

Comment,  
ADDRESSING THE PRE-ADMISSION AND  
EXTRAJUDICIAL USE OF CHILD  
CUSTODY REPORTS

## I. Introduction

The legal process is characterized by methodical, calculated steps toward gaining what one's client desires. These steps are codified in Rules of Civil Procedure, Criminal Procedure, and Court Rules, among countless others. In the arena of family law, it is important to ensure that these court rules and procedural processes are handled extremely carefully because of the high emotions involved. Custody cases can become some of the most high conflict legal battles and therefore necessitate considerable knowledge of the law in order to handle cases effectively.<sup>1</sup> Family proceedings are arguably the most important cases that are handled because of the sensitive issues present.<sup>2</sup>

Inevitably, whether through one's upbringing, moral influences, or everyday knowledge of how the world works, each person brings to the table, in nearly every situation, a bias.<sup>3</sup> But justice insists on a higher standard, through the countless rules governing all judicial authorities already mentioned. The role of a judge in any proceeding—federal or state, small claims or a criminal case where perhaps the death penalty is on the line—should be a neutral one. After all, our very Constitution and foundation of American jurisprudence requires due process of law for every person. That due process mandates not only a fair chance to be heard, but to be heard in front of a neutral trier of fact: a judge with no agenda or prior knowledge of the specifics of that case.

It seems to fit, then, that not only should extreme caution be heeded in normal proceedings where bias may surface, but espe-

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<sup>1</sup> Hon. Donna J. Martinson, *One Case—One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High Conflict Cases*, 48 FAM. CT. REV. 180 (Jan. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Dan Kahan, Cultural Cognition Project, Yale Law School, available at <http://culturalcognition.squarespace.com/dan-kahans-working-papers/>

cially in those actions involving family matters, judges should be completely objective. Minus unavoidable predilections, a presiding judge in a custody action must be neutral not only to uphold justice but to ensure that unnecessary arguments are avoided. The greater the transparency of the process, the more likely it is that both parties will feel they have had their fair day in court, and a more amicable result will likely follow.

If these basic premises are true, it is surprising that in custody proceedings, judges will often receive reports on the children involved before the written report is introduced and read into evidence. When the American Academy of Matrimonial Lawyers sought responses from practitioners from around the country on forensic evidence in a custody proceeding, this topic elicited one of the largest and most diverse collections of responses ever generated by an AAML listserv topic.<sup>4</sup>

This article will discuss the practice of allowing judges to evaluate a forensic file on a child before, and even after, it is introduced into evidence. A single solution to the problem of bias with regard to custody evaluations does not exist, but the opinions and counter-opinions which this topic has brought forth are crucial to opening a dialogue on how to attempt to fix the negative aspects of such an invaluable part of a custody proceeding.

Part II of this article will lay out the history and process of custody evaluations and how they are conducted and utilized by the court. Part III of the article discusses related case law. Although these cases do not directly involve custody evaluations, they are analogous in that they deal with issues of extrajudicial investigations, and how this bias may be considered inappropriate on appeal. Part IV will then address different ways in which state codes, rules of procedure and evidence have specifically addressed custody evaluations. Some of these rules in fact allow for a pre-trial judicial consideration of professional advice. Finally, Part V will discuss how the legal profession could handle the repercussions of custody evaluations, if a bad result should occur; and how to perhaps address the issue of the misuse of these eval-

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<sup>4</sup> Emails from members of the American Academy of Matrimonial Lawyers, to [discussion@lists.aaml.org](mailto:discussion@lists.aaml.org) (Jan. 2009).

uations early in the proceedings as opposed to waiting until actual harm occurs.

## II. Custody Evaluations and the Family Court

Psychological evaluations are common in proceedings involving children. But the consults in family court, while they may be typically administered, are fairly unique in their implementation because that psychologist is “ethically required to represent the best interests of the children.”<sup>5</sup> This ethical duty is mandated regardless of who is asking for the evaluation, whether the court, a parent of that child, or a children’s division or children’s services agency.<sup>6</sup> Generally these forensic evaluations enable a mental health professional to provide information to the judge concerning where the child would be most appropriately placed in terms of custody and visitation. Since this assessment is to determine what is best for the child, the evaluation also may address the likelihood of abuse and other risk factors.<sup>7</sup>

Mental health professionals use various methodologies to determine what is actually in the best interest of a particular child. Often the parent will also be evaluated for any extreme psychological problems.<sup>8</sup> Also, the relationships between the parties themselves and each party’s relationship to the child or children in question will be discussed and assessed.<sup>9</sup>

The presence of a court appointed psychologist is a somewhat novel concept in the American legal system.<sup>10</sup> Prior to this innovation gender stereotypes often dictated the final decisions in custody disputes, whereas post-“tender years doctrine” battles focus on the emotional interests of the child.<sup>11</sup> This type of court-appointed actor serving a neutral role in the custody action sets family law apart from other areas of legal practice. While

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<sup>5</sup> Overview of Psychological Services for Family Court, <http://www.psychologyinfo.com/forensic/overview.html>

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Child Custody Evaluations by Donald J. Franklin, Ph.D. [http://www.psychologyinfo.com/forensic/child\\_custody.html](http://www.psychologyinfo.com/forensic/child_custody.html)

<sup>9</sup> *Id.*

<sup>10</sup> Andrew Shepard, *Mental Health Evaluations in Child Custody Disputes: Editorial Notes*, 43 FAM. CT. REV. 187 (Apr. 2005).

<sup>11</sup> *Id.*

expert witnesses are common in other areas of law, “party-paid” experts in family law may not have access to the entire picture of the family, due to serving one party’s interests, and are likely to favor that party by whom they are being paid.<sup>12</sup> Therefore it seems that the court appointment of neutral mental health is “a healthy social development because they are a step away from the adversarial model of child custody decision making.”<sup>13</sup> The focus becomes less about the legal battle and allows for a neutral opinion about the most important issue: the welfare of that child.

Like all theories, when put into practice, problems arise when these theories are applied to varying fact patterns. Issues related to rules of evidence, judicial impartiality, and general performance of the evaluations have caused heated debate within the legal community.

### **III. Judicial Impartiality and Analogous Case Law**

The right to a fair trial is a fundamental right under the Constitution.<sup>14</sup> Much law has been promulgated regulating the actions of those serving in judicial positions. Title 28 of the United States Code provides that if a judge is found to have a personal bias or prejudice either against or in favor of a certain party that the judge shall not proceed in hearing the matter.<sup>15</sup> Section 455 of the same title requires a judge to recuse herself where “impartiality might reasonably be questioned.”<sup>16</sup> The specific circumstances of impartiality include a provision that when a judge has personal knowledge of disputed evidentiary facts concerning the proceeding, recusal is mandated.<sup>17</sup> Safety nets are in place for situations where a judge may no longer be the neutral trier of fact required by law. But when it comes to the report on a child in a custody hearing, it would seem that the protections of the laws of evidence, at least in some states, have been bent, or even broken to serve “the best interest of the child.”

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> U.S. CONST. amend. XIV § 1.

<sup>15</sup> 28 U.S.C. § 144.

<sup>16</sup> *Id.* § 455.

<sup>17</sup> *Id.* § 455(b)(1).

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Consider a case not involving custody, but that is analogous to such a situation where prejudice existed involving outside information. In *Lamonts Apparel, Inc., v. SI-Lloyd Associates*,<sup>18</sup> a judgment was entered against the defendant and thereafter the defendant filed a motion for judgment notwithstanding the verdict.<sup>19</sup> The question was whether the motion notwithstanding the verdict was timely filed. After the hearing on the matter, the presiding judge visited the clerk's office twice where the motion had been filed and had discussions with the court operations supervisor.<sup>20</sup> The supervisor testified later that the conversations had involved whether the file stamp was irregular on the motion in question, the synchronization of clocks, and procedural issues within the office. Plaintiff filed a motion for the judge to recuse himself after these meetings with the clerk's office. The judge denied the motion.

The plaintiff's motion for recusal relied on the argument that the judge erred by failing to recuse himself and that his ruling on the issues was invalid.<sup>21</sup> The plaintiff argued that "a judge should not conduct an investigation outside the record or speak with witnesses on the subject of a proceeding."<sup>22</sup> The plaintiff also cited the Code of Judicial Conduct that contains ethical rules requiring disqualification of a judge where that judge has personal knowledge of disputed evidentiary facts.<sup>23</sup> The defendant argued that the external discussions, although they took place, did not affect the judge's ruling on the motion to recuse; but this explanation of what happened in that conversation is not in the record, and would not have been allowed if the Judge had offered to testify as to what occurred. Rules of Evidence would have disqualified the judge from testifying as to the veracity of his decisions.<sup>24</sup> Further, this type of requirement imposed on a judge might open the floodgates to those who would question a judicial officer's neutrality.

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<sup>18</sup> 956 P.2d 1024 (Ore. App. 1998).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1026; see *In re Conduct of Jordan*, 624 P.2d 1074 (Or. 1981); see also *State v. Barker*, 420 N.W.2d 695 (Neb. 1988).

<sup>23</sup> *Id.* at 1026; see *Code of Judicial Conduct*, JR 2-106(A)(1).

<sup>24</sup> FED. R. EVID. 605.

Knowledge that is possessed solely by the judge cannot be allowed to influence judicial decisions.<sup>25</sup> In *Lamonts*, the rules governing procedural law prevailed, and the court remanded the decision and ordered a new judge to consider the motion.

In a similar case, *State v. Barker*,<sup>26</sup> a judge met with the family of a murder victim. The family was upset that the jury had only convicted the defendant of manslaughter rather than the more serious murder charge.<sup>27</sup> At sentencing, the same judge gave the defendant the maximum sentence for manslaughter to seemingly counteract the jury's lesser verdict. On appeal, the court noted that the meeting with the victim's family was an "ex parte communication."<sup>28</sup> This ex parte communication reasonably raised a question regarding the judge's impartiality, and the court held that "a judge, who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal."<sup>29</sup> In the *Barker* case, it was not even necessary to prove actual prejudice.<sup>30</sup> The court in *Barker* reasoned that:

the problem attendant to a judge having personal knowledge of the facts is that he may thereby be transformed into a witness for one party. Where the trial is to a jury, explicit rules provide some protection. Where a judge is to preside, he may not testify. Whether, in a bench trial, a judge can avoid an involvement destructive of impartiality where he has personal knowledge of material facts in dispute is a question that cannot be answered satisfactorily, and therefore, a judge should recuse himself.<sup>31</sup>

In both *Lamonts* and *Barker* it is clear that knowledge of the facts gained from extra-judicial means are seen as prejudicial requiring a recusal at the request of a party. Analogously, it would seem that a forensic evaluation given to a judge prior to a custody hearing, before it has been entered into evidence, might be a violation of judicial conduct standards. But as one family law practitioner from Texas noted, in order to "do equity" or

<sup>25</sup> *Lamonts*, at 1026; see *Patanyi v. Davis*, 9 A.2d 430 (Pa. 1939).

<sup>26</sup> 420 N.W.2d 695 (Neb. 1988).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 698.

<sup>29</sup> *Lamonts*, at 1027 referencing *Barker*.

<sup>30</sup> *Id.*

<sup>31</sup> FED. R. EVID. 605, see Advisory Committee's Notes R. 605.

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deal with “the best interest of the child, all rules are out,”<sup>32</sup> meaning procedural issues are not necessarily the most significant aspects of these cases. Because familial issues and children’s well-being are at stake, is possible that lawyers and judges have allowed this type of bias.

It is true that in some states evaluative reports are allowed before a proceeding begins, without discussion or issue with whether or not they are hearsay.<sup>33</sup> Many courts read the forensic evaluations into evidence, allowing both counsels to read and take issue with the documents, and to cross-examine the psychologists. What the aforementioned cases support is the principle that personal knowledge of any sort may be good cause for recusal upon request of a party. Even a conversation about stamp-mechanisms with a clerk is personal knowledge of evidence that could cause reversal on appeal. Further, with a bench decision, which is the procedure in custody matters, there is even less protection against bias; and a judge simply cannot be a witness to testify as to how much that personal knowledge has affected her. Judicial Codes of Ethics give great deference to the decisions of judges; but there will always be those who (maybe rightly) agree that it is difficult to “un-ring a bell.”

In nearly every non-family law setting, an outside investigation by a judge of particular facts of a pending case would likely result in a recusal, if a party requested it. Arguably, forensic evaluations may or may not be tantamount to “external investigations of the facts” or “ex parte communications” however there have been cases on this issue in the family law arena as well.

In *Hallet v. Hallet*,<sup>34</sup> the Oregon Supreme Court reversed a child custody decision based in part on evidence the trial court learned during its own investigation and that was not in the record.<sup>35</sup> The judge assigned to the case went to the defendant husband’s home and spoke to the minor child and afterwards ruled on an order to keep the defendant away from his only

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<sup>32</sup> Email from AAML member, to discussion@lists.aaml.org (Jan. 29, 2009).

<sup>33</sup> See *infra* notes 48, 55, 58 & 59.

<sup>34</sup> 55 P.2d 1143 (Ore. 1936).

<sup>35</sup> *Id.*

son.<sup>36</sup> The Supreme Court of Oregon reasoned that a judge should not be able to try a case where it has been established that “such judge is prejudiced against any party or attorney, or the interest of any party or attorney in such cause.”<sup>37</sup> It is debatable whether an external interview is more prejudicial than a forensic evaluation done by a neutral third party psychologist. Certainly in the grand scheme of legal ethics one scenario appears on its face to be less contrary to court procedures and impartiality. However, receiving information through a forensic analysis or by an off-the-record investigation may result in knowledge of the very same information. To parties involved, procedural constructs may give the illusion of fairness when it comes to an evaluation, even if the same end is achieved by procedural means.

In *Rankin v. Criswell*,<sup>38</sup> the respondent appealed from a domestic violence order that had been entered against him. On appeal the court concluded that the lower court had failed to conduct a full evidentiary hearing as required by the statute for this type of case.<sup>39</sup> Again, the external evidence in question was not a forensic evaluation, but was a report, generated for a previous case. In *Rankin*, the court relied solely on the contents of a petition and records in a prior dependency case involving sexual abuse referred to during the instant hearing.<sup>40</sup> *Rankin* reasons that while it is important to sympathize with family courts that have extremely burdensome dockets, that “the courts are required to provide each party with a full evidentiary hearing.”<sup>41</sup>

In *Wright v. Wright*,<sup>42</sup> relied upon by the *Rankin* court, the trial court’s “failure to question the parties and its reliance on extrajudicial evidence necessitated reversal.”<sup>43</sup> The petition in *Rankin* contained statements made by the child to a third party who then relayed them to the petitioner. The court determined that these statements were hearsay. Hearsay contained in a petition cannot be considered evidence, unless some exception ap-

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<sup>36</sup> *Id.* at 1145.

<sup>37</sup> *Id.*

<sup>38</sup> 277 S.W.3d 621 (Ky. Ct. App. 2008).

<sup>39</sup> *Id.* at 623.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 625; see *Wright v. Wright*, 181 S.W.3d 49 (Ky. Ct. App. 2005).

<sup>42</sup> 181 S.W.3d 49 (Ky. Ct. App. 2005).

<sup>43</sup> *Id.*



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plies.<sup>44</sup> In *Rankin*, no other testimony or evidence was offered, nor was there an opportunity for cross-examination. Further, the court made no effort to gain any further knowledge of the facts or parties.<sup>45</sup>

In addition to the petition contents, the dependency files from the prior abuse proceedings were read “silently by the court” without informing either party about the contents of those files that the court was considering.<sup>46</sup> The dependency files were read without admitting them as evidence; and on appeal, the court found that the lower court erred in reading the files without allowing the respondent to examine or refute any of the information contained in them.<sup>47</sup>

*Rankin* is another important case because it involves family law issues, and also deals with types of evidence often seen in psychological evaluations. A dependency file, read silently by the court, is very similar to a forensic analysis that might be read before a court proceeding, and possibly not entered into evidence. If this occurs, inadmissible hearsay might be considered without any opportunity to refute it. Further, if the court considers that evidence without the procedural safeguards regarding the rules of evidence, a party may not have a chance to cross-examine the maker of that file, evaluation or other piece of insightful evidence.

The problems surrounding the intersection between extrajudicial evidence and the psychological evaluations used in family court custody proceedings are not minor. This type of evidence, without the checks and balances of evidentiary rules, may hurt the credibility of the court as viewed by the parties. With outside knowledge of a situation, it is likely that there will be partiality. And if that partiality cannot be contravened by opposing counsel, questions of fairness and neutrality could be raised.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

#### **IV. The Variation of State Codes and Rules Regarding Custody Evaluations**

Although analogous case law pertaining to extrajudicial evidence is helpful in understanding the issues surrounding a psychological evaluation in custody proceedings, state lawmakers have sought concrete ways to alleviate these problems. Many states have codified rules to govern such court-appointed evaluations, and even those investigations that may not have been ordered by the court. Other states that have not adopted laws to specifically cover custody evaluations rely on rules of civil procedure and rules of evidence generally. Regardless of whether a state allows this type of child evaluation in its domestic relation rules, the question still remains what kind of damage could potentially be done to a party's ability to obtain custody of his or her child.

In Illinois, the Marriage and Dissolution of Marriage Act contains a specific provision for interviews under a subsection for custody.<sup>48</sup> The law contains a general rule for interviews in camera and also allows the court to "seek the advice of professional personnel, whether or not employed by the court on a regular basis."<sup>49</sup> The advice of that professional must be given in writing and made available by the court to counsel. The statute also allows that person to be examined by counsel, designated as a witness of the court.<sup>50</sup> Section 5/604(b) governing advice by professional personnel does not seem to have time constraints or a method for how each party, and the court itself, will obtain this evaluation. In practice, Illinois family law practitioners have noted that this type of report and recommendation ordered and appointed by the court goes directly to the judge presiding over the matter.<sup>51</sup>

As for timing, section 5/604.5 allows for an evaluation of the best interest of a child either "in place of, or in addition" to the evaluation allowed under subsection (b) with certain time limita-

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<sup>48</sup> 750 ILL. COMP. STAT. § 5/604 (2010).

<sup>49</sup> *Id.* at 5/604(b).

<sup>50</sup> *Id.*

<sup>51</sup> Email from AAML member, to discussion@lists.aaml.org (Jan. 26, 2009).

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tions.<sup>52</sup> If the party seeks to call the evaluator as a witness, that evaluator must prepare the evaluation in writing and deliver copies to the attorneys of record within 21 days after the completion of the tests.<sup>53</sup> If this written copy is not delivered, barring motions for extension accepted by the court, that evaluation shall not be entered into evidence.<sup>54</sup> “Interviews” and “best interest” evaluations seem to have different standards with regard to time limitation, access, and evidentiary standards. Another difference is that the section 5/604(b) interviews are made available to the parties *by the court*, and the section 5/604.5 best interest evaluations are made available to relevant persons by the moving party (who could also be the court).

Similarly, in Arizona the court may seek the advice of professional personnel, whether or not employed by the court on a regular basis.<sup>55</sup> The Arizona statute is nearly identical to the Illinois statute, except that where Illinois requires that the advice given to the court shall be made available whether or not requested, Arizona’s rule states the information shall be provided “on request. . . [and] under such terms as the court determines.”<sup>56</sup> Counsel may call as a witness any professional personnel consulted by the court, unless that right is waived.<sup>57</sup> The same holds true in rules related to domestic matters in Colorado, except that Colorado specifically provides that this type of interview shall remain confidential to anyone but counsel, parties, and relevant expert witnesses.<sup>58</sup> Again, in Colorado the evaluation will be provided by the court upon request, not by default. In a child custody proceeding, professional advice sought by a court in the states of Indiana, Kentucky, Montana, and Washington is allowed and is governed by statutes nearly identical to those of Arizona and Colorado.<sup>59</sup>

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<sup>52</sup> 750 ILL. COMP. STAT. § 5/604.5.

<sup>53</sup> *Id.* at § 5/604.5(d).

<sup>54</sup> *Id.*

<sup>55</sup> ARIZ. REV. STAT. § 25-405 (2010).

<sup>56</sup> *Id.* at § 25-405(B).

<sup>57</sup> *Id.*

<sup>58</sup> COLO. REV. STAT. 14-10-126 (2009).

<sup>59</sup> BURNS IND. CODE ANN. § 31-17-2-10 (2009); KY. REV. STAT. ANN. § 403.290 (West 2009); MONT. CODE ANN. § 40-4-214 (2009); WASH. REV. CODE. § 26.09.210 (2009).

The domestic relations law in Delaware varies slightly in regard to interviews and the advice of professional personnel. The Delaware statute states that the court may “seek the advice of professional personnel whether or not they are employed on a regular basis by the Court [and] [t]he advice given may be in writing and *shall for good cause shown* be made available by the Court to counsel of record, parties, and other expert witnesses upon request.”<sup>60</sup> It is likely that Delaware commands a higher burden of proving that the forensic analysis of professional personnel should be provided to parties, counsel, and other relevant expert witnesses rather than simply being provided upon request.<sup>61</sup>

Under Minnesota law too, the court may seek outside recommendations of professional personnel. The Minnesota statute differs slightly in that this type of outside advice would only be appropriate “in contested custody proceedings, and in other custody proceedings if a parent or the child’s custodian requests.”<sup>62</sup> Again, the information received must be in writing and be made available to applicable persons upon request.<sup>63</sup> Case law in Minnesota also provides that it is within the discretion of the court to decide whether to interview the child in person; and that if the court has considered an outside custody evaluation by a professional instead, that the review of a report is sufficient.<sup>64</sup>

Under California’s Family Code, the court may take into account a child’s preference for custody.<sup>65</sup> The California code allows the court to preclude a child from testifying as a witness where the best interests of the child would be served and “may provide alternative means of obtaining information regarding the child’s preferences.”<sup>66</sup> “Other means” likely include court-appointed child custody evaluations permitted by California court rules.<sup>67</sup> Courts can appoint professionals to evaluate the health,

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<sup>60</sup> 13 DEL. CODE ANN. § 724 (2009) (emphasis added).

<sup>61</sup> *Id.*; compare 750 ILL. COMP. STAT. § 5/604.

<sup>62</sup> MINN. STAT. § 518.166 (2009).

<sup>63</sup> *Id.*

<sup>64</sup> *Madgett v. Madgett*, 360 N.W.2d 411, *see also In re Marriage of Stojan*, No. C7-88-1549 at \*3 (Minn. Ct. App. Jan. 18, 1989), 1989 Minn. App. Lexis 62 at \*3 (Decided 1989).

<sup>65</sup> CAL. FAM. CODE § 3042 (2009).

<sup>66</sup> *Id.* § 3042(b).

<sup>67</sup> Cal. Rules of Court, Rule 5.220 (2010).

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safety and general best interest of the child where custody and visitation issues arise. The court must establish rules regarding these evaluations for reasons such as: (1) determining whether a peremptory challenge to a court-appointed evaluator is allowed and when the challenge must be exercised, (2) providing for acceptance of and response to complaints about an evaluator's performance, and (3) addressing ex parte communications.<sup>68</sup>

As mentioned above, and in the introductory materials to California's rule on ex parte communication in child custody proceedings, "generally, ex parte communication is prohibited in legal proceedings."<sup>69</sup> California's Code does not contain a provision for the court to seek the knowledge of professional personnel. In custody proceedings in California, ex parte communications are prohibited unless the parties enter into a stipulation either in open court or in writing to allow that communication between an evaluator and the court. The rule recognizes "specific circumstances in which ex parte communication is permitted between court-connected or court-appointed child custody mediators or evaluators and the attorney for any party, the court-appointed counsel for a child, or the court."<sup>70</sup> These exceptions include generally clerical scenarios (setting up appointments), or circumstances where harm to a child is apparent (domestic violence or abuse has occurred). This professional evaluator may be a contract employee of the court or a private practitioner.<sup>71</sup>

Ex parte communications are relevant, but more specifically, the code provides directions for written psychological evaluations. Where the court determines it is in the best interest of the child to undergo a court-appointed evaluation, that evaluator must provide a written copy no more than 10 days before any hearing regarding the pending case to the clerk, all parties or counsel of parties, and any court-appointed counsel for the child. The statute then explicitly states that "the report may be considered by the court"<sup>72</sup> on the same terms that counsel, guardian ad litem, or an involved party might "consider" the report. The stat-

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<sup>68</sup> *Id.* Rule 5.220(d)(1)(A).

<sup>69</sup> *Id.* Rule 5.235.

<sup>70</sup> *Id.* Rule 5.235(a).

<sup>71</sup> *Id.* Rule 5.235(b)(3)&(4).

<sup>72</sup> CAL. FAM. CODE § 3111(a) (2009).

ute further provides that “the report may be received in evidence on stipulation of all interested parties and is competent evidence as to all matters contained in the report.”<sup>73</sup> Practitioners in California note that in practice these evaluations are read by the court “all the time” without being offered into evidence and that often practitioners disagree with stipulations allowing this type of information to be permitted, but the damage has already been done.<sup>74</sup>

Similarly, in Pennsylvania a court may order any party, including the child, to undergo an evaluation by an appropriate expert.<sup>75</sup> The relevant rule of civil procedure requiring that the expert deliver the evaluation to all parties, counsel, and to the court,<sup>76</sup> provides that no evaluation shall “be filed of record or considered evidence unless and until admitted by the court.”<sup>77</sup> By contrast, Missouri’s domestic relations statute provides that, at least 10 days prior to the hearing, court-ordered custody evaluations must be provided to counsel and to any party not represented by counsel; but that “[no] one else, *including the court*, shall be entitled thereto prior to the hearing.”<sup>78</sup> Neither Missouri nor Pennsylvania statutes relating to custody proceedings include a section on “interviews,” where the court may seek advice on its own. Pennsylvania allows the court to review this type of evaluation, but provides some guidance as to whether the report will be allowed into evidence. By contrast, Missouri seems to have specifically addressed where a judge considering a report prior to entry into evidence would create an unfair bias.

Whether by court rule, family law code, or by rules of civil procedure, many states have addressed the problem of psychological evaluations and their use in custody proceedings. A handful of states operate like Illinois and explicitly allow the judge to read the report and, in fact, to seek it. The majority of states use more general custody evaluation rules when an evaluation is ordered by the court, guardian ad litem or by the parties.

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<sup>73</sup> *Id.* at § 3111(c).

<sup>74</sup> Email from AAML member, to discussion@lists.aaml.org (Jan. 25, 2009).

<sup>75</sup> PA. R.C.P. No. 1915.8 (2009).

<sup>76</sup> *Id.* at No. 1915.8(b).

<sup>77</sup> *Id.*

<sup>78</sup> MO. REV. STAT. § 452.390(3) (2009) (emphasis added).

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These rules vary from state to state, as is evident from the discussion regarding Missouri and Pennsylvania. An attorney from Alabama reports that in family courts in Alabama (but not divorce court) once dependency is found “everything comes in: any reports, [or] hearsay on top of hearsay,” but that these pieces of evidence must be introduced, not simply mailed to the judge.<sup>79</sup>

Experience of practicing lawyers and judges vary by state as well. One Texas attorney suggests that “we need to get over this fiction that Family Law judges strictly follow and rules of procedure or evidence.”<sup>80</sup> While this opinion may seem extreme, a Massachusetts attorney agrees that reports are read without regard to evidentiary rules “all the time” and that even in a state with strict family court rules, prohibitions against reading what had not been read into evidence will only be effective on appeal if appellate standards permit,<sup>81</sup> and that unless you are fairly certain your client is going to prevail, one should not agree to the evaluation in advance, although it will do “little or no good.”<sup>82</sup> Others feel that “without an appropriate record, even the best intentioned judge may consider inappropriate evidence” and that more judges are needed “who appreciate their judicial obligations.”<sup>83</sup>

Ultimately, the law regarding the family and especially young children must be treated differently than other areas of law; and therefore, where there are extraordinary circumstances, extraordinary measures should be taken. One view in support of this premise is that after the extensive research that has been performed on the effects of high conflict divorce, sufficient evidence exists that these evaluators are appropriate to make custody recommendations and have a positive effect on custody proceedings.<sup>84</sup> In opposition, some feel that scientific research is lacking in the area and that even a lay person could provide the same

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<sup>79</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Philip M. Stahl, *The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Court: A Response to Tippins and Wittmann*, 43 FAM. CT. REV. 187, 260 (Apr. 2005).

observational data that an evaluator can.<sup>85</sup> Regardless of which opinion is more correct, it is clear that the fairness issues that surround child custody evaluations do exist around the country. As one attorney puts it, what this discussion should probably focus on is “how does one counter the fact that these things will happen?”<sup>86</sup>

## V. Addressing the Current Negative Aspects of Child Custody Evaluations

There are many examples where judicial impartiality has created cause for reversal. In a defamation action a judge did a “little investigation for [himself]” by speaking with a juror involved in the case.<sup>87</sup> The appellate court there held that this was error.<sup>88</sup> In a Pennsylvania case, a post-trial examination of the plaintiff caused the court to grant a new trial. The Supreme Court of Pennsylvania held that it was error to consider such a report because “the physician was not sworn and the defendants had no opportunity to cross examine him.”<sup>89</sup> And in a Utah case, the Supreme Court found that the trial judge had erred in using a book not in evidence in preparing exhibits<sup>90</sup> because he had gone “outside the evidence to make a finding.”

Appellate proceedings are an option where a party feels that a decision has been influenced by prejudice or judicial partiality. Analogous to a sentencing action, custody proceedings are often characterized by a “legitimate interest in the character of the procedure which leads to the imposition of sentence.”<sup>91</sup> In other words, the fairness in making the decision is just as important as the decision itself. People want to feel that they have been heard and have been judged objectively.

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<sup>85</sup> *Id.* referencing Timothy M. Tippins & Jeffery P. Wittmann’s *The Benefits and Risks of Child Custody Evaluators Making Recommendations to the Court*, 43 FAM. CT. REV. 187, 193 (Apr. 2005).

<sup>86</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

<sup>87</sup> *Pua v. Hilo Tribune-Herald, Ltd.*, 1929 WL 3042 (Haw. Terr. 1929).

<sup>88</sup> *Id.*

<sup>89</sup> *Patanyi v. Davis*, 9 A.2d 430 (Pa. 1939).

<sup>90</sup> *Salt Lake City v. United Park City Mines Co.*, 503 P.2d 850 (Utah 1972).

<sup>91</sup> *Barker*, 420 N.W.2d at 697.



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The issue with appellate procedure with reference to judicial bias is that “a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.”<sup>92</sup> A motion to disqualify a trial judge on account of prejudice is given heavy discretionary weight and generally, “the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.”<sup>93</sup> And prohibitions against bias where items have been considered outside of being read into evidence will only be effective if the individual state’s appellate standard would require reversal.<sup>94</sup> Appellate procedure is time consuming, costly, and in this case very difficult to win. But, as the cases mentioned above prove, it is not impossible.

Other options for remedying this problem are more proactive in nature. In response to a Symposium Issue on Child Custody Evaluations discussing *Empirical and Ethical Problems with Custody Recommendations*, Professors Mary Kay Kisthardt and Barbara Glesner Fines have suggested ways in which custody evaluations could be used early in a custody arrangement, rather than used later as a weapon during litigation. It is true that even in custody battles, despite rules of professional conduct, the adversarial system is structured to promote opposition, not cooperation.<sup>95</sup> In providing these evaluations to the court, it is unlikely that an attorney will truly analyze the reports and what the data actually concludes. Instead, attorneys have the incentive to “move the expert in a direction that will provide the most persuasive testimony possible.”<sup>96</sup> Additionally, it is probable that reports read silently and not admitted into evidence would be advocated by the party which that report suggests have custody, regardless of whether there is a question of judicial bias.

Professors Kisthardt and Glesner Fines suggest that the system could be improved by: (1) using the evaluators during the

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 698.

<sup>94</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

<sup>95</sup> Mary Kay Kisthardt & Barbara Glesner Fines, *Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes*, 43 FAM. CT. REV. 187, 229 (Apr. 2005).

<sup>96</sup> *Id.* at 229-30.

process of creating a parenting plan, before the combative trial atmosphere takes over, (2) revising procedures where custody reports are ordered, and (3) adopting of the approximation standard for custody determinations.<sup>97</sup> Bringing the custody evaluators in at a much earlier stage would be a better use of their expertise, according to the authors. Relitigation rates are dramatically high where an evaluator has been an integral part of the orders made thereafter.<sup>98</sup> Therefore it would make sense to bring in the experts to aid in creating parenting schedules before those experts are seen as acting on behalf of one side. At this stage, the psychologists could assist in resolving conflict arising out of the negotiation of these plans. The mental health professional could act as a guide in planning and imagining how the child's life will look after the divorce.

Further, the mental health professional's role is invaluable because psychologists have been trained on how children's developmental stage will be a large factor in how that child may react to the separation.<sup>99</sup> With respect to interviewing the child, the psychologist would, at this stage, be aiding the most important decision makers involved in the action: the parents.<sup>100</sup> Instead of a silent report read by the judge, or one read into evidence and attacked at trial, the evaluator would gain knowledge about the child and relay those ideas to the parents. The parents would then be in the best position to negotiate what is in the best interest of that child.<sup>101</sup>

Next, the authors suggest that the structure of how the evaluators are used in litigation be adapted. Professors Kisthardt and Glesner Fines suggest that more than one expert would result in greater fairness. It would be especially beneficial to engage custody evaluators on both sides to gain real objectivity since "differences in their observational standpoints and theoretical orientations may then be disclosed."<sup>102</sup> The authors note that in some Australian courts, experts are called as a panel, rather than individually, and discuss custody issues. In these sce-

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<sup>97</sup> *Id.* at 230.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 231.

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narios, the experts are even allowed to ask each other questions, rather than being nudged in one direction by an attorney's examination.<sup>103</sup>

The final way in which the authors contend custody evaluations could be better employed is by the adoption of the approximation standard. The approximation standard, proposed by the American Law Institute, holds that custodial arrangements should approximate the proportion of caretaking functions before the separation.<sup>104</sup> Generally proceedings where custody evaluations are ordered involve parents who are generally in equal standing in terms of being "good" caretakers; yet the parties wish to fight it out through legal means in order to "win." In this way, the evaluations, again, become weapons, rather than useful tools to guide decision-making. The approximation standard would make the outcome of the action more predictable and reduce legal combat.<sup>105</sup> In this way, psychologists could be employed to evaluate the *already demonstrated* connection and ability to care for the child rather than speculate as to the future.<sup>106</sup>

It is true that implementing these changes would be costly. One family law practitioner in Kentucky believes that the evil in these situations is the lack of resources and time that the court has to determine family dynamics.<sup>107</sup> Further, the funding and time issues do not allow the court to investigate which parties or witnesses have more credibility in the presentation of differing versions of the same events.

Problems also appear when the parties themselves do not have the funds to allow counsel and courts to properly prepare. To "do the job right" could mean spending a family's savings. In Kentucky custody proceedings, it is likely that the incentive to allow the reports in without testimony may stem from a concern about expense. In Jefferson County, Kentucky, the direction that

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<sup>103</sup> *Id.* referencing Justice Gary Downes AM, *Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience*, Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals in Hobart February 27, 2004, available at <http://www.aat.gov.au/CorporatePublication/speeches/downes/concurrent.htm>.

<sup>104</sup> *Id.* at 231.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Email, to [discussion@lists.aaml.org](mailto:discussion@lists.aaml.org) (Jan. 2009).

the party challenging the report would pay for expert depositions and attendance at trial appears in every trial order.<sup>108</sup> Fairness versus cost is also a concern of Kisthardt and Glesner Fines, who mention that there would be an obvious increase in cost where more than one evaluator was brought in during custody litigation. Clearly, “more fundamental structural reforms may be required before the skills and knowledge of mental health professionals can effectively and ethically guide the custody decision.”<sup>109</sup>

Additionally, it may be true that good evaluators are subject to burnout. They are constantly overwhelmed by simply trying to get an evaluation finished for trial, much less preparing for depositions and cross examination.<sup>110</sup> Again, as Professors Kisthardt and Glesner Fines would likely agree, some of these evils could be mitigated by good interdisciplinary protocols in the adversarial system and more generally, by employing such professionals in the collaborative setting.<sup>111</sup>

## VI. Conclusion

Psychological evaluations can provide advantages but also pose drawbacks in the custody arena. As evidenced by analogous case law, generally where a judge seeks information outside of the record on her own, there will likely be reversal. Sometimes this reversal and remand will come even without a demonstration of prejudice. Sometimes it may not be appropriate to apply the theories of judicial bias to court-ordered custody evaluations or psychological evaluations of children in custody disputes. From the first family law course experienced in law school, through practice, and ultimately presiding over a custody proceeding, there is no question that the issues confronted in the family law setting require a different standard of emotional sensitivity and equity. “The best interest of the child” may not always be what is procedurally fair to the parent.

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<sup>108</sup> *Id.*

<sup>109</sup> Kisthardt & Glesner Fines, *supra* note 95, at 231.

<sup>110</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

<sup>111</sup> *Id.*

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A handful of jurisdictions bypass this issue by allowing the judge to seek outside advice.<sup>112</sup> The remaining states generally guide these court-ordered evaluations through rules of evidence, civil procedure, or domestic relations statutes. The ways in which the evaluations actually are received by the court differ. In some states, judges are permitted to consider the evaluations before they are read into evidence. Some states, like Missouri, seem to specifically try to prohibit this practice.<sup>113</sup> In practice, some attorneys insist that regardless of the rules, these reports will be read. One domestic court judge adds that courts settle disputes rather than actually finding truth; therefore, as long as a judge is intellectually honest, he or she may consider all sorts of information before during or after receiving them into evidence.<sup>114</sup> For this judge, who has presided over domestic disputes for many years, there would be a great deal more to be concerned about if a judge were not allowed to *or was not interested* in reading the report than if that judge just simply considered it. But other practitioners, in response to this opinion state that cases tried without an evaluation are likely to gain better results and that “the good judges do not read the reports and the best ones do not order them.”<sup>115</sup>

This issue is obviously one that has stirred up heated debate. Opinions may vary on what equity requires, but what is most important is to make sure that the focus in a custody action remains on the welfare of the children involved. While the rhythm and procedure of law are fundamental in maintaining justice, bright line rules regarding custody may not provide that justice after all.

Katherine J. Baker

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<sup>112</sup> *Supra* notes 48, 55, 58 & 59.

<sup>113</sup> MO. REV. STAT. § 452.390(3) (2009).

<sup>114</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

<sup>115</sup> Email, to discussion@lists.aaml.org (Jan. 2009).

