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Editor-in-Chief's Column

Should New Jersey Adopt Uniform Child Custody Evaluation Guidelines Applicable to all Professionals?

by Charles F. Vuotto Jr.

Mental health professionals are often asked to perform custody and/or parenting time evaluations in family law cases. Generally, those evaluations are conducted by psychologists; however, psychiatrists and social workers may also perform them. Each of these mental health professionals—psychiatrists, psychologists, and social workers—are governed by their own set of ethical guidelines and a separate state board of examiners. These disciplines have ethical guidelines that address how custody and/or parenting time evaluations should be conducted. This column will raise the question of whether New Jersey should adopt one standard set of guidelines applicable to all mental health professionals who perform custody and/or parenting time evaluations.

A gap exists in New Jersey law about the parameters of child custody evaluations and related reports. Although various rules, statutes, and cases refer to guiding principles, factors, or guidelines to be followed by a child custody expert, missing from all of those pronouncements is a mandate about one set of rules to be applied to all mental health professionals who perform child custody evaluations and reports. For example, Rule 5:3-3(b), titled "Custody/Parenting Disputes," provides that "[m]ental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of who engages them. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case." Unfortunately, the rule does not provide the parties, courts, and professionals who conduct these evaluations with anything approaching a uniform guide on how to conduct a child custody evaluation.

The American Academy of Matrimonial Lawyers (AAML) has issued *Child Custody Evaluation Standards* (2011). Those standards are aspirational in nature and do not have the force of law.

While there is no body of decisional law governing the practices of child custody evaluations, licensing regulations for psychologists and social workers provide them with mandatory standards for child custody evaluations. The mandatory standards applicable to psychologists are included in the regulations promulgated by the State Board of Psychological Examiners (New Jersey Administrative Code, Title 13, Chapter 42, 2011), which accompanies their licensing law (New Jersey Administrative Code, Title 13, Chapter 45, 2011). These regulations were preceded by guidelines that were in effect for about the last 18 years (New Jersey Specialty Guidelines, 1993) and were developed by a committee of psychologists and lawyers.

The mandatory standards for social workers are included in the regulations promulgated by the State Board of Social Workers (New Jersey Administrative Code, Title 13, Chapter 44G, 2011), which accompanies their licensing law (New Jersey Administrative Code, Title 13, Chapter 45, 2011). Their regulations are consistent with psychologists' regulations, modified to reflect disciplinary differences in education and training. The State Board of Medical Examiners (New Jersey Administrative Code, Title 13, Chapter 35) has standards for psychiatrists, which accompanies their licensing law (New Jersey Administrative Code, Title 13, Chapter 45); however, psychiatrists do not have regulations regarding child custody evaluations.

All three of these mental health professionals are guided by the professional associations to which they voluntarily belong. Their respective guidelines are aspirational, not mandatory, however. Psychologists have several guidelines that define best practices for custody evaluations. New Jersey psychologists who voluntarily belong to the American Psychological Association (APA) are also bound by the *Ethical Principles of Psychologists and Code of Conduct* (APA, 2012). In addition, if they belong to the American Psychology-Law Society, which is division 41 of the APA, they are guided by the *Specialty Guidelines for Forensic Psychology* (APA 2011) and the *Guidelines for Child Custody Evaluations in Family Law Proceedings* (APA 2010).

Social workers who belong to the National Association of Social Workers (NASW) are bound by their general *Code of Ethics* (2008). NASW has not published specialty standards for conducting child custody evaluations.

Psychiatrists who belong to the American Psychiatric Association (APA) are guided by their general *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (APA, 2010). Psychiatrists who belong to the American Academy of Psychiatry and the Law are guided by their *Ethics Guidelines for the Practice of Forensic Psychiatry* (2005) and those who belong to the American Academy of Child and Adolescent Psychiatry (AACAP) are guided by several practice parameters specific to forensic cases—child custody evaluation (AACAP, Volume 36 Oct. 1997 Supp.), forensic assessment (AACAP, Vol. 50, Dec. 2011,) and guidelines for forensic evaluation for children and adolescents who may have been sexually abused (AACAP, Vol. 36 Oct. 1997 Supp.).

The Association of Family and Conciliation Courts (AFCC), a multidisciplinary organization that includes attorneys, psychologists, and social workers, has generated model standards of practice for child custody evaluation (2006). These standards are consistent with the regulations of psychologists and social workers and the guidelines issued by their respective professional associations. Since the AFCC is a voluntary organization, its standards only apply to its members, and lack the force of law. In addition, the AFCC lacks an enforcement mechanism for compliance with its standards. The standards are more accurately considered guidelines, which are aspirational, as opposed to true standards, which would be mandatory and enforceable for members of a professional association. The AFCC standards are generally accepted. However, they are limited by their exclusive focus on the scientific method for child custody evaluations. This focus does not provide guidance regarding the roles of clinical expertise in child custody evaluations, despite the fact that clinical interviews are central to data collection and all expert opinions use clinical reasoning to integrate the data into a coherent whole that represents a particular individual.

While all these regulations, standards, and guidelines are generally consistent with each other, they vary in specificity, comprehensiveness, and emphasis. Consequently, those variances create ambiguity for courts trying to decide whether evaluations done under their authority represent best practices and are legally reliable.

With New Jersey currently allowing different types of mental health professionals to perform child custody evaluations, and with each of those professionals being subject to different mandatory and aspirational guidelines for those child custody evaluations, the state needs

consistency. More importantly, the children subject to these child custody evaluations need reliability when they are subject to the intrinsically intrusive nature of evaluations. It appears the evaluation standards promulgated by the AAML,[1] mentioned above, offers the best opportunity for this sorely needed uniformity.

The AAML standards were the product of a multidisciplinary effort by attorneys and psychologists. The following is an excerpt from the preamble to the standards booklet, which explains the genesis of their promulgation, and reveals why they supply the uniformity the state needs:

> During the 2006-2007 term, President Gaetano Ferro appointed Maria Cognetti chair of an interdisciplinary committee to develop standards for the courts, parties, counsel and mental health professionals for the preparation of uniform child custody evaluations. The committee was composed of experienced family lawyers, all Fellows of The American Academy of Matrimonial Lawyers from regions throughout the United States who have not only handled all types of custody disputes but also functioned as Guardians ad Litem. Two nationally recognized forensic psychologists, Arnold Shienvold, Ph.D. and Marc Ackerman, Ph.D., volunteered their time to provide valuable insight into the complexity of the conduct of these evaluations.
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> Every jurisdiction in the United States has established legal standards for the determination of child custody; few states have rules or laws which govern how child custody evaluations are conducted. In large urban areas where mental health professionals are plentiful, these evaluations are typically completed by licensed psychologists who have stated competencies in child development and custody evaluation. However, this committee recognizes the fact that in the rest of the country, where mental health professionals are scarce and economic resources limited, these evaluations may sometimes be conducted by professionals (which may include attorneys) without training in custody evaluations and court appointed lay persons functioning as Guardians *ad Litem* and under the mantel of various ADR methodologies. It is the intent of the committee that these Standards will aid professionals in understanding the necessary training, skill and experience required in conducting custody evaluations. It is also the intent of the committee that the court will utilize these Standards in their selection of custody evaluators.
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> Citizens are more likely to be touched by the family court system than any other area of law and no intrusion of the law is more intimate than the determination of who will have custody of a child. The ramifications extended well beyond the family to the entire community. The task of the child custody evaluator is unlike any other court expert. The consequences of these recommendations reverberate long after the legal case is over.
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> It was the conclusion of the committee that there is need for a coherent, uniform set of standards for the variety of professional who may be called upon by the court to conduct a custody evaluation. The standards set by this committee are not intended to supersede the ethical precepts of each profession; rather they are an adjunct, intended to provide the court with uniform means of assessing the quality of a custody evaluation submitted to the court. The committee gratefully acknowledges a major debt to the Association of Family and Conciliation Courts [hereinafter, AFCC] for its permission to utilize and rely upon major portions of its Model Standards of Practice for Child Custody Evaluation, 2006, and the Guidelines for Brief Focused Assessment, 2009. Many of the issues involved in drafting these Standards are virtually identical to those presented by the AFCC in its Model Standards. As a result, some of the provisions are taken verbatim or with slight adaption of the Model Standards. To reduce confusion, those provisions are presented here without quotation marks or citations. The committee also acknowledges the Specialty Guidelines for Forensic Psychology.
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> The criteria for expertise as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993) and *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923) were incorporated in these Standards. In addition, the committee reviewed and took into

consideration the American Psychological Association [hereinafter, APA] Guidelines for Child Custody Evaluations in Divorce Proceedings, 2009, the APA Draft Guidelines for Evaluating Parental Responsibility, May 2007, and the APA Ethical Principles of Code of Conduct for Psychologists with 2010 Amendments.

Application of the knowledge and skills of mental health providers in the resolution of legal disputes is a forensic endeavor. These standards have been written in consideration of the importance of that skill set to the orderly and effective resolution of child custody disputes. In the case of custody evaluations, the purpose is to assist the court in application of the law to these important decisions. Lawyers, mental health professional and judges each have different and distinct roles in child custody disputes. The lawyer advocates for the client; the mental health professional investigates, evaluates and recommends under the canopy of the best interests standard. It is in domestic relations that law and psychology intersect.

The AAML Child Custody Evaluation Standards are intended to provide the parties, courts and professionals who conduct these evaluations a uniform guide to the properly performed child custody evaluation. These Standards may be applicable in any proceeding in which custody or access to a child is being determined.[2]

The AAML standards were drafted by attorneys, with the key assistance of psychologists. That interplay created consistency with licensing laws and regulations, as well as with the professional ethics for mental health experts. The need to have guidelines that were drafted primarily by attorneys, rather than mental health professionals, is clear for a variety of reasons. Notable is the need to coordinate mental health experts' best practice parameters with legal requirements, such as the *Daubert* and *Frye* criteria in custody cases.

The AAML standards are intended to constitute a coherent, uniform set of standards to be applied to all of the different mental health professionals who may be called upon by a court to conduct child custody evaluations. While these standards are not intended to supersede the licensing laws and regulations or the ethical precepts of each profession, they will provide courts with a uniform way of assessing the quality of child custody evaluations and their legal reliability, regardless of the conflicting and varied standards now in place for each of the mental health professionals who presently conduct child custody evaluations.

The AAML standards appear to represent a thoroughly investigated and researched multidisciplinary set of criteria intended to provide a uniform guide to mental health professionals, attorneys, and courts when dealing with child custody evaluations. Those standards highlight the need for one set of rules, guidelines, and procedures to govern any New Jersey professional conducting a child custody and/or parenting time evaluation regardless of that professional's discipline.

Although there is currently some consistency among the laws, regulations, and guidelines governing child custody evaluations, there is much work to be done to increase specificity across disciplines, standardize procedures, and coordinate professional regulations and guidelines with legal criteria. It is my hope that the bench, bar, and governing bodies of the applicable mental health professionals will come together to create an interdisciplinary committee to work on these uniform guidelines with, perhaps, the AAML standards as a guidepost toward an appropriate outcome. ■

The author wishes to thank the following mental health professionals for their assistance with this column: Robert Rosenbaum, Ph.D.; Eileen Kohutis, Ph.D.; and Madelyn S. Milchman, Ph.D.

Endnotes

1. http://www.aaml.org/library/publications/21621/child-custody-evaluation-standards.
2. http://www.aaml.org/library/publications/21621/child-custody-evaluation-standards/preamble Excerpt from the preamble to the American Academy of Matrimonial Lawyers' Child Custody Evaluation Standards booklet (AAML), with attribution to Maria Cognetti, J.D., chair, and the following members of the committee: Marc Ackerman, Ph.D., Nancy Zalusky Berg, J.D., Rick Campbell, J.D., Keith Nelson, J.D., Arnold Shienvold, Ph.D., Louis Truax, J.D., and reporter Sacha Coupet, J.D., Ph.D., Loyola University Chicago School of Law.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Executive Editor's Column

A Critical Review of Our Current FD Process is Warranted

by Ronald G. Lieberman

On Sept. 2, 2011, the Administrative Office of the Courts issued Directive #08-11, effectuating changes to Rule 5:4-4 regarding non-dissolution cases, commonly referred to as FD cases due to the docket number assigned to them.

Directive #08-11 implemented changes to Rule 5:4-4, whereby all non-dissolution cases will be initially considered summary actions with mandatory appearances by the parties with specific exceptions. Additionally, mandatory revised forms must be used by everyone in filing these complaints or post-dispositional applications, and, as set forth on page two of the directive, there will be two classes of litigants, as follows:

> The revised procedures distinguish between Non-Dissolution motions and the Dissolution motion process governed by R. 5:4-4 and R. 1:6-2….

These changes inadvertently raise issues about whether two classes of litigants were created, addressing the same issues of child custody or child support. Another look at this new FD process is warranted, because the creation of two classes of similarly situated litigants raises certain issues.

Article I, Paragraph One of the New Jersey Constitution provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

That article and paragraph protects the right to privacy.[1] The right of a parent to the care and custody of a child is a fundamental, natural and legal right that deserves special protection.[2]

That same article and paragraph deals with equal protection;[3] in fact, our state's equal protection has "even more demanding equal protection guarantees" than the United States Constitution, 14th Amendment.[4] Even though the term "equal protection" does not appear in Article I, Paragraph One of the New Jersey Constitution, the article and paragraph have been interpreted as conferring a right analogous to the equal protection right available under the 14th Amendment of the United States Constitution.[5]

A state must "provide equal protection of its laws not only in the acts of its legislature, but also in the decision of its courts."[6] Stated another way, "that first paragraph to our State Constitution 'protect[s] against injustice and against the unequal treatment of those who should be treated alike.'"[7]

Under the directive, the rights of litigants to bring issues regarding the care and custody of their children are being affected depending upon nothing more than whether or not those litigants said "I do." Different classes of litigants—dissolution as opposed to non-dissolution—should not be treated differently when the issues—children and child support—are the same. Instead of being treated equally, Directive #08-11 and Rule 5:4-4 create separate, and by definition, unequal classes of litigants.

The following chart sets forth some of the disparate and unequal treatment of dissolution and non-dissolution litigants:

Issue	Non-dissolution Litigant	Dissolution Litigant
Appearance at hearing	Mandatory and no notice of whether a plenary hearing will ensue	Voluntary attendance and no confusion as to the purpose of any hearing
Use of forms	Mandatory	Not required and not used
Treatment of actions	Initially treated as summary	Subject to regular motion practice
Attachments to motions	Limited to forms	As deemed appropriate by litigant and subject to Rule 1:6-6 (evidentiary)
Return dates	10-day limit	24/15/8 per Rule 1:6-2
Case information statements	Not required for applications dealing with child support	Required for applications dealing with child support
Counsel fees	No specific ability to seek	As deemed appropriate

Because the directive creates a clear distinction between the due process afforded dissolution (designated as FM) litigants and FD litigants, all dealing with the same issues involving child custody and child support, a balancing test should be used to decide whether the law that is challenged as not applying evenhandedly to similarly situated people, creating two classes of people, bears a substantial relationship to a legitimate governmental purpose.[8] There are three factors to be weighed: the right at interest, the extent to which the challenged scheme affects that right, and the governmental need for any such restrictions.[9]

The directive itself states that it is creating two classes of people who are similarly situated when dealing with child support and/or child custody. The right at stake, namely the right to care and custody of a child, has long been established as a fundament one. The schemes set forth in Rule 5:4-4 and Directive #08-11 may have the effect, by design, of limiting both the information that can be supplied or relied upon and the way it is being supplied or relied upon by FD litigants when compared to FM litigants.

Calendar pressure is prevalent throughout the court system, and probably no more so than in the non-dissolution calendar. But, such pressure cannot serve to justify two different due process actions dealing with the same issues of child custody and child support under Rule 5:4-4. As was held in the unreported decision of *Constanza v. Clemente*:[10]

> Case clearance is a noble goal, but we are 'constitutionally entrusted with the fair and just resolution of disputes in order to preserve the rule of law and to protect the rights and liberties guaranteed by the Constitution and laws of the United States and this State.' Mission Statement of the New Jersey Court System.

The new FD process may also run afoul of the New Jersey Parentage Act,[11] which reads as follows:

> The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

Directive #08-11 specifically mentions that it is creating two classes of litigants, differing only in their marital status. So, questions are raised regarding whether the difference mentioned in the directive is depending upon, and not regardless of, the parents' marital status.

Questions about the directive keep arising because a child born out of wedlock has created a different set of procedures and devices to address custody and support matters than a child born during a marriage.

Different procedures may cause judges to receive the information differently, process that information differently, address the claims raised differently, view the presentations differently, and move the matters along differently, for no other reason than marital status.

The questions raised about Directive #08-11 and the recent changes to Rule 5:4-4 merit serious review and contemplation.

Endnotes

1. *In re Quinlan*, 70 N.J. 10, 20, 40-42 (1976); *Lewis v. Harris*, 188 N.J. 415, 423 (2006).
2. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re Guardianship of Dotson*, 72 N.J. 112, 122 (1976) (Pashman, J., concurring); *Adoption of Children by G.P.B.*, 161 N.J. 396, 403 (1999); *In re Baby M.*, 109 N.J. 396, 447 (1988); *In re D.T.*, 200 N.J. Super. 171, 176-77 (App. Div. 1985).
3. *A.D.A. Financial Services Corp., v. State*, 174 N.J. Super. 337 (App. Div. 1979).
4. *Id.* at 347.
5. *Lewis, supra*, 188 N.J. at 442; *Secure Heritage, Inc. v. City of Cape May*, 361 N.J. Super. 281, 299 (App. Div. 2003).
6. *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 84 N.J. 137, 145 (1980).
7. *Lewis, supra*, 188 N.J. at 442, *citing Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985).
8. *Lewis, supra*, 188 N.J. at 443, *citing Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 472-73 (2004); *Barone v. Dep't of Human Servs.*, 107 N.J. 355, 368 (1987).
9. *Greenberg, supra*, 99 N.J. 567; *Robinson v. Cahill*, 62 N.J. 473, 491-92.
10. 2006 N.J. Super. LEXIS Unrep. 130 (App. Div.), at page 2.
11. N.J.S.A. 9:17-40.

Senior Editor's Column

Ode to Judge Lehrer

by William M. Schreiber

The Honorable Alexander D. Lehrer, 68, of Wall Township, passed away at his home on Friday, Dec. 14, 2012.

How do you pay homage to someone who is larger than life? Judge Lehrer was that kind of individual. For much of his life, he served as a lawyer, prosecutor and superior court judge; most recently, he was a senior vice president/chief risk officer for Meridian Health. Judge Lehrer was a trustee for the Monmouth Bar Association and president of the Retired Judges Association. He served on the Monmouth County family bench for many years.

We have lost someone who was beloved to the bar, to the bench and to the public in general.

So many people have stories to tell about Judge Lehrer. He was someone who made each individual feel important, as if he or she was his best friend. He cared about lawyers and was always there to be of assistance. When he sat in the family part he was 'the judge.' Cases settled because he cared and tried to do what was right. He cajoled people into doing things they never thought they would agree to do, because ultimately they realized he had the solution that was just slightly out of the grasp of the attorneys and parties involved.

Many individuals have been writing their own personal stories about Judge Lehrer. I have mine. There was one day when I was in court and suffering from some type of virus or cold. I apparently appeared so ill that the judge was concerned for my health. He took me into chambers and said that I needed to leave the courthouse. He was afraid for me to drive myself, and contacted the Monmouth County Sheriff's Office and arranged transportation for me to my home. I was eventually able to see a doctor that day, and was not suffering from anything serious. But it was the personal concern of Judge Lehrer that was so memorable. He took the time and made the effort to do something most individuals would not even think of doing, let alone actually do.

He was a friend to the bar, especially young lawyers. Although he would test a young attorney and challenge him or her to the limit, he never rendered a decision that embarrassed a lawyer in front of a client, if it could be avoided. On more than one occasion, you could sit in his court on a motion day and observe his face getting red, the color gradually rising to his forehead, and then the inevitable explosion would occur. The only surprise was on the face of the attorney arguing, who had not paid attention to what was going on and had kept arguing a point that was clearly not going to convince the judge of the merits of the position. Even on those occasions he would leave the bench, sometimes in a fury, with his robe billowing, and would return to the bench after a period of time, cool, calm and collected.

He enjoyed a good time, and truly loved what he did and how he did it. His unique personality and ability to lay his hands on a case reflected his deep concern for the people appearing before him, and their families. Of particular importance to him were the children, the innocent victims of what went on in the courtroom, and of the fights and disagreements between their parents. Notwithstanding the rancor between the parents, Judge Lehrer would do everything possible to create peace between children and parents, even if peace was not possible between the parents directly.

We have suffered the loss of a wonderful, caring human being, who left us much too soon. It is difficult to pay tribute to such an individual, who truly was a friend to all and 'the judge' to many. ■

Commentary

Using Cross-examination to Challenge Child Custody Experts: A Step Along the Way to a More Productive Use of Psychologists in Resolving Child Custody Disputes

by Christopher R. Barbrack

Over the years, I have observed attorneys scratching their heads upon leaving depositions of psychologists.[1] I have observed attorneys pulling their hair out after reading a child custody evaluation authored by a child custody expert (CCE). Admittedly, these reactions vary as a function of the direction the psychologist's wand is pointing that day relative to the lawyer's case. But strong negative reactions, punctuated by waves of utter confusion, are almost always present in contested child custody cases. The phrase "what is he or she talking about?" is a frequently heard refrain referring to the CCE. Are such reactions irrational? This article takes the position that they are not.

This article discusses ways to think about and deal effectively with CCEs in the family court. It offers alternatives to the attorney falling prey to feelings of exasperation and futility. Limited space allows presentation of only a few alternatives, and only a limited technical analysis of the situations that create the need for those alternatives. A full-day seminar could be devoted to taking apart standardized tests commonly used in custody evaluations (*e.g.*, the MMPI or the MMCI). Here, the reader will get no more than an appetizer. Within these limitations, ways are presented for exposing the lack of scientific foundations for the work of CCEs. The article discusses ways to build challenges to the credibility of and weight ascribed to CCE recommendations and a discussion of the major obstacles to these efforts emanating from the family court and from the New Jersey Rules of Evidence. Deposition and cross-examination questions are used to illustrate the major points. Finally, more constructive modes of functioning are proposed to replace the outmoded CCE model in divorce cases where child custody is an issue.

Preliminary Considerations: How Do CCEs Become Involved and How are They Appointed?

By way of review, most divorcing families with children eventually settle their issues without a trial, yet the preparation of each divorce case is undertaken as if a trial were inevitable. This mind-set has widespread effects, including the premature and unnecessary introduction of CCEs into the families of divorcing parents. Parents who are unable to agree on custody and/or allocation of parenting time arrive at what I call a "systemic-tolerance-threshold" that is defined by court schedules, the level of patience of the attorneys or the court, and the willingness and ability of the parties to bankroll a drawn-out court battle over custody. Once the threshold is exceeded, the parties are directed by the court or the attorneys to be seen by a CCE.

How the CCE is appointed has important implications. The worst scenario is for the court to appoint one CCE. The parents are told that this process does not preclude their hiring a private CCE to work exclusively for one side, but most of these parents cannot afford to pay one expert, much less two or three. The court appointment provides unwarranted immunity to the CCE, has the effect of endorsing and insulating the CCE's bad practices described in this article, and robs the divorce process of the 'truth' that can emerge from a contest between two experts facing off. The court-appointed CCE working alone simply has too much power to influence the court relative to the objective quality of what he or she has to offer.[2]

The Context: A Typical Child Custody Evaluation

The typical child custody evaluation involves: 1) review of records (health, criminal and academic), 2) interviews with the parents and children in a variety of configurations, and 3) administration of a battery of standardized psychological tests. Some evaluations may include: 4) visits to the schools, and 5) interviews with so-called co-lateral sources (*e.g.*, relatives or neighbors). Once the data have been collected, many cases experience a lull in the action. Everyone waits a relatively long time for the CCE to deliver a report, even though one of the main reasons the CCE was brought into the case was to quickly help ease the stress in the family, particularly stress experienced by the children. This fact seems to have virtually no effect on the pace of CCEs producing reports. My speculations about the reasons for this are beyond the scope of this article. As a psychologist who has prepared well over a thousand psychological reports, I have never been able to discern why it takes so long to produce these evaluation reports beyond the fact that these mind-numbing documents are hugely overwritten. It is difficult to justify a $10,000 or $15,000 fee for a few report pages. This means that a report that should be at most 10 pages, balloons to upwards to between 50 and 80 pages, or more. This enlargement process not only supports the inflated charges but wastes time, and the participants are forced to cool their heels and dig deeper into their bank accounts.

During the hiatus, the data are evaluated and the expert's opinion is fashioned into the report. Many reports include specific recommendations. The report is submitted to the court and may be shared with the parties and their attorneys, with or without restrictions. Unfortunately, the CCE report is rarely shared with the parents in draft form, for discussion purposes, prior to submission to the court. Therefore, the parents are almost always surprised by the CCE's recommendations, and one or of the both parents inevitably is left feeling angry and hurt, perhaps even confused. The attorney is then put in the role of helping the client to accept the findings and recommendations or to discredit some or all of the report.[3] There are two predominant roles in this scenario: the psychologist as oracle and the attorney as gladiator. Both psychologist and attorney are paid handsomely for playing these roles.

I believe readers will fall at several points on a continuum from 1 to 5: 1) like and endorse CCEs; 2) value CCEs on a case-by-case basis; 3) have little or no use for CCEs; 4) discount all value of CCEs; or 5) believe CCEs often do damage in the child custody determination process. Readers are invited to place themselves on the continuum now and then after reading this article, and again six months from now.

The recent widely publicized case of *In the Matter of the Suspension or Revocation of the License of Marsha J. Kleinman, Psy.D.. License No. 35s100231900 to Practice Psychology in the State of New Jersey*[4] is illustrative of the last point on the continuum, and warrants a brief description at the outset.

On July 13, 2012, Administrative Law Judge Edith Klinger revoked Marsha Kleinman's license as a psychologist in New Jersey for various reasons pertaining to her psychotherapy work with a child in a contested custody matter.[5] Much of the case rested on evidence from audiotapes and videotapes provided by Kleinman. I believe this case could not have been proved without this evidence showing what actually took place between Kleinman and the child. The important take away is that negative and damaging professional conduct can occur in forensic child custody activities. I think even the sharpest critics of CCEs are hesitant to accept this premise because it is so dissonant with their past experiences or desire to believe that mental health professionals at least try to do the correct thing.[6] In some ways it is easier to believe that the strenuous complaints of a parent in a child custody situation are the product of sour grapes or illustrative of the anger and poor judgment that is documented in the CCE's report. The alternative view is that the parental protest is well founded and based on the misbehavior of the professional due to his or her poor training, lack of experience, bias, laziness, etc.

Whether Kleinman is an outlier in the CCE community or the tip of an iceberg remains the subject of speculation until more cases surface. It is unfortunate that New Jersey legislative initiatives that would have required child sex abuse evaluations to be videotaped have stalled. Legislation like this could be a start in the direction of opening up child custody evaluations for systematic documentation and scientific scrutiny. At the current time, all we can do is trust CCEs to accurately report the specific circumstances of their evaluations. This trust flies in the face of everything I know about the vicissitudes of human perception and memory.

I have used this prefatory material to create a mind set for the reader to make it more likely that the material presented will be given serious consideration.

Cross-examining and Discrediting the CCE

Attorneys will be aided by adopting certain attitudes and beliefs relative to CCEs that they cross-examine:

1. You will never hit a home run against a CCE, so don't even try. In other words, don't spend much time trying to disqualify the CCE. His or her testimony will be heard.
2. You should approach the deposition and cross-examination with realistic goals. Courts want to believe and trust mental health experts who conduct CCEs.[7]
3. The most important achievable goal in a deposition or at trial is to undermine the CCE's credibility in the eyes of the court.
4. In setting out to achieve #3, you must avoid getting lost in the technical weeds. If you lose the court's interest or attention, you have lost this part of your case.
5. Never permit the examination of the CCE to be personal or sarcastic.
6. Be thoroughly familiar with the rules of evidence, especially NJRE 702.[8]

Effective questioning of CCEs must be based on understanding certain underpinnings. I categorize the first of these as substantive. The best interests of the child (BIC) is the keystone of all child custody evaluations. This is a construct meaning that it is not real, such as height or weight, but symbolic like loyalty or honesty. BIC cannot be measured directly. In order to measure BIC, the construct must be defined. Unfortunately, BIC is not defined, even though courts, attorneys and CCEs toss around the term as if everyone is on the same page with this construct. This is misguided.

The practice of using any mental health expert to assist the court in resolving disputes over child custody is fatally flawed for one basic reason. The keystone constructs of 'parenting,' as in 'good parenting' or 'better parenting,' and 'best interests of the child' have never been adequately defined or subjected to thoroughgoing empirical analyses. In addition, there is no evidence in the literature I can find where more sophisticated constructs such as 'goodness of fit' as per Stella Chess, MD and Alexander Thomas, MD,[9] between parent and child have been defined and measured. All of the players in the child custody dispute drama act as if these constructs have been defined and measured, or as if doing so is not essential to the proper resolution of the child custody dispute. Both assertions are categorically false. In fact, all of the other problems with child custody evaluations flow from this state of affairs. This is not to say that psychologists lack commonsense. Hence, when the psychologist uses commonsense, some of his or her recommendations will add up for the attorney, court or parent. However, commonsense is a necessary but insufficient condition for being an expert. Experts have to have commonsense, plus. Today's CCEs fall short on the plus part. I would label cross-examination based on theorists and researchers 'substantive' or 'definitional' issues, whereas the next section deals with what I would term 'technical' or 'psychometric' issues.

Substantive Issues: Defining the Best Interests of the Child

The seminal work in this area was published in 1973 by law professor Joseph Goldstein, psychoanalyst Anna Freud and child psychiatrist Albert J. Solnit,[10] and is described in the book titled *Beyond the Best Interests of the Child (BIC)*. Over the next 23 years these authors published three more books on the same topic, culminating in 1996 with *The Best Interests of the Child: The Least Detrimental Alternative*.[11] This major contribution of the early work of the authors' book was not developing a concise or novel way to define BIC. Rather, the major contribution was to argue that the child's interest should trump the interests of the adults in the family or related social group. The last book in the series strikes a somber tone and reflects sharply reduced expectations for the children of divorce. Hence, the title *Best Interests of the Child* is counterbalanced by the gloomy phrase "least detrimental alternative." As argued elsewhere in this article, the authors note the lack of consensus on the meaning of BIC and how mental health professionals and the courts fail to recognize the very real limits of their professional knowledge in this area.

I have found that many matrimonial attorneys and courts have not read any of these basic BIC books, or even heard of them. Sadly, I have found that many CCEs have not read these books. This is inexcusable, not because the ideas set forth are novel today, but because even 40 years ago these authors captured, wrote down and discussed all of the major issues that exist today in the child custody arena. These texts are as fresh as if they were written last year.[12]

Anna Freud hit the nail on the head when she wrote that the BIC is a product of psychodynamic theory about children and good judgment (what I call commonsense).

She stressed the lack of consensus on the nature and definition of BIC.[13] The present day limits of Freud et al.'s contributions stem from their reliance on psychodynamic theory. You will rarely, if ever, come across a CCE that genuinely and exclusively uses psychodynamic theory (other than a vagrant psychodynamic term thrown in here or there). Hence the only element remaining from Freud's contribution is good judgment and commonsense. Freud argued that the most important element in a child's best interests was continuity of care. This makes sense, but never rose above the level of speculation.

CCEs cannot even agree among themselves about what variables are important in custody evaluations. For example, in a recent survey of Canadian psychologists who routinely perform child custody evaluations, out of 60 variables the level of conflict between parents was rated 25th in importance, while parental pressure on a child to choose one parent rather than the other was rated 44th in importance. At the current time, accurate assessment of variables pertinent to child custody evaluations is not possible. The material presented in child custody evaluations is no more than guesswork on the part of the psychologist.[14] The belief that there is a scientific approach to child custody evaluation is a myth, but like many myths there are many professionals, not only psychologists, who ardently reject this notion. The expert will act as if he or she can assess critical variables and can make empirically based recommendations even though this is not true. They will do this because of professional pride, wanting to make money, have feelings of power and compassion, and so on.

Technical Issues: Psychometrics

In terms of technical issues, it is well to remember that the attorney does not have to become a psychologist in order to discredit child custody recommendations. However, he or she must master a few basic psychological ideas, including one item of technical information. This material is a subset of psychometrics or psychological measurement. There are two reasons for this recommendation: one, psychometric material is simple to understand and use; two, many psychologists are no more than dimly aware of psychometrics as they apply to child custody evaluations. This is a fertile area for cross-examination.[15]

Under the psychometric heading, there are two basic concepts. Point one is reliability. In the mental health literature, reliability means consistency. It does not mean accuracy. Imagine getting on a scale 10 times within 10 minutes and the scale showing 10 significantly different weights. If you were a psychologist, you would conclude that the scale is generating unreliable or inconsistent data. The scale is not unreliable, but the data it generates are unreliable. If the scale shows the same weight 10 times, it is reliable over the 10-minute period.

Point two is validity. In the mental health literature, validity means accuracy; that is, the extent to which the test data measure what they are purported to measure. This time imagine two scales, one is an unbiased balance beam with a counterweight of 145 pounds on one side and you on the other. When you step on it, the scale is in equipoise, so we know you weigh 145 pounds. Now you immediately get on the conventional scale and it shows you weigh 160 pounds. You get on and off the conventional scale 10 times, and each time it reads 160 pounds. The conventional scale data are reliable (consistent) but are not valid (accurate) measures of your weight.

Every test and every procedure used by the CCE should generate data possessing acceptable levels of reliability and validity. So if test A measures 'good parenting' or 'the best interests of the child,' then data from A, generated by the test, should be the same or similar from one time to the next, and should accurately measure what they are supposed to measure. The later quality is very elusive because the key elements of a child custody evaluation have never been defined. However, let's say for example, part of 'good parenting' is giving verbal as opposed to non-verbal instructions to children. If we identify a group of parents who give a lot of verbal instruction and if we give test A to them, the data from test A should strongly suggest the tendency to give verbal instructions. If, in addition to giving verbal instructions, there were 24 other known qualities of 'good parenting,' we would want our test to be highly associated with these characteristics. Sadly, there is no defined set of qualities, and therefore there is no such test.

In addition to the foregoing factors, the attorney should be familiar with the following:

1) the reliability of test data decreases over time. The longer the time between when you measure and what you commenting on, the less the reliability. This is why fresh data are preferable to stale data.

2) Reliability sets a limit on validity, which can be expressed in an equation that you don't have to worry about. The upshot is that unreliable data cannot be valid.

Since you may safely assume the CCE will get to testify, preparation of questions is warranted. Substantive questions are used to discredit the CCE. These would include the following:[16]

1. Have you ever heard the word "construct"? If so, do you know what it means?
2. On page x of your report you refer to the BIC, please define what you mean by this?
3. Where did you come up with this definition?
4. Are you aware of any other definitions?
5. Why did you choose this one?
6. Are you familiar with the word "theory?"
7. Please tell me what theory or theories inform the tests you select, the way you combine data, the way you formulate recommendation.
8. Are you 100 percent certain of the accuracy of your evaluation?
9. If there is some uncertainty, what is it?
10. Have you read *The Best Interests of the Child? (Before the Best Interests of the Child, Beyond the Best Interests of the Child*, etc). What do you remember from these books?
11. Would you please share how the best interests of the child is defined in those books?
12. Did you rely on any one of the Freud texts to formulate your opinion in this case? Did you rely on any other sources to formulate your opinion in this case? What were they? Please give us a synopsis of (refer to books cited).

Mindful all the while of the looming hazard of 'getting into the weeds,' the cross-examination would move onto tests such as the MMPI or MMCI, or Rorschach or the kinetic family drawing technique. How can you take apart the expert's testimony on these test data? Regarding the MMPI, ask:

1. Was that MMPI standardized on parties in the process of divorce?
2. Are data from the MMPI reliable?
3. Over what time period?
4. In what study?
5. Does the study show that the MMPI is 100 percent reliable?
6. What are implications of lower reliability for your report?
7. What is this test supposed to measure?
8. Does it measure good parenting or the best interests of the child?
9. How does it do this?
10. How do you know?
11. How sure are you?
12. Is there room for error?
13. How does your report testimony take account of such errors?[18]

Of course this kind of questioning takes practice. The CCE has plenty of wiggle room. The CCE will seek refuge in the argument that he or she blends the test data (and everything else at his or her disposal) into an opinion of the BIC or of good parenting. If you refuse to be taken in by this, you would take a step back and ask, how reliable is the blended opinion and how valid is it? How do you know? Again, the CCE cannot provide any satisfactory answers to this.[19]

How to Deconstruct the Recommendations in the CCE's Report

Visualize the recommendation section of a CCE report. Scan, cut and paste this section onto a clean page, and separate every sentence into a new section. Think of each sentence as a piece of colored thread. Next, try to find the predicate statement—facts, test scores, etc. in the body of the report. In other words, where is the basis for this sentence in the body of the report? You will have trouble doing this because the body of the report and the recommendations are what organizational psychologists refer to as 'loosely coupled' (*i.e.*, there is little or no connection between recommendations and what precedes them).

As an attorney for two decades, and a tenured professor of psychology for nine years, I have concluded that I will never turn the juggernaut of the mental health expert away from the divorce court. I have faced these folks in the courtroom and out, and have said, "you don't know what you are talking about or you wouldn't know the best interests of the child if it came up and bit you on the behind...." I have embarrassed no one. And no one has dared to refute my arguments. For certain parts of the child custody business, things are going along just fine. No one is about to upset the apple cart by even acknowledging that such questions and issues exist.

I believe that many courts are loathe to make custody decisions by themselves when they can defer to an expert.[20] It is extremely rare for a court to reject the expert's input. The court may not believe the expert has 'the answer,' but is swayed by its own lack of time and expertise, and by the fact that the expert at least spent time with the parties and the children. The expert is the

last person who will admit he or she doesn't know what he or she is talking about.

For reasons I do not understand, no academic has undertaken to define and measure the important constructs mentioned above. No academic has committed to assess the various parts of a custody evaluation to find out what parts of the evaluation might contribute to useful recommendations. There appears to be little interest in changing these things. The expert remains in the oracle role and the adverse gladiator attorney is like Horatio at the bridge for his client-victim. The battle ensues and gobs of money, time and emotion are needlessly wasted.

A Promising Solution

I want to eliminate or reduce the perceived need for expert evaluations in child custody disputes, and I want to relinquish the need to be a gladiator as a divorce lawyer. For the past year, I have been exploring the merits of collaborative and cooperative divorce law. Others have recently discussed these approaches, and I won't repeat what they have said. What happens in these new forms of legal practice is that the CCE is put in the position of problem solving as a cognitive and behavioral change agent instead of being the oracle of commonsense or scientifically unfounded recommendations. Real problems of divorcing parents are presented and real solutions are expected. If these are not forthcoming, it is painfully and quickly evident. There is no hiding behind mind-numbing 80-page reports and esoteric standardized tests. If done properly, this role is very challenging work for the CCE, so I expect few will come running to embrace it. ■

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Endnotes

1. This article uses the terms "psychologist" and "child custody expert" interchangeably.
2. The problem here is the imposition of child custody arrangements based on the biases contained in the CCE's 'truth' or version of reality. I have no issue with parties cooperating to create their own version of what is best for them.
3. The famous sociologist Erving Goffman (1952) wrote a paper titled, On Cooling the Mark Out: Some Aspects of Adaptation to Failure. *Journal of Interpersonal Relations*, 15 (4), 456-463. That is a fascinating analysis of the urban scam known as three-card Monte. One role in this scam involves 'cooling the mark' that entails an ostensible bystander (shill) talking to the mark who has just lost all of his money and convincing him that the game is fair and above board. In my view, the parallel is this: One of the main tasks of the CCE is to defuse any anger on the part of the parent and to legitimize our entire approach of making child custody decisions to society in general. At the same time, the CCE is protected from expressions of party anger by various forms of judicial immunity from suit. The parties are effectively sealed in an unhealthy environment.
4. Kleinman was reportedly the child's play therapist but the issues in the case greatly overlap those that arise in a typical child custody evaluation conducted by a CCE.
5. The administrative law judge decision was sent to the New Jersey Board of Psychological Examiners, which held a two-day hearing in October 2012. The board voted to accept Judge Klinger's decision and revoked Kleinman's license to practice psychology in New Jersey.
6. A well-known psychologist, Paul Meehl, internationally appreciated for his dedication to the scientific method, described what he called the My Aunt Mary phenomenon to the effect that a plausible premise that is strongly supported by empirical data is rejected by an audience member who cites a singular contrary event or several such events as proof against the premise. This type of reaction can be expected here. There will be attorneys who sing the anecdotally based praises of CCEs but without consideration of the questions raised in this article. (*see* P.E. Meehl (1986) *Clinical versus Statistical Prediction: A theoretical Analysis and Review of the Evidence*. Northvale, NJ: Jason Aronson (originally published in 1954).

7. C.R. Barbrack, (2010). Parent Coordinators in the Family Court: Another Questionable Venture. Paper based upon testimony before the New Jersey Supreme Court.
8. NJRE 702 opens a wide door to allow entry of the CCE's testimony and is the greatest obstacle to discrediting the CCE and is the main reason CCE testimony is almost never barred. The attorney must accept that he or she is fighting an uphill battle against the CCE but even small victories can be important victories.
9. S. Chess & A. Thomas (1999). *Goodness of Fit: Applications from Infancy Through Adult Life*. Levitttown, Pa.: Brunner Mazel
10. J. Goldstein, A. Freud & A.J. Solnit (1973). *Beyond the Best Interests of the Child*. New York: Free Press.
11. J. Goldstein, A.J. Solnit, S. Goldstein & A. Freud (posthumously) (1996). *The Best Interests of the Child: The Least Detrimental Alternative*. New York: Free Press.
12. If pressed for time, the reader should read the *Least Detrimental Alternative* text since it summarizes all of the earlier work. Practice pointers in this area are: first read the *Least Detrimental Alternative* book and second, prepare deposition questions that address the CCE's familiarity with this basic text and with psychoanalytic theory and terminology.
13. The LDA text begins with bleakly accurate language:

    > When the state intervenes in family life, it does so in the name of the "best interest of the child." And this phrase has been embraced by mental health professionals, child advocates, government officials, and scholars. *But there is little consensus, in law or science, about what "best interests" means. In the absence of a clarifying definition, personal preferences of lawyers, judges and social workers may govern decision-making.* And when two adults compete for a child's custody, 'best interests of the child' can easily be subverted by being equated with the "best interests of the 'more deserving' adult" (p. xiii).

14. Expert witnesses are not permitted to testify on matters that involve no more than commonsense or common knowledge. A practice pointer would be to file a motion *in limine* to bar the admission of any expert testimony on BIC. The motion would raise the fatal flaws of the best interests standard. But even if the argument is superbly crafted and eloquently delivered, it is likely to lose. However, even in losing, his tactic might serve to chip away at the expert's overall credibility. The motion *in limine* represents an all-out attack on the expert that can cause the expert to be more circumspect in his or her testimony. This has to be argued assertively. At this juncture of the case, there is no place here for ambivalence on the part of the attorney.
15. B.J. Jameson, M. F. Ehrenberg & M.A. Hunter (1997) Psychologists Rating of the Best Interests of the Child Custody & Access Criterion: A Family Systems Assessment Model. *Professional Psychology: Research & Practice*, 28 (3), 253-262.
16. Another practice pointer is to prepare questions that thoroughly explore the CCE's training in and knowledge of psychodynamic theory.
17. C.R. Barbrack (1991). Beyond the Guessed Interests of the Child. *Newsletter of the Carrier Foundation*, Belle Mead, New Jersey.
18. This form of questioning is designed to reveal the CCE's lack of fundamental knowledge. Hence the questions are not phrased as one would ordinarily ask a leading question.
19. This is one of the most important tips I can provide. At points in the cross-examination like this one, the CCE will feel backed into a corner and will play his or her get out of jail free card. You will know this when you hear the word 'clinical' or any of its variants, such as 'clinically' or 'from a clinical perspective.' I interpret this as the curtain going up on the magical part of the story. Like snake oil, the word clinical is designed to cure all testimonial ills and to recoup any ground lost in prior colloquies. Most of us have seen this show. The attorney asks, "Well doctor, where in the MMPI manual does it say that this or that subtest measures parenting ability?" The CCE says, "It doesn't say that." The attorney says, "Well doctor, how do you come to use the MMPI to come to the conclusion that Ms. Smith should be the PPR?" The CCE responds, "Well, it's not just that test. I take the MMPI results and results from the

other tests and form a clinical impression. It is my clinical impression that is the basis for my recommendation." Here and everywhere it is used in child custody work by psychologists, the word "clinical" opens the door to almost anything the CCE wants to say. 'Clinical' means that the CCE has left the solid ground of science or almost-science for somewhere else, where words mean something other than their common usage, and where principles of logic and science do not fully apply. The kindest interpretation of the word 'clinical' is that it represents the field of applied psychology. In my experience, there are few artists among the ranks of the CCEs who practice in New Jersey. I know a few psychologists who I would consider artists, but none of them conduct child custody evaluations.

20. C.R. Barbrack, (2010). Parent Coordinators in the Family Court: Another Questionable Venture. Paper based upon testimony before the New Jersey Supreme Court. B.J. Jameson, M. F. Ehrenberg & M.A. Hunter (1997) Psychologists Rating of the Best Interests of the Child Custody & Access Criterion: A Family Systems Assessment Model. *Professional Psychology: Research & Practice*, 28 (3), 253-262. C.R. Barbrack (1991). Beyond the Guessed Interests of the Child. *Newsletter of the Carrier Foundation*, Belle Mead, New Jersey.

Commentary

Is It Time to Retire the 'Parent of Primary Residence' Designation?

by Amy C. Goldstein

An increasing number of divorces, dissolutions and custody disputes are being diverted by agreement of the parties to alternative forms of dispute resolution (ADR), such as mediation and collaborative processes. Likewise, an increasing number of clients who have retained attorneys to represent them within the adversarial system are asking for quicker settlements to keep the costs of the litigation down. Even in high-conflict cases, because family courts have become overwhelmed as a result of judicial vacancies and budget restrictions, litigants and their attorneys have been selecting arbitration rather than waiting for trial dates. In these ADR, quasi-adversarial and adversarial cases, judges, litigants, mediators, parent coordinators and attorneys are looking for innovative, less expensive ways to arrive at custody agreements.

One very common question now being asked by clients and prospective clients who are trying to resolve their custody disputes outside of the courtroom is whether or not they 'need' to have a parent of primary residence (PPR) designation in their settlement agreements. We already know that, as with virtually every other settled issue, even if courts are required to designate a parent as the PPR after a custody trial, settling parties are not required to do so. Therefore, the question we are really being asked is not whether the designation is 'required' but, rather, whether the PPR designation is necessary and worth the fight. In light of the fact that the PPR designation is one of the most contentious issues (if not the most contentious issue) in custody cases, this is a legitimate and difficult question, with a great deal at stake, and it therefore deserves an answer. This article arrives at the conclusion that not only is the PPR designation unnecessary, but that the time has come to retire it along with its sidekick, the PAR (parent of alternate residence) designation.

To begin with, we need to define what we mean by the parent of primary residence designation. For purposes of this article, the term is being used as it has evolved over time, to mean a parent who, within a joint legal custody framework, must consult with the other parent regarding any major decision involving a child but who, in the absence of an agreement between the parties, gets to make the final decision *as to all decisions* that are or ever will be in dispute.[1] In other words, the PPR is the parent who always holds the decision-making trump card.

Second, the development of the law as it relates to custody needs to be reviewed in order to understand how it evolved that one parent holds that trump card. To begin with, pursuant to N.J.S.A. 9:2-4, "the rights of both parents" are equal, and joint custody includes "consultations between the parents in making major decisions regarding the child's health, education and general welfare." The case of *Beck v. Beck*[2] first defined joint custody in 1981 as "the legal authority and responsibility for making 'major' decisions regarding the child's welfare," which is "*shared at all times by both parents*."[3] Thus, not only was there no designation of a 'primary' parent when joint custody was first recognized in the state of New Jersey but, to the contrary, the responsibility for major decision-making was specifically given to *both parents equally* when the concept of joint custody was first introduced.

During this period of time, courts began to look at societal and cultural patterns in formulating custodial and parenting time arrangements. Early social science research studies had focused on mother/child attachments while there was little research into fathers' roles in child development. Fathers were considered "peripheral and unnecessary to children's development and psychological adjustment."[4] As a result, parenting time arrangements developed in the courts that designated mothers as the primary caretakers and delegated fathers to being visitors

who typically had 'visitation' on alternating weekends and one night per week. "This maternal preference reflected society's view that fathers were not particularly important in the development of children's overall social, intellectual and emotional well being, a view reinforced by Freudian psychoanalytic theory which had dominated the training and thinking of mental health experts for decades."[5]

In line with the maternal preference concept of joint custody, the definition of joint custody as equally shared decision-making by both parents began to change in New Jersey in 1995, when the Supreme Court decided the case of *Pascale v. Pascale*.[6] In that case, Mr. Pascale was attempting to convince the court that the parenting arrangements he had with his former wife were "nontraditional," so that he could pay less child support than he would otherwise have had to pay.[7] Thus, the New Jersey Supreme Court was called upon to determine whether the Pascales' parenting time arrangements were 'traditional' or 'nontraditional.' This, in turn, necessitated a review of the case law and the social science research available at that time and, as is often the case in family law cases that reach the New Jersey Supreme Court, it was the social science research available at the time of the decision (in this case 1995), which drove the court's decision.

The *Pascale* Court started its analysis by reviewing the social science research, which differentiated between joint legal custody and joint physical custody. Based on that research, the Court concluded that true sharing between divorced parents of both physical and legal custody was uncommon, and that "custodial parents" *(i.e.*, the parent with primary physical custody) often had both rights and responsibilities while "noncustodial" parents (*i.e.,* the visiting parent) had rights but significantly fewer responsibilities.[8] Thus began recognition under the law that there was an imbalance between the custodial parent and the noncustodial parent when it came to sharing the responsibilities of raising children.

After its review of the social science research, the *Pascale* Court went on to review New Jersey case law, and concluded that "a review of New Jersey cases leads us to believe that 'joint physical custody' is as rare here as it is in other states."[9] The Court cited the parenting arrangement in *McCown v. McCown*[10] as common in cases of "joint legal custody." In that case, the parenting time arrangement between the father and the children was alternating weekends, one night per week and alternating major holidays. Many practitioners remember the days when alternating weekends and one dinner a week was the standard visitation schedule for almost every noncustodial parent, and obtaining more time for a noncustodial parent was virtually impossible. Again citing numerous articles about the roles of divorced parents in raising their children, the *Pascale* Court, therefore, introduced the term "primary caretaker" to replace the term "custodial parent," and the term "secondary caretaker" to replace the term "noncustodial parent." This gave recognition to the fact that in most divorced families at that time, one parent typically had the greater physical role, which carried with it greater responsibilities, and was therefore 'primary' and the other parent, with less physical time, had fewer responsibilities and was therefore 'secondary.'

It is important to note that the *Pascale* Court never said that the primary parent would be the parent responsible for making the *major* decisions regarding the children. To the contrary, the Court was describing then-current societal roles for purposes of protecting the autonomy of the primary caretaker to carry out his or her day-to-day responsibilities without interference from the secondary caretaker. Thus, it stated:

"…When joint custody is merely legal in nature, the primary caretaker should be accorded autonomy *over the day-to-day structure of the new family* in which he or she is the primary caretaker. The structure is established by the courts, not to leave out the secondary caretaker, but to assure that the child is as undisturbed as possible in the implementation of the child's parents' decision to make one parent the child's primary caretaker."[11] (Italics added)

The Court had noted in the first paragraph of its opinion that, as always, "(t)he lodestar of our consideration continues to be the best interests of the child."[12] The connection between the division of parents into primary and secondary, and the best interests standard was not clarified in the opinion until well into the decision, when the Court stated that the division would "… *assure that the child is as undisturbed as possible…*" As the opinion unfolded, it thus became clear that in reviewing the social science research, the Court looked for and found what was, at the time, considered to be the best way to reduce tensions between parents for the benefit of the children: It aligned the parenting labels with what was happening in the real world by recognizing that one parent had both rights and responsibilities, and therefore that parent should be entitled to make the myriad day-to-day decisions that went into raising children.

The case that stands for the proposition that the primary parent should be the parent to make *major*

decisions after consultation with the secondary parent is *Boardman v. Boardman*.[13] In that case, the trial judge heard three neutral witnesses testify on the father's irresponsibility and his failure to supervise the children properly. Likewise, a medical expert testified that the father's "judgment with respect to child care was defective" and that the father was "not capable of 'meaningful input' on decisions concerning the children." In fact, the father himself testified that he did not always foresee the consequences of his actions.[14]

Noting that the *Beck* case stood for the proposition that both parents share responsibility for making major decisions under a joint legal custody arrangement, and further noting that the *Pascale* decision gave day-to-day decision-making responsibilities to the primary parent, the *Boardman* Court said that, under the facts before it, the trial court was well within its discretion to award the parties joint legal custody but to limit the secondary parent's/father's custodial powers in making major decisions. Specifically, the appellate court upheld the trial judge's decision that "major decisions affecting the children's lives will be discussed between both parents….(h)owever the mother will make final decisions for all issues surrounding the children." This appears to be the earliest incarnation of what is now considered to be the right of the PPR to make major decisions regarding the children in the absence of an agreement between the parents.

Thus, there are two historical legal premises that precede the question regarding the rationality of having a PPR designation in today's world. First was the fact that in 1995 the *Pascale* Court relied heavily upon then-current social science research in awarding day-to-day decision-making rights to a primary caretaker because that person had both rights and responsibilities. Second, was the fact that in 1998 the *Boardman* Court took an unusual set of facts and expanded the *Pascale* ruling to award *major decision-making* rights to the primary caretaker.

It goes without saying that since the mid-1990s, research and reality have changed society's view of the role of fathers in child development. The traditional alternating weekend arrangement is now recognized as being wholly inadequate, and in most cases contrary to the best interests of the children of divorced parents. "Such guidelines are inherently flawed because of the one-size fits-all standard and because they…failed to consider children's ages, gender and developmental needs and achievements, the history and quality of the child's relationship with each parent, quality of parenting and family situations requiring special attention."[15]

As a result of the changes in how society views the importance of the father-child relationship, visitation ultimately became 'parenting time,' and during the 17 years since the *Pascale* decision, both parents have come to truly share physical custody time with the children. In fact, it is now common for parents to share physical custody equally or close to equally. More equal sharing of physical custody means a greater degree of day-to-day decision-making and greater responsibilities for the secondary parent, which in turn calls into question the entire premise of primary and secondary parenting established in the *Pascale* decision. The vast societal changes in how divorced or separated parents actually parent their children since the mid-1990s, therefore, forces a re-examination of whether or not one parent should continue to hold the parenting trump card.

According to research 12 years after *Pascale* and *Boardman*, 24 to 33 percent of families who go through divorce continue to undergo significant conflicts lasting up to two years after the marital separation, and "it is clear that parental conflicts may have a much more devastating effect on children than the marital status of their parents itself."[16] In fact, "(b)oth pre-and post-divorce conflict can be harmful to children and…some of the perceived effects of divorce are better viewed as the effects of post-separation marital conflict. Additionally, most experts agree that conflict localized around the time of litigation and divorce is less harmful than conflict which remains an intrinsic and unresolved part of the parents' relationship and continues after their divorce."[17] Thus, the very great importance of reducing conflict between divorced parents continues to be a critical aspect of acting in the best interests of the children, just as was recognized in *Pascale* 17 years ago.

Up until recently, the line of thinking has been that when one parent is designated as the final decision maker over all decisions in the event of disagreement, while there may be disagreement in the initial decision-making stages, the conflict (supposedly) ceases when the PPR gets the final vote. Put another way, there has been a preconceived notion that the benefit of the PPR designation is that it appears to reduce post-divorce conflict between the parents because there is finality when one parent 'wins' in the absence of agreement. However, practitioners have to ask themselves whether the designation of a parent of primary residence really does reduce conflict given the

increased amount of time the parents of alternate residence (as they are now called) are spending with their children and the resulting increased responsibilities they are shouldering. In fact, commonsense dictates that in today's world designating one parent as the final decision maker over every major decision may, in fact, *increase* the amount of post-divorce conflict. This is because it is understandably frustrating for any parent who spends equal or almost-equal time with the child and greatly shares responsibilities with the other parent to *always* be denied the final word in *all* major disputed decisions.

Thus, it would appear that other, better options for custody dispute resolution and, therefore reduced conflict, should be explored. One simple method of approaching the problem, which has been adopted by statute in many states,[18] and which the author believes should be adopted in New Jersey, has been to allow for the allocation of categories of decision-making responsibilities (education, healthcare, religion, recreational activities, etc.) between the parents. This will hereinafter be referred to as split decision-making. Thus, one parent may be the ultimate decision maker (after consultation) regarding educational decisions while the other parent may be the ultimate decision maker (after consultation) over medical decisions.

It is true that the New Jersey custody statute allows the courts to award "any…custody arrangement as the court may determine to be in the best interests of the child,"[19] and that proposed parenting plans in New Jersey are supposed to include proposals regarding "participation in making decisions regarding the child(ren)."[20] However, New Jersey does not have a specific statute or court rule (as do many other states) allowing and encouraging the parents to allocate categories of decision-making when it would be in the children's best interests to do so. As a result, many, if not most people involved in the custody dispute resolution process in New Jersey (lawyers, mediators, judges, arbitrators, parent coordinators) do not seriously consider this option.

The overriding method that has evolved in many states[21] to resolve custody disputes without a PPR designation has been the negotiation of and agreement to a clear, detailed parenting plan, which contains, among other things, the provision allocating decision-making responsibilities between the parents discussed above.

"Particularly with parents engaged in parallel and conflicted parenting, it is important to include specific language in parenting plans that indicates which child-related decisions will be jointly made, if any; what types of information will be shared between parents; and what intervention process such as mediation, parenting coordination, or counseling, will be used if parents can not reach agreements on their own."[22] Unfortunately, there is confusion in New Jersey over the submission and implementation of parenting plan. This is because in contested custody cases the New Jersey custody statute does not require the submission of a parenting plan,[23] while the New Jersey Rules of Court do require the submission of a parenting plan.[24] Because of this mixed message, lawyers, mediators, arbitrators and parent coordinators do not press litigants to negotiate and implement detailed parenting plans, if they even consider this option in the first place.

The author believes that if detailed parenting plans were mandatory and the option of split decision-making was incorporated and encouraged under New Jersey law, their use in settlement discussions during litigation and during ADR processes would follow and would quickly become commonplace. Practitioners are seeing more and more mediated and otherwise-attained agreements that contain the standard "the parties shall consult with one another and if they cannot reach agreement they will attend/return to mediation" language. The benefit of this type of language is that it quickly, and with minimal discomfort, moves the parties forward toward the signing of an agreement. The downside of this language is that it sacrifices true custody dispute resolution in favor of expediency and conflict avoidance during the negotiation process.

If custody agreements contain clear detailed parenting plans and split decision-making provisions, then it is submitted that the PPR designation should be retired not only because is it no longer reflective of societal norms but precisely because its failure to reflect societal norms increases conflict rather than reduces conflict. If the lodestar of all custody decisions is the best interests of the child, then anything that increases conflict between parents must be discarded, as it is contrary to the children's best interests. The PPR designation had its day when parenting was much different. However, like its sister states, it is time for New Jersey to take another look at the PPR/PAR designation. ■

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Endnotes

1. The designation PPR is actually the term used in the New Jersey state child support guidelines, while the term "primary caretaker" was the term used in the developing case law regarding custody. Since it has become common to use PPR in both the custody and child support context, this article will use that term. "What's In a Name," A Comparison and Review of Custody and Child Support Designations by Michael A. Weinberg, 31 *NJFL* 92.
2. *Beck v. Beck*, 86 N.J. 480 (1981).
3. *Id*. at 486.
4. Michael E. Lamb, Placing Children's Interests First: Developmentally Appropriate Parenting Plans, 10 *Va. J. Soc. Pol'y & Law* 98, 100 (2002).
5. Joan B. Kelly, *The Determination of Child Custody, 4 Future of Child: Child & Divorce* 121,122 (1994).
6. *Pascale v. Pascale*, 140 N.J. 583 (1995).
7. Mr. Pascale's parenting time was dinners on Wednesday and Thursday evenings and a 24-hour overnight stay every weekend during the school year. During the summer, he kept the children overnight on Wednesdays and Thursdays. Major holidays were alternated.
8. *Id*. at 596.
9. *Id*. At 597.
10. *McCown v. McCown*, 277 N.J. Super. 213, 649 A.2d 418 (1994).
11. *Pascale* at 600.
12. *Pascale* at 588.
13. *Boardman v. Boardman*, 314 N.J. Super. 340 (1998).
14. *Id*. at 348.
15. Joan B. Kelly, Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce, *Journal of AAML*, Vol. 19, 237, 239.
16. Janie Sarrazin and Francine Cyr, Parental Conflicts and Their Damaging Effects on Children, 47 *Journal of Divorce & Remarriage* 78 (2007).
17. Lamb, Placing Children's Interests First: Developmentally Appropriate Parenting Plans, 10 *Va. J. Soc. Pol'y & Law* 98, 100 (2002).
18. *See e.g.,* Ct. St. § 46b-56a; Co. St. § 14-10-124; Fl. St. § 61.13; Ga. St. § 19-9-1; NM. St.. § 40-4-9.1; SD. St. § 25-5-7.1; Ut. St § 30-3-10.9; Wa. St. § 26.09.184.
19. N.J.S.A. 9:2-4(c).
20. New Jersey Court Rule 5:8-5(a)(7).
21. *See e.g.*, Ariz. Rev. Stat. Ann. § 25-403.02 (West); Colo. Rev. Stat. Ann. § 14-10-128.3 (West); Fla. Stat. Ann. § 61.13 (West); Ga. Code Ann. § 19-9-1 (West); Mass. Gen. Laws Ann. § 31 (West); Okla. Stat. Ann. tit. 43 § 109 (West); 23 Pa. Cons. Stat. Ann. § 5331 (West); Tex. Fam. Code Ann. §§ 153.601 *et seq.*; Utah Code Ann. § 30-3-109 (West); Wash. Rev. Code § 26.09.184 (West).
22. Joan B. Kelly, Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce, *Journal of AAML*, Vol. 19, 237, 252.
23. N.J.S.A. 9:2-4(e).
24. New Jersey Court Rule 5:8-5(a).

Fanatics and Heretics: The Court's Role in Religion-Based Custody Disputes

by Karen Nestlebaum

A beautiful young woman sat across from Dr. Phil and laid out the story of her life: an arranged marriage, a strict religious upbringing, a difficult divorce and a custody battle to save her children from what she termed "a cult." The woman, an Orthodox Jew from a Hassidic sect, had also brought her custody issues before the Ocean County family court. She feared her recently adopted departures from the modesty standards of her community may, under the conditions set down in the Bais Din (religious court) settlement she and her husband signed, cost her the custody of her four children.

Fortunately for the couple's children, the publicly fought battle did not make it all the way to the courtroom. Their mother and their father managed, in July 2012, to settle the custody issue. The children, at least for now, will stay with their mother.

While all this was happening on the local stage, the national news was filled for a few tempestuous moments with the marital break-up of actor Tom Cruise and his famous wife, Katie Holmes. The key issue, according to the news reports, was Holmes's disenchantment with Cruise's Scientology beliefs, and her desire to protect the couple's child, Suri, from indoctrination. In this case, too, the public and the court were spared the battle. A settlement emerged in what may be record time, providing for Suri's care by both parents, under conditions that remain undisclosed.

Perhaps the true winners in both of these controversies were the judges, who were spared the exquisitely delicate task of teasing out the First Amendment religious protections due to all of the parties from the tangle of "best interest of the child" considerations. Nevertheless, religion-based custody disputes have been on the upswing in the courts and in the news, and the criteria involved in deciding these cases are far from black-and-white.

Why are there more of these cases? One reason is the increase of intermarriage. Despite the parties' apparent willingness to compromise on religious practices when they tie the knot, a new adamancy seems to arrive when the knot unravels. In some cases, the parents feel their child will become estranged from them if he or she adopts the other spouse's religion.[1]

Another reason is the rise in joint custody arrangements. Simple logic dictates that with two parents actively involved in the child's day-to-day upbringing, religious differences are bound to create conflict.

An increase in conversion is yet another factor. Many of the cases that feature religion-based controversies arise when one partner converts to a new religion and, as the custodial parent, exercises the right to rear the children in that new religion.[2] Others occur when a partner who converts in contemplation of marriage reverts to his or her original religion when the marriage falters.

Yet another, more recent phenomenon adding to the rise of such cases, is the polarization of religion. As society grows more secular and free of taboos, many religious groups have moved to the right, embracing a more fundamentalist, insular philosophy and lifestyle. The secular side sees the religious side as fanatical, while the religious side sees the secular side as heretical.[3] Thus, a mother and a father might both be Protestants, but their religious practices could be light-years apart.

The Perilous Adventure

On the face of this issue, there are two seemingly simple guidelines. "The law is clear that the primary caretaker has the right to determine the religious upbringing of the children in his or her charge."[4] The primary caretaker's right must bow to the overarching standard of the best interests of the child, defined as his or her "safety, happiness, physical, mental and moral welfare."[5]

In applying the best interests standard, the court is thrust into a conflict with the First Amendment rights of the parents, and sometimes of the children as well. The establishment clause prohibits the court, as an arm of the state, from ordering any kind of religion-based action; the free exercise clause prevents the court from encumbering the exercise of a party's religious beliefs and the 14th Amendment applies these protections to the states.

Furthermore, because the right to rear one's children as one wishes is a fundamental constitutional right, any ruling that diminishes that right must rise to the standard of strict scrutiny

Nevertheless, when religion is the central issue in a custody battle, the court is often put in the position of deciding which religious practices serve the child's best interests, thus running head-on into the parents' First Amendment rights. The central question this article addresses is how the courts assess the child's best interests in religion-based cases. When they are forced to consider if a child will go to parochial school or public school; maintain a consistently kosher diet or eat freely when visiting the non-kosher spouse; be raised in a sheltered society or tune into popular culture; be circumcised or not; and many other decisions, how do they decide which of these practices serve the child's best interests? Concurrently, how do they decide how much a parent must sacrifice regarding the right to raise a child in the religion of his or her choice?

To be sure, the courts have consistently tried to resolve the religious questions before them on the basis of secular issues at hand. Nearly every New Jersey decision on this topic cites the 1948 case of *Donahue v. Donahue*,[6] a religious patchwork quilt in which a Catholic father and Jewish mother married in a Lutheran Zion Church, after which the father embraced Christian Science. The couple's son was enrolled in Christian Science Sunday school, but after the couple split, the father unilaterally had their daughter baptized a Catholic. At the time of the hearing, the mother and children were living with their maternal grandfather, a devout Orthodox Jew.

The father asked the trial court to order that the children be raised in a Christian faith, but the judge declined to interfere with their religious training. Affirming that decision, the appeals court stated, "No end of difficulties would arise if judges sought to proscribe the selection of a religious faith made by a parent having custody.... Intervention in matters of religion is a perilous adventure, upon which the judiciary should be loathe to embark."[7]

When called upon to embark on this 'perilous adventure,' however, the courts have responded. The case of *T. v. H.*[8] declares that its decision "clearly carries our law beyond the proposition that religious education is never more than an element of consideration. Religious education, considered in the best interest of children, may become an important factor in deciding custody."[9]

In viewing the parents' competing free exercise rights against the backdrop of the child's best interests, several elements come into play. Should the expectations and agreements the parents had regarding the raising of their children bear any weight? In a case where both parties were Catholic, married in a Catholic church and baptized their children as Catholics, the court declined to order the mother, custodian of the three children, to raise them as Catholics. Her right to join a Methodist church was protected by the First Amendment, and her right to raise her children accordingly was based on her status as the children's primary caretaker. Regardless of the original expectations established by the marriage, and the religion followed by the family during the marriage, the court declined to intervene in her decision as long as the mother was morally fit to care for the children.[10]

A further question is the weight given to property settlement agreements that designate the children's religious upbringing. Most, if not all, Jewish religious divorce settlements specify that the children are to be raised in the Jewish faith, and in the case of Orthodox families, that provision implicitly or explicitly means adherence to the dietary, dress, educational and lifestyle norms of the community to which the children belong. Can a parent be held to such an agreement if changes in his or her own religious activities make it difficult to carry out?

In *T. v. H.*, the parties stated in their separation agreement that they would each continue raising their children in their mutual religion—Judaism—after the divorce. The court took note of that agreement and, absent a New Jersey precedent on the subject, cited a Pennsylvania case[11] that inferred that religion will dominate the custody issue when the parents have contracted in regard to the children's religious training. The issue at hand was whether the mother, the custodial parent, would be able to fulfill that agreement, having married a gentile and moved with him and her two children to Kellogg, Idaho, where the nearest temple was 200 miles away and the mother and children were the only Jews in the town.

In support of the court's decision to transfer custody to the plaintiff father, it cited a study on Jewish America,[12] which showed that children living in a mixed marriage, who are brought up in a non-Jewish environment, are unlikely to remain Jewish. On the other hand, when they are surrounded by a Jewish environment, they are likely to retain their religious identity. Thus, the court determined that the parents' agreement to raise the children Jewish would be better served by giving custody to

the father, who lived in Northern New Jersey, where an ample infrastructure existed to nurture their faith.

Interestingly, no mention was made of any other aspect of the children's overall welfare in this decision. No claim was made against the mother's fitness to raise the children. Since both parties had agreed to raise the children in the Jewish faith, there was no conflict between the religion of the primary custodian and that of the other parent. The court cited a line of cases from other jurisdictions in which custody had been determined based on the opportunity for the children to receive religious training.[13]

The norms established during the marriage also carry weight when the parents are of different faiths. In *Asch v. Asch*,[14] the plaintiff father moved to stop his ex-wife from enrolling their daughter in a Catholic parochial school. He asserted that since he had always been Jewish and the child's mother had converted to Judaism before their marriage, the child should be brought up in the Jewish faith. However, the mother had custody of the daughter, and wanted to enroll her in the Catholic school attended by her stepchildren, close to her home. The trial court had allowed the enrollment with the proviso that the child must take the option, given by the school, to abstain from religious instruction classes.

On appeal, the court recognized that the couple's separation agreement anticipated their daughter's exposure to multiple religions, providing for visitation with the father on Jewish holidays and with the mother on Christmas, Good Friday and Easter. However, it remanded the case to the trial court, finding that the trial judge had given insufficient weight to "the religious preference of both parents when Meredith [the daughter] was born…"[15]

The weight of pre-marital and separation agreements was confirmed, interpreted as an element of the child's best interest:

> The courts cannot choose between religions; they cannot prevent exposure to competing and pulling religious ideas and rituals. But the courts should seek to minimize, if possible, conflicting pressures placed upon a child and to give effect to the reasonable agreement and expectations of the parents concerning the child's religious upbringing before their marital relationship foundered, subject to the predominant objective of serving the child's welfare comprehensively.[16]

The religious norms of the marriage arose in a more recent appellate case, *Ali v. Ali*,[17] in which the appellant father sought to gain custody of the couple's son, alleging the mother was not giving the son an adequate religious education. The longstanding situation, which pre-dated the divorce, was held not to be a change of circumstance warranting a re-examination of custody. Nevertheless, the appellate court advised the appellant father that if the mother did not live up to the trial court's order to "provide religious upbringing to the son of the marriage as it was during the marriage," he would be entitled to seek enforcement of the order.

Even when the court decides, based on the primary custodian's religion or the agreements within the marriage or separation, that a child should be raised in one religion, the other parent does not completely lose the First Amendment right to exert his or her own religious influence on the couple's children. In *Feldman*, the court confirmed the mother's constitutional right to bring her children to church with her, while denying her permission to educate them "in an alternate religion" by sending them to CCD classes.

In an earlier case,[18] the trial court considered a controversy involving a mother who had converted to Judaism, unilaterally converted her two daughters, married an Orthodox Jew and moved into the Teaneck Jewish community. The mother sought to modify the property settlement agreement to preclude the father from taking the children to church and compelling the children not to violate dietary laws while they were visiting him. At a plenary hearing, the court decided the children would be permitted to "follow the cultural household routine and religious practices" of the plaintiff when they were with him, "provided they shall not be enrolled in a Christian Sunday School or other formal religious educational program." The appellate court confirmed, referring to "the legitimate right of the children to understand their heritage."

Let Them Eat Pork?

Whether driven by the primary custodian's religious beliefs, changes in either party's affiliation or some aspect of the child's best interest, controversies often come before the court that would force one party to take religious action that conflicts with his or her own religious beliefs. In *Brown*,[19] the mother, who was born Catholic, converted to Judaism and then married a Catholic in a church ceremony. Following the couple's divorce, the mother became an observant Jew and raised her

young children according to that tradition. The father was ordered by the court to comply with the mother's demand that the children not transgress Jewish dietary or Sabbath constraints during visitation.

The father appealed, claiming that requiring him to obey Jewish laws while visiting with his children would violate his constitutional rights because the court, as a state entity, would be taking affirmative action in support of a religion. The court was called upon to strike a balance between the mother's and children's rights to religious freedom and the father's right to be free of a government-imposed obligation to observe the tenets of a religion.[20]

In analyzing the issue, the court drew upon the distinction between freedom to believe and freedom to exercise one's belief. While the former is absolute, the latter is not, and can be weighed against the public welfare.[21] Taking that concept one step further, the court in *Brown* stated that "it must also be weighed against an individual's right not to be compelled to abide by the rules of another's religion."[22] The court held that although the mother had the sole authority to choose the religion of the children, she could not impose the practice of her beliefs upon her former husband, "for it is that very imposition that our federal and state constitutions prohibit."[23]

It then cited cases in other jurisdictions that did, in fact, impose upon the noncustodial parent the burden of policing the religious instructions of the custodial parent. In such cases, the criterion was a showing that religious conflicts were emotionally harmful to the children. In this case, the court noted, among other factors, that the children had not reached an age, according to Jewish law, "where they could be ecclesiastically culpable for non-observance." Seeing no harm to the children in heaven or on earth if they were to eat non-kosher food and violate Sabbath laws while with the father, the court declined to impose the children's religious laws on the father during his visits with them. Rather, the opinion advised "sensitivity."[24]

In a Colorado custody case, where the trial court had recommended the non-Catholic mother be required to take her child to Catholic activities during her parenting time, the appeals court asked for further findings. "This recommendation would clearly impinge on mother's religious freedom if on remand, the court interprets it as requiring her to accompany the child to Catholic religious activities scheduled during her parenting time."[25]

Is it a Religion?

In order for a parent's religion to come under the protections of the First Amendment, it must be an actual religion. The Supreme Court made that determination based on the sincerity of a person's beliefs, rather than the truth of their beliefs.[26] The definition was refined further in *Yoder v. Wisconsin*,[27] an oft-cited case in the area of state interference with religion. In this case, three Amish families were fined for failing to comply with Wisconsin's compulsory education law. The Court carved out an exception to this law for the Amish defendants based on their way of life, grounded in their religion, which eschewed education past eighth grade in favor of apprenticeships in farming, crafts and trades.

The court distinguished between a mode of life that is intertwined with religious beliefs and one that is simply "a way of life, however virtuous and admirable." Contrasting the Amish rejection of contemporary secular values with Henry David Thoreau's rejection of the social values of his time, the court stated that "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[28]

Another opinion,[29] which dealt with the teaching of transcendental meditation in a public school, relied on three "useful indicia" to identify a religion: First, religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion can often be recognized by the presence of certain formal and external signs.

In cases in which a religion is out of the mainstream, insular, or exceptionally demanding of its adherents' time, money, lifestyle or loyalty, the word "cult" is sometimes applied in a custody battle in an effort to remove the group from the protections afforded to religions. In an article for the International Cultic Studies Association,[30] the author, an attorney, explained that identifying a group as a cult does not assist a parent in obtaining custody of a child who is being subjected by the other parent to the group's practices. Rather, the welfare of the child must be addressed:

> Without questioning the truth or falsehood of a group's religious doctrines, attorneys should try to demonstrate that the group's practices are physically or psychologically detrimental to the child. Information from a variety of sources,

including teachers, school psychologists, social workers, therapists, etc., should be considered.

The organization's website offers a list of defining traits of destructive cults, which includes an authoritarian leader who acts as a father figure and demands total devotion; demonization of those outside the cult, especially family members; interference with the parent-child and husband-wife relationship; isolation and rigidity.

What's Best?

Even when a court bases its analysis on the child's best interest, there are relatively subjective questions about religion the court must answer. One is the degree to which a child can accept conflicting religious messages. Some cases see diversity as a worthy goal that outweighs any potential confusion, while others see 'mixed messages' as detrimental to the child's religious development. In *Brown*, despite the testimony of two expert witnesses who stated the children would be confused if confronted with values that conflicted with those they were taught at home, the court found the evidence "insufficiently empirical" to cause the court to interfere with the father's practices during his parenting time.[31] The court asserted that notwithstanding the conflicting practices, the children would, with maturity, choose the path in which they were being trained and grounded.

In *McSoud*, the court cited the view that "harm to the child from conflicting religious instructions or practices...should not be simply assumed or surmised; it must be demonstrated in detail."[32] Not only was there no presumption of harm, but in this court's opinion, "merely exposing a child to second religion…indeed may be healthy for the child."

In stark contrast to those views, the *Yoder* opinion quoted with approval the testimony of an expert witness who asserted that high school attendance would result in great psychological harm to Amish children because of the conflicts it would produce.[33] Further, the court in *Brown* cited a line of cases in other jurisdictions that restricted a parent's visitation rights where there was a showing that the religious conflicts were emotionally harmful to the children.[34]

The courts see a positive, loving bond with both parents as an important factor in the child's welfare, and the religious beliefs and celebrations shared between parent and child can have a significant influence on this bond. In *Asch*, one of the father's objections to his daughter's enrollment in parochial school was that the environment would have the inevitable effect of weakening her bond with him.[35] In *McCown*, the court accepted the evidence of an expert witness that the children's attendance at a Jewish day school would serve to isolate them from their father.[36]

The bonding issue arises starkly when one parent's religion views the other parent as doomed. In *Snider v. Mashburn*,[37] a mother who had adopted conservative Christian beliefs was ordered to refrain from sharing with her child her religious belief that the child's father was "going to hell."

A child's educational opportunities comprise another vital factor in his or her welfare, and another fertile ground for custody disputes. The rise of homeschooling among conservative religious groups purposefully limits the children's exposure to ideas that conflict with their religious beliefs. In one such case, a North Carolina judge ordered a divorced woman to return her children, ages 10, 11 and 12, to public school, ruling that the children's father had the right to expose his children to alternative views.[38]

On the other hand, the *Yoder* court decided in favor of maintaining the Amish system of limiting the children's formal education to the basic skills learned in the first eight grades. The majority found that Wisconsin's effort to force high school education on the Amish children would not only derail the children's growth and attachment within their religion, but would eventually interfere with the existence of the religious group. It upheld the group's right to eschew an education focused on "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success and social life with other students" in favor of a system by which the children "acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife."[39]

Yoder also finds value in preserving children's simplicity and innocence by keeping them out of the social mainstream. However, other cases see such lifestyles as hobbling to the child's normal development. In *Snider*, the father sought custody in order to free his child from what he perceived as a harsh and restrictive lifestyle adopted by his former wife and her new husband. The child was dressed in long skirts, received corporal punishment when she misbehaved, was forbidden from watching television and movies and swimming in mixed company, and had been isolated, along with her mother, from the secular influences of their extended family.

The father won custody in trial court, and the mother appealed, claiming the decision was made based on her religious beliefs. The appeals court determined that, according to the evidence presented at trial, the father had won custody based solely on the child's best interests. The dissent, however, decried the court's interference with a mother's efforts to teach her child a belief in God. Specifically, it criticized an order preventing the mother from espousing her views and ordering her to teach by example only, in order to avoid conflicting with the father's more liberal views.

Conclusion

Despite the most stringent efforts to maintain neutrality on religious matters, custody decisions influence the formation of children's religious beliefs. The only effective way to keep these decisions from infringing on the parents' First Amendment rights is to keep these issues out of the courtroom. For many people, religion serves as a unique tool to uplift their lives, inspiring them to do good in the world, helping them to live a life of purpose, bonding them to a community and arming them to handle life's difficulties. In the author's view, to whatever extent divorcing parents, with their mediators and attorneys, can keep this tool sharp and intact for their children, they are giving them the gift of a lifetime. ■

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Endnotes

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14. *Asch* at 501.
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30. Frances Randy Kandel, J.D., Ph.D, Litigating the Cult-Related Child Custody Case, *Cult Observer*, Volume 13, No. 1 (1996).
31. *Brown* at 142.
32. *Felton v. Felton*, 383 Mass. 232, 233.
33. *Yoder* at 212.
34. *Brown* at 142.
35. *Asch* at 502.
36. *McCown* at 219.
37. *Snider v. Mashburn*, 921 So. 2d. 478 (2004).
38. Derived from an online news article Divorce Judge Orders Religious Woman's Kids Sent Back to Public School, Fox New, March 18, 2009.
39. *Yoder* at 211.