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## Custody Investigations in Divorce-Custody Litigation

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# CUSTODY INVESTIGATIONS IN DIVORCE-CUSTODY LITIGATION\*

Robert J. Levy\*\*

## I. MAPPING THE TERRITORY

Very few divorce cases are contested for any reason. To be sure, there are lots of matters about which angry divorcing spouses can disagree—and litigate: distribution of marital property, amount of maintenance, custody and visitation of the couple's children. Nonetheless, observers have consistently found that almost all divorce decrees are consensual, the products of negotiation and agreement. Marriage termination decrees are in fact almost always default judgments awarded after pro forma testimony by one of the spouses (to the judge, usually accompanied only by a court reporter) of the minimum factual evidence required in the jurisdiction to authorize a divorce. The presentation usually includes the plaintiff's offer in evidence of a document describing the (yet to be approved) operative terms of the decree, known by some variant of the term "Marriage Termination Agreement."<sup>1</sup> No one objects to the evidence offered because the defendant, sometimes nowadays denominated the respondent or some similar "non-adversarial" term,<sup>2</sup> is not in attendance.

But, this picture of a "non-adversarial" divorce universe inadequately portrays the bustle and litigiousness of much judicial supervision of what become, formally, uncontested divorce custody decrees. Despite the fact that by private agreement the parties clearly control post-divorce placement of children of the marriage, the formal tradition includes a notion that judges have a special responsibility for the care and welfare of the children of divorce.<sup>3</sup> A host of divorce practice "reforms"

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<sup>1</sup> The typical estimate is that somewhere between five and ten percent of divorces involve the contest of some issue. *See, e.g.*, Robert J. Levy, *Custody Investigations in Divorce Cases*, 10 AM. B. FOUND. RES. J. 713, 718 n.12 (1985). This typical figure does not include court hearings related to common pretrial skirmishes regarding such matters as temporary support or maintenance, custody and visitation of children while the divorce action is pending.

<sup>2</sup> For a discussion of the general legislation trend to prefer "non-adversarial" methods for divorce litigation, see NATIONAL INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY LAW MENTAL HEALTH ASPECTS OF CUSTODY LAW 3-7 (2d ed. 2005) [hereinafter NICCCL]. *See also* Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009).

<sup>3</sup> *See, e.g.*, *Toiberman v. Tisera*, 998 So.2d 4, 5 (Fla. Dist. Ct. App. 2008) (2-1 decision) (legislature denied a divorcing couple the authority to agree to have their custody issue decided by a private arbitrator). *See also* *Harvey v. Harvey*, 668 N.W.2d 187, 198 (Mich. App. 2003) (despite legislative recognition of possibility of arbitration in

have been adopted by legislatures; others have been conceived by family court judges. All of these reforms have been designed and expected to protect the “best interests” of children of divorcing parents. Whether or not they protect in the expected fashion (the claims have not been tested by careful evaluation) there is no doubt that they have added substantially to the complexity of divorce litigation; and they have multiplied the time and money spent determining which parent will be chosen as the post-divorce custodian of the couple’s children and what post-divorce behavior will be required of that custodian. Many divorcing spouses are ordered (and some agree as an aspect of their negotiations with their spouses) to undergo a lengthy, social work investigation of their parenting potential and pre-divorce behavior;<sup>4</sup> some parents are required to undergo psychological interpretation of their strengths and weaknesses (as persons as well as parents);<sup>5</sup> some divorcing parents are required to submit to supervision of their parenting by a court or social service agency professional;<sup>6</sup> some divorcing parents have been required to seek the approval of a professional to visit their children;<sup>7</sup> some divorcing parents are required to undergo mediation of their marital disputes by a professional appointed by the judge.<sup>8</sup> But this list hardly exhausts the “treatments”

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determining divorce property and custody issues, wife’s agreement to arbitration of custody by “Friend of Court” social agency referee could not bind wife to forgo judicial review of arbitrator’s decision); Paulson v. Paulson, 694 N.W.2d 681, 691 (N.D. 2005) (trial court’s order allowing child’s treating psychotherapist to set visitation schedule for child’s mother was an impermissible delegation of trial judge’s authority to decide visitation issues despite wife’s drug addiction).

<sup>4</sup> See, e.g., Cepek v. Cepek, 684 N.W.2d 521, 524 (Minn. Ct. App. 2004).

<sup>5</sup> See, e.g., Citta-Pietrolungo v. Pietrolungo, Nos. 81943, 82069, 2003 WL 21469770, \*3 (Ohio Ct. App. 2003). In many cases, psychological tests, such as the Minnesota Multiphasic Personality Inventory and other projective tests, are a customary preliminary exercise in custody investigations. For doubts about the reliability and validity of many of these tests as well as the skills of those who interpret them in custody cases, see, e.g., the conclusions of three prominent psychologists, Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. IN THE PUB. INTEREST 1, 7 (2005) (the measures used in many forensic assessment instruments “assess ill-defined constructs, and they do so poorly, leaving no scientific justification for their use in child custody evaluations.”); NICCCL, *supra* note 2, at 309-20.

<sup>6</sup> See, e.g., Thompson v. Yu-Thompson, 837 N.Y.S.2d 313, 313 (N.Y. App. Div. 2007) (affirming Family Court order of “supervised therapeutic visitation” for father and ordering that visitation be conditioned on father and child undergoing individual therapy).

<sup>7</sup> See Hom v. Zullo, 775 N.Y.S.2d 66, 66 (N.Y. App. Div. 2004) (affirming trial court order suspending without hearing divorced father’s visitation in light of recommendation of law guardian who had worked on case for more than ten years).

<sup>8</sup> A very small proportion of trial court custody decrees are appealed. Therefore, the scope and frequency of limitations trial judges attach to their custody decrees in contested (and perhaps occasionally even in uncontested) cases is unknown. Some taste of the scope of orders uncovered in the atypical appeal gives reason for concern. See, e.g., Soohoo v. Johnson, No. A05-537, 2006 WL 851808, at \*1-\*8 (Minn. Ct. App. 2006), *aff’d in part, rev’d in part*, 731 N.W.2d 815 (Minn. 2007) (trial court award of visitation to former

to which divorcing parents may be subjected. Consider the following list of services at divorce (some but not all authorized by statute) which judges can impose on divorcing couples in Hennepin County, Minnesota: “Parenting Time Expeditor”; “Guardian ad litem”; “Custody Evaluator or Investigator”; “Therapist”; “Attorney for Child”; “Early Neutral Evaluation.”<sup>9</sup>

Most of these non-judicial “aids” to custody litigation have been approved by legislatures and judges on the theory that the public is responsible for the care and welfare of children and parents—or at least those parents who are in the midst of the emotional, legal and financial turmoil of divorce litigation—cannot be trusted to make the necessary choices without assistance or oversight. The minor premise is that parents who cannot agree on the terms of their divorce cannot be trusted in

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female companion of mother and order that mother and children continue with therapy affirmed; statute authorizing visitation award for non-spouse adult who has spent at least two years with children applies to same-gender relationships; divorce statute’s authorization of therapy on a temporary basis can be interpreted to apply to final order as well); Getschel-Melancon v. Melancon, No. 09-07-396 CV, 2008 WL 4587639, at \*3 (Tex. App. 2008) (affirming trial court order that prohibited custodial mother from allowing any person with whom she has a “dating relationship or intimate sexual relationship to remain in the party’s residence with the child between the hours of 10:00 PM and 6:00 AM the next day”); Ruggiero v. Ruggiero, 819 A.2d 864, 869 (Conn. App. Ct. 2003) (trial judge cannot order father to undergo psychiatric evaluation after spouses have settled all pending issues in custody litigation); Paulson v. Paulson, 694 N.W.2d 681, 690 (N.D. 2005) (trial judge committed reversible error in divorce custody dispute by allowing psychologist treating child of the marriage to determine visitation opportunities for child’s noncustodial mother); Powell v. Blumenthal, 827 N.Y.S.2d 187, 189 (N.Y. App. Div. 2006) (father who had not visited children for nine years while incarcerated in federal penitentiary allowed only supervised visitation in New York, not in Hawaii where he was living; Family Court properly exercised discretion by restricting father from discussing with children any issues pertaining to his—not described—religion or philosophy). *See also* NICCCL, *supra* note 2, at 257 n.19 (divorcing parents agreed to decree requiring custodial mother to seek judicial approval of any move with children after fixed period hiatus and with testimony at default hearing by psychologist and both parents that it would not be in children’s interest to allow mother to move with children prior to end of fixed period).

<sup>9</sup> *See* ELLEN A. ABBOTT & KAY M. KRAUS, SUMMARY GUIDE COMPARING ROLES IN FAMILY CASES (Minnesota Continuing Legal Educ. ed., 2008). There are other designations for some of these interventions in various jurisdictions. For example, in Alabama, apparently custody investigators are court appointed judicial advocates (“CAJA”). *See* J.M. v. D.V., 877 So.2d 623, 625 (Ala. Civ. App. 2003). *See also* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 12-13-25 (2003) (discussing the role of the “CASA,” court appointed special advocate). Moreover, the functions and powers of court appointed experts can vary from state to state. *See, e.g.,* Goberville v. Goberville, 694 N.W.2d 503, 507 (Wis. App. 2005) (guardian *ad litem* is an advocate for the child’s best interest, not a fact finder or a consultant to the judge). In Wisconsin, the guardian is specifically authorized to make custody recommendations without regard to the children’s wishes. *See* WIS. STAT. ANN. § 767.407 (2009). In New York, the extra-judicial aid is provided by a legislatively created official called the Law Guardian. *See, e.g.,* cases cited *supra* notes 7-8.

all cases to submerge their own selfish interests for the benefit of their children.<sup>10</sup> Such non-judicial aids to the adjudication of divorce/custody cases have many advocates among legislators, practicing lawyers and judges as well as social and psychological scientists; but they have not been studied often or in depth. An empirical investigation of the use during 1970 of social work investigations in two Minnesota counties was critical of the investigations themselves and of the uses to which the courts put them.<sup>11</sup> A more recent exploration of the practice by a group of sociologists, not based on any empirical investigation, drew similar conclusions.<sup>12</sup> But, the statutory and appellate law on non-legal aids to custody adjudication has not been explored since Levy's study. This Article examines the appellate decisions nationally for the last decade.<sup>13</sup>

## II. PERHAPS AN UNREPRESENTATIVE CASE

### A. *The Daddio Case*

Joann and Ken were married in 1994 and had a son shortly thereafter. They were divorced in June 1997 and by agreement physical custody of the boy (then about two and a half years old) was awarded to Joann while legal custody was

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<sup>10</sup> Judges occasionally impose extra-judicial investigations on divorcing parents who present a default judgment for approval. Almost all the appellate cases concerning such judicial orders are the products of contested cases, that is, cases in which the parents do not present to the judge a deal to which they agreed prior to the default hearing. *See, e.g.*, NICCCL, *supra* note 2, at 142-45.

<sup>11</sup> *See* Levy, *supra* note 1.

<sup>12</sup> *See* Emery et al., *supra* note 5, at 1.

<sup>13</sup> This essay explores what might be called the substantive law of extra-judicial aids to judicial determination of custody contests. The case law includes a potpourri of decisions concerning the procedural aspects of using extra-judicial aids. *See, e.g.*, *Citta-Pietrolungo v. Pietrolungo*, Nos. 81943, 82069, 2003 WL 21469770, at \*3 (Ohio Ct. App. 2003) (describing contesting parents' psychological circumstances which authorize trial judge to order psychological evaluations of parents); *Kellogg v. Kellogg*, No. 04AP-382, 2004 WL 3090184, at \*3 (Ohio Ct. App. 2004) (describing how trial judge should conduct private judicial interview with children in contested custody case); *Schill v. Schill*, No. 2002-G-2465, 2004 WL 2803230, at \*8 (Ohio Ct. App. 2004) (wife did not waive medical privilege as to mental health records related to child of prior marriage by requesting custody of child of the marriage); *Cepek v. Cepek*, 684 N.W.2d 521, 525 (Minn. App. 2004) (mother's failure to serve notice of appeal of trial court modification of custody award does not deprive appellate court of jurisdiction to consider appeal); *In the Matter of Kalil*, 931 A.2d 1255, 1256-58 (N.H. 2007) (father not entitled to review or to strike from record sealed report of guardian *ad litem* because parents had stipulated to hold report confidential on grounds that report contained conversations between the guardian and the child); *Betz v. Betz*, 575 N.W.2d 406, 409 (Neb. 1998) (guardian *ad litem* and counsel for child cannot be same person in custody contest; guardian may not file pleadings, introduce evidence, argue to the court or act in the role of an attorney).

made joint.<sup>14</sup> The spouses agreed that Ken would have overnight visitation with the boy on alternating weekends. The decree also included a hortatory provision concerning post-divorce cooperation that many lawyers would advise against:

The parties shall make good faith attempts to consult one another on all major decisions concerning [the child], including but not limited to [his] health, education, religion and welfare. In the event the parties are unable to reach an agreement on issues concerning [the child], the primary custodial parent [Joann] shall make such decisions. This does not preclude either party from taking reasonable and necessary action on behalf of the minor child in the event of an emergency, nor from making ‘day-to-day’ decisions when the minor child is with one or the other parent.<sup>15</sup>

The spouses may have been able to reach agreement on many issues—but they found it difficult to stay out of court. The decree was modified by agreement three years later; the mother was required to confer with the father as to “significant decisions concerning the child’s health, education and general welfare” and the father’s overnight visits with the child were increased to one every week and alternating weekends.<sup>16</sup> Three years later—the boy was by now around eight years old—the father, acting *pro se*, petitioned to have the decree modified once again, this time to convert the decree to joint physical custody, to authorize an additional four overnight visits each month, to allow the father to make illness treatment decisions when the child was in his care and to eliminate his child support obligation.<sup>17</sup> This time, Joann refused to agree and counter-petitioned for sole legal custody, for an increase in child support, and for a reduction in the number of Ken’s currently authorized visits. The trial judge appointed a family relations counselor (whose educational and training credentials were not reported) to confer with the child, a psychologist to advise the judge after conferring with the parents,

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<sup>14</sup> At the time, the Connecticut Statute, CONN. GEN. STAT. § 46b-56a(b) (1997), provided “a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody . . . .” The provision almost certainly applied only to joint legal custody.

<sup>15</sup> *Daddio v. O’Bara*, 904 A.2d 259, 288-89 (Conn. App. Ct. 2006). That the parties engaged regularly in post-decretal litigation about the boy does not prove that the decree term was a mistake; but many experts would see the term as evidence (and a warning) that the noncustodial father was “too involved” in the life of the child, and therefore that post-decretal litigation was inevitable. Many divorce lawyers would suspect, moreover, that this clause was the price Joann paid to persuade Ken not to contest physical custody.

<sup>16</sup> *Id.* at 289.

<sup>17</sup> Although the appellate opinion says nothing about the father’s request to eliminate child support while increasing his time with the child, it would not surprise most observers of the dynamics of divorce and divorce litigation if this request played a role in the trial court’s negative response to the other aspects of the motion.

and a guardian *ad litem* to protect the child's interests.<sup>18</sup> It took almost a year for the counselor and the psychologist to file written reports and another year for the trial judge to schedule and conduct a hearing and to issue a decision. But there is no doubt that Joann was the winner:

The court denied [Ken's] request for additional time with the child on the basis of the evidence from the family relations counselor, psychologist and court appointed guardian *ad litem*. Their testimony and reports indicated that the child suffered extensively from the detrimental effects of consistent litigation initiated by [Ken] in his efforts to spend more time with the child.<sup>19</sup> The court found that the frequent and repeated litigation served to harm the child and deprived him of the ability to grow and develop. The court found that [Ken] failed to recognize the harm caused by his 'strategy of attrition by repeatedly asking for small increase in his parenting time.' Each success resulted in encouraging the defendant to seek more time. The court concluded that to break this cycle, it was in the child's best interest to deny [Ken's] request for additional time.<sup>20</sup> With respect to the parties' respective requests to change the custody order, the court found that '[t]he evidence overwhelmingly proves that these parents are unable to work together cooperatively except on the simplest of issues.' Accordingly, the court determined that an order giving [Joann] sole legal custody was in the best interest of the child and that all previous orders were not in his best interest.<sup>21</sup>

In addition, the trial court ordered that Joann alone have final authority to schedule recurring activities for the child, indicating that such activities should be scheduled, if possible, so as to impact the parenting time of both parents equally. Finally, the court approved the parties' agreement that any future motions to modify custody, visitation or parenting orders first must be filed with the presiding judge for family matters in the judicial district of New Haven and approved by that judge as raising legitimate issues.<sup>22</sup>

Ken appealed. The Connecticut intermediate appellate court affirmed the trial judge's decision. The opinion commenced with the usual niceties of appellate

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<sup>18</sup> *Id.* at 289-90.

<sup>19</sup> *Id.* at 290 n.3 ("The consistent litigation further harmed the child by siphoning [Joann's] energy from her parenting skills.").

<sup>20</sup> *Id.* at 290 n.4 ("The court also denied [Joann's] motion to reduce [Ken's] time with the child.").

<sup>21</sup> *Id.* at 290.

<sup>22</sup> *Id.* The appellate opinion did not discuss this unusual clause. The clause could have been a judicial effort to keep control of the spouses' (especially Ken's) desire to litigate endlessly; but, because both spouses apparently agreed to the provision, it may have been designed as a limitation on the freedom of either spouse to seek help in the custody war from a judge in some other Connecticut town or another jurisdiction.

review: trial court orders are affirmed unless the trial judge abused his discretion or if the judge could not reasonably conclude as it did based on the facts presented; custody orders must be based on the best interests of the child; the legislature has limited the broad discretion of the trial judge in custody modification proceedings because of the child's interest in stability of physical surroundings.<sup>23</sup>

The *Daddio* case is unusual because the appellate court's opinion affirming the trial judge's decision included considerably more of the reports and testimony of the experts than is common in custody litigation. The opinion continued:

During the hearing, the court heard testimony from the parties, Heather A. Clinton, a family relations counselor, John T. Collins, a psychologist, and Thomas A. Esposito, the child's guardian *ad litem*. Both Clinton and Collins submitted written reports to the court. Clinton's report, dated March 31, 2004, recommended that custody and visitation remain the same. This report, however, was completed more than one year before the hearing. At the hearing Clinton testified that the parties had been involved in episodes of litigation since the child was three months old.<sup>24</sup> She noted [Ken's] cyclical pattern of using litigation as a means of obtaining more time with the child and then repeating the process. Clinton explained that [Joann] had become concerned with [Ken's] history of repeated requests for additional increments of time with the child. She concluded that [Ken] had lost sight of the child's best interest and instead focused on his need to spend more and more time with the child. Essentially, the constant barrage of litigation resulted in a tremendous amount of stress on the family, particularly the child. Clinton described her most recent interview with the child. She believed that the child was responding to questions in an effort to please [Ken] rather than give his own thoughts. Specifically, the child indicated his concerns regarding the amount of parenting time that [Ken] had. Clinton noted that the child appeared to be under an incredible burden and focused his energies on pleasing his parents rather than dealing with his attention deficit disorder. Clinton repeated her belief that this constant litigation, initiated by [Ken], and causing intra-family conflict, was contrary to the best interest of the child.<sup>25</sup>

The court gave additional detail in a footnote:

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<sup>23</sup> *Id.* at 291 (The stated rules are summaries of the appellate court's discussion).

<sup>24</sup> *Id.* at 293 (Collins testified that the extensive litigation had been an "extreme hardship" and an "emotional abuse" of the child).

<sup>25</sup> *Id.* "Clinton testified that in addition to having attention deficit disorder, the child has been described by his pediatrician as 'socially awkward.' Furthermore, the perpetual litigation was preventing him from learning how to resolve conflicts properly and to engage in healthy relationships." *Id.* at 294 n.6.



Clinton further elaborated her opinion as follows: “[M]y impression of this child is that all of his energy goes into making sure that he says the right thing. That things are kept equal. That he does not hurt either one of his parents. All of this energy to please, to avoid conflict. He lacked the spontaneity that most children have. You know, what’s fun? What do you like to do? I mean [with] those questions this child was like a deer in the headlights. These are spontaneous questions . . . . I mean, how sad that a nine and a half year old can’t tell you what his interests are and what he likes to do. That’s an emotionally loaded question for this little boy, so his chances of developing a healthy relationship as an adult as he gets older are going to be—I think he’s at risk for being impaired. I mean, he needs to be protected, and if his parents can’t do this for him then somebody needs to.”<sup>26</sup>

The remainder of the appellate court’s opinion was devoted to explaining and approving the reasons given by the trial judge for terminating joint legal custody, refusing the father additional visiting time, and reporting the experts’ support for this decision. The opinion continued:

The court stated that, on the surface, [Ken’s] request for an additional two or four days a month with the child appeared both modest and reasonable. Nevertheless, on the basis of the testimony from the experts, which the court described as consistent, persuasive and compelling, the court found that such a modification was not in the child’s best interest. Specifically, the court determined that [Ken] would continue his ‘strategy of attrition by repeatedly asking for small increases in his parenting time . . . [that] encouraged him to seek yet more time.’ [Ken] failed to recognize the harmful effects of this strategy on the child.

The court stated that the child had been described as ‘vulnerable’ and that he devoted his energies to pleasing his parents rather than growing and developing into adolescence. The conflict between his parents also place the child between Scylla and Charybdis, that is, a proverbial classic dilemma of having to choose his way between the respective parent’s desires. Although the extra time itself would not harm the child, the court explained that it was [Ken’s] intention to use this gain as a springboard for future litigation. Specifically, the court stated that [Ken] had ‘given numerous signals that he will again seek additional parenting time in the future. Yet [the child’s] best interest requires an end to litigation between his parents.’ The small increment in parenting time sought did not cause harm, but rather it was [Ken’s] pattern of using these minor increases to fuel a perpetual cycle of future requests and corresponding litigation that resulted in damage to the minor child. In other words, it was not the individual increase viewed in isolation that was harmful, but the overall

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<sup>26</sup> *Id.* at 294 n.7.

pattern of a constant stream of requests, conflict and litigation that served to erode and negatively impact the health of the minor child.<sup>27</sup>

*B. The Daddio Case Analyzed*

The law makes irrelevant a determination whether Ken would be helped or Joann harmed (or emotionally bruised) by an award of additional parenting time for Ken—the only proper measure is the impact on the child. It is not my purpose here to try to make the incredibly difficult determination whether the child would have been helped or hurt by additional time with his father. To be sure, as in many custody cases, a legal doctrinal short-cut was available: both trial and appellate courts, relying on sufficient precedent, could simply have dismissed Ken’s petition for additional parenting time. The court could have relied on the standard, stability enhancing doctrine, almost a presumption, that judicial modification of a previous custody award requires some very substantial difference in the parents’ or the child’s situation (phrased in Connecticut as a “material change of circumstances”).<sup>28</sup> It would have been relatively easy for Joann’s counsel to find Connecticut cases which support such a presumption,<sup>29</sup> and for both the trial and the appellate court to cite them in a short opinion dismissing Ken’s petition. Indeed, the trial judge’s order circumscribing Ken’s future modification motions may have been designed, with the parents’ approval, to control Ken’s future efforts to expand his parenting role in a more conclusive fashion than the standard restrictive modification rule. Ken’s penchant for litigation, apparently so unsettling to Joann and to the varied participating professionals, could have been deterred by the trial judge’s order without withdrawing from Ken the designation of joint legal custodian, a symbol of parental power he obviously deemed vital to his self image. Why did the trial court go to the trouble of hiring three experts and imposing the financial and emotional cost (not to mention the judicial time) required to conduct three expert pre-trial examinations and what appears to have been a fairly lengthy trial?

It seems clear that child custody wars impose enormous heartache and expense on the parents and their children, and perhaps also on the parents’ lawyers and the judges who have to listen to and decide the parents’ controversies. But for the moment ignore the heartache and expense of the litigation. What were the real issues and were the trial and appellate judges justified in resolving them as they did? Many commentators, lawyers and judges as well as social scientists, would agree that spousal conflict is not good for the children who are both the subjects of

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<sup>27</sup> *Id.* at 300-01 (citation omitted).

<sup>28</sup> CONN. GEN. STAT. ANN. § 46b-56 (West 2005).

<sup>29</sup> The *Daddio* opinion cites a variety of Connecticut cases supportive of the accepted practice of limiting modification. *See supra* note 23 and accompanying text. *See also* U.L.A. Marriage and Divorce Act § 409(a) (1973) (“No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe [that some condition more onerous for the child than the usual ‘change of circumstances’ rule contemplates has occurred].”).

the conflict as well as its observers. There is no doubt that many, and probably most, lawyers and counselors try to persuade parents, whether they are divorcing or divorced, to minimize their personal as well as their legal conflict.<sup>30</sup> Even without reviewing in detail the expert reports and trial transcript in the *Daddio* case, it is not difficult to notice the family relations counselor's antipathy to Ken's continuing use of (and, it is claimed, future plans for) litigation to obtain more time with and parental control of his son. Ken's methods persuaded the counselor (and, the opinion implies, the psychologist as well) that Ken's "need to spend more and more time" with the child caused him to "[lose] sight of the child's best interest and instead [to focus] on his [parental] need. . ." But Ken's desire to increase his time with the child could be viewed in a variety of ways: healthy or "sick" parenting need, properly parental or manipulative concern about Joann's parenting or desire to drive her crazy, responsibly seeking to serve the child's needs or psychopathically seeking to undermine Joann's parenting and/or the child's stability. Any of these alternatives could be the actual (the "real") motivator of Ken's behavior—even if the "small increment in parenting time sought" would be extremely unlikely to "cause harm." These contrasting possibilities could not be ignored, of course, by anyone seeking to assess the family's emotional situation. The assessment would be difficult because the child, the person whose "welfare" needed to be assessed, was disposed to give (or an observer could be convinced that he was disposed to give) answers to appropriate questions about his custodial care which "lack spontaneity," answers designed to avoid hurting either parent, to keep "things" "equal" during the legal conflict. Then there is the impact of the controversy on the child and his future. The family relations counselor concluded that the father's behavior created at least a chance that the child would grow up with impaired ability to develop "a healthy relationship as an adult"—a pretty serious allegation, even discounting for the known accuracy risks predictions about

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<sup>30</sup> There is considerable dispute in the legal and social science literature about divorce as to the amount of harm to children produced by parental conflict as well as the extent to which that conflict is caused and/or magnified by divorced parents' lawyers. *See, e.g.*, NICCCL, *supra* note 2, at 3-10, 26-29; Lynn Mather, et al., *The Passenger Decides on the Destination and I Decide on the Route: Are Divorce Lawyers' Expensive Cab Drivers?*, 9 INT'L J.L. & FAM. 286 (1995). There is no doubt that many of the legislative and judicial "reforms" of divorce law in recent decades—family courts and mediation, for example—have been motivated by a desire to lessen divorcing spouses' hostility and dispute. *See also* sources cited *supra* note 2. For a sampling of the voluminous literature claiming and denying that divorce lawyers promote "adversarial" and therefore conflict-filled divorce, compare Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCH. 323 (2001), with Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs and Desires of Litigious Parents*, 7 PEPP. DISP. RES. L.J. 501 (2007) and Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 501 (2004-05).

personal, especially emotional, futures entail.<sup>31</sup> And, any lengthy and complex iteration of the psychological “issues” (the contestants’ motives, the variety of possible “best interests” resolutions) must be followed by an even longer listing of the possible impacts of the alternative resolutions under variant and unpredictable future circumstances. How can the trial judge choose, or the appellate court approve or reject a trial judge choice: allowing Ken more days’ visitation with his son monthly but less than he asked for; ordering fewer visitation days than presently authorized because Ken’s “strategy of attrition” was harming the child by compelling him to choose between supporting Ken’s wishes and Joann’s opposition; denying additional visitation despite Ken’s pain because Joann’s custodial distress if Ken’s petition is granted would be more harmful to the boy? Are these questions answerable? And, if so, by whom? Can they be answered by the “experts” judges can hire as family relations counselors? By these experts? We know who will answer the questions ultimately—judges will, if parents and their lawyers won’t.

Might the reader be interested in another interpretation of the evidence, an interpretation at two degrees of separation from the actual facts (rather than only the one degree from which the *Daddio* trial judge was making inferences and drawing conclusions)? Judge Levy (temporarily robed) would have denied the motion without experts or a hearing, without any of the judicial aids, because the petitioner, at least as far as the opinion reported, offered no evidence of any change of circumstances, much less one sufficient to justify a modification of a custody decree. But, if inferences can be drawn from the investigations and hearings that were conducted, ad hoc Judge Levy suspects the following: the father was forceful, abrasive and self-righteous in asserting his interest in his son’s present and future welfare; the family relations counselor was likely threatened by the father’s passion, pushiness and hostility to people taking his former wife’s side despite the harm her “protecting” the child from him seemed to him to be doing to the boy; Ken’s aggressiveness made him an annoyance for anyone who came close to the case; yet one cannot help wondering how much harm a couple of extra days of visitation could possibly do to the boy or to his mother; the boy failed to oppose—and extra weight should be given to a child’s wishes expressed privately to the judge, if they can be believed, by the time he is nine years old. So, Judge (the imposter) Levy would order the extra days of visitation, make Ken pay for transportation, reinforce the earlier motion-limiting term, already accepted by the parents, by imposing on Ken an onerous tax on any future effort to seek additional amendments. Would Joann have appealed this resolution? Probably, if she was as

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<sup>31</sup> See, e.g., NICCCL, *supra* note 2, at 9-10 (recommending that family court judges avoid “reliance on exaggerated rhetoric by experts of danger to children from one or another mistaken placement refusing to rely upon over-confident predictions by expert advisors or witnesses about a child’s future.”). “Yet because prediction is so uncertain an activity modesty must be the watchword for evaluators, and caution the watchword for those courts they advise.” *Id.* at 72.

litigious as Ken. Would the boy have been better off? Judge (the imposter) Levy doesn't make predictions!

### III. EXTRA-JUDICIAL AIDS TO JUDICIAL CUSTODY DECISION-MAKING

Judges employ family relations counselors, psychologists, psychiatrists, guardians *ad litem*, and the like, to help them decide difficult issues which are highly emotional, perplexing to the children and vital to the parents. But, consider some factual hypotheses. Suppose the family relations counselor, when he was a boy, was shipped from his divorced mother to his divorced father against his wishes? Suppose the counselor had a domineering father who insisted that he forgo fun with his schoolmates or siblings to spend time helping tend the family store? Or suppose as a boy the counselor wanted desperately to spend more time with his father than his mother would allow, or had a dear cousin whose father neurotically controlled his children's time and activities? Perhaps the person appointed guardian *ad litem* has had family experiences or holds values that unduly influence his or her judgment about the dispute between Joann and Ken or about one of the psychological issues underlying the struggle over their son? The court appointed psychologist, one or both of the lawyers, perhaps the judge, may hold values or have had experiences which bear on and influence their perceptions or judgments. The judge may have had to decide a similar case, or, especially relevant to Ken and Joann, a series of cases in which an obnoxious and pushy father's efforts to bully his former wife to obtain additional visitation succeeded both in alienating the wife and enraging the judge; or a succession of divorced wives resisting what the judge considered reasonable visitation may have disposed the judge to look with suspicion on any effort by a wife to oppose visitation expansion. There is no doubt that judges can be and often are influenced (unduly?) by both their backgrounds and prior experiences as well as the findings of experts hired to advise them and to testify in their courtrooms. Family relations counselors, psychologists, psychiatrists can all be influenced, consciously or inadvertently, by their life experiences and their values.

There is certainly substantial evidence that custody investigation reports have occasionally reported facts about the parties inaccurately:

In one of the few . . . empirical analyses of custody evaluations by a court-attached social agency, one case was reported in which an evaluator's failure to provide full information about the physical care of a two year old child and the emotional circumstances of the child's twenty five year old mother might well have made a difference to the outcome of the custody litigation. The evaluation recommended that the mother continue to have physical custody of the child despite the fact that the child was living with her great grandmother (whose age was never disclosed) five days a week while the mother lived by herself and worked as a cocktail waitress five nights a week. The evaluation did not disclose that the mother had left town on her own three times (once to the

west coast three weeks after the spouses separated). The evaluation disclosed that the mother had been hospitalized thirteen months previously, supposedly for “counseling largely around problems centering in the marriage relationship,” and indicated that a medical report had been requested but not received. The evaluation did not disclose that the hospitalization had been for “weight loss and depression,” the attending psychiatrist had reported that the mother indicated “great conflict about taking care of [her child]” and was “running around,” and that the psychiatric diagnosis was “reactive depression superimposed on a sociopathic personality.” The mother’s psychiatrist’s letter to the evaluator indicated that the evaluation deadline was dated one day after the evaluator’s letter was mailed to the psychiatrist.<sup>32</sup>

Perhaps more important to an evaluation of the utility of custody investigations is the extent to which investigator values influence the shading, and therefore the impact on fact finders, of the facts reported as well as the investigator’s inferences from those facts:

Some of the reports convey an impression familiar to divorce lawyers accustomed to custody investigations, one that is difficult to describe or to identify objectively in any individual report: an assumption that the caseworker’s standards—of child care, say, or housekeeping, or personal behavior—are equally proper evaluation measures for client populations. The existence of such “value impositions” should not surprise. It is by now a commonplace of custody adjudication that the “indeterminacy” of the substantive standard allows the decision maker discretion to impose personal values, and that decision makers do (and perhaps must) impose their own values. Yet if one is willing to credit casual remarks in the reports as well as emphases read between the lines, some of the personal value assumptions underpinning some of the recommendations in these reports are unusually idiosyncratic and not among those “mainstream” child development values emphasized in the academic and professional literature about custody and parent-child relationships. There were simply too many reports that referred to such

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<sup>32</sup> NICCCL, *supra* note 2, at 338-39 (quoting Levy, *supra* note 1, at 741-43). The investigator’s preference for the mother may have been based on the mother’s amenability to counseling, by the investigator as well as the mother’s agreement to be counseled by a professional. *See id.* at 339 n.100. *See also* Levy, *supra* note 1, at 749-50 (reporting a case in which the investigator described a parental dispute as to the source of a mother’s venereal disease. The investigator reported that “it seems to me a matter of judgment as to who was first responsible for this disease.” But the investigator had in her file an earlier letter from the mother’s doctor indicating that the father had called him in advance of the mother’s visit to warn the doctor that he had infected his wife after having been infected himself on a recent business trip).

matters as the couple's unsuccessful management of their financial affairs, that drew attention to the quantity rather than the quality of parenting time each parent would likely spend with the child, that allowed the impression that the recommendation rested more on the caseworker's dislike for one of the spouses than on any other consideration, that manifested a disquieting concern with personal appearance and/or cleanliness, or that hinted at an even more disquieting use of differential standards for minority race families and racially mixed couples.<sup>33</sup>

Appellate case law can easily be found documenting custody investigator bias.<sup>34</sup> Even the most extensively trained mental health experts can allow their histories and subjective values to influence their judgments. Consider "the reports of one evaluator [a child psychiatrist], for example, [which] reflect his belief in

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<sup>33</sup> Levy, *supra* note 1, at 751-52 (footnote references to cases in the sample illustrating these observations excluded). *See also id.* at 758-63 (investigators' emphasis in recommendations on mothers' sexual misconduct despite court decisions minimizing the importance of such behavior for assignments of post-divorce custody).

<sup>34</sup> *See, e.g.,* Patel v. Patel, 555 S.E.2d 386, 388-89 (S.C. 2001) (guardian ad litem's actions and failure to investigate so tainted trial judge's decision granting custody to father as to deny mother due process of law; guardian did not keep notes of investigation and did not produce written report, contacted husband's lawyer nineteen times but never contacted wife's counsel, did not feel comfortable with wife so did not meet with her although she met with children while in husband's care; guardian "did not conduct an objective, balanced investigation [and] did not afford each party a balanced opportunity to interact with her"; decision establishes guidelines for custody investigations until legislature addresses the issues); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004) (applying rules established in *Patel* and subsequently confirmed by legislature). *But see* Brown v. Brown, 877 So.2d 1228, 1237-38 (La. Ct. App. 2004) (trial court order granting custody of thirteen-year-old daughter to father rather than mother was affirmed; trial judge said to mother on hearing testimony that mother had authorized daughter to have her bellybutton pierced, "Hooray for you"; in announcing his decision the trial judge commented adversely on the mother's sexual activities, especially in "the back end of a car at a bar" and, as to the naval ring: "That's just shocking to this Court. I see it happening. I see it on movies and rock movies. But, I didn't realize it happened in our community."); Goberville v. Goberville, 694 N.W.2d 503 (Wis. Ct. App. 2005) (trial court erred in relying exclusively on guardian ad litem's recommendations because the recommendations were not based on contemporary fact finding but relied on investigation performed before a significant change in children's visitation practices). *Cf.* J.M. v. D.V., 877 So.2d 623 (Ala. Civ. App. 2003) (no prejudice to mother denied custody because court appointed judicial advocate ("CAJA") tried to rent house to father during custody investigation, because, on mother's motion, the trial court removed the advocate, although the subsequent appointee relied in part on his investigation and conclusions); Burk v. State, 156 P.3d 423 (Ariz. Ct. App. 2007) (court dismisses mother's civil rights suit against court employee who recommended that father become custodial parent of the couple's children despite mother's claim of employee's religious prejudice because the court employee was entitled to absolute immunity from the suit).

very little contact between parents and children, as well as his difficulty recommending custody to any parent who kisses his or her child on the lips.”<sup>35</sup> Even trial judges can be unduly influenced by their values and past experiences:

Trial court willful departures from legal norms in divorce cases are not difficult to find. Perhaps it will save space simply to illustrate the point with a recent decision of the Michigan Supreme Court . . . The court resolved intermediate appellate court inconsistencies and held that the divorce statute allows consideration of fault in apportioning marital property. The decision was nonetheless remanded because the trial judge had awarded 75 percent of the marital property to the husband solely because the wife’s extramarital affair caused the breakup of a 26-year marriage. The trial judge, who admitted that he divided marital assets equally in the absence of fault, had commented [on the record]:

*I have done some research; and as much as I want to punish some people in a divorce, I find out that these appellate judges, who don’t try divorce cases, say that it’s just unfair.*<sup>36</sup>

Indeed, there is evidence of factually inaccurate reporting by family investigators, and biased analyses by social workers, psychologists and psychiatrists based on conscious and unconscious motivations, attitudes and values. Similarly, it cannot be doubted that judicial decisions in divorce cases are influenced by the judge’s personal values.<sup>37</sup>

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<sup>35</sup> See NICCCL, *supra* note 2, at 346.

<sup>36</sup> Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 198 n.24 (1993) (internal citation omitted). See also *Goberville*, 694 N.W.2d at 507 (“The trial court began by expressing faith in the reports of guardians ad litem. ‘The lawyers know it takes an awful lot to persuade me that the guardian ad litem is wrong. The attorneys that do this in Eau Claire do it very seriously [and] make every effort to be accurate in their reports to the court so I don’t need more testimony.’”).

<sup>37</sup> For some dated support for the statements in the text, see generally Robert J. Levy, *Custody Investigations in Divorce Cases*, 10 AM. B. FOUND. RES. J. 713 (1985). See also Thomas R. Litwak et al., *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269, 283, 297 (1979), who acknowledge, despite their support for mental health expert testimony in custody cases, that:

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. . . . [Opponents argue] that psychological judgments are subject to bias and often are colored by the values of the diagnostician. That is demonstrably so. It is of the utmost importance therefore that psychological witnesses describe the data and specify the logic upon which they base their conclusions regarding an individual’s personality and level of functioning.



An important aspect of the education and training of at least some mental health professionals who undertake custody investigations includes emphasis on understanding the extent to which their personal histories and values may influence their observations and advice—but the training demonstrably does not, cannot, obviate every instance of personal history- or value-influenced observation and advice. (Consider again the therapist who disapproves parent-child expressions of affection by means of kissing on the lips.) Moreover, lawyers and judges, and in most cases social workers, are given no such training. Everyday life helps many people to differentiate their own needs and values from those of others with whom they deal. But, subjectivity is part of the human condition. The important question is what to do about the subjectivity that inevitably remains. With judges, the path is obvious: judges whose personal experiences and values are (or even may be) implicated in a specific custody case should recuse themselves; lawyers should overcome their traditional hesitance to give a judge any reason to dislike them and

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*See* NICCCL, *supra* note 2, at 344-49 (delineating reasons in addition to “values” for examining the possibility that mental health expert testimony may lack objectivity: “retainer bias” (e.g., fee retainers from the parent who hired the expert) and “bias based on noneconomic factors” (such as past personal or professional relationships with a litigant or a friend or relative of a litigant)).

Consider also the heated controversy in professional circles as to whether in divorce/custody cases courts should appoint only one “independent” mental health expert rather than following the traditional practice of allowing (or requiring) each of the litigants to hire his or her own expert. Lawyers, judges and even mental health experts are hopelessly in conflict about this issue. *See* NICCCL, *supra* note 2, at 347-49. For an interesting debate on the relative merits of court-appointed, independent versus party-retained, “adversarial” experts, see *Rosenblitt v. Rosenblitt*, 486 N.Y.S.2d 741, 744 (N.Y. App. Div. 1985) (“A disgruntled litigant should not be permitted to thus compel an adversary to join in his or her efforts to shop around for favorable expert testimony.”). The dissenters claimed that

The art or science of psychiatry is not so precise that the opinion of a single ‘impartial’ expert resolves all issues. . . . Unless we intend to dispense with the adversarial process as we know it, it is to be expected that parties will continue to seek the services of experts in the expectation that the views of these experts will support the retaining parties’ positions. While it is hardly a secret that this system contains the seeds of venally induced distortion, the cure lies not in the abolition of the system, but in the factfinder’s ability to evaluate the potential bias when considering expert testimony.

*Id.* at 746-47 (Lazer, J., dissenting). The controversy was described and the opinions are quoted in NICCCL, *supra* note 2, at 349 n.29.

Consider also “Judge” Levy’s visitation decisions for the *Daddio* case. *See supra* note 32 and accompanying text. The opinions might certainly be questioned because of his frequently acknowledged suspicions about family court judges’ objectivity, court-connected mental health experts’ biases, or even his suspected sympathy for divorced fathers’ efforts to share parenting with their former spouses and how such efforts have been short-changed by judges.

should seek recusal of judges whose objectivity in a particular case might be doubtful. Of course, recusal cannot solve the bias problem if lawyers do not know enough about judges' backgrounds and their values to make intelligent decisions as to whether the judge should sit. Moreover, judges have traditionally been hesitant to recuse themselves or grant party motions to recuse them.<sup>38</sup> The background educations, even the values, of mental health professionals can be explored and questioned in pretrial discovery; but most mental health professionals who testify regularly are as skilled at repelling hostile cross-examinations regarding their credentials as they are at defending against attacks on their conclusions in individual cases. And investigating the backgrounds and values of the many lawyers, social workers, psychologists and psychiatrists who make appearances in divorce cases and post-decretal custody disputes is far beyond the time available to most divorce lawyers, much less the budgets of most divorcing spouses. (Try to estimate the charges of the three experts in the *Daddio* case and how much and how quickly they were paid.)

Are we at an impasse, then? Perhaps not. Lawyers "know their customers" when they choose mental health professionals to testify for their clients and should know how to prepare them for cross-examination; and at least the lawyers who specialize in divorce-custody litigation know the backgrounds and often the general outlines of some of the testimony in prior cases and many of the individual dispositions of the local mental health professional population. We could construct rules allowing lawyers to recuse particular court-attached custody investigators in much the fashion they can recuse judges they suspect to be insufficiently objective in a particular case or with respect to a particular issue. In-service training requirements for court-attached social workers, psychologists as well as judges might also be helpful.<sup>39</sup> We should reject out of hand the proposal, one that

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<sup>38</sup> In those few jurisdictions which still allow lawyers in each case "one bite at the apple," e.g., the right to recuse the first judge assigned to the case without assigning reasons, this proposal might help to minimize value impositions. However, it might not help in Family Courts where judges are assigned to divorce-custody cases for substantial periods and are able to discover from the clerk's office (as one judge, now retired, in Minneapolis did regularly) the names of lawyers who have recused them.

<sup>39</sup> In service training for lawyers, judges, and court-attached mental health specialists, is not uncommon. Some of the educational endeavors are manipulatively devoted, in large part, to efforts to influence audiences to adopt some particular judicial approach to a particular problem or set of problems. *See, e.g.,* R. CAGE ET AL., ADJUDICATION OF CASES INVOLVING ALLEGATIONS OF CHILD SEXUAL ABUSE (Florida Coll. of Advanced Judicial Studies ed., 1997) (on file with author). The impression gathered by the author from attending family law continuing education sessions for judges in one state is that they tend to be superficial and self-serving—that is, they focus either on the extensive skills of and the broad discretion needed for whatever experts or judges are lecturing the particular audience. The author has never observed a training session focused on the risks to objectivity of the very emotional atmosphere of divorce cases, much less the need for, or the methods for seeking, objectivity in observation, analysis and decision making. An interesting experiment would be to create a continuing legal education course for practicing lawyers, court-connected custody investigators and judges, taught by a qualified mental

occasionally surfaces in larger family law circles, that mental health issues should be left to the discretionary exploration of and decision by mental health professionals.<sup>40</sup> The fact that divorce jurisdiction judges have extensive powers and may be dangerous to families if uninformed and unaware of their personal biases is certainly true; but both democratic theory and common sense command continuing commitment to judicial process in divorce cases. There have been more radical proposals. Professor Shuman, complaining that “the role of mental health professionals in custody litigation is being transformed from expert as expert to expert as judge,” argued:

If society wishes to use mental health practitioners as experts in child custody cases, the law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change. . . .<sup>41</sup>

The implicit claim is that custody investigators and their investigations substantially determine too many judicial decisions in contested custody cases in an undemocratic fashion, especially in light of the fact that the investigation findings and recommendations are based on unscientific criteria. However, there are two objections to this notion. First, it is far from clear that judges heavily rely on investigators’ value-laden and scientifically unsubstantiated

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health professional from another jurisdiction, using materials created from a series of custody investigations, properly rendered anonymous, conducted in the local jurisdiction. See Levy, *supra* note 1 (cases collected involving custody investigations). Obviously, care would have to be taken in choosing the trainer; and tact would be required to avoid the choice of any trainee’s good friend or favorite “shrink.”

Most professional associations whose members conduct custody investigations have sponsored and adopted guidelines for conducting such investigations. Sponsoring agencies include the American Psychological Association, the Association of Family and Conciliation Courts, and the American Academy of Child and Adolescent Psychiatry. See Emery et al., *supra* note 5, at 24. See also David A. Martindale, *Reporter’s Foreword to the Association of Family and Conciliation Courts’ Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 61, 68-69 (2007); Virginia H. Luftman et al., *Practice Guidelines in Child Custody Evaluations for Licensed Clinical Social Workers*, 33 CLINICAL SOC. WORK J. 327 (2005).

<sup>40</sup> See Andrew S. Watson, *Children of Armageddon: Problems of Child Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 79 (1969) (recommending appointment of “behavioral science ‘judges’” to sit with legally trained judges in custody cases).

<sup>41</sup> Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAMILY L.Q. 135, 160, 162 (2002). Professor Shuman’s claims and conclusions are quoted and approved in Emery et al., *supra* note 5, at 20.

recommendations;<sup>42</sup> additionally, it is not unlikely that in many cases the investigators' recommendations are based substantially on value-suppositions and hypotheses they know are shared by the judges.<sup>43</sup> If it is true that the values judges would impose on custody litigants are the same as those that infuse the jurisdiction's custody investigations, litigants may be better off relying on custody investigators, to the extent judges follow their recommendations, because there is not the slightest chance that values about family life and parental care of children are at any time soon going to be completely eliminated from custody law.<sup>44</sup> Nor should they be eliminated—as even a simplistic compilation of hypothetical cases

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<sup>42</sup> Levy reports the judicial results in the only effort to examine a sample of actual custody investigations in one jurisdiction during one year. Drawing inferences from Levy's data is complicated by the fact that the cases studied had to be separated into categories based upon whether the case was actually litigated, settled at the last minute with the judge's input, or settled by the parties and their lawyers after an investigation. *See* Levy, *supra* note 1, at 731 n.68:

(In cases where the report made a specific recommendation, the children were a little more likely to end up in the custody of the recommended parent in 'consensual with c/i cases' . . . than they were in 'contested with c/i' cases. . . . Of 42 recommendations, 36, or 86%, were followed in 'consensual with c/i cases' (although only 60 % of those recommendations were that the mother be awarded custody); but only 10 of 18 recommendations, 55%, were 'followed' by the judge in 'contested with c/i' cases (although the percentage of mother recommendations in this category, 55%, was about the same as in the 'consensual with c/i' group). In contested cases, recommendations that the temporary custodian [the parent awarded custody in a temporary hearing or chosen by the parents when they separated] be awarded custody were much more likely to be followed than recommendations of other possible custodians (75% of the 8 temporary custodians recommended compared to only 33% of the 8 spouses recommended who were not temporary custodians). Similar proportions held in 'consensual with c/i' cases. Overall, more than 75% of the reports recommended that the temporary custodian be awarded permanent custody.).

Thus, the picture of the "success rate" of custody investigator recommendations is murky.

<sup>43</sup> The case workers' recommendations were considerably more successful when they were premised on values the judges were likely to share. *See id.* at 753-78 (influence of presumption favoring mother, disqualification for sexual misbehavior, and emotional and relational criteria on investigators' recommendations). *See also supra* note 34 and accompanying text. An additional fact of life in the custody trenches is that Family Court judges see a great deal of the professionals who perform custody investigations and are likely to have invested psychologically in their professional competence and the wisdom of their recommendations (and, of course, to a much greater degree than the judges are likely to trust the advice and recommendations of the litigants' lawyers).

<sup>44</sup> *See also supra* notes 37-38 and accompanying text.

would make clear.<sup>45</sup> Finally, in at least some cases, investigations add to the efficiency of custody litigation—by persuading the spouse who “loses” that his or her spouse deserves to have custody of the children, or that the reported “loser” cannot possibly win and should therefore save his or her contribution to the cost of the study.<sup>46</sup> In these cases lawyers, judges, both parents, and even the children (if those who believe in the evils of conflict are correct) are all better off.<sup>47</sup>

The most common recommendations for improving custody decision making include encouraging divorcing parents to make their own deals as to their children’s custody so that judges will not have to make them.<sup>48</sup> There is nothing wrong with this proposal—and nothing new. Almost every empirical study of divorce/custody law has concluded that only somewhere between ninety and ninety-five percent of the cases are decided by the parents with the help and advice of their lawyers and without any intervention by the legal system.<sup>49</sup> These proposals, though, are almost always adjunct to proposals for greatly expanded use by parents of court or privately provided mediation to help ameliorate what are claimed to be the consequences of the dispute and hostility producing qualities of the “adversary system.”<sup>50</sup> There continues to be considerable controversy as to the comparative efficacy as well as cost effectiveness of mediation as a conflict minimizing device in divorce cases.<sup>51</sup> Another common recommendation for ending or minimizing judicial reliance on the vagaries of custody investigations is that the courts or the legislatures should adopt a “clear custody standard” such as the “approximation” standard originally proposed in a law review article<sup>52</sup> and later adopted in the American Law Institute’s Principles of the Law of Family Dissolution.<sup>53</sup> Although the A.L.I. standard has been adopted in one state,<sup>54</sup> it has

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<sup>45</sup> Consider the divorcing husband who has been devoted during the marriage to the couple’s children despite the fact that he has known the older child was fathered by another man prior to the couple’s marriage; when the mother leaves the husband and reunites with the child’s father, the father (husband?) begins to treat the older child with extreme hostility. Or, consider the mother who is the dominant caretaker of the pre-school child but locks the child in her room every afternoon while the mother plays bridge.

<sup>46</sup> See Levy, *supra* note 1, at 793 (In at least some of these cases lawyers for the “losing” spouse may have suggested the investigation precisely to persuade his or her client not to contest custody.).

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

<sup>48</sup> See, e.g., Emery et al., *supra* note 5, at 20.

<sup>49</sup> See *supra* note 1 and accompanying text.

<sup>50</sup> Emery et al., *supra* note 5, at 20-22.

<sup>51</sup> See *id.* at 21-22 (claiming that carefully designed empirical studies have shown that mediation settles custody conflicts more quickly and with greater parental satisfaction than a randomly selected “adversary settlement group.”). For an opposing view of the utility and cost of mediation, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

<sup>52</sup> See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630 (1992).

<sup>53</sup> See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

not received widespread or enthusiastic academic support<sup>55</sup> and, given what we know about judges' values and decisional proclivities in custody cases, is unlikely to receive enthusiastic judicial or legislative support.

#### IV. CONCLUSION

Divorce custody litigation has been a social success. Despite the continuing complaints of participants—judges, lawyers, social and behavioral experts, the parents—the vast majority of couples who want to terminate their marriages and allocate control and responsibility for their children have been able to accomplish their goals relatively efficiently. And, if the law and government actors have not been terribly successful or efficient in resolving parental custody disputes that the parents' lawyers have not been able to settle, it has not been for lack of trying. Custody litigation is difficult, emotional, and unrewarding, for all participants (even financially, lawyers claim, because of the extraordinary time custody litigation takes). There is no doubt that social and behavioral science experts can be helpful in resolving at least some of the most difficult cases. Yet for all participants modesty in analysis, in prediction, in recommendations, in judicial judgment, must be an essential element of the enterprise.

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<sup>54</sup> W. VA. CODE § 48-11-604 (2001).

<sup>55</sup> See, e.g., Robert J. Levy, *Custody Law and the A.L.I.'s Principles: A Little History, a Little Policy and Some Very Tentative Judgments*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 57 (R. Fretwell Wilson ed., Cambridge Univ. Press 2006).