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# THE COMPREHENSIVE CHILD CUSTODY EVALUATION—TEN YEARS LATER

*Robert L. Halon, Ph.D.\**

## I. INTRODUCTION AND INTENT

*"[I]t has become clear that the number of licensing and ethics complaints arising from psychologists performing child custody evaluations is quickly rising."<sup>1</sup>*

Complaints was one of two central issues with which "The Comprehensive Child Custody Evaluation" concerned itself. "Quickly rising," like "overnight success," is a presence finally too prevalent to miss. The second issue, inseparably related to the first, was about the need for clinicians to return to their scientific roots when accepting status as "experts." The strategies offered ten years ago for conducting child custody evaluations were formed in recognition of the immutable distinction between science, on the one side, and the law and parenting, on the other.<sup>2</sup> The distinction and the dangers have been steadily emphasized by experience over those ten years and by the cumulative results of three lines of research begun almost fifty years ago: elements of therapeutic efficacy; relative accuracies of clinical versus actuarial methods of predicting; and "clinicians' judgments." Hence, being scientific as opposed to clinical when serving as an "expert" in courts of law is the most formidable ally an evaluator has when faced with the onslaught of client discontent.

The current essay is intended to do four things: (1) explain how the job descriptions and obligations of "clinicians" are significantly altered by their accepting status as "expert" witnesses serving courts of law; (2) describe the philosophical and practical distinctions between science,

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1. S. Margaret Lee, *Complaints in Child Custody Cases*, 31 THE CAL. PSYCHOLOGIST, Dec. 1998, at 24.

2. See Robert L. Halon, *The Comprehensive Child Custody Evaluation*, 8 AM. J. FORENSIC PSYCHOL. 19 (1999).

the law, and parenting, and the significance of those differences; (3) show how (1) and (2) are related; and (4) offer refinements to suggestions offered ten years ago for how clinicians might best be scientific in their work as child custody experts.

## II. JOB DESCRIPTIONS: CLINICAL OPINION VERSUS EXPERT TESTIMONY

By the beginning of the 1950s, researchers, especially Eysenck, were directly questioning the efficacy of professional counseling and psychotherapy. In 1967, Carkuff and Berenson summarized the results of such research by saying "troubled people, both children and adults, are as likely to be rehabilitated if they are left alone as if they are treated in professional counseling and psychotherapy," and "[w]hen we look at the data, we find that counseling and psychotherapy can have constructive or deteriorative consequences for clients, and these changes can be accounted for by the level of the therapist's functioning on facilitative dimensions, and independently of the therapist's orientation."<sup>3</sup> While Eysenck focused on showing that professional counseling and psychotherapy were not what many touted them to be, Rogers began looking closely at what exactly might be their core curative elements.<sup>4</sup> Learning what might be that core remained the focus of research throughout the 1950s, 1960s and 1970s.<sup>5</sup> As a result of that research, the way clinicians served their clients was fundamentally changed. The gist is this: therapy is more likely to be efficacious when clinicians pay empathic attention to the subjectivity of their clients while maintaining "unconditional positive regard" toward them. The more empathic, the least likely therapists will be judgmental, and the more likely clients will, in a sense, rehabilitate themselves and learn to be their own therapists in the future. "Patients" are now considered "clients" who are brought in on virtually all aspects of the therapy. They actively participate in the development of intervention strategies, form therapeutic alliances with the therapist, and become their own monitors, asked directly for feedback about how well the therapy seems to be working.

Highly pertinent to this current essay, and to the distinction between "clinical" and "forensic" practices, clients in therapy have ongoing, unending opportunities to decide for themselves whether to

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3. ROBERT R. CARKHUFF & BERNARD G. BERENSON, *BEYOND COUNSELING AND THERAPY* 13 (1967). *See also* BERNARD G. BERENSON & ROBERT R. CARKHUFF, *SOURCES OF GAIN IN COUNSELING AND PSYCHOTHERAPY* (1967).

4. *See* CARL R. ROGERS, *CLIENT-CENTERED THERAPY* (1951).

5. *See* MORTON LIEBERMAN ET AL., *ENCOUNTER GROUPS: FIRST FACTS* (1973).

change therapists, things about the therapy, their relationships, and themselves. In the therapeutic environment changes can be made moment-to-moment, no one necessarily saddled with anything; not with diagnosis, not with treatment plans, and not with clinicians' opinions, to which clients are encouraged to freely respond with their own. In stark contrast, not only are decisions in the forensic arena made for persons but, once made, leave virtually no opportunity for meaningful feedback nor alteration. The diagnosis, so to speak, is almost always the final decision. Persons before the courts, and all those having significant relationships to them, can be permanently effected by forces that are essentially completely out of their control. Psychotherapy today is essentially a moment-to-moment dialogue between clinicians and clients who often relate person-to-person. In contrast, testimony in court is never a dialogue, and the opinions rendered by "experts" in that arena have a decided probability of being conclusory whether or not they were intended to be.

When Meehl examined the accuracies of diagnoses made by "clinical judgment" versus those made using the "Minnesota Multiphasic Personality Inventory," he gave birth in psychology to a second line of significant research, which eventually led to the broader debate concerning the relative predictive accuracies of "judgment" versus "actuarial methods."<sup>6</sup> A steady stream of research since has repeatedly demonstrated that "clinical judgment" is, at best, only 60% accurate. That level of inaccuracy is acceptable in the therapy office because no one is ever entirely saddled with the errors. In courts of law, however, such error rates are acceptable only when expert testimony directly acknowledges them and alerts triers of fact to the potential for the expert having made such errors in the case at hand.<sup>7</sup> The conclusion of that research seems indisputable: actuarial methods, upon which the MMPI and the bulk of scientific knowledge are based, are superior to clinical judgment for predicting just about anything.

From the results of the third line of research into "clinicians' judgments," Garb concluded that clinical opinion is probably the last thing upon which to base court decisions:

The research findings reviewed in this book put severe limitations on what forensic clinicians can ethically state in a court. First, and foremost, expert witnesses should not defend their testimony by

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6. See PAUL E. MEEHL, *CLINICAL VS. STATISTICAL PREDICTION* (1954).

7. See VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* (1998).

saying that their statements are based on clinical experience. It is difficult to learn from experience, because accurate feedback is frequently unavailable and because the cognitive processes of clinicians are not always optimal. Instead of giving their clinically based opinions, expert witnesses should inform the court about relevant research.<sup>8</sup>

No testimony is more immune from the influences of clinicians' subjectivity than that concerning the "relevant research." Through the lens provided by the research, it is abundantly clear that the psychotherapeutic methodology most helpful to folks can be a disaster for them when utilized by experts providing information from which triers will make judicial decisions. The lens also reveals that the distinctions in job description of clinicians versus experts is now set in concrete, and the "particular set of rules for achieving certain goals" quite distinct: in therapy for relieving suffering, and in courts of law "for describing and explaining phenomena."<sup>9</sup>

Client-therapist feedback is the *sine qua non* to efficacious therapy. On the other hand, in the forensic arena, even if clients do have their say they will rarely also have the chance to modify or reconsider on second thought what they already said. Some persons, children for best example, whose lives will be permanently altered by court decision, often get no chance whatever to speak for themselves. Even though clients and their family members will be the ones most effected by the court's decision, opportunities to reconsider anything are virtually annihilated when the mallet strikes the block.

Although the lines of research described above were not specifically related to child custody issues, they are especially pertinent to them. Accurate feed-back about one's predictions is the *sine qua non* to the advancement of knowledge in any field of study. Yet, it is not possible to obtain accurate feedback for re-organized child custody arrangements; especially when they are ordered by the court. When families themselves change custody arrangements they are also free to change them again, in any way and as often as they please. However, once implemented, court-ordered changes are not easily alterable, sometimes not at all and, if at all, only after a showing of "substantial change of circumstance," which is itself usually a formidable task. Since the principals' adaptations and assimilations to the arrangements

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8. HOWARD N. GARB, *STUDYING THE CLINICIAN* 246 (1998).

9. See BARRY F. ANDERSON, *THE PSYCHOLOGY EXPERIMENT: AN INTRODUCTION TO THE SCIENTIFIC METHOD* 3-4 (1966).

modify the environment and, to some extent, everyone in it, fluidity and cooperation mitigate against the extent to which folks are forced to live with arrangements they perceive, or are, hurtful or damaging to them. A court-ordered arrangement, however, is not fluid, and typically forever precludes meaningful comparison to alternatives that once existed. Family members each impose their own share of influence into the paradigm that is any family arrangement, which is especially true of younger children who are not yet set in virtually any of their perceptions or ways.

### III. SCIENCE, THE LAW, AND PARENTING

Science is not normative. It was, of course, designed precisely not to be. Hence, science and scientists do not establish values nor the hierarchy of values. On the other hand, setting norms for people, establishing values, is precisely what parents, the law, and judges are required and authorized to do. When parents place the futures of their families in the hands of the court they receive decisions and orders that are normative, that is, based fundamentally in values. Except for laws specifying the limits of courts' authority, court orders are made for families on the basis of the trial judge's sound discretion about what should be of value, and the hierarchy of those values, to that family. No "expert" has similar authority or qualifications. Section 1.04 of the Ethical Principles of Psychologists, entitled "Boundaries of Competence," states, "(a) *psychologists provide services, teach and conduct research only within the boundaries of their competence, based on their education, training, supervised experience, or appropriate professional experience.*"<sup>10</sup> The best of education, training, and experience do not qualify mental health professionals to have competence to know what is or should be important to other people. "Significance," in which term science speaks, is not "importance." "Importance" is precisely what scientists cannot know or decide. No amount of training, education, talent, or skill, qualify mental health professionals to be norm-makers for other people. On the other hand, parental prerogative, like the law and courts, is normative. Only when parents abdicate their responsibility and right to set norms for themselves and their families do judges become the ad hoc norm-makers for them. This writer has heard it said by clinicians that, "We can't let judges make such decisions. They do

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10. *Ethical Principles of Psychologists and Code of Conduct*, 10 AM. PSYCHOLOGIST (1992).

not understand the dynamic issues.” While it might be true that judges do not always understand the dynamic issues, it is also immaterial whether they do or not. Judges are precisely the ones designated by the law of our land, and by the philosophy upon which science is based, to make such decisions. It is not the task of “experts” to adjudicate cases, but to provide information about issues brought before the courts for which “expert” information seems necessary, and is requested and available.<sup>11</sup> That means informing the courts about the relevant research from the expert’s field.

Fields of study are not qualified to number themselves amongst the disciplines of science on the basis of their subject matter, but on the way in which they study their subject matter. That is, by adopting both the philosophy of science and its methodology as their own. The disciplines of science further removed from the study of physical matter, especially psychology, are typically filled with competing theoretical ideas about what causes, or goes with, what. Results of research into the subject matter vary and are expected to, much of the matter and its significance in flux. On the other hand, the basic methodology of science is not significantly alterable. Therefore, subject matter only differentiates one discipline from another, it does not qualify the discipline to call itself scientific. Hence, no discipline is science, but can only be of science. McCormick states:

To warrant the use of expert testimony, then, two elements are required. First the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and, second the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.<sup>12</sup>

When clinicians accept status as experts in courts of law, they are obliged to utilize scientific methodology. Specific therapeutic interventions have a myriad of forms, supported by many different underlying theories and hypotheses.<sup>13</sup> Even when testifying specifically about therapeutic issues, clinicians must refer to the relevant research, *i.e.*, be expert. Quinsey states, “Ironically, there is evidence that triers (*i.e.*,

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11. See *Guidelines for Child Custody Evaluations in Divorce Proceedings: General Guidelines: Preparing for a Child Custody Evaluation*, 49 AM. PSYCHOLOGIST 67 (1994).

12. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 28 (1954).

13. See, *e.g.*, CREATIVE DEVELOPMENTS IN PSYCHOTHERAPY (Alvin R. Mahrer & Leonard Pearson eds., 1971); HOWARD L. MILLMAN ET AL., THERAPIES FOR ADULTS (1982).

judges) actually want testimony from mental health professionals for just those legal questions about which mental health professionals are least expert."<sup>14</sup>

If it is true that clinicians are asked for opinions they are not qualified to render, then the issues of who are the norm-makers, and the clinicians' lack of expertise or rights to be norm-makers, are not well understood by court officers who request such opinions, nor by clinicians who answer them on the sole basis of their clinical experience. The subjectivity considered desirable in the therapy room is the antithesis of the objectivity of the courtroom. Precisely because court decisions have permanent ramifications for people, the research presents an indisputable case that something much more scientific, much more objective and tentative, must take place in courtrooms than it ever needs take place in private offices. In child custody cases that means clinicians do not render "expert" opinions about values, ideology, morality, etc., or about what other people should do with their lives and families. Not only do other people have to live with the impact upon their lives of such moralizing, but some are labeled deficient and/or dangerous by such labeling.

The stark distinction in the ways clinicians think and function, versus the way scientists do, is reflected in the fact that not too many years ago the American Psychological Association almost split along those very lines: clinicians versus researchers and academicians. However, clinicians who mis-apply methods when they cross over into the forensic arena come by it honestly. Their clinical opinions are repeatedly requested and accepted by court officers as if such opinions had the same accuracy, and the same scientific acceptance, as do the research and methodology that qualify a field to be numbered amongst the disciplines of science. In reference to child custody cases, the most profound misunderstandings appear to be those concerning what scientists can validly say about parenting and parenting values, and about the distinction between a value and an issue about which science might have something to say. In the forensic child custody arena, the primary issue is "best interests" of other people's children, nothing but values.

Courts appear to actually seek "clinical opinion," not just accept it, for which clinicians are not obliged to be tentative or to provide actuarial or other research data. Experts are allowed to present their

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14. See VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* 188 (1998).



conclusions based, instead, on precisely the "clinical opinion" that the research knows to be quite suspect. In child custody cases the rule that "expert" witnesses are never to testify to the ultimate legal questions has been waived by practice; child custody evaluators frequently asked directly to testify to the ultimate question of specific child custody arrangements.

It is relatively simple to interpret the court's order "conduct a psychological evaluation" of a person. Mental health experts can turn directly to existing tools and standards in their trades for doing so, coming to rather standard conclusions pointed to by the database. "Conduct a child custody evaluation," however, has no similar straight forward interpretation. What specifically is "a child custody evaluation"? Section 11 of the Guidelines for Child Custody Evaluations in Divorce Proceedings states, among other things, "The psychologist strives to use the most appropriate methods available for addressing the questions raised in a specific child custody evaluation . . . ." My focus is precisely on what those questions might be, and from whence they come, in any "specific child custody" case.<sup>15</sup> There is by now an extensive array of instruments thought to be useful in conducting child custody evaluations. Unless they are applied to specific issues focal to this family, however, those instruments are a shotgun, significantly increasing the probability of sampling errors, "chance" interpreted as "significance."

Scientists, therefore clinicians serving as "experts," validly function as do travel consultants. The automobile club, AAA, has a map to just about everywhere, but, they do not tell people where they should go. Tell an AAA consultant of the destination, then, maps are provided, usually with more than one route to getting there. In the same way, mental health experts cannot validly evaluate until they are informed of the values cherished for this child, for this family. Once mental health experts are informed of the destinations, so to speak, they are in positions to turn to their maps, the tools of and the information from their trades, in suggesting various ways to get there. Few clinicians would consider establishing values for clients who present at their offices. Certainly travelers would be quite taken aback if informed that the consultant will be the one to decide where the travelers are going. Travelers, parents, courts, or a guardian ad litem, are the only ones sometimes qualified to decide destinations for other people.

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15. *Guidelines for Child Custody Evaluations in Divorce Proceedings: General Guidelines: Preparing for a Child Custody Evaluation*, 49 AM. PSYCHOLOGIST 67 (1994).

Evaluators who comply when asked to make specific recommendations when their instructions are no more than “conduct a child custody evaluation and make recommendations for custody” abandon the very objectivity that qualifies them as “experts,” just as they do when they themselves specify the “best interests” of other people’s children. In doing either the mental health expert usurps the sacred prerogatives that lie solely within the province of legitimate, qualified norm makers. Parents and court officers who request such opinions appear to assume that clinicians have the requisite qualifications and knowledge to render them. They come by the assumption honestly when clinicians accept such charges, thereby implying that they have knowledge they cannot possibly have.

When child custody conflicts reach the stage at which appointment of mental health evaluators is necessary, it is extremely unlikely that both parents or their attorneys will agree with the evaluator’s findings; no matter who initially chose the issues that were to be focal to the evaluation, no matter how sincere they were when asking the experts for custody recommendations. To the contrary, heated disagreement is the norm. For one thing, conflict over which parent is to blame for breaking up the family quickly metastasizes into the rest of the family. When the conflict threatens the parents’ relationships with their children, blame rapidly becomes contagious to interventionists. For another, everyone’s parental values are as good as anyone else’s and, in a democracy, there is no legitimate argument to the contrary. For still another, attorneys, who are legally and ethically mandated to serve only their clients, will sometimes be the first to raise dissent to the evaluator’s methods and conclusions. Attorneys are formidable allies in justifying the parents’ views of reality, of what constitutes the “best interests” of the children, and of their client’s abilities to best provide for those interests. Even if parents and attorneys initially claimed to be unable to identify what constituted “best interests,” rest assured that one side, at least, will be convinced that whatever the evaluator chose was absolutely wrong.

Weiss, speaking from a broader point of view, presents an extremely cogent argument for why clinicians must be very tenuous about their conclusions when serving as experts in courts of law:

Moreover, social science does not provide certainties. It gives probabilistic conclusions that are time- and place-bound, provisional, and subject to revision. It [social science research] tends not to simplify problems and converge on a single solution, but to provide a wide range of findings—some discrepant, some in outright conflict. As research continues over time, it tends to yield a complex and

multifaceted view of reality. This may well be a realistic representation of a complex world, but it hardly simplifies the lot of decision-makers looking for an "answer." Moreover, social science evidence is based upon events in the past, and extrapolations to the future are always problematic. In all these senses, it fails to satisfy policymakers' yearning for easy solutions.<sup>16</sup>

Science and the law can work extremely well together, like partners in a good union. However, just as in a good union, they can not do so when the division of labor is not agreed-upon, respected, preserved, and nurtured. Failure to engage a mutually agreed-upon division of labor typically results in conflict, eroding many gratifications to be had in a union. Similarly, failure to keep the job descriptions of science, on the one hand, and the law, on the other, distinct and separate, results in conflict, confusion, and distrust, instead of harmonious relationships.

The closer the mental health evaluators' premises and conclusions are to reflections of value, the easier and more appropriate it is for others to take rightful issue with their so-called "expert" opinions. Mental health professionals wade into treacherous waters when they render opinions about what constitutes the "best interests" of other people's children, and/or make specific recommendations about child custody on the basis of their own values instead of the values of those having the authority to specify value. Stakes are so high in child custody cases that even experts who rigidly adhere to the methods of science in their processes and in drawing their conclusions are sometimes subject to vicious attacks upon their credibility and reputations by those who do not like their conclusions. When under such siege, experts who do not confine their interventions to the role of scientist are left without their most formidable ally. They are left to explain, among other things, how their conclusions are not just speculation, and how they were not pivotally influenced by their own subjectivity. The way the research has shaped up, the standard of practice in the forensic arena is now quite distinct from what it is in one's office.

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16. Carol Weiss, *The Diffusion of Social Science Research to Policymakers: An Overview*, in REFORMING THE LAW; IMPACT OF CHILD DEVELOPMENT RESEARCH 72 (Gary B. Melton ed., 1987) (citations omitted).

#### IV. FOCAL ISSUES: GROUNDING THE EVALUATION IN SCIENTIFIC OBJECTIVITY

“Comprehensive” in “The Comprehensive Child Custody Evaluation” refers to the comprehensiveness with which the evaluation is structured, and the focal issues selected and addressed. It does not mean that every conceivable issue one could imagine about parenting and/or children will be investigated. Having variables specified in advance of examining them is not novel in science. All objective research begins that way. And, save child custody cases, it is exactly what occurs and is expected to occur in the forensic arena. In child custody cases, however, directions such as “conduct a child custody evaluation and make recommendations for custody” are the rule rather than the exception, as if there actually were such a thing as “a child custody evaluation,” that everyone sees it the same way, and that it would actually indicate the best possible specific custody arrangements.

Legal descriptions of “best interests” are broad, and can often be addressed without the services of mental health experts: “health, safety, and welfare of the child;” “the nature and amount of contact with both parents;” “stable custody arrangements;” “an end to litigation;” “preserving the child’s established mode of living;” “nature and amount of time with both parents;” “no change in custody,” etc. Typically, parents who are thought to have been physically abusive to the children and/or to the other parent, and those who show evidence of interfering with the relationship between the children and the other parent, are considered less able to provide for whatever the other best interests are thought to be. For all but the most clear-cut of those definitions there are numerous competing interpretations. Except for laws proscribing certain ways of handling children, and those specifying to what children are entitled, what constitutes psychological and emotional “health, safety and welfare of the child” is subject of considerable controversy. In every family, intact or splintered, there are substantial differences of opinion as to what provides for those. Everybody, including the children themselves, have their own separate versions. In disputed child custody cases that difference of opinion is heatedly emphasized.

Family issues, like legal concepts, cannot be answered directly with information from the field of mental health. Everything about families and custody arrangements is relative. Therefore, experts are required to operationalize language into specific factors that can be legitimately examined using scientific methodology. How is “nature” in “nature and amount of contact” to be defined? What is the optimal balance between

quantity and quality, and how is "quality" defined? At a more basic level, science has never declared itself to know what is in anyone's best interests. And, no one has ever shown that they know what is in the ultimate best interests of anyone, including themselves. Nowhere is there evidence to support the notion that the ultimate quality of one's life is determined by the kinds of parenting or parents, or family arrangements, they had. This writer has often mused on what an evaluator's focus and opinions would be in a custody case with, for example, the Mozarts, or for Helen Keller.

In its "Guidelines for Child Custody Evaluations in Divorce Proceedings," the American Psychological Association states, "The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations."<sup>17</sup> However, mental health professionals have no proficiency to specify what constitutes "best interests" of other people's children. Rather, "expert" proficiency can not begin until "best interests" are determined by those actually authorized and qualified to define them. When it comes right down to it, that means virtually anyone except the expert who will conduct the evaluation. Once the focal issues are specified, the evaluator might be able to provide information that might be helpful to parents and triers in deciding about them. Evaluators who take on the prerogatives of parents and the courts do not function as the helpers and scientists they are supposed to be, but as social engineers, attempting whether they know it or not to build society according to their own currently-held images. It is this author's contention that mental health professionals are not qualified in any way, nor authorized by anything, to determine what issues are the important ones from amongst the many that surround families, nor are they qualified to decide what custody arrangements will maximize quality of life for the family members, or, to even know what constitutes that quality.

Courts must reach decisions based on evidence that makes its way into the record. Therefore, testimony from evaluators about specific recommendations based in the evaluator's subjective opinion of what constitutes "best interests," or made without referring to best interests as defined by others, provides evidence that is incomplete, even distorted, because it is not derived scientifically and is highly subject to bias. On the other hand, propositional recommendations based on assessment of focal issues specified by others for the evaluator, can

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17. *Guidelines for Child Custody Evaluations in Divorce Proceedings: General Guidelines: Preparing for a Child Custody Evaluation*, 49 AM. PSYCHOLOGIST 67 (1994).

provide triers with a wide range of cogent, objective evidence as each conclusion is tied to the specified issues and the data pointing there. For example, say the following two issues are specified: "emotional attachment patterns" of the child, and "the stability of each parent's personality and attitudes" as measured by, for example, the "Minnesota Multiphasic Personality Inventory" and the "Sixteen Personality Factors," and their track records of residential and interpersonal permanence, and lack of arrest record. Say also that the mental health expert interprets the database as meaning that the child exhibits a high degree of positive emotional attachment to father, and that father's psychological profile suggests that he is not all that reliable or consistent in terms of taking care of everyday stuff. To the contrary, father describes himself, and tests, as more *laissez faire*, adventurous, and somewhat impulsive. Father believes that "kids are better at fending for themselves than most adults realize," hence, gives the child wide latitude to explore surroundings without direct adult intervention.

Mother, on the other hand, to whom the child is also positively emotionally attached but to what appears to be a significantly lesser degree than the child is to father, has a psychological profile suggesting that she is rather compulsive, highly practical, consistent and organized. She takes care of every day business in some detail. She is not nearly as adventurous as father, is more staid and conventional than father, and she believes that children must be well supervised and directed. Both mother and father describe themselves in precisely those very ways, and they have track records that fit hand-in-glove with other data suggesting those attributes. At the same time, they are both free of any hints of psychopathology, and both appear psychologically and emotionally stable, neither expressing any more distress or emotional turmoil than would be expected of folks undergoing such hurtful and threatening experiences. How can any mental health professional legitimately decide for that child and those parents which of the parents represents the best full-time placement for that child, or how that arrangement should be constructed? How can a mental health professional legitimately decide whether the attachment pattern or the practical consistency is of best interests to this child?

Propositions, on the other hand, are what scientists are qualified to offer. The expert's report to the court should discuss precisely those findings. The expert should inform that "this is what the data has to say about the attachment patterns of this child," and "this is what the data has to say about personality stability of the parents." If any recommendation for custody arrangement were made in this case it would be

phrased something like: "If the attachment patterns are considered the more important for this child, then, the data supports the idea of placement with the father. If the judge considers it more important for the child to reside in a more conventional home, which provides more, and more regular, hands-on supervision, in which the child has more limitations imposed upon his movement, then, the data supports the idea that the mother is the placement of choice." When examining the issues, evaluators are advised to apply to their thinking what Saks calls the "litmus test" for experts: "*Tell me about all the missing pieces, all the defects, all the weaknesses in the testimony you have given so far; tell me everything you know that would be helpful to my client's case.*"<sup>18</sup> Experts are much closer to passing that test, before they ever reach the witness stand, when they remain scientifically objective, refer to and cite the relevant research, and provide tentative, propositional opinions and recommendations linked to focal issues selected for them by those qualified and authorized to select them.

This author is often met with disfavor when he declares his lack of expertise for determining "best interests," his need to have those values defined by someone other than the author himself, and when he informs that he will provide his recommendations in the form of propositions tied to those focal issues. Complaints are often that the clients cannot financially afford it, which is, of course, reality-based. Offering propositional custody recommendations, rather than recommending one specific arrangement, raises costs because they typically provide something favorable to both sides, while a specific recommendation usually gives one side little to go on; splitting even more into "good parent"- "bad parent." Money is often saved because a parent and attorney are less likely to push for trial when they believe their side is already lost because of the evaluator's specific recommendation. Nonetheless, making propositional recommendations that are tied to issues selected for the expert by others is the scientific way to do it. It places the responsibility for choosing the destinations (values) and the roads for getting there (the alternative arrangements) solidly where it legitimately belongs, with the parents and, in their failure to agree, with the sound discretion of the trial court.

Every professional involved in child custody cases has long since developed empathy for the way divorce and custody battles debilitate

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18. Michael Saks, *Opportunities Lost: The Theory and the Practice of Using Developmental Knowledge in the Adversary Trial*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 187 (Gary B. Melton ed., 1987).

people and finances. Regardless of how reasonable the complaints may be, however, they do not thereby provide "experts" with skills and authority they cannot have. Hence, the choice is rather simple: either objectively specify "best interests" to begin with or there can be no "expert" evaluation by a mental health professional, and either present recommendations as proposition or there are no "expert" opinions. On the other hand, having precise issues upon which the evaluation is to focus can be economical. It can preclude the expense of evaluators checking everything, speaking to everybody, reading everything, and testing for everything, in the hope of finding some kind of information pointing in one direction or the other, by chance if nothing else. Disgruntled parents and their attorneys are extremely adept at attempting to discredit experts by pointing out how the experts did not do an adequate job. Therefore, when financial limitations are described beforehand, it is necessary to have even more than the focal issues specified in advance.

None of this is new. In science only exploratory research legitimately begins with the researchers themselves subjectively choosing the variables they will then examine. At its most informative, results of exploratory research suggest directions for additional, and more controlled, research. In controlled research, the stuff from which scientific knowledge is thought to arise, the variables are objectively selected by other than those doing the research, and/or by the flags raised in previous research. A moment's reflection on the persuasive influence of social, political, emotional, religious, moral and financial pressures informs that objectivity in research or in evaluations cannot exist without such controls. Every court-ordered custody arrangement is necessarily an experiment for which there can be no meaningful feedback. Because decisions must be made about custody arrangements does not mean the judge's decision will actually prove to be the best of the options available just before the decision was made. There will never be an opportunity to assess what would have happened under any of the alternative arrangements whose roads were open until the decision was made. Everyone, perhaps especially children, appear to have an instinct to foster their own view of things and the environment, and in doing so alter to some extent everyone in their families. As the Existentialists say, the nature of human consciousness is that it believes anything it wants to believe; folks believe precisely what they perceive as being good for them to believe at any given moment. Every person will accommodate and assimilate, therefore modify any arrangement in



which they are placed. Implementation of any arrangement necessarily influences and shapes the dynamics of any subsequent arrangement.

Child custody arrangements are therefore an experiment that is absent the controls and feed-back available in scientific research. Once the family sets foot on one road all others vanish. There will never be subsequent opportunity to go back and try the roads not traveled because everyone and the roads are in some ways changed irreversibly by the first step on the road taken. That is why, if for no other reason, those who must live with the arrangements should decide upon them. And, not being able to decide on them must, at least, have the opportunity to give their versions of what is important to them and to their families, from which the judge can make a decision.

#### V. SELECTING FOCAL ISSUES

A valid strategy for objectively selecting focal issues sets out the means for selecting them before the evaluative process begins: *i.e.*, the trial judge specifies them; the parents select them; the attorneys specify them and the parents concur; if the parents and their attorneys cannot or will not agree on the focal issues, then the guardian ad litem or the child's attorney can specify them; the parents can each specify their versions and the evaluator explores both. The court's order, or instructions from the parents and the attorneys can, when certain conditions are met, place the task of selecting the focal issues at the discretion of the evaluator. The "certain conditions" are met prior to actually selecting the focal factors: the evaluator informs the principals that when evaluators choose the focus of their evaluations they necessarily introduce their subjectivity into that process and, even when they consult the research, might address issues that are of importance to the evaluator but not necessarily to the parents, the attorneys or the court (*i.e.*, estimating fitness of a broad child developmental need to this child can be extremely difficult). The evaluator explains that textbooks do not contain information that directly transform parental values, interests, goals, or legal language into specific focal issues or psychological correlates. That, in the absence of direction from those authorized to provide it, the scientific thing to do is for the evaluator to conduct exploratory interviews and analyses, then return to the parents and attorneys with the evaluator's ideas of what the "best interests" might be. The parents and/or the attorneys can then choose from amongst them, can modify them and/or, having heard those, specify their own.

“Alternative dispute resolution” strategies are a promising source for pin-pointing the crucial issues in a family. Through general divorce education and, if necessary, through strategic education and/or counseling, many parents will themselves decide upon or recognize those issues. If the focal issues are not clarified through the end of the general and specialized education and/or counseling, then, mediation that fails to reconcile the differences may well point to them.<sup>19</sup> When all else fails to yield direction from those with authority to give that direction, obtain from the parents their complaints and compliments, their versions of various potential arrangements, and what each foresees as likely positive and negative consequences of the alternatives they described. On the whole, parents disclose their values in their complaints and compliments toward each other. The evaluator may infer from those descriptions what might best address the parents’ values and goals and the children’s needs. Then, before starting the evaluative process, obtain agreement from the parents and their attorneys (and guardian ad litem or child’s attorney) concerning those suggestions.

Ten years ago it was this author’s opinion that he should also obtain the court’s agreement. However, it has become obvious that courts themselves rarely specify the content of the arguments the courts will hear, leaving it to the attorneys to present their versions of the issues. If the author still does not obtain agreement on the focal issues in that way, he asks permission from the parents and attorneys to choose them from the body of information existing in the professional literature.<sup>20</sup> The evaluation begins only when the parents agree to the focal issues. However, the evaluator informs that even after an objective evaluation of the variables and his interpretation of their interrelationships, he cannot be said to have actually provided information that guarantees the “best interests” of the children have been addressed, and that ultimately, if they fail to agree on custody, it will be the trial court who estimates and predicts best interests from all the information presented to the court.

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19. See Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 393 (2000); see also Janet Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 451 (2000).

20. See Robert Halon, *Child Custody “Move Away” Cases: McGinnis and Psychology*, 12 AM. J. FORENSIC PSYCHOL. 43-54 (1994). See also Amicus Curiae Brief of Dr. Judith S. Wallerstein, Ph.D., *Burgess v. Burgess*, 39 Cal. Rptr. 2d 213 (Nos. F02050, F021744) (Cal. Ct. App., 5th Cir. 1995).

Regardless of how the focal issues are chosen, there remain three additional tasks to complete before the evaluation begins: (1) translate common and legal language within which focal issues are stated into professional language of best fit; (2) estimate the extent to which each of the cited focal factors can be legitimately investigated using the tools of the mental health trades; then (3) inform the parents, the attorneys, and/or the court as to the limits of the evaluators' (the professional literature's) ability to directly answer the questions posed by those issues. In his original paper, this author described a lengthy "Terms, Conditions, and Agreements for Custody Evaluations." However, a highly seasoned trial judge soon informed that the evaluator was not free to form a contract with anyone else since the evaluator's contract was already with the judge appointing him to the case. The author, therefore, no longer creates contracts with the clients in court-ordered cases, but still obtains their "informed consent." He also does not perform child custody evaluations that he is not ordered by the court to perform.

## VI. GENERAL GUIDELINES

When accepting appointment as an expert to conduct a child custody evaluation establish and maintain rigid neutrality. Unless there are clear contraindications to doing so (*i.e.*, one or both parents appear extremely emotionally fragile; one parent is in dread of the other; the parents are unable to control themselves in each other's presence, etc.) hold the initial session conjointly with both parents and, unless the attorneys specifically inform that they do not desire to attend, with them as well. At that first session seek from the parents (and attorneys) their versions of the focal issues, explain the limits of professional abilities then, obtain their agreement on both the focal issues and the scope of the evaluation. If the court's order, or the guardian ad litem for the child, specified the focal issues, explain those to the parents and attorneys so that they will have the opportunity to decide whether or not they want to participate in an evaluation with that scope and focus.

Experts do not appear mandated to conduct evaluations if the parents do not wish to participate. It is this author's habit to not ask "why" when a parent declines to participate but to merely inform the court and the attorneys, and to beg the court's guidance. If the court then specifically orders the evaluator to conduct the evaluation, the evaluator notifies the parents and their attorneys that the order will be obeyed unless the evaluator believes that he might not be able to remain

objective in face of the parent(s) disinclination to willingly participate. It is up to the attorneys to deal with the court and their clients about such issues.

Strongly encourage parents to agree and decide themselves on the custody of their children. Explain the foreseeable pitfalls of having strangers involved in the process making such profound decisions concerning their futures. If not precluded by court order, or prior directives, provide a forum for agreement to be reached between the parents themselves. Before submitting final conclusions, and unless there is stark evidence that one of the parents is not fit to parent the child, the evaluator strives to have the parents themselves decide upon the future custody of the child.

Hold no *ex parte* contacts with the attorneys. The only exception to the rule being that the author will speak to the child's guardian ad litem (or attorney) when he is unable to obtain agreement from parents and attorneys about an important factor involved in the evaluation. However, it is stated at the outset that the examiner will speak to the guardian ad litem under those conditions. Information supplied to the examiner during the evaluation is in writing, which attorneys courtesy-copy to each other. Except under conditions warranting mandatory reporting, everything that the evaluator has to say about the case is said to all the attorneys and both parents at the same time unless made impossible by the participants. Sometimes attorney and parent decline to participate or are unable to do so. When that happens they can authorize the examiner to speak with the others without them.

Publicize as little information about the parents' "psychological profiles" and histories as is necessary to support the evaluator's conclusions. Information about these are fertile fields for the growth of additional emotional concerns and stress, and of self-righteous justifications between fault-finding parents trying to gain the upper hand or keep their own head above water. Parents are informed that psychological test results will be provided to qualified professionals designated by the parents to receive them. Sometimes an attorney on one side will insist that she/he wants this author to explain the test results to the client. When that happens this author informs the other side of the request, and obtains their permission for the author to meet with the other parent before doing so.

Explain to parents and attorneys the negative impact written reports can have; *i.e.*, publicize their personal lives. Explain to parents that, while the evaluator desires to protect their privacy as much as is possible, a written report requires that the evaluator fully support the

choice of focus, every conclusion, and the recommendations. This may often mean writing information in a document that will become a public record and might be discussed in open court; information that parents might have preferred was not made known to others. All evaluator reports, verbal or written, are provided to both sides at the same time.

Hold no case preparation nor consult with only one side unless the other specifically states that they do not want to participate and the examiner considers a preparation with less than full complement of parents and attorneys vital for protecting the children. Attorneys representing the parent who seems favored by the evaluator's report will often want to confer with the evaluator in preparing the case for trial. They will also seem to have a very understanding and supportive ear for the evaluator's insightful recommendations. Don't do it. Remain absolutely neutral. Do nothing whatever that anyone could perceive as biased. Even when arriving at the courthouse hold conferences only with both attorneys present. Strive to not take comfort from the praise of parents and attorneys, nor umbrage at their attacks, as difficult an intrapsychic maneuver as that can be. Indulging either erodes objectivity. Rigidly resist any invitation to align with anything but the data.