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Custody Investigation in Divorce Cases: The New York Law Revision Commission Proposal in Perspective

ROBERT J. LEVY*

I. INTRODUCTION

The ongoing policy debate between advocates of "nonadversarial" marriage dissolution administration ("mediation" is their current proposal) and those who continue to support "adversary methods" has become urgent and intense. The New York Law Revision Commission bill debated in this symposium1 is a fair illustration of the "nonadversarial" genre. The Commission's bill would create a public, judicially supervised, social service bureaucracy to conduct "mediations" and/or custody investigations in divorce cases if the judge deems the service necessary.2 Such proposals have been endorsed enthusiastically by judges, who seem concerned primarily to reduce what they perceive as a flood of difficult and emotional divorce litigation. Such proposals have also been supported by a diverse but vocal group of advocates: social service professionals, some of whom are seeking to preserve existing jobs and to create new ones in times when professional opportunities are declining;3 some divorced spouses who, as a result of their

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2. Both this essay and my oral presentation to the conference on the Law Revision Commission's proposal are based upon a legal analysis of the role envisioned for custody investigations by their promoters and an empirical study of one full set of such investigations in one county in Minnesota conducted during 1970. For the complete discussion, see Levy, Custody Investigations in Divorce Cases, 1985 Am. B. Found. Res. J. 713 [hereinafter Levy, Custody Investigations].

experiences with the law and lawyers, believe that their children were harmed by legal contention; and a relatively small group of lawyers and researchers whose careers (in legal practice or in the academy) have somehow become attached to what they describe as the “nonadversarial” (or “ADR,” for alternative dispute resolution) “movement.” The opponents, the defenders of the status quo, are lawyers. In short, “mediation” has become the subject of a classic public policy controversy: supposedly disinterested advocates of reform have joined forces with professionals who have an economic interest in adoption of a new program, to do battle with guardians of traditional practices — in this case, lawyers who are thought to be opposed to change because they are afraid the new program will lower their incomes.4

At least in New York, custody investigations, denominated “family evaluations,” have become the subject of a strategic skirmish in the controversy. The statute proposed by the Law Revision Commission ties custody investigations to mediation; despite opposition by one or both of the divorcing spouses and perhaps even if the spouses have already agreed to the child’s postdecretal custodian, the trial judge can order mediation “to serve the best interest of the child”6 and can order a custody investigation so long as the “report may aid in its determination of custody.”7 The statute as drafted, then, utilizes two “nonadversarial” techniques (mediation and custody investigations), administered by social service professionals, which sacrifice the autonomy of divorcing spouses in the

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4. For suggestions as to methods for resolving the conflict, see Levy, Comments on the Pearson-Thoennes Study and on Mediation, 17 Fam. L.Q. 525 (1984).

5. See Symposium, supra note 1, at 105, 134 (§ 242(d) of proposed statute). I will use the term “custody investigation,” the more common one in statutes and the academic literature. See generally Levy, Custody Investigations, supra note 2, at 715-18.

6. Symposium, supra note 1, at 132 (§ 242(b)(4)).

7. Symposium, supra note 1, at 134-35 (§ 242(d)(4)). The Law Revision Commission’s Commentary makes it clear that it intended the judge to have discretion to order an investigation even in cases where the spouses have reached agreement (id. at 150):

The statute takes a middle course between the alternatives of ordering a report in every case and prohibiting a report unless one or both of the parties request it. This position . . . insures that even in an uncontested case, the court can satisfy itself that the agreement is in the child’s best interests.

See also infra notes 10-17 and accompanying text.
interests of “child protection.” This is reminiscent of the most
dangerous “child saving” tendencies of the juvenile court tradi-
tion. Thus, both the reformers’ intentions and the “nonadver-
sarial” devices they favor invite new and closer attention to cus-
tody investigations and to mediation, especially to the role each
can play in facilitating authoritarian impositions by judges into
spousal decisionmaking despite the American norm favoring “fam-
ily privacy.”

The Law Revision Commission’s bill appears to give trial
judges discretion, after an informal conference in chambers, to or-
er order spouses to undergo mediation, even if the spouses have already
agreed on the child’s postdecretal custodian:

If after the conference . . . , the court is of the opinion that
agreement between the parties on custody or a custody plan will
not occur within a reasonable time, the court shall, prior to hold-
ing a hearing to resolve the custody dispute, refer the custody dis-
pute for mediation . . . unless the court determines that (1) there
is no reasonable possibility that mediation will promote settle-
ment of the issues in the custody dispute or that (2) mediation
will otherwise fail to serve the best interests of the child. At such
time the court shall also consider referral for a family evaluation
report . . . .

The statutory language is either badly drafted or deliberately am-
biguous. “Custody dispute” is defined to mean “any action or

8. For a contemporary description of the forces which led to creation of the juvenile
statement of the procedural and substantive evils which the juvenile court “child saving”
movement has produced and a plea for radical reform, see Feld, Juvenile Court Legislative
Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal,” 65 Minn.
L. Rev. 167 (1981). See also infra note 19 and accompanying text.

For thoughtful and accurate accounts of the juvenile court “movement” and the forces
which produced and perpetuated it, see D. Rothman, Conscience and Convenience: The
Asylum and Its Alternatives in Progressive America (1980); S. Schlossman, Love and the
American Delinquent (1977). For a fascinating account of “nonadversarial” techniques in
the history of American divorce administration, and the contention that such techniques
were usually adopted in order to eliminate or at least to minimize divorce, see L. Halem,
Divorce Reform: Changing Legal and Social Perspectives (1980). Consider also L. Trilling,
The Liberal Imagination 214 (2d ed. 1953): “Some paradox of our nature leads us, when
once we have made our fellow men the object of our enlightened interest, to go on to make
them the objects of our pity, then our wisdom, ultimately our coercion.”

9. See generally Levy, Custody Investigations, supra note 2, at 782; Mnookin, Child-
Custody Adjudication: Judicial Functions in the Face of Indeterminancy, Law & Contemp.
Probs., Summer 1975, at 226, 265.

10. Symposium, supra note 1, at 132 (§ 242(b)(4)).
proceeding between parents concerning custody . . . ”11 That this language may have been intended to be broad enough to allow the judge to order mediation despite opposition by the parents and despite their prior agreement as to a postdecretal custodian is indicated by the reference in the provision quoted above, phrased in presumptive terms, which directs the judge to order mediation “to serve the best interests of the child.”12 In short, if the statute’s scope were limited to cases in which the parents are actually contesting custody (rather than including all cases “concerning custody”), the second (“best interests”) “jurisdictional” provision would not have been included. It is true that this interpretation of the subsection may be inconsistent with its opening language, which indicates that the judge shall order mediation if “the court is of the opinion that agreement between the parties on custody or a custody plan will not occur within a reasonable time . . . .”13 It is also true that a trial judge who is committed to the noninterventionist norm might well interpret the ambiguous language to limit judicial discretion to order mediation. Since the same subsection refers to the judge’s authority to order an investigation (although the “jurisdictional” standard is not the same),14 reference to the Law Revision Commission’s intentions as to mediation may be inferred from its intentions concerning investigations — and here the intent to give the judge discretionary authority even in the absence of real contest is clear. A “family evaluation report,” the statute provides, can be ordered “upon motion by any party or the court’s own motion,” even if the spouses have agreed as to which of them shall become the child’s postdecretal custodian, so long as the report “may aid in [the court’s] determination of custody.”15

The Commission’s comments, worth quoting at length, make it clear that the custody investigation provisions were designed to function in tandem (“synergistically”)16 with the mediation provisions and to serve interdependent purposes: to “settle” divorce cases without litigation (the “mediation” function) and to help insure that children are placed with the custodian who will better serve their interests (the “child protection” function). The

11. Id. at 130 (§ 242(a)(4)).
12. Id. at 132 (§ 242(b)(4)).
13. Id.
14. Id. at 130 (§ 242(a)(4)).
15. Id. at 134-35 (§ 242(d)(4)).
16. Id. at 151 (Commission Commentary).
Commission stated:

Not only does the family evaluation enlist the aid of persons with specialized training and experience in assessing the best interests of the child, but the evaluation process has also been an important tool in bringing about settlement of custody disputes. Lawyers in custody cases may sometimes be hampered in urging a settlement of a custody dispute, given the strong emotional feelings generated around the issue of custody. Counsel may be perceived by a client as not appropriately supportive of the client’s position in the course of advising a client on settlement. By forcing a client to confront the possibility of a negative report after a family evaluation, counsel may be able to be more effective in bringing about some type of settlement without jeopardizing the attorney-client relationship.

The family history-type evaluation is contemplated in all cases where the report would materially aid the custody determination. . .

. . . [E]ven in an uncontested case, the court can satisfy itself that the agreement is in the child’s best interests.

At the mandatory conference . . . the judge may direct that the parties proceed for an evaluation rather than for mediation. Alternatively, if the judge orders mediation, he can advise the parties that should mediation efforts fail to bring about an agreement, the parties will subsequently be subject to the evaluation process. . . .

The concept of mediation followed by evaluation should have a synergistic effect on both processes. The prospect for parties undergoing an evaluation which will produce a recommendation to the court should be a catalyst for serious and good faith efforts on their parts to reach agreement in mediation. Moreover, the evaluation process will usually be invoked only when the parties have not been able to arrive at their own custodial arrangements for the child, and thus it is an appropriate time to call upon qualified and expert mental health professionals for their assessment of the situation.17

I will first summarize the evidence that compels the conclusion that custody investigations, nationally and as contemplated by the Law Revision Commission, must be identified as one of the “non-adversary” methods of what I have elsewhere named “Child Savers Inc. — Divorce Division.”18 Then I will review the findings of the

17. Id. at 150-51 (emphasis added).
18. Levy, Custody Investigations, supra note 2, at 719, devised the title. The legal and
only effort to study an actual sample of custody investigation reports. Finally, I will recommend modifications to the Law Revision Commission's proposed statute designed to protect the divorcing population from the risks posed by custody investigations.

II. THE HISTORICAL SOURCES

The juvenile court "movement" is now, finally, in trouble, and its procedural methods and substantive standards are headed toward radical modification.¹⁹ But when divorce reformers were creating the family court, devising nonadversarial methods for divorce cases and seeking through governmental intervention in family decisionmaking to protect children whose parents divorce, the juvenile court was a prominent and admired progressive ideal. Reformers of the substantive and procedural law of divorce adopted almost verbatim the ideology and rhetoric of the juvenile court "movement." The juvenile court "child savers" favored "individualized justice," with emphasis on the child and the child's rights rather than those of the parents; they favored specialized courts and judges and gave great credence to informal and nonadversarial procedures and clinical assessment and treatment by mental health experts. The divorce reformers favored the same policies and advocated the same techniques for divorce litigation.²⁰ By adapting the juvenile court's probation technique (while preserving its emphasis on psychodynamic interpretations) the divorce reformers created the custody investigation.²¹

The custody investigation's intellectual ancestry in the juvenile court "movement" is not difficult to document. A few examples will have to suffice. As to the proposition that the divorce court's responsibility to the child is broader than the narrow confines of "adversarial" testimony as offered by the spouses and their attorneys, consider the comments of a prominent and successful pleader for creation of a family court structure for New York City:

empirical material which follows is summarized from the much fuller treatment in the same article — with the permission of the American Bar Foundation.

19. The reasons are adumbrated in Levy, Custody Investigations, supra note 2, at 719. See generally Feld, supra note 8.

20. See generally D. Rothman, supra note 8.

21. A complete statement of the "nonadversarial" divorce reform position as articulated by one of its earliest, most formidable and tireless promoters can be found in Alexander, Let's Get the Embattled Spouses Out of the Trenches, 18 Law & Contemp. Probs. 98 (1953).
Custody litigation may result in a charge by one spouse that the other is emotionally disturbed or mentally ill, not to the point where the interests of society as a whole necessitate commitment, but sufficiently so as to make extensive, or perhaps any, contact with the child harmful to its well being. . . . It is doubtful that any judge would take it upon himself to make such a determination, without assistance. . . . What is called for is, clearly, the services of a person fully trained in the diagnosis of mental and emotional sickness. The parties may or may not see fit to secure the testimony of expert witnesses on this point. Their failure to do so, however acceptable in ordinary adversary litigation, can hardly justify dispensing with that kind of help when the court's jurisdiction is being exercised with reference to the welfare of the child. Surely there is no adequate reason why the Court should be dependent for expert help upon the whim of the parties.22

As to the need to avoid "adversarial" methods and to rely upon the special insights of mental health experts such as psychiatrists, psychologists and social workers, consider once again the New York family court proposal:

What is involved essentially is a determination of personality and emotional attitudes as they affect relationships between the parents and children. Present procedures are inadequate for dealing with that type of problem for three principal reasons. The first is that the adversary method is a painfully slow way of developing the mass of factual detail out of which such attitudes can be made apparent, and it may often fail to produce significant data. Second, the conduct of adversary judicial proceedings intensifies the hostilities and further obscures the picture, whereas there should be the maximum effort to quiet hostilities and broaden the area of agreement. Third, the court needs the advice of experts in the field of human emotions to assist him in making a determination that in law and in fact must deal with emotional problems. . . .

Social investigation into family situations is by now a well established technique. It is used in connection with probation and parole as applied to adult offenders. It is used in connection with the investigation and determination of treatment in [New York's

22. W. Gellhorn, Children and Families in the Courts of New York City, A Report by a Special Committee of the Association of the Bar of the City of New York 315-16 (1954). Professor Gellhorn's work attracts special attention in placing custody investigations in their proper historical perspective because his statement articulated clearly the policies and their origins as well as their risks. Additional citations and a fuller treatment of the parallels may be found in Levy, Custody Investigations, supra note 2, at 718.
version of the juvenile court]. . . The common element of these activities is their use of the basic premises of psychology and psychiatry as the core of what may be called a science of the dynamics of personality and of interpersonal relation. It may be acknowledged that this new science is not fully developed. . . . But . . . something of general acceptance has been attained which can be utilized to facilitate the understanding of problems of human personality and its adjustment. This kind of knowledge is, at least in theory, a central part of the professional training of probation officers as well as social workers. . . .

The matters at issue are factual, but they are not easy to determine. A judge who is a wise man can certainly formulate a conclusion about many of them from observation of parties in the light of the full factual report. But there is serious doubt whether observation can be fair and effective where, without further aids, it consists solely of impressions in the unnatural atmosphere of a courtroom during the course of contentious proceedings in the outcome of which the parties have an almost violent interest. . . .

The simple fact is that lawyers and judges, with rare exceptions, do not have a fully developed awareness of the possible significant facts. They should, at the very least, have the benefit of investigations by persons who, because they do have the requisite knowledge, will be able to appreciate and search out those facts. 

The commitment of the “nonadversarial” divorce reformers to mental health expertise continues almost unabated. Consider the claim of three psychologists, one of whom is also a lawyer, that psychological diagnosis and advice is vital in custody cases:

Given the difficulty of resolving many custody disputes with some assurance that the right decision has been made, it is not surprising that judges often look to “expert” witnesses for guidance — or for confirmation of, and support for — the court’s own judgments. . . .

We . . . readily agree that many psychological/psychiatric judgments, such as psychiatric diagnoses, are highly unreliable, may befuddle rather than clarify the issues to be determined in courtroom settings, and may even mislead the court. But it is also our position that psychological testimony, properly circumscribed and evaluated, may often play a useful, valid role in custody cases.

23. W. Gellhorn, supra note 22, at 310-11, 314.
... Through interviews or psychological tests, mental health professionals might be able to discover, and then bring to the court's attention, feelings, attitudes, and personality traits in the child(ren) and in the contestants, as well as patterns of interaction between the child(ren) at issue and the contestants that are relevant to the custodial decision and not otherwise readily apparent to the court.

... Psychological interviews and tests may unearth evidence of a severe, but well-concealed psychological disturbance in a contesting adult. For example, a sensitive interviewer might discover that a female custody contestant harbors the belief that all men (but not women) are controlled by the devil, though she knows well enough what other people think of such a belief to keep it hidden ordinarily. (The malignant power of such a belief, once it is ascertained, will often be observable in the way the woman relates to men.) It should not require empirical studies to conclude that a female child who grows up with a female parent who harbors such deep hostility to men, and who, therefore, cannot provide the child with a positive model for how to relate to men, will likely (though not necessarily) grow up with attitudes toward men, and anxieties regarding men, that will seriously interfere with her enjoyment of life and her ability to function in the world in a secure, non-anxious fashion.24

These psychologists express nicely the attitudes which have motivated "nonadversarial" divorce litigation reform proposals and now underlie the Law Revision Commission's proposed statute. The argument is that mental health experts are essential and can be relied upon to detect and report to decisionmakers the subtle aspects of parental psychodynamics and familial relationships which will affect how the children of that divorce turn out. "Implicitly, the contention is that because bad outcomes 'will likely (though not necessarily),' occur, the untrained should defer to the judgment of those who are able to make the essential differential predictions."25 The reformers' reliance on mental health expertise is unswerving: they are apparently unaware that adequately credentialed public agency personnel may nonetheless be badly trained or simply unqualified, or that mental health jargon can be and has been used to disguise the imposition of the mental health

expert's personal values on the expert's clientele.\textsuperscript{26}

Finally, the "nonadversarial" divorce reformers as well as the promoters of the Law Revision Commission proposal exhibit that enthusiasm for the reform proposal which characterized the juvenile court "movement" and the later efforts to give social service professionals a large role in custody decisionmaking. Consider the advice given to young lawyers by one of the advocates of custody investigations (himself a lawyer):

\begin{quote}
[When you are not limited in your freedom of action and you do have an opportunity to exercise your own judgment, your failure to accept the proposal from your adversary or from the Court, to call in the [social service agency which conducted custody investigations in New York City] — or, better yet, to initiate such a step yourself — puts in serious question your protestations of solicitude, however eloquent, for the child's well-being.\textsuperscript{27}]
\end{quote}

Thus, mediation advocates propose compulsory mediation "to overcome the substantial attrition rate that most voluntary programs experience."\textsuperscript{28} Research on mediation outcomes, although widely publicized, is often shallow and hopelessly biased to favor the value of the "nonadversarial" technique.\textsuperscript{29} And reform

\textsuperscript{26} For evidence that these risks have sometimes been realized in custody investigation practice, see Levy, Custody Investigations, supra note 2, at 763. Litwack, Gerber & Fenster, supra note 24, at 296, argued that psychological witnesses can be trained to "describe the data and specify the logic upon which they based their conclusions regarding an individual's personality and level of functioning." So long as trial judges refuse to accept psychological conclusions bereft of "clear evidence and logic," the authors contended, "there is little danger that the value judgments of behavioral scientists, masquerading as scientific opinion, will unfairly sway the judgment of the court." Id. at 297 (footnote omitted). For a demonstration from actual investigation reports that such a hope is unrealistic, see Levy, Custody Investigations, supra note 2, at 767. Perhaps more important, such simplistic assertions ignore the fact that most investigation reports have an impact on spouses' consensual decisionmaking rather than in trials before judges. Id. at 735.

\textsuperscript{27} Rothenberg, The Lawyer's Role in Child Custody Disputes, 23 B. Bull. 95, 98-99 (1966). For a description of the public relations efforts which supported the juvenile court "movement," see Levy, Custody Investigations, supra note 2, at 718-28.

\textsuperscript{28} This is the explanation for the move to compulsory mediation in California given by Pearson & Thoennes, Mediating and Litigating Custody Disputes: A Longitudinal Evaluation, 17 Fam. L.Q. 497, 514 (1984).

\textsuperscript{29} Compare id. with Levy, Comments on the Pearson-Thoennes Study and on Mediation, 17 Fam. L.Q. 525 (1984). At the symposium reported in the present issue, one researcher commented informally that mediation research funding is much easier to obtain if funders are persuaded that the research product is likely to be favorable to mediation — and that researchers lacking the protections of tenure at an academic institution respond in an appropriate fashion.

For an example of research intended to reinforce the notion that "mediation" is a new social service distinct from "traditional" custody investigations, see Olson et al., Custody
advocates show an almost child-like faith in the efficacy of their program and the good faith and good intentions of the professional personnel it will attract.\footnote{See, e.g., Schepard, Philbrick & Rabino, Ground Rules for Custody Mediation and Modification, 48 Alb. L. Rev. 616, 656-57 (1984) (mediation retainer agreement drafted to provide that in case of postdecretal problems which the spouses cannot resolve themselves, they must return to mediator who would act as a “gatekeeper” to subsequent arbitration or postdecretal litigation; mediator could thus deter bad faith efforts by a parent to terminate mediation; no parallel controls needed to constrain mediator because “[a] mediator presumably would not continue her efforts if both parents thought the process had no chance of success . . . .”).

The Law Revision Commission’s proposal would allow the spouses to see the investigator’s underlying file only upon “a showing of good cause,” Symposium, supra note 1, at 136 (§ 242(f)(3)). “This approach avoids pro forma requests for the underlying work product, which may be intrusive and obstructive to the evaluation process.” Id. at 153 (Commission Commentary). For evidence that investigators occasionally deliberately suppress from their reports facts which might have an impact on the parents’ or the judge’s decisionmaking, see Levy, Custody Investigations, supra note 2, at 742, 749, 763. For the claim that investigations cannot adequately be controlled unless investigators are required to keep a running record of their investigation which will be automatically available to the spouses or their lawyers, see id. at 795.}

There is no doubt that the custody investigations can be identified as one of the “nonadversarial” methods of “Child Savers Inc. — Divorce Division.” It remains to determine whether the risks to children and to family autonomy posed by the interventionist possibilities of custody investigations and the interventionist powers of custody investigators are real, whether custody investigations nonetheless serve a useful function, and whether, and how, their risks can be adequately controlled without abolishing the institution.

III. CUSTODY INVESTIGATIONS

My estimate of the advantages and disadvantages of custody investigations is based upon a review of all the files and reports of the Hennepin County (Minneapolis), Minnesota, Department of Court Services (the social service agency of that county’s divorce court) for the eighty-four cases in which custody investigations were ordered by a judge or referee during the initial divorce


30. See, e.g., Schepard, Philbrick & Rabino, Ground Rules for Custody Mediation and Modification, 48 Alb. L. Rev. 616, 656-57 (1984) (mediation retainer agreement drafted to provide that in case of postdecretal problems which the spouses cannot resolve themselves, they must return to mediator who would act as a “gatekeeper” to subsequent arbitration or postdecretal litigation; mediator could thus deter bad faith efforts by a parent to terminate mediation; no parallel controls needed to constrain mediator because “[a] mediator presumably would not continue her efforts if both parents thought the process had no chance of success . . . .”).

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hearing in that county during the year 1970. Although more custody investigations were conducted in subsequent years, there is little reason to believe that the reports filed that year, or the cases in which reports were filed, are not sufficiently representative to permit generalizations about custody investigation practice in other states fifteen years later, or to make predictions about what may happen in New York under the Law Revision Commission's proposed statute. For example, of the ten investigators who filed reports during the year 1970, five are still employed by the Department — some of them conducting mediations under the Department's allegedly "new" "Custody Resolution Counseling" program; and the Commission's model for investigations seems to have psychological emphases similar to those in the Hennepin County reports and, according to impressionistic reports by judges, to investigation reports in other jurisdictions.

We should begin with the good news. As the Law Revision Commission's comments suggest, custody investigations in Hennepin County during 1970 did in fact produce some (and perhaps many) settlements. In only three cases did the reports themselves indicate successful investigator efforts to resolve the dispute. But in almost three quarters of the cases in which an investigation was completed, in many of the reports of which there were references to "counseling" of some kind by the investigators, the spouses

31. For details of the information assembled for Hennepin and two other counties, a variety of statistical and impressionistic factual data about the reports themselves, the investigators, and some limited information about the clientele's reaction to the reports, see Levy, Custody Investigations, supra note 2, at 736-38. Space limitations preclude repetition of all the evidence assembled in the American Bar Foundation Research Journal to support the conclusions reported here. Readers should consult the prior article.

32. See supra note 24.

33. See Levy, Custody Investigations, supra note 2, at 734.

34. See id. at 768 n.177 for a comparison of the psychologically-oriented Hennepin County reports with those of another Minnesota county in the same year. Id. at 734-35 compares the Hennepin County reports with what the Law Revision Commission's commentary suggests was its vision of a psychologically-oriented report. See also Ash & Guyer, In the Shadow of Solomon's Sword: The Functions of Psychiatric Evaluation in Contested Custody and Visitation Cases, ___ J. Am. Acad. Child Psych. ___ (n.d.) (not yet published) (custody investigations by independent mental health experts in Michigan; emphasis on psychological factors and settlement of disputes); Pearson & Ring, Judicial Decision-Making in Contested Custody Cases, 21 J. Fam. L. 703, 723 (1983) (Colorado trial judges interviewed for study of social service and judicial practices in contested custody cases where close to half the sample of cases included a custody investigation "were especially critical of the private, psychological reports that were extremely jargon-ridden and evaluative.").

35. See Symposium, supra note 1, at 126.
settled their dispute without further hearing.\textsuperscript{36} A report on custody investigations by therapists at a teaching hospital in Michigan during a recent four-year period also indicates that high settlement rates in such cases probably result when investigators take “a more active role in promoting agreement.”\textsuperscript{37} Consider the entire report filed in one of the 1970 cases:

[In February] a custody study was ordered at an initial divorce hearing for the four children of the above couple. Both husband and wife were interviewed individually in the office, both parents were seen with the children in the family, and a joint conference was held with both parties present. Mr. H-17, during his individual sessions, stated that he had no particular complaints about his wife’s ability to parent his children and that indeed he felt that she had been a good mother for the children. Since Mr. H-17 had carried out many of the mothering responsibilities while his wife worked in the evenings, he had, in fact, taken much of the mother’s role from Mrs. H-17. Mrs. H-17 has shifted her work hours from evenings to days in the last nine months and has been at home in the evenings to care for the children as he had done previously. Mr. H-17 stated that he was concerned that his wife may remarry a man she has known who is in the service and that such a marriage would eventually reduce his association with his children and the relationship he has with them. This seemed to be his primary concern and is somewhat unrealistic as the wife has no commitments at this point with this man and probably would not marry for two years if at all at that time. Consequently, I recommended to both parties that they consider a stipulation which would permit the children to remain with Mrs. H-17, which both accepted. Contacts with [their attorneys] have indicated that this has been agreed upon as has [sic] contacts with both parties.\textsuperscript{38}

The H-17 case was settled because the investigator, a neutral and objective observer, was able to reassure Mr. H-17 that his wife was not likely to remarry and move away soon after the divorce. But cases can be, and have been, settled by investigator coercion as well as reassurance. In the Minnesota sample there was some evidence of the application of pressure by investigators;\textsuperscript{39} and others

\begin{enumerate}
\item See Levy, Custody Investigations, supra note 2, at 780.
\item Ash & Guyer, supra note 34.
\item H-17 (C/W 1), quoted in Levy, Custody Investigations, supra note 2, at 779. For an explanation of the numbering system used to make the cases anonymous, see id. at 714 n.3.
\item See H-81 (CW/4), quoted in Levy, Custody Investigations, supra note 2, at 788.
\end{enumerate}
have reported similar incidents in other jurisdictions.40 Finally, the Minnesota sample included a particularly unpleasant example of behind-the-scenes, postdecretal retaliation against a custodial mother by an investigator whose mediation had been only temporarily “successful” in resolving parental disagreements.41 Whether the case settlement potential provided by investigators justifies the risks they pose of coercion and manipulation of divorcing parents is hardly an easy decision. But the advocates of the New York Law Revision Commission program have given no indication that they even recognize that a trade-off is required.

The statute proposed for New York indicates that the Law Revision Commission places great faith in the work product of custody investigators. Since investigations can be ordered even where the parties have already agreed on a custodian, the Commission obviously believes that reports will be neutral and impartial and will help judges to “satisfy [themselves] that the agreement is in the child’s best interests.”42 Since a “good cause” showing is required to permit the parties to have access to the investigator’s underlying file,43 the Commission must believe that investigators’ factfinding and reporting will be reliable. Unfortunately, the evidence from the Hennepin County reports suggests that these assumptions are unwarranted. Some of the reports were modest, thoughtful and, insofar as it was possible to check their facts, careful and accurate. But such conclusions could not be drawn about all, or even most, of the reports. In virtually none of the cases was it possible for a neutral decisionmaker to determine independently

40. See Ash & Guyer, supra note 34:
   The evaluator made clear that if the parents could not settle their dispute, a full evaluation would follow. This alone made intrafamily settlements more attractive . . . .
   For these parents, the evaluator appeared to be a powerful, but benign figure with whom they could agree, thus obviating the difficulty they would have had in “giving in” to a spouse at whom they were furious . . . .
   . . . [O]ur experience illustrates that psychiatric evaluations play a variety of functions in the process of dispute resolution over and above providing evidence to a judge. An evaluator who functions as an appointee of the court exerts considerable influence which derives in large part from the shadow of judicial power which looms behind him . . . .
41. See H-26 (CW/1), quoted in Levy, Custody Investigations, supra note 2, at 778.
42. Symposium, supra note 1, at 150 (Commission Commentary).
43. Id. at 136 (§ 242(f)(3)).
whether the investigator’s custody recommendation followed logically and necessarily from the facts reported. In some of the cases, for example, “by the time information-gathering was complete, the [investigator] had already decided which parent would make the better custodian — and the report became a ‘brief,’ defending a decision made in some other (‘clinical’) fashion.” In these cases, the report’s description of relevant facts was unreliable; indeed, there were a number of cases in which relevant facts known to the caseworker were simply suppressed from the report. In some cases, investigators “shaped” their reports to produce a report favorable to a judge or referee who had already made up his mind.

In addition to the fact-finding risks, in some of the cases the investigators obviously imposed upon the divorcing spouses their own personal and idiosyncratic child care and behavioral values in making custodial recommendations rather than relying upon “mainstream child development values” as to which there is relatively widespread, if not universal, agreement in the academic and professional literature. One of the investigators utilized

44. See Levy, Custody Investigations, supra note 2, at 741-44 nn.100-05 and accompanying text.
45. Levy, Custody Investigations, supra note 2, at 740.
46. Further evidence that the report was not itself a serious effort to weigh fairly competing custodial claims was provided by the caseworker’s failure to report relevant information in his possession. The report did indicate that the mother had been hospitalized by a psychiatrist thirteen months previously — with a throwaway line about the problem: “Dr. provided counseling, largely around problems centering in the marriage relationship. A request for an evaluation of Mrs. H-7 has been requested of Dr. , but has not been received as of this writing.” The report did not indicate that the hospitalization had been for “weight loss and depression,” that the psychiatrist had reported that the mother had indicated that she had great “conflicts about taking care of her [child] and was ‘running around,’” that the psychiatrist’s diagnosis had been “reactive depression superimposed on a sociopathic personality.” Obviously, the child’s presence in her greatgrandmother’s home most of each week could be viewed very differently against a background which included this information. Significantly, the psychiatrist’s letter made it clear that [his views were not solicited until after it was too late to include them in the investigator’s report].
Id. at 742.
47. See Levy, Custody Investigations, supra note 2, at 748.
48. Id. at 749-51. Some reports “hinted at an even more disquieting use of differential standards for minority race families and racially mixed couples.” Id. at 752 n.137. In H-9 (CW/5), for example, the report commented that the wife, a young woman who had emigrated from Germany after her marriage to a soldier from Minnesota, was living with an “age 27, young, a divorced negro man. This was verified during an unannounced home visit.” (This was one of the very few unannounced home visits described in the entire sample.
"maternal presumption" consistently, but in most cases,

the presumption appeared to be a tool, a contention to be hauled out when it might add persuasiveness to a recommendation of the mother as custodian. As a result, those reports which rely heavily upon the presumption appear to lawyer-readers, accustomed to assessing whether conclusions follow from factual premises, to be unpersuasive and unsatisfactory.49

The investigators were much more consistent when addressing issues of extramarital sexual practices by custodial mothers. In cases presenting this behavior, there was close to an automatic disqualification:

Since Mrs. H-24 has not yet clarified her thinking as to her relationship with Mr. _____ vs. the care and welfare of the children, I am not convinced custody should automatically be awarded to the mother at this time, due to their young ages. It is therefore recommended custody of [one child] and [the other child] remain with the father with liberal visitation rights by the mother. Contact of the children with Mr. _____ is considered not to be in the children's best interest.50

The investigators' application of a "disqualification for sexual misconduct" has unhappy implications, both for the hope for reliable factfinding and for minimizing the discretion of investigators:

It is difficult to analyze fairly or to criticize recommendations based upon values which were quite common prior to the "sexual revolution" but appear very dated by contemporary norms. If the [investigators'] reports and recommendation simply reflected widespread community as well as their own moral and parenting values, it might be culturally and morally arrogant to find even mental health professionals at fault for being "normal" members of reports.) The caseworker emphasized the wife's "independent and defiant nature" and "rebellious attitude" when threatened that she would lose custody of her son "when she became involved in racially mixed relationships," and reported that the wife "stubbornly stayed with her decision to seek divorce and make friends of her own choosing." The caseworker also made a full report about allegations of physical abuse of the child by the "stepfather," including directions as to how to obtain a police report and pictures, despite the fact that an investigation of the allegations by the police had concluded (and the caseworker agreed) that abuse had not occurred.

Id. at 752 n.137.

49. Id. at 758.

50. Id. at 756.
of their community. But the sexual revolution had certainly begun by 1970; academic and professional criticism of imposing moral norms in divorce and custody litigation had already reached a crescendo; and [the Minnesota Supreme Court's] and other cases indicate that the courts were already beginning to respond to these new norms. The [investigators'] emphasis on mothers' sexual practices may have been, then, something of a rear-guard action to preserve disappearing moral standards and to punish deviants.

A discretionary exclusion for sexual conduct substantially increases the caseworker's real authority — perhaps more in uncontested than in contested cases. Nothing requires the [investigator] to cite or to emphasize the exclusion uniformly (and, excepting CW/5, the Hennepin County [investigators] did not). . . . Thus, whether the [investigator] investigates the behavior, decides to report it, and the extent to which the [investigator] emphasizes the behavior in the report, may play a decisive role in even a negotiated outcome. The risks of "moral imperialism" are obvious and substantial.51

The litany of realized dangers continues. The Hennepin County reports regularly emphasized conclusory psychodynamic interpretations which were not subject to easy or convincing rebuttal,52 which occasionally reflected only current fashions or fads in the therapy community,53 or which sometimes masked in the language of therapy and family dynamics the investigator's personal and idiosyncratic values.54 In addition, the "psychological style" seemed from time to time to bias the investigators to favor the parent who was willing to agree to or seemed more amenable to counseling.55 This style also relied for individual diagnosis and prediction on statistical profile results of pro forma administrations of the Minnesota Multiphasic Personality Inventory, a standard non-projective personality test.56 The results were inevitably misleading. In short, the Hennepin County investigators did not distinguish themselves in their use of psychological and family relationship material and criteria.57

51. Id. at 762-63.
52. Id. at 763-71.
53. Id. at 768-69.
54. Id. at 769.
55. Id. at 770-71.
56. Id. at 775-78.
57. These bare conclusions are supported by substantial evidence from the reports themselves. Id. at 776. Anyone tempted to doubt these conclusions should consult the full
The Hennepin County reports also indicate that the Law Revision Commission’s implicit expectation that custody investigations can be used for purposes of juvenile-court-like child protection (or “child saving”) is correct. Because that expectation is correct, divorcing parents and their children who are subject to custody investigations may also be subjected to significant authoritarian impositions on their privacy during and after their divorce:

In fact, the problem is a very serious one: custody investigations create for caseworkers a procedurally and substantively unconstrained opportunity to influence (indeed, control) the behavior of divorcing spouses simply because they can't agree as to the children’s post-divorce custodian (and occasionally even if they have agreed). Safeguards would be in order even if reading the reports did not produce anxiety — as does reading the 1970 Hennepin County set — about the moralistic, judgmental, sometimes punitive, and occasionally manipulative qualities of the caseworkers and their work product. . . . Although the judges did not seem very interested in postdecretal supervision orders, certainly less interested than the [investigators] were, a rule prohibiting such orders in the absence of both spouses' consent can . . . be defended . . . . [N]o one is given authority to arbitrate undivorced parents' petty quarrels which hurt their kids, so long as juvenile court minimum standards are not transgressed. Nor is there reason to believe that kids whose parents have divorced need or should have more protection — and some reason to doubt the wisdom of relying on such protection in any event (at least if the Hennepin County files are the appropriate criterion).

IV. Conclusion

No one should doubt that controls are essential. Indeed, there is a fair argument that in a state like New York, where no social service bureaucracy has as yet been established, the best policy would be to avoid “nonadversarial” aids of the custody investigation variety. But if the case settlement potential of investigations is considered essential (a judgment, it should be emphasized, I refused to make earlier), it is simply irresponsible not to include in the statute techniques designed to preclude the demonstrated evils of the Hennepin County program. Such techniques can be devised.

58. Id. at 782-87.
59. Id. at 789-90.
The evils include coercive settlement effects, faulty factfinding, imposition of improper substantive custody criteria and coercive child protection efforts by investigators. If custody investigations are to be allowed at all, then, at a minimum the legislature should deny judges discretion to order an investigation unless both spouses agree to it; because most investigations are used by the spouses rather than by the judge in litigation, the investigator should be required to keep "running dictation"\(^{60}\) of all contacts and that record should be automatically available to the spouses and their attorneys so that they will be able to estimate the reliability of the investigator's report and its likely impact on the judge if the case is litigated.

The injuries which professionals who combine zeal and authoritarian power can perpetrate on children and their parents have been documented regularly.\(^{61}\) No extensive "nonadversarial" program for divorce administration which ignores that documentation should be enacted and I believe, therefore, that the Law Revision Commission's proposal should be amended or abandoned.

\(^{60}\) See id. at 741 n.100 & 795 n.240 for a description of this practice among many mental health professionals.
