusions and the data in support of them. What makes it clear that one parent should have custody? Why, if both parents are equally fit, does the expert ultimately choose one over the other? Or, what factors lead to the conclusion that joint custody is in the best interest of the child?

O. The final report should be released simultaneously to all parties due to receive it. The clinician should be willing to meet with each parent and the attorneys to explain the contents of the report. Often, the clinician can help parents understand and accept the recommendations.

III. Courtroom Testimony

A. General Principles.
   1. Although the parents might reach a settlement after the evaluation, the case eventually will be

heard by a judge. The actual trial might take place 1 year or more after the evaluation. The evaluator must refresh his or her memory about the family if much time has elapsed. An update of the evaluation may be necessary.

2. Offer to meet with both attorneys before testimony. (Usually, only the "friendly" attorney will want to do this.) Use this time to discuss the direct and cross-examinations. The testifying clinician should be aware of his or her biases. If unfamiliar with courtroom routine, consult with an experienced colleague before testifying.
3. Bring all materials to trial. On cross-examination, the attorney may want to compare notes to the final, typed report, looking for errors and inconsistencies.
4. Be familiar with courtroom procedure. If this is a first experience with expert testimony, it may be useful to observe a trial even briefly to get a feeling for the experience.
5. *Dress appropriately and conservatively.* Appearance affects credibility.

B. Pitfalls and warnings.

1. Respectfully disagree when appropriate, but avoid arguing with attorneys or the judge.
2. Avoid jargon and arcane medical terms unless they are clearly defined.
3. If a lawyer correctly points out an error or omission, acknowledge it with grace and do not take it personally.
4. It is not necessary to answer every question posed. Sometimes, an attorney will ask a question that cannot be answered properly as framed or is designed as a trap. In this case, explain to the judge why the question cannot be answered as posed.
5. Do not instantly answer an attorney's question on direct or cross-examination. Allow yourself time to formulate answers and for the opposing attorney to object.
6. Delays and postponements are common and often unavoidable. Be flexible and willing to accommodate.
7. After testimony has been given, leave the courtroom.

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(d) Custody/Parenting Disputes. Mental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of by whom they are engaged. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case. If the mental health professionals reach diverse views concerning the parenting/custody arrangement that is in the best interests of the children, the Court may direct them to confer in an attempt either to reach a resolution of all or a portion of the outstanding issues, or to make a common recommendation.

(e) ... (Redesignated)
(f) ... (Redesignated)
(g) ... (Redesignated)
(h) ... (Redesignated)

Note: Source—R. (1969) 5:3-5, 5:3-6. Adopted December 20, 1983, to be effective December 31, 1983; caption amended, former rule redesignated paragraph (a) and paragraph (b)(1), (2), (3), (4) and (5) adopted November 7, 1988 to be effective January 2, 1989; former paragraphs (b)(1), (2), (3), (4), and (5) captioned and redesignated as (c), (d), (e), (f) and (g) respectively June 29, 1990 to be effective September 4, 1990; paragraph (a) amended January 21, 1999 to be effective April 5, 1999; paragraph (d) added and former paragraphs (d), (e), (f), and (g) redesignated as (e), (f), (g) and (h) to be effective .

NJSBA Position: The NJSBA objects to the last sentence of paragraph (d)in the proposed rule amendment. We believe that the Rule change would be applied in a manner that would cause the Judiciary to transfer its decision making authority to experts against the wishes of the litigants or their attorneys. The application of the Rule would direct the experts to try to reach a common resolution of the issues or a common recommendation. Once that occurred, this information, under the Rule would be communicated to the Court as substantive evidence thereby additionally discrediting the expert reports submitted in anticipation of the trial. Thus, the attorney would be placed in an ethics bind by frustrating the attorney's duty to represent his or her client.

The NJSBA believes that in the absence of a rule change, the attorneys and the parties have ample opportunity to reach resolution of their case before trial. Before a custody trial commences, the parties are required to attend a parent education class. They are required to attend a custody mediation. The parents also have the opportunity to meet with their experts and their attorneys to discuss settlement and there is always a settlement conference with the Court. (For example, a settlement conference can take place during case management, after the Court interviews the child/children or as part of its own scheduling of the case). Moreover, the Court is not prevented from appointing its own expert at any time during the proceedings to try and reconcile the opinions of other experts.

F

Finally, we wish to point out that the parties always have the ability, with their consent, to have their experts confer to discuss settlement and/or reach common ground. A cold reading of this Rule change does not further any policy goals which further the interests of justice for the parties, or advance the best interests of the child.

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June 10, 2003

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Re: Subcommittee – Custody & Parenting Time

Dear John:

You have asked me to consider and report on the issues pertaining the roles of law guardians and guardian ad litem for children in private custody and parenting time matters. In doing so I have considered the research previously done by the committee members and my own research.

The Court's appointment of law guardians and guardians ad litem is permitted by N.J.S.A. 9:2-4. The statute in pertinent part states:

> ...The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interest. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties to the litigation... N.J.S.A. 9:2-4(c).

H

In 1989 the New Jersey Supreme Court, with input from the Supreme Court's Family Practice Committee, adopted New Jersey Court Rule 5:8A and B, Appointment of Counsel for the Child and Appointment of Guardian Ad Litem respectively. See attachment A for the text of Rule 5:8A and 5:8B as amended in July 2000.

The Rules, comments and case law reveal fundamental distinctions between the counsel for the child, also known as law guardian, and guardian ad litem: The role of the guardian ad litem is very specifically articulated, anyone can be appointed a guardian ad litem for the child. In fact, there are no guidelines as to what qualities, training or education a guardian ad litem needs in order to perform the role of guardian ad litem. The comments however suggest that if a certain guardian ad litem can be also qualified as a needed expert in that case, then that particular guardian should be appointed. The guardian ad litem "represent[s] the best interest of the child or children" and his or her services are rendered "to the court on behalf of the child". The guardian ad litem must prepare "a written report" to the court and is an independent fact finder, investigator and evaluator as to what furthers the best interest of the child(ren). The guardian ad litem is thus a witness and as the rule provides "shall be available to testify and be subject to cross-examination".

The guardian ad litem is empowered by rule to interview "the children", "the parties" and "other persons possessing relevant information". He/she may "confer with counsel", "obtain relevant documentary evidence" and "confer with the court, on notice to counsel." The guardian ad litem may obtain the "assistance of independent experts" and the assistance of "a lawyer for the child", on leave of court. The guardian ad litem's involvement ends "on the entry of a Judgment of Divorce or an Order terminating the application for which the appointment was made, unless continued by the court. The guardian ad litem has no obligation to file a notice of appeal from a Judgment or Order or to participate in an appeal filed by a party".

The role of the counsel for the child /law guardian is somewhat more diverse. It is clear that the law guardian must be an attorney licensed to practice law in the State of New Jersey. As the child's attorney the law guardian takes an active part in the hearing and employs all methods of witness examination necessary but is not himself or herself a witness at the hearing. ". The law guardian duties extend to the appeals process, if an appeal is warranted.

In Matter of the Adoption of a Child by E.T. and T.T., 302 N.J. Super 533 (1997) the Court described the role of the law guardian as a zealous advocate for the client. By contrast the Court announced the role of the guardian ad litem as assisting the court in its determination of the child's best interest. In Matter of M. R., 135 N.J. 155 (1994), in the context of appointed counsel for an incompetent, the court elaborated on the distinctions between the law guardian and the guardian ad litem, it stated;

> ... In sum, several reasons support the distinction between an attorney and a guardian ad litem for an incompetent. First, the attorney and guardian ad litem may take different positions, with the attorney advocating a result consistent with the incompetent's preference and the guardian urging a result that is different but in the incompetent's best interests. Second, the attorney and guardian may differ in their approaches. When interviewing interested parties, the attorney for an incompetent should proceed through counsel, but often a guardian ad litem may communicate directly with other parties. Finally, a guardian may merely file a report with the court, but the attorney should zealously advocate the client's cause. Id at 175.

Interestingly the official comments state that attorneys appointed in abuse and neglect and termination cases should limit their role as counsel to the child under R. 5:8A, and not act in the capacity of a guardian ad litem under R. 5:8B

Rule 5:8A itself assigns duties to the law guardian which conflict with a strict attorney /client relationship and tend to confuse the standards with those of the guardian ad litem. The body of the Rule itself instructs the court to appoint counsel for the child when the trial court

concludes that a child's **best interest** is not being sufficiently protected by the attorneys for the parties. Further, in the comments to the Rule counsel for the child, the law guardian, is hailed as and independent legal advocate for the **"best interest of the child"**

A similar duality in the law guardian's role is seen in the law of the State of New York. The Family Court Act of 1970, defines the dual role of the law guardian as "counsel [1] to help protect the minor's interest and [2] to help them express their wishes to the court." Family Ct. Act, Sec. 241. In the Matter of Apel, 409 N.Y.S. 2d 928 (1978) the court found that the law guardian must act as both advocate and a guardian. By contrast New York courts assume that a guardian ad litem will operate on the best interest of the child. Marquez v Presbyterian Hospital, 608 N.Y.S. 2d 1012 (1994).

In their publication *Representing Children: Standards for Attorneys & Guardians Ad Litem in Custody or Visitation Proceedings*, the American Academy of Matrimonial Lawyers (hereinafter "AAML") sets forth their view that as an attorney appointed to represent a child, the focus is not "the best interest of the child" but rather the child's perspective and desires. According to the AAML an attorney appointed to represent a child must advocate for the goals set by that client, regardless of that attorney's personal values surrounding the outcome. This role is in contrast to that of the guardian ad litem, who must communicate the preferences of the child to the court but is not required to advocate for the client's personal preferences. The AAML categorizes its standard for law guardians and guardian ad litem as follows;

1. Counsel for children who are empowered to direct the role of counsel, referred to as an unimpaired client;
2. Counsel for children lacking the capacity to direct the role of counsel, referred to as the impaired client.
3 Guardian ad Litem (regardless of the child's capacity)

The AAML recognizes that counsel for the unimpaired child has a role similar to that of counsel for an unimpaired adult. The unimpaired child client therefore has the right to set the

goal of the representation. In contrast an impaired child is deemed as unable to set goals for the outcome. In this regard, the counsel of an impaired child cannot advocate a position for the outcome of any contested issues or the proceedings in general. Impairment depends on the child's age, degree of maturity, intelligence, level of comprehension, ability to communicate and other similar factors. It is up to counsel for the child to make the threshold judgment as whether a client is impaired or unimpaired. In New York the idea of levels of capacity dictating the role of the law guardian was given recognition in Matter of Scott L. v Bruce N., 509 N.Y.S. 2d 971 where the Court acknowledged that when a case involves very young children, there is virtually no distinction between the role of a law guardian and guardian ad litem.

The New Jersey Supreme Court adopted R. 5:8A and B before the release of the AAML standards. While addressing many of the AAML standards in the formulation of the R. 5:8A and B, it also differed from them on several key issues. The New Jersey Rules make no distinction between an impaired an unimpaired child, and do not require that counsel for the child or the law guardian make a determination on this issue. Most notably, the AAML takes the position that counsel for the unimpaired child is to follow the "child client's instructions whether in his or her own best interest..." In contrast the New Jersey Rule calls for the child's counsel to act as an independent legal advocate for the best interest of the child. This statement is problematic and goes to the very hart of the matter. Is the role of counsel for the child in New Jersey a client centered one as required by the ethics and professional practice rules, or somewhat lesser hybrid of the role of the traditional advocate and the role of the guardian ad litem? Are the appointments interchangeable and therefore a duplication of services?

Furthermore, other than the requirement that counsel for the child be an attorney licensed to practice law in the State of New Jersey R. 5:8A and B offer little instruction on the criteria for selection of law guardians and guardians ad litem or as to which is a more necessary

appointment. The comments to the Rule 5:8A provide that, if the appointment is for legal advocate, then counsel should be appointed." See also Wilke v Culp, 196 N.J. Super. 487, 483 A.2d 420 (App. Div. 1984), certif. den. 99 N.J. 243,491 A.2d 728 (1985) (Child should have independent counsel instead of attorney hired by stepfather), Mayer v Mayer, 150 N.J. Super. 556, 376 A. 2d 214 (Ch. Div. 1977) (Independent counsel for children in custody cases should be used only where the interest of children are truly adverse to those of the parents, as where neither parent is a fit custodian), Doe v. State of NJ, Department of Human Services, Division of Youth and Family Services, 165 N.J. Super. 392, A2d 562 (App Div 1979) (Independent representation for the child is required where the child's interest conflicts with the parents' interest.

A further issue is raised when the guardian ad litem becomes aware that the child's wishes are at variance with his/her best interest. Is the guardian ad litem then to petition the court for the child's own counsel? What if the reverse is the case and the counsel for the child realizes that the child's wishes are not in his/her best interest? Is it inimical to the zealous representation of the attorney for the child to petition the court for a guardian ad litem?

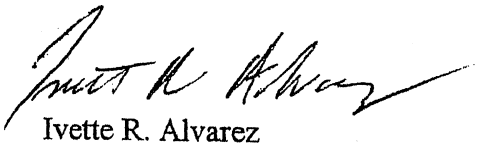
We can gain some insights and guidance on these issues from the discussion on appointment of advocates in the abuse and neglect arena by Donald N. Duquette in *Legal Representation for Children in Protection Proceedings : Two distinct Lawyer Roles are Required.* 34 FAMLQ 441 (Fall 2000). Duquette strongly cautions against trying to develop a single lawyer role for representing children as "that conflict between the two lawyer roles is irresolvable" and no one person should have unchecked authority to make decisions as to competency and ability to participate in the decisions. He suggests that the dichotomy of impaired and unimpaired is misguided, as "competence is a broader spectrum where children may be able to contribute in various amount to guide the representation if the lawyer properly incorporates the child's unique individuality." Id at 460. Duquette would have the client directed

attorney for the child (law guardian) provide the same "undivided loyalty, confidentiality, and competent representation to the child as is due to an adult." He then calls upon the lawyer guardian (guardian ad litem) to aggressively represent the best interest of the child as determined by that lawyer. Id. at 458-459.

Duquette suggests training for guardians that focuses on the recognition of substituted judgment and cultural competence, while giving weight to the child's expressed wishes on some issues if not all. He emphasized the importance of training guardians on how to elicit the child's preference in a developmentally appropriate manner. Id at 463. Further Duquette offers two options for prioritizing appointments. The first option is the bright line rule, where a guardian ad litem is appointed in every proceeding for a child under the age of fourteen. If the child is over fourteen, an appointment of an attorney for the child is in order. The second option is borrowed from the Michigan statute on this subject. Michigan appoints a lawyer for the child, only in the instance where the guardian ad litem's assessment of best interests is in conflict with the wishes of the child.

In New Jersey the court may appoint a guardian ad litem or an attorney for the child, or both, in private custody and parenting time proceedings. While the role for the guardian ad litem pursuant to the court rules is rather clear, the role for the attorney for the child is confusing and at odds with an attorney's duty of representation to a client. It is also unclear from the Rules under what circumstances, for what purpose and at what point in the proceedings a guardian ad litem or an attorney for the child is to be considered. Finally, other than for the requirement that an attorney for the child must be an attorney licensed to practice law in the State of New Jersey the Rules are devoid of any guidelines as to what qualifications, criteria, training and education a guardian ad litem and law guardian for the child should have.

Very truly yours,



Ivette R. Alvarez

Cc: Hon Bradley J. Ferencz, J.S.C.
Hon. Sheldon R. Franklin, J.S.C.
Jane R. Altman, Esq.

ATTACHMENT A

RULE 5:8A. APPOINTMENT OF COUNSEL FOR THE CHILD

In all cases where custody or parenting time/visitation is an issue, the court may, on application of either party or the child or children in custody or parenting time/ visitation dispute, or on its own motion, appoint counsel on behalf of the child or children. Counsel shall be an attorney licensed to practice in the courts of the State of New Jersey and shall serve as the child's lawyer. The appointment of counsel should occur when the court concludes that a child's best interest is not being sufficiently protected by the attorneys for the parties. Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing it against either or both parties.

RULE 5:8B. APPOINTMENT OF GUARDIAN AD LITEM

(a) Appointment. In all cases where custody or parenting time/visitation is an issue, a guardian ad litem may be appointed by court order to represent the best interest of the child or children if the circumstances warrant such an appointment. The services rendered by a guardian ad litem shall be to the court on behalf of the child. A guardian ad litem may be appointed by the court on its own motion or on application of either or both of the parents. The guardian ad litem shall file a written report with the court setting forth findings and recommendations and the

basis thereof, and shall be available to testify and be subject to cross-examination. In addition to the preparation of a written report and the obligation to testify and be cross examined thereon, the duties of a guardian may include, but need not be limited to the following:

1. Interviewing the child and parties.
2. Interviewing other persons possessing relevant information.
3. Obtaining relevant documentary evidence.
4. Conferring with counsel for the parties.
5. Conferring with the court, on notice to counsel.
6. Obtaining the assistance of independent experts, on leave of court.
7. Obtaining the assistance of a lawyer for the child (Rule 5:8A) on leave of court.
8. Such other matter as the guardian ad litem may request, on leave of court.

(b) Objection or Refusal of Appointment. A proposed guardian ad litem shall have the right to consent or to decline tot serve as such, notice of such decision to be in writing to the court with copies to counsel. The parties shall have a right to object to the person appointed as guardian ad litem on good cause shown.

(c) Term. The term of the guardian ad litem shall end on the entry of a Judgment of Divorce or an Order terminating the application for which the appointment was made, unless continued by the court. The guardian ad litem shall have no obligation to file a notice of appeal from a Judgment or Order or to participate in an appeal filed by a party.

(d) Fee. The hourly rate to be charged by the guardian ad litem shall be fixed in the initial appointing order and the guardian ad litem shall submit informational monthly statements to the parties. The court shall have the power and discretion to fix a retainer in the appointing order and to allocate final payment of the guardian ad litem fee between the parties. The guardian ad litem shall submit a certification of services at the conclusion of the matter, on notice to the parties, who will thereafter be afforded the right to respond prior to the court fixing the final fee.