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**Matrimonial Lawyers**



**THE USE OF EXPERTS IN  
FAMILY LAW CASES**

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This issue is devoted to:

**THE USE OF EXPERTS IN FAMILY LAW  
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## About This Issue

Many family law attorneys report that they are increasingly relying on experts as they prepare and present their cases. Accordingly, it seemed like a fitting topic for our current issue. Included are articles that examine how to work with experts for children with special needs as well as child custody evaluators and guardians ad litem. Other articles explore the legality and admissibility of intercepted electronic communications, how to handle foreign bank accounts in a divorce action, how to enforce foreign judgments and how to present evidence of domestic violence in a Hague abduction case. There are also articles related to legal issues raised by assisted reproductive technology and high conflict child custody cases.

Our Issue Editors are Laura Davis Smith and James Nolletti. Ms. Smith is a principal in the Coral Gables, Florida marital and family law firm of Davis Smith & Jean, LLC. Admitted to practice in Florida, Georgia, and Massachusetts, Ms. Smith is a past Chair of the Family Law Section of The Florida Bar, and presently serves as the Secretary of the Florida Chapter of the American Academy of Matrimonial Lawyers. Mr. Nolletti, the founder of Nolletti Law Group in White Plains, New York has earned board certification as a family lawyer trial advocate from the National Board of Trial Advocacy. He is also a founding member of the New York Chapter of the American Academy of Certified Financial Litigators, a group of divorce litigators dedicated to professional development and effective advocacy in cases involving complex financial matters. He has been selected for inclusion in New York SuperLawyers since 2008 and Best Lawyers in America since 2014.

Our first article entitled, *Cross-examining Experts in Child Custody: The Necessary Theories and Models . . . With Instructions* by Milfred D. Dale, Jonathan Gould and Alyssa Levine, articulates a comprehensive view of the processes, models, and theories related to cross-examination of child custody experts. It is written for attorneys faced with the task of examining and cross-examining such experts. It examines the unique demands of family law where cases are tried before a judge who has often ordered a child custody evaluation by a third-party neutral expert. Dr. Dale is an attorney and psychologist from Topeka, Kansas whose work, and scholarship focuses on child custody and family law. He performs child custody evaluations and consultations and practices family law. He is board certified in clinical child and adolescent psychology and is a nationally recognized scholar and speaker on best interests of the child topics including attachment, alter-

native dispute resolution approaches, attorney-expert relationships, evaluations, and ethics. He is available at drbuddale@outlook.com. Jonathan Gould is a board certified forensic psychologist from Charlotte, North Carolina who conducts child custody evaluations and provides litigation support and consultation to attorneys across the country. He may be reached at jwgould53@gmail.com. Alyssa Levine, also from Charlotte, is an experienced divorce litigator as well as a trained collaborative attorney and parenting coordinator. She focuses her practice on family law cases, including for military and LGBTQ+ families. Her practice also includes civil domestic violence, no contact orders and guardianship cases. She may be reached at alevine@alysalevinelaw.com.

Our next article is by Nicholas G. Himonidis and is entitled, *Digital Espionage in Matrimonial Cases: Drawing the Line Between Legitimate Self-help and Unlawful Interception of Electronic Communications*. The article discusses the various state and federal laws that criminalize electronic hacking and surveillance and give rise to other liabilities and sanctions. It also discusses the limited circumstances in which “self-help” may be legal and attempts to distinguish those situations from the unlawful interception of ESI in the form of electronic communications under applicable law. He points out that intercepting the electronic communications of a current or estranged spouse (or anyone else), without the consent of at least one of the parties to the communication, is criminal, sanctionable, gives rise to monetary damages, and usually results in evidence that is inadmissible. Mr. Himonidis, an attorney who has litigated cases in both state and federal courts, has thirty years of experience in fraud investigations and computer forensics. He is currently the President / CEO of The NGH Group, Inc., specializing in complex investigations, digital forensics, e-Discovery, cryptocurrency and blockchain forensics, and cyber security. He has been qualified in court as an expert witness numerous times, including in high profile matrimonial and custody matters, has lectured extensively, and has published numerous articles on various technical, investigative, and legal topics.

Sarah E. Kay and Maria C. Gonzalez contributed our next article entitled, *Working with Experts and Families with Special Needs Children*. In it they provide a checklist of potential experts or professionals that can assist families in a variety of challenging issues relating to children with special needs or disabilities. They discuss how to best approach a case and identify which experts attorneys should consult with and which documents they should consider reviewing. They focus on guidance in cases with families with special needs children who are either separated or divorcing, both inside and outside of a courtroom setting. Their article also provides an overview to familiarize the reader

with basic terminology of childhood conditions. Lastly, they examine the development of appropriate parenting plans and resources available to assist families. Both Ms. Kay and Ms. Gonzalez are Board Certified in Marital and Family Law by The Florida Bar and are Florida Supreme Court Certified family law mediators. Ms. Key is the Secretary of the Family Law Section of The Florida Bar and a Past President of the Hillsborough Association for Women Lawyers. Ms. Gonzalez is a Fellow of the Florida Chapter of the Academy and is past-Chair of the Family Law Section of the Florida Bar.

Our next article is *Enforcement of International Foreign Judgments, Is That Even a Thing?* By Elisha D. Roy. Its purpose is to provide information regarding those procedures that are the most effective and generally the most successful in enforcing foreign judgments. The discussion focuses on a number of uniform acts from the Uniform Laws Commission (ULC) (previously the National Commission on Uniform State Laws (NCCUSL)), that were developed to make it much easier to enforce not just judgments between states, but judgments from foreign jurisdictions as well. In addition, the article discusses the concept of comity, inherent in the uniform laws, but also an independent common law concept. The author focuses specifically on the types of orders that are likely to be enforced in dissolution of marriage actions, such as property settlements, support orders and child custody orders. Ms. Roy is a partner at Sasser, Cestero & Roy, P.A., in West Palm Beach, specializing in complex financial and child related case work. She is the past Chair of the Family Law Section of the Florida Bar and President Elect of the Florida Chapter of the AAML.

In *Playing Catch with a Hand-Grenade: How to Deal with an Unreported Foreign Bank Account in a Divorce*, Bryan C. Skarlatos and Caroline Rule summarize the reporting requirements for United States taxpayers who have an interest in one or more foreign bank accounts and describe the issues regarding criminal and civil penalties that are presented by such accounts that are unreported. They review case law, including two recent divorce cases, which suggest that courts are inclined to rule in favor of the government when it seeks to collect civil penalties assessed by the IRS for failure to report a foreign account. Relevant to divorce cases, they explain how these civil penalties do not apply jointly and severally even if spouses filed joint income tax returns, but also how the same penalties may apply separately to each spouse. Finally, the article reviews the alternatives that spouses with unreported foreign accounts should consider when deciding how to proceed and they set out a simple, straightforward framework for deciding what to do when an unreported foreign account surfaces during a divorce proceeding. Bryan C. Skarlatos has, for more than thirty years, represented individuals and corporations in civil and criminal tax

controversies, white collar criminal matters, regulatory investigations, tax whistleblower cases and voluntary disclosures. He is often hired as an expert on tax standards, penalties and procedures and he is an adjunct professor at NYU School of Law. Ms. Rule, a graduate of Yale Law School, defends clients' lives and businesses when they face civil and criminal fraud allegations. She serves as the Chairman of the Tax Crimes Subcommittee of the ABA Litigation Section, is a member of the New York Council of Defense Lawyers, the Federal Bar Council Sentencing Reform Committee, and the Federal Bar Inn of Court.

The confusion surrounding the role of a guardian ad litem and the ethical rules that flow from that role is expanded upon by Jacqueline M. Valdespino and Laura W. Morgan in their article entitled, *Guardians Ad Litem: Confidentiality and Privilege*. The article addresses the confidentiality of conversations with a guardian ad litem, the degree to which, if any, the guardian ad litem is a holder of the child's privilege and a related but distinct issue – whether the guardian ad litem can pierce privileges held by the parties. They argue that waivers of privilege by the parties should be unique and tailored to the particular case. And that, if the mental health of the child or a party is in issue, the first resort of the court should be to order a mental health exam, with the clear knowledge by the child or a party that the results are not privileged, rather than piercing the privilege of non-court ordered exams. Ms. Valdespino is a Fellow of the Academy and is Board Certified in Matrimonial and Family Law by the Florida Supreme Court. She is a founding partner of Valdespino & Associates, P.A., in Miami, Florida, a boutique family law firm specializing in divorce, child custody, child support, alimony, prenuptial and cohabitation agreements and mediated divorce settlements. Ms. Morgan owns and operates Family Law Consulting, providing research and writing services to family law attorneys nationwide. She is a member of the Board of Editors for the Journal and can be reached at goddess@famlawconsult.com.

Highlighting how advances in medical science, including in the field of assisted reproduction, have influenced the way the law has evolved in many areas, Bruce Wilder highlights the distinction between birth registration and the birth certificate emphasizing the need for a closer examination of what a birth certificate is, what it is not, and what its utility and function are in fact. Focusing on two cases, one, a recent decision in the U.K. Court of Appeals, and the other, a case from Germany that is now before the European Court of Human Rights, he suggests that changes in social norms having to do with the role of gender in marriage, and in the way the law views gender, marriage, and legal parentage, require such an examination. His article is entitled, *Evolution of the Birth Certificate: A Tale of Gender, ART and Society*. In it, he proposes a scheme for a more universal process of birth registration

and issuance of the birth certificate to help clarify the legal rights and responsibilities that flow from each. Dr. Wilder is Of Counsel to Wilder Mahood McKinley & Oglesby, a Pittsburgh law firm founded by Joanne Ross Wilder in 1978. He is the author of the chapter on Assisted Reproduction in WEST'S PENNSYLVANIA FAMILY LAW PRACTICE AND PROCEDURE WITH FORMS (Vol. 17, West's Pennsylvania Practice).

Our final article entitled, *Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post Monasky*, was written by Andrew A. Zashin, who was counsel throughout all phases of *Monasky v. Taglieri*, 140 S. Ct. 719 (2020). In it he considers the role of domestic violence in the context of the Hague Abduction Convention's 13(b) grave risk of harm exception. He proposes a framework that considers when victims of domestic violence are victims by proxy, applying a tort law principle for guidance. He argues that this framework will benefit the court, the parties, and the child(ren) involved as well as serving the interests of justice and the policy set forth in the articles of the Convention. Mr. Zashin is the Co-Managing Partner of Zashin & Rich in Cleveland, Ohio. He is also on the faculty of the Cox International Law Center and is an Adjunct Professor of Law at Case Western Reserve University School of Law where he teaches advanced and international family law.

We also have three student Comments written by Journal staff members at the University of Missouri-Kansas City School of Law. The first deals with the tension between attempts to protect children from communications that might harm them and the first amendment rights of parents and third parties. It is entitled, *The Use of Non-Disparagement Clauses in Family Law Cases* and was written by Jacob Eisenman. The serious issues that are raised in "resist/refuse" cases are examined in *Post-Separation Parent-Child Contact Problems: Understanding a Child's Rejection of a Parent and Interventions Beyond Custody Reversal* by Marissa Mallon. Morgan Parker provides an update on how courts are addressing some of the issues raised by the increasing use of assisted reproduction in *The Disposition of Frozen Embryos at Divorce*.

Finally, the issue concludes with an extensive annotated bibliography on *The Use of Experts in Family Law Cases* by Allen Rostron, William R. Jacques Constitutional Law Scholar and Professor of Law at the University of Missouri-Kansas City School of Law.

Mary Kay Kisthardt  
Executive Editor  
Kansas City, Missouri



## Cross-examining Experts in Child Custody: The Necessary Theories and Models . . . with Instructions

by

Milfred D. Dale,\* Jonathan Gould,\*\* & Alyssa Levine\*\*\*

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The authors wish to thank Desiree Smith for her research and editorial assistance with this article.

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## **Introduction**

This article articulates a comprehensive view of the processes, models, and theories related to cross-examination of child custody experts. It is written for attorneys faced with the task of examining and cross-examining experts. It examines the unique demands of family law where cases are tried before a judge who has often ordered a child custody evaluation “(CCE)” by a third-party neutral expert.

Part I of this article begins by reviewing how attorneys must develop their theory of the case. The theory of the case is often expressed as a story. It is a set of ideas or themes that tie together the facts and events of the case into a credible whole. It is dynamic; evolving as facts and understandings accrue and sometimes as facts and understandings change. This article outlines how the theory of the case becomes a persuasive tool. Attorneys must test their own theories. These theories must be comprehensive, explain undeniable facts, and make sense out of the behaviors, events, and motives of multiple people. A good theory of the case must be cohesive and plausible, given what is known or expected. To be effective, the theory must be organized and prioritize important elements. It must be coherent and explanatory, able to withstand scrutiny, and logical and persuasive enough to be chosen over the best argument of the opposing party.

Part II of the article describes three areas of substantive knowledge that attorneys must understand to be competent in supporting or challenging mental health experts who have conducted child custody evaluations. The first area is easiest for attorneys. They must understand the rules of evidence for expert witness testimony and how these apply to CCEs. This means understanding the emphasis on reliability of the expert's methodology and the nexus between the facts of the case and the conclusions, inferences, and opinions of the expert. The second and third areas of substantive knowledge reflect things the attorney can benefit from knowing and understanding; namely, the conceptual, procedural, and theoretical aspects of CCEs and the professional best practice guidelines that have developed in this area. While how much science the attorney must know is a debatable issue,<sup>1</sup> scientifically-informed attorneys can have a distinct advantage over those who are less informed. A comprehensive description of CCEs is provided followed by a

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<sup>1</sup> See Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 *FORDHAM URB. L. J.* 449 (1998) (arguing that unethical lawyers are often to blame for introducing junk science into the courtroom); *but see* David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony*, 39 *IDAHO L. REV.* 341 (2002-2003) (reviewing the ethical issues regarding an attorney's duty to not knowingly mislead the court regarding matters that the lawyer knows to be false).

section on the professional best practice guidelines that have been developed by various professional organizations. Ultimately, the advice for attorneys is based upon their duty of competence to their client. An easy way to remember the attorney's duty of competence is the phrase: Attorneys need to "get smart, get help, or get out."<sup>2</sup>

Part III outlines three prominent approaches developed by mental health consultants for reviewing and evaluating CCEs. These are organized and systematic models based upon a combination of legal and scientific requirements. Each of these models utilizes ethical codes prescribing minimum standards of professional practice, both generally and specifically in forensic cases, as well as increasingly sophisticated aspirational best practice guidelines promulgated by prominent professional organizations. Attorneys who understand the demands on an evaluator that emanate from the evaluator's profession have another important set of tools for supporting a favorable CCE report or, when necessary, challenging an adverse CCE report.

Part IV provides guidance for attorneys regarding both the historical time-honored approaches to cross-examination and a number of more recent models. This section begins by articulating the tenets of traditional cross-examination, then details a number of advances and additions to this approach. It also covers modern constructive cross-examination models that combine traditional principles with a more positive presentation of one's own theory of the case, including advancing one's theory of the case through adverse experts and an emphasis on the attorney's credibility as an "informal" witness or storyteller.

## **The "Local" Context for Family Law Cases**

The first three rules of family law are: know your judge, know your judge and know your judge.<sup>3</sup>

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<sup>2</sup> MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N, DISCUSSION DRAFT 1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The attorney's competence can be achieved through association with another or reasonable preparation.).

<sup>3</sup> Linda D. Elrod, Class notes of Milfred D. Dale from the first day of Divorce Practice class at Washburn University School of Law (2007).

Family law is local law. It is hard to overemphasize the need to know as much as possible about the philosophies, practices, and tendencies of the judge hearing the case.<sup>4</sup> Most family law judges will respect and respond more favorably to an emotionally positive approach rather than an emotionally negative one. Knowing the personality of the judge makes it easier to know where to strengthen the case, what type of evidence to use, and which witnesses will impress the judge the most. The lawyer also needs to know the judge's views on the proper length of the trial or motion hearing.<sup>5</sup> Because the best interests of the child is a fact-intensive individualized determination, family courts and judges are given a large amount of discretion to determine a reasonable and appropriate parenting plan. When trying a case in a new jurisdiction, lawyers should interview local counsel who have practiced in front of the judge for information, not only about local procedures and rules, but about the judicial philosophies of the judge who will decide the case.

“Child custody is one of the few areas in which our otherwise adversarial, party-driven courts routinely appoint a neutral expert to conduct an investigation on its behalf.”<sup>6</sup> Courts regularly appoint a neutral mental health evaluator to report on the functioning of the parents, children, and family dynamics, and to make recommendations about the parenting plan that is in the best interests of the child.<sup>7</sup> At least initially, this was designed to help avoid custody cases becoming a “battle of the experts,” where each side proffered testimony from a privately-retained evaluator. While courts are not required to rely upon the recommendations of the evaluator, many do. When cross-examining a court-appointed expert, the choice of technique must consider whether the evaluator is court-appointed and the court's relationship with that particular expert.

On the one hand, the evaluator's report may be viewed as a preview of the court's ruling because the court may have chosen

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<sup>4</sup> See LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, § 13:2, 1337-38 (2020 ed.).

<sup>5</sup> *Id.*

<sup>6</sup> ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 152 (2004).

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

the evaluator and is familiar with the evaluator's work.<sup>8</sup> On the other hand, many parties are dissatisfied with child custody court processes generally and child custody evaluations specifically. Many have noted that CCE reports have a "dramatic effect on the trajectory of the litigation and, ultimately, on the form a particular child's life will take after judicial disposition."<sup>9</sup> Many participants and scholars claim that the empirical foundations for evaluator recommendations are suspect or nonexistent.<sup>10</sup> Problems with the quality of CCE evaluations, investigations, and reports have resulted in a cottage industry of experts, comprised mostly of experienced and senior evaluators, who can provide assistance to attorneys in reviewing the scientific methodologies and inferences made by the evaluator.<sup>11</sup>

## **Part I: The Central Role of the "Theory of the Case" in Everything a Lawyer Does**

### *A. The "Theory of the Case": A Fact-Driven Concept that Explains*

James McElhaney wrote about the concept of "the theory of the case."<sup>12</sup> "The theory of the case is the basic underlying idea that not only explains the legal theory and factual background but also ties as much of the evidence as possible into a coherent and credible whole."<sup>13</sup> The theory of the case is the basic concept around which everything else revolves and provides a view-

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<sup>8</sup> *Id.*

<sup>9</sup> Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 *FAM. CT. REV.* 193, 193 (2005).

<sup>10</sup> *Id.*; see Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6(1) *PSYCHOL. SCI. IN PUB. INT.* 1 (2005); see also William T. O'Donohue & April R. Bradley, *Conceptual and Empirical Issues in Child Custody Evaluations*, 6 *CLINICAL PSYCHOL.: SCI. & PRAC.* 320 (1999).

<sup>11</sup> See Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48(1) *FAM. L. Q.* 1 (2014).

<sup>12</sup> See James W. McElhaney, *The Theory of the Case*, 45 *LITIG. J.* 1 (Spring 2019) (1979).

<sup>13</sup> *Id.* at 1.

point through which the trier of fact can look at all of the evidence in order to decide in the proponent's favor.<sup>14</sup>

According to McElhaney, the lawyer must adhere to one of the most fundamental rules in trial practice. "It comes before the rules of evidence, techniques of persuasion, impressive demonstrative evidence, and sophisticated touches of eloquence. It is simple, understandable, and nearly absolute. Never do anything inconsistent with your theory of the case."<sup>15</sup>

#### B. *What the "Theory of the Case" Must Explain*

Theories or arguments about what a party considers to be in the best interests of their child are fact-intensive. When telling the story, the focus should be on the people. For the family attorney, this ultimately means focusing on the child or children and continuously bringing the focus back to what is best for them. The facts that the attorney chooses must explain the motives of key witnesses, account for differences among the witnesses and other evidence, and address why the trier of fact should believe this version of events.<sup>16</sup> The theory must be comprehensive and include any facts that are necessary to convince the trier of fact that the theory and story accurately describe what happened.<sup>17</sup> The theory of the case must possess internal plausibility. This means the necessary elements of the theory are included, the relationships between data and facts are defined, and the setting, characters, and means or motive are adequately developed.<sup>18</sup> An internally plausible story is one that appears to illustrate reality given the lawyers' explanation of the facts and events of the case.<sup>19</sup> The theory must also possess external plausibility, or be believable based on how people typically react.<sup>20</sup>

Attorneys must have a comprehensive and intimate knowledge of the facts of the case to be effective advocates. These

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<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> See Anthony J. Bocchino, *Ten Touchstones for Trial Advocacy*, 74 *TEMPLE L. REV.* 1 (2001).

<sup>17</sup> JESSICA D. FINDLEY & BRUCE D. SALES, *THE SCIENCE OF ATTORNEY ADVOCACY: HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING* 162 (2012).

<sup>18</sup> See R. P. BURNS, *A THEORY OF THE TRIAL* (1999).

<sup>19</sup> FINDLEY & SALES, *supra* note 17, at 163.

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

facts must be organized within a comprehensive theory of the case. These facts may also serve as valuable portions of the sub-themes or subplots of the case. Attorneys must make numerous decisions as they prepare and present the facts and their theory of the case, whether this will occur during opening statement, direct examination, as part of a constructive cross-examination, or during closing arguments. These decisions include how to prioritize different aspects of the case theory, how to order the presentation of facts and theories, how many points or themes to include, and how much to focus on the case or theory of the opposing party.

The concept of “facts beyond change” is central to developing the theory of the case and a vital element of the attorney’s advocacy. It is essential for the attorney to understand how these case-specific facts relate to every aspect of the case. Because a successful theory cannot ask the trier of fact to ignore facts that they will believe, the theory of the case must always explain “facts beyond change.”<sup>21</sup>

Pozner and Dodd explain this concept and its importance in the following manner:

Facts beyond change are the givens of a lawsuit that will be believed by the jury as fair, accurate, and highly relevant regardless of any party’s best efforts to dispute or modify them. In a positive sense, facts beyond change are the structure that supports and channels our theory. The negative consequence of a fact beyond change is that it limits the possible theories of the case. *A successful theory must either incorporate all relevant facts beyond change, or be unaffected by them. That is, a theory must either build upon the facts beyond change, or stand in harmony with them.* A successful theory can never contradict a fact beyond change, because, if the jurors are confronted with the theory and an actuality (a fact beyond change), and the two cannot exist simultaneously, the jurors must decide the case in accordance with the actuality (the fact beyond change). Remember, a fact beyond change is one that will not be diminished by an effective cross. If cross can affect the jurors’ perception that the fact is fair or accurate or relevant, the fact is capable of dispute and is no longer a fact beyond change.<sup>22</sup>

Similarly, “inferences beyond change” must be taken into account in developing a theory. An inference is a finding de-

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<sup>21</sup> LARRY POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* (3d ed., e-book 2018).

<sup>22</sup> *Id.* at 2883 (emphasis added).

duced from the existence of other facts. “Certain facts, grouped together, lead the [triers of fact] to an inference or to multiple possible inferences. If there is only one possible inference from a grouping of facts, or only one inference that a [trier of fact] will take away from a group of facts, that inference itself becomes a fact beyond change.”<sup>23</sup>

The theory of the case should allow the trier of fact to empathize or picture themselves in the client’s position. Specific theories are favored over general theories. The theory must be specific enough to allow the triers of fact to hear and integrate the facts they are going to hear during cross-examination into their theory of the case. To persuasively use a theory, it should be expressed as a number of theme lines or phrases that can be used throughout the trial, including during the cross-examinations of opposing witnesses.<sup>24</sup>

### C. *Prioritizing Facts Within the Theory of the Case*

In prioritizing different points or themes in the theory of the case, lawyers should start with their best and most interesting argument.<sup>25</sup> This is best offered in the opening statement to give the judge the lens through which to view the facts and the people in the case. Challenges to adverse experts should remain focused on the facts of the case. Expert witnesses usually know more about the subject matter than the attorney seeking to challenge the witness,<sup>26</sup> but this should not be true about the facts of the case. Fighting the facts, including the facts of the expert’s methods and work in the case, should be the focus. At every phase of the process, it is important to fight the facts, not the opinion.<sup>27</sup> A California appellate court once noted about the focus on facts when challenging an expert that, “Like a house built

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<sup>23</sup> *Id.* at 2897.

<sup>24</sup> *Id.* at 3095.

<sup>25</sup> See Joseph A. Greenaway Jr., *Sua Sponte: A Judge Comments*, 40 LITIG. J. 27 (Winter 2014).

<sup>26</sup> See Thomas C. O’Brien & David D. O’Brien, *Effective Strategies for Cross-Examining an Expert Witness*, 44 LITIG. J. 1 (Fall 2017).

<sup>27</sup> See David Sugden, *The Expert Impeachment Witness: Fight the Facts, Not the Opinion*, EVIDENCE AT TRIAL (Apr. 19, 2018).

on sand, the expert's opinion is no better than the facts upon which it is based."<sup>28</sup>

While there is no reliable way to decide whether judges will see the issue the same way as the party or the lawyer, effective advocates trim and prioritize their arguments.<sup>29</sup> The more the lawyer focuses on weaker or smaller points, the more likely it is that this will detract from the force of their stronger or more significant points.<sup>30</sup> In addition, lawyers should resist the temptation to try to prove too many facts or points during their case-in-chief or during cross-examination. Judges often advise that "flinging arguments at the judge and hoping that one will stick" is not persuasive.<sup>31</sup> For example, in interviews of the U.S. Supreme Court Justices, Brian Garner quoted Justice Antonin Scalia as stating, "Make every respectable point. And no nonrespectable point. Just drop the stuff that isn't strong enough."<sup>32</sup>

#### D. *The Other Party's Theory of the Case*

With respect to the lawyer's theory of the case and the theory of his opponent, Larry Pozner and Roger Dodd posit that "time = importance." In this view, time spent undermining, making unbelievable, and destroying the opponent's theory of the case, is viewed as counterproductive because this is time talking about the opponent's theory of the case rather than on teaching the lawyer's own theory of the case.<sup>33</sup> The focus on one's own theory also allows for a more positive and more controlled presentation of the case. For example, a well scripted cross often affords the lawyer more control than eliciting facts on direct examination. Using the opponent's witnesses can also be more powerful and persuasive than presenting a case through one's own witness.

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<sup>28</sup> *Kennemur v. California*, 133 Cal. App. 3d 907, 924 (1982).

<sup>29</sup> See Martin J. Siegel, *How to Winnow Arguments on Appeal*, 40 LITIG. J. 30 (Winter 2014).

<sup>30</sup> Matthew F. Kennelly, *Over-Arguing Your Case*, 40 LITIG. J. 1, 3 (Winter 2014).

<sup>31</sup> *Id.*

<sup>32</sup> Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 51, 53-54 (2010).

<sup>33</sup> POZNER & DODD, *supra* note 21, at 3869.

Lawyers know which arguments are most difficult for their position or theory of the case and should anticipate the best, not the worst, arguments from the other side. When it is necessary to focus on the opponent's theory of the case, the lawyer should take a "steelmanning" approach. Steelmanning refers to the process of intentionally seeking out the best facts or best form of the opponent's argument, or deriving the strongest possible position from their arguments, then developing one's own challenges to this best argument. Steelmanning stands in contrast to attacking straw man arguments, or arguments that are easily dismissed.

George Bernard Shaw once noted that, "The moment we want to believe something, we suddenly see all of the arguments for it, and become blind to the arguments against it."<sup>34</sup> To protect against this, a member of the litigation team who helps the lawyer find possible vulnerabilities or weaknesses in an argument or theory of the case can be a valuable devil's advocate. This helps the lawyer protect against blind spots, which are easier to identify in others than in ourselves.<sup>35</sup> Lawyers maximize their effectiveness through strict fidelity to the use of facts beyond change within one's theory, by including a devil's advocate on the litigation team, and by focusing on prevailing over the opponent's best or steelman argument rather than raising straw man arguments to easily defeat them.

#### E. *The Lawyer's Role as "Witness" and "Storyteller"*

The lawyer's credibility, demeanor, and presence in the courtroom are extremely important. The lawyer is functionally a witness and a storyteller, both for themselves and indirectly for their client. James McElhaney writes, "the [lawyer's] real purpose of cross-examination is to show the judge and jury that you are the better witness."<sup>36</sup> While never under oath, lawyers functionally "testify" during every aspect of the process, not just during opening and closing arguments. Among other things, cross

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<sup>34</sup> This quote is generally attributed to George Bernard Shaw.

<sup>35</sup> Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 785-91 (2004) (noting that even experts are more likely to view others as potentially biased than they are to see themselves as biased).

<sup>36</sup> JAMES W. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* 444-45 (2006).

examination offers numerous opportunities to credit the lawyer and sometimes only a limited number of opportunities to discredit the witness. Herbert Stern stated this same premise slightly differently. Stern described cross examination as “arguing through the witness, not with the witness.”<sup>37</sup> Gerry Spence analogized the entire trial process, including cross-examination, as a kind of psychodrama, a contest of competing stories.<sup>38</sup> William Barton noted, “Trials are about the generation, collection, consolidation, and utilization of the intangible personal attribute of credibility.”<sup>39</sup> Credibility cannot be “seen” but its effects are usually known to all.<sup>40</sup> A party can have credibility and lose, but a party without credibility cannot win.<sup>41</sup>

While case facts and evidence have been found to be the strongest predictors of trial verdicts, attorneys should not discount the influence of their behaviors and performance on judicial decisions.<sup>42</sup> Lawyers who are unaware of how judges perceive them may be placing themselves and their clients at a strategic disadvantage in the courtroom.<sup>43</sup> It is not only the message but the messenger and how the message is presented that matters. The person-perception and stereotype content research literature emphasize that credibility is an extremely important part of global person impressions.<sup>44</sup> In fact, in one cross-exami-

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<sup>37</sup> HERBERT J. STERN, TRYING CASES TO WIN: CROSS-EXAMINATION 2 (1993).

<sup>38</sup> GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME (1995); see Trial Lawyers College, [www.triallawyerscollege.com](http://www.triallawyerscollege.com), (last visited Jan. 23, 2021).

<sup>39</sup> See William A. Barton, *Different Types of Cross-Examination*, 31(2) LITIG. J. 7, 16 (2012).

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

<sup>41</sup> *Id.*

<sup>42</sup> See NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000).

<sup>43</sup> See Steve M. Wood, Lorie L. Sicafuse, Monica K. Miller & Julianna C. Chomos, *The Influence of Jurors' Perceptions of Attorneys and Their Performance on Verdict*, AM. SOC'Y. TRIAL CONSULTANTS 23, 24 (2011).

<sup>44</sup> See Bogdan Wojciszke, Roza Bazinska & Marcin Jaworski, *On the Dominance of Moral Categories in Impression Formation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1251 (1998) (finding that up to 82% of the variance in person perceptions is related to credibility).

nation model, “looking good” is elevated in importance over the substance of the trial.<sup>45</sup>

In their book, *The Science of Attorney Advocacy: How Courtroom Behavior Affects Jury Decision Making*,<sup>46</sup> Jessica Findley and Bruce Sales summarize attorney behaviors that legal scholars have identified as adding to the perception of the attorney as someone who possesses honesty, integrity, truthfulness, and sincerity:

1. Always telling the truth because the triers of fact rely on the attorney’s word;
2. Not overstating their case;
3. Not promising evidence that they do not have;
4. Not breaking promises made in trial;
5. Not making unsupported arguments;
6. Not trying to sneak excluded evidence in through subterfuge;
7. Conceding unimportant points or issues;
8. Avoiding displays of insincere emotions as an attempt to fool the trier of fact;
9. Showing a genuine belief in the client and the client’s case; and,
10. Using passion to show jurors that the lawyer cares about his or her client and the client’s case.<sup>47</sup>

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<sup>45</sup> See TERENCE F. MACCARTHY, *MACCARTHY ON CROSS-EXAMINATION* (2007).

<sup>46</sup> FINDLEY & SALES, *supra* note 17.

<sup>47</sup> *Id.* at 16-19 (2012); see THOMAS A. MAUET, *TRIALS: STRATEGY, SKILLS, & NEW POWERS OF PERSUASION* (2005); see also DAVID A. BALL, *THEATER TIPS & STRATEGIES FOR JURY TRIALS* (1997); STEPHEN D. EASTON, *HOW TO WIN JURY TRIALS: BUILDING CREDIBILITY WITH JUDGES AND JURIES* (1998); MICHAEL R. FONTHAM, *TRIAL TECHNIQUE & EVIDENCE* (2002); ROGER S. HAYDOCK, *TRIAL: THEORIES, TACTICS, & TECHNIQUES* (1991); STEVEN LUBET, *MODERN TRIAL ADVOCACY* (2000); THOMAS A MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* (3d. ed. 1992); L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART & SCIENCE OF TRIAL ADVOCACY* (2003).

## **Part II: Three Substantive Areas of Required Knowledge: Evidence, CCE Model, Professional Guidelines**

### *A. The Daubert Trilogy: Admissibility of Expert Testimony (Individualized Factor-Based Approach)*

From 1993 through 1999 in what has been called the *Daubert* trilogy of cases, the Supreme Court significantly revised the Federal Rules of Evidence (FRE) for experts, particularly FRE 702. In 1993 in *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court found FRE 702 to require that expert testimony must be based on sufficient facts or data and that the expert must apply reliable methods and principles to the facts and data of the case.<sup>48</sup> The *Daubert* standard<sup>49</sup> is a flexible factor-based test intended to embrace the liberal nature of the Federal Rules of Evidence by replacing the “general acceptance” test found in *Frye v. United States*.<sup>50</sup> The named factors include (1) whether the knowledge can and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the practice is generally accepted.<sup>51</sup> *Daubert* did not eliminate the concept that “general acceptance” was evidence of reliable expert testimony, but it did alter the rule to allow for other equivalent and new methods of determining whether expert evidence is reliable.<sup>52</sup>

*Daubert* emphasized that the reliability analysis and any issues of admissibility would be tied to the particular facts of the case. The court explicitly emphasized that “the inquiry envisioned by Rule 702 is . . . a flexible one.”<sup>53</sup> The *Daubert* standard includes flexibility in allowing all relevant factors to be weighed in any given situation.<sup>54</sup> The Court explained its emphasis was on scientific validity and the evidentiary relevance and reliability

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<sup>48</sup> FED. R. EVID. 702.

<sup>49</sup> See *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 587-88 (1993).

<sup>50</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>51</sup> *Daubert*, 509 U.S. at 593-94.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 594.

<sup>54</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

of the principles that underlie a proposed submission. In *Daubert*, the Court focused on “principles and methodology, not the conclusions that they generate.”<sup>55</sup> In fact, one might argue *Daubert* is more flexible than *Frye* because it allowed experts to use newer methodologies, but more stringent in making the judge the gatekeeper and providing factors to be used to keep junk science out of the courtroom.

The *Daubert* Court noted that courts use what has been described as the “crucible of the adversarial process”, which it defined as:

Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising “general acceptance” standard, is the appropriate procedural means for challenging expert testimony. While it is possible that the gatekeeping or screening by the judge might prevent the jury from hearing authentic scientific evidence is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes.<sup>56</sup>

In 1997 in *General Electric Co. v. Joiner*,<sup>57</sup> the Court altered the scope of the judge’s gatekeeping responsibilities beyond simply methodological review to include an examination of the expert’s extrapolation from research findings to the facts of the case and what is referred to as the “analytical gap.”<sup>58</sup> The facts of the *Joiner* case. This is relevant here because they involve an effort to extrapolate<sup>59</sup> research findings from one area of scientific research and apply it in another area. In *Joiner*, the injured party offered two experts whose testimony in large part attempted to extrapolate findings from animal studies and four epidemiological studies to the circumstances of the human respondent’s claimed exposure to cancer-causing chemicals and subsequent injury. The Court upheld the district court’s exclusion of testimony

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<sup>55</sup> *Daubert*, 509 U.S. at 594-95.

<sup>56</sup> *Id.* at 580.

<sup>57</sup> 522 U.S. 136 (1997).

<sup>58</sup> *Id.* at 146.

<sup>59</sup> “Extrapolate” is defined as to “extend the application of a method or conclusion to an unknown situation by assuming the existing trends will continue or similar methods will be applicable. The scientific terms for this are “generalizability” and “transportability”). LEXICO, *Extrapolate*, <https://www.lexico.com/en/definition/extrapolate> (last visited Jan. 23, 2021) (online dictionary founded by Oxford).

because the plaintiff never explained how and why the experts could have extrapolated their opinions from animal studies to the circumstances of the human plaintiff's claimed exposure and injury. It also found that the epidemiological studies were similarly too attenuated from the facts of the case to be considered a reliable basis for proving causation.<sup>60</sup> The Court concluded,

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytic gap between the data and the opinion proffered. That is what the District Court did here, and we hold that it did not abuse its discretion in doing so.<sup>61</sup>

In 1999 in *Kumho Tire Co. v. Carmichael*, the Court held that the trial judge's task as gatekeeper included application of the *Daubert* factor-based analysis to both scientific and non-scientific testimony. The *Kumho* Court recognized that there were different kinds of expertise and that the level of scientific rigor in different relevant professional fields should be taken into account. *Kumho* also involved a failed attempt to extrapolate findings from one area of expertise to another. The case involved a vehicle accident and injuries that the plaintiff claimed resulted from a tire defect that caused the accident. After determining that FRE 702 and *Daubert* applied to the plaintiff expert's skill- or experience-based observations, the Court found the district court had not abused its discretion by excluding the testimony. The Court found that the district court could have found that the expert's testimony "fell outside the range of where experts might reasonably differ"<sup>62</sup> and that the expert's "repeated reliance on the 'subjectiveness' of his mode of analysis"<sup>63</sup> could justify the district court's exclusion of the evidence. The Court emphasized the trial court was "to make certain that an expert, whether bas-

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<sup>60</sup> *Joiner*, 522 U.S. at 144 (the studies showed that infant mice injected with massive doses of PCBs developed a different kind of cancer than Joiner had and showed the mice developed a different kind of cancer than Joiner and failed to show the PCB exposure led to cancer in other animal species such as humans).

<sup>61</sup> *Id.* at 146.

<sup>62</sup> *Kumho Tire Co.*, 526 U.S. at 153.

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

ing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>64</sup>

The “same intellectual rigor that characterizes the practice of an expert in the relevant field” is an important phrase for the present analysis because there exists some confusion about what standard should be applied to CCEs and what constitutes the relevant field. Some have argued that the additional demands of the forensic context involve a “greater need for psychologists to adhere to established standards, to be responsive to applicable guidelines, and . . . to utilize the best methodology possible.”<sup>65</sup> However, any call for higher standards in forensic work than the standards for clinical work should not be viewed as reflecting the legal standard for admissibility of a child custody evaluator’s expert work or testimony.

The “same intellectual rigor in the relevant field” of *Kumho* is not the same as the “general acceptance in the relevant field” of *Frye*. In *Kumho*, the Court demonstrated it was “less interested in a taxonomy of expertise and more concerned about directing judges to concentrate on ‘the particular circumstances of the particular case at issue.’”<sup>66</sup> This flexible, individualized, and nondoctrinaire approach is faithful to the intentions of the drafters of the Federal Rules of Evidence, who viewed Article VII as asking courts to apply flexible standards for evaluating expert testimony rather than rigid rules.<sup>67</sup>

## B. Conceptual Model for Child Custody Evaluations

### 1. *The evaluator’s search for the theory of the case in the facts aided by science*

Like the attorney’s search for a theory, the child custody evaluator’s task involves developing a theory or theories related to the questions and subquestions of the evaluation based on the facts of the case. However, the expert evaluator’s unique contri-

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<sup>64</sup> *Id.* at 152.

<sup>65</sup> David A. Martindale & Jonathan W. Gould, *The Forensic Model: Ethics and Scientific Methodology Applied to Custody Evaluations*, 1(2) J. CHILD CUSTODY 1, 19 (2004).

<sup>66</sup> *Kumho Tire Co.*, 526 U.S. at 141.

<sup>67</sup> See Margaret A. Berger, *The Supreme Court’s Trilogy on the Admissibility of Expert Testimony*, in REF. MANUAL OF SCI. EVIDENCE 21 (2d ed. 2000).

butions to the case concern bringing the science of their discipline to the facts of the case as a means of helping the court beyond the assistance that the attorneys representing the parties can provide.<sup>68</sup>

In 1975, Robert Mnookin commented that the best-interests-of-the-child principle is unique in that, “While it provides a purpose or objective, it leaves a decision-maker the task of figuring out how to achieve that objective and the weight to be accorded to that objective when there are other principles pointing in other directions.”<sup>69</sup> Thinking of the best interests principle in terms of tasks and objectives can be helpful when attempting to operationalize the task.

The best-interest-of-the-child psycholegal task requires an assessment of multiple persons (e.g., the parties, the child[ren]), and other significant adults in the home involving individual and comparative analyses of required and relevant factors (identified by statute or caselaw and context) to develop a parenting plan. The parenting plan must meet three objectives: (1) Provides for the future health, welfare, and developmental needs of the child or children; (2) Reasonably balances the constitutional and statutory rights of the parents and interested parties and the child; and, (3) Provides an enforceable allocation of parental responsibilities to and for the child via a parenting plan.

To these tasks and objectives, the child custody expert seeking to produce a scientifically-informed report needs to understand how to evaluate and use social science research. In 2019, an AFCC Task Force developed “Guidelines for the Use of Social Science Research in Family Law Cases” that outlined principles for responsible use of empirical research.<sup>70</sup> This document provides guidance for how to identify reliable research, how to determine the relevance of the research to the question before

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<sup>68</sup> See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE 702-41, § 702.03[2][a] (Lexis 2d ed. 2013) (“Proffered expert testimony should be excluded when it will not help the trier of fact to any degree beyond the assistance that the lawyers representing the parties could provide during their closing arguments”).

<sup>69</sup> Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 231 (1975).

<sup>70</sup> AFCC Task Force on the Guidelines for the Use of Social Science Research in Family Law, *Guidelines for the Use of Social Science Research on Family Law*, 57(2) FAM. CT. REV. 193 (2019).

the court, and how to generalize from research findings while also noting the limitations of these efforts.<sup>71</sup> In addition to knowing the relevant research, expert evaluators must understand what has been called the “G2i” (group to individual inference) problem of “determining whether and how scientific knowledge derived from studying groups can be helpful in the individual cases before them.”<sup>72</sup>

Grisso referenced the relationship between theory and empirical research, noting

The foundation of science is theory, not empirical prediction. The value of empirical research is to test a theory’s ability to produce hypotheses that make sense of what we see around us. A theory is strengthened by multiple empirical validations of hypotheses that it has generated, which in turn allows us to use that theory to guide our judgment in clinical work. Science depends on theory development, because no amount of empirical research can ever test all of the relationships that arise in complex physical and social processes.<sup>73</sup>

Expert evaluators use science, both empirical research and theory, at two different levels in every instance. At the social framework evidence and testimony level, experts can offer the court social framework evidence and testimony regarding general scientific propositions.<sup>74</sup> But social framework testimony, even about frameworks for which there is extensive group aggregate research, is not enough by itself to answer questions in individual cases. Science generalizes while courts particularize.<sup>75</sup> Not every individual in any aggregate group empirical research sample demonstrates characteristics consistent with the ultimate conclusions of the researcher, or even of the average participant in the research sample. The term the “belief in the law of small num-

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<sup>71</sup> *Id.*

<sup>72</sup> David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81(2) U. CHI. L. REV. 417, 417-18 (2014).

<sup>73</sup> Thomas Grisso, *Commentary on “Empirical and Ethical Problems with Custody Recommendations:” What Now?* 43(2) FAM. CT. REV. 223, 227 (2005).

<sup>74</sup> John Monahan & Laurens Walker, *Social Authority, Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 879 (1988).

<sup>75</sup> Faigman, Monahan, & Slobogin, *supra* note 72, at 417-18.

bers” refers to the bias present when research consumers assume that the averages in samples apply to all of the population from which the sample was generated.<sup>76</sup>

The particularization process in individual cases has been referred to as expert diagnostic evidence where the expert applies the general propositions to individual cases.<sup>77</sup> This involves a combination of awareness of the group aggregate research with respect to base rates, error rates, and the probabilities that factors are empirically associated with each other or with some kind of unifying theory in the individual case. This ability to use theory at the general and individual levels is central to the scientific aspects of the child custody expert’s task. When properly used, the logic of a theory becomes a scientific tool that can provide “a set of coherent principles and constructs for making sense of certain psychological and social phenomena” (i.e., a social framework testimony)<sup>78</sup> and a sound logical rationale based on the facts and observations of the case for the expert’s opinion (e.g., diagnostic testimony).

Examining individual case theories asks the questions:

Is the theoretical basis for the expert’s opinion based on:

- A common sense, logical, and rational approach to the question;
- Theories which are peer tested and generally accepted by other similarly qualified experts while adjusting for new theories that are grounded in logic and common sense;
- Unsubstantiated speculation lacking any evidentiary foundation?
- Is there substantial admissible evidence supporting the foundation for the opinions expressed?<sup>79</sup>

## 2. *Operationalizing the best interests principle*

The modern child custody evaluation is probably the most complex and difficult type of all forensic evaluations. In contrast to most examinations in which one person is evaluated, in the typical child custody evaluation, the mental health professional examines a number of persons (e.g., mother, father, child or chil-

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<sup>76</sup> See Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76(2) PSYCHOL. BULL. 105 (1971).

<sup>77</sup> Faigman, Monahan, & Slobogin, *supra* note 72, at 418.

<sup>78</sup> Grisso, *supra* note 73, at 227.

<sup>79</sup> Mark Simons & Thomas Trent Lewis, *Applying People v. Sanchez to Experts in Family Law Cases*, ASSOC. CERTIFIED FAM. L. SPECIALIST 1, 7 (Winter 2019).

dren, and potential or actual stepparents). Additionally, given the expansive nature of the underlying psycholegal issues (i.e., the best interests of the children and the ability of the parents to meet those interests), the examinees must be assessed regarding a variety of behaviors, capacities, and needs. Finally, because the stakes are so significant (i.e., residential placement of the children and decision-making authority with respect to their welfare), emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process.<sup>80</sup>

Competent child custody evaluators must operationalize the best interests task and objectives. This includes the use of multiple methods to gather data and facts on factors and psycholegal questions.<sup>81</sup> Through use of the multitrait-multimethod matrix interpretation principles of data analysis,<sup>82</sup> the evaluator triangulates the data for accuracy. “The behaviors of the parties and their children and their relationships usually have multiple determinants. There may be few, if any, linear or simple cause-and-effect relationships.”<sup>83</sup>

Complex custody disputes involve not just one theory or question but multiple questions and competing theories about highly disputed facts.<sup>84</sup> These factual disputes require formulating, hypothesizing, and developing opinions on numerous series of questions that are often subsumed under multiple main questions.

Determining what is in the best interests of the child involves answering numerous subquestions about child factors, in-

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<sup>80</sup> Randy K. Otto, John F. Edens & Elizabeth Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. & CONCILIATION CTS. REV. 312, 312-13 (2000).

<sup>81</sup> Milfred D. Dale & Desiree Smith, *Making the Case for Videoconferencing and Remote Child Custody Evaluations (RCCs): The Empirical, Ethical, and Evidentiary Arguments for Accepting a New Technology*, PSYCHOL., PUB. POL’Y & L. 1, 3-4 (Advance Online, 2020).

<sup>82</sup> See Donald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56(2) PSYCHOL. BULL. 81 (1959).

<sup>83</sup> *Id.* at 2.

<sup>84</sup> Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48(1) FAM. L. Q. 1 (2014).

terfamilial and parenting factors, parent factors, and extrafamilial factors. Each of these factors is composed of subfactors that address separate factual questions about how the age of the child, the child's gender, and the child's cognitive and emotional development will affect current and future parent-child interactions and functioning.<sup>85</sup>

In addition, CCEs typically involve multiple moving targets: that is, the parties, their children, their circumstances, and their situations may be in a constant state of change in response to the parents' separation or other aspects of the ongoing dispute. The evaluator must assess and investigate required factors and topics, be responsive to opportunities for additional details—which may emerge at any point in the process—and adjust inquiries as the data confirms or disconfirms various hypotheses. The process of any evaluation is dependent upon a perpetual adaptation of the evaluator's ability to operationalize best interests considerations and questions, the evaluator's competence in the use of each of the multiple methods of data collection, and the evaluator's ability to integrate large amounts of data into a comprehensive understanding of the issues in the case.<sup>86</sup>

While there are scientific principles to guide portions of the work, a CCE is still a fact-intensive inquiry and investigation using multiple methods to seek an individualized answer. Diligently applying the conceptual model, the multitrait-multimethod data analysis, and the investigative mindset is the evaluator's best defense against missing something, against challenges of possible biases, or against performing a less than adequate evaluation.

### 3. *CCE scope: Best interests factors & case-specific psycholegal questions*

In CCEs, evaluators collect data and facts that are used to develop opinions about relevant factors or psycholegal questions, including opinions about the ultimate issues of custody, residency, and parenting time. Evaluators are also encouraged to develop case-specific psycholegal questions to define the scope of

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<sup>85</sup> Daniel A. Krauss & Bruce Sales, *The Problem of 'Helpfulness' in Applying Daubert to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*, 5(1) *PSYCHOL., PUB. POL'Y & L.* 78, 96 (1999).

<sup>86</sup> See Dale & Smith, *supra* note 81, at 2.

the investigation and guide the inquiry.<sup>87</sup> Clearly defined questions help the evaluator choose assessment methods or measures directly relevant to these questions.<sup>88</sup> By including specific questions in court orders or stipulations, judges and attorneys increase the likelihood that evaluators will stay on course, investigate the issues of concern, and, in preparing their reports, provide information that bears directly upon the issues before the court.<sup>89</sup> This process requires considerable pre-evaluation preparation.

Child custody evaluators are often asked to evaluate allegations of risky and/or abusive behaviors such as domestic or intimate partner violence, child sexual abuse, various forms of child maltreatment, or claims of parental alienation or alienated children, as well as a multitude of other behaviors believed to place children at risk for harm, neglect, or adjustment problems. Efforts to assess the historical truth of an allegation, for example, usually involve interviewing all of the involved parties and combining this data with information from relevant records or information from other third-party informants.

In making a best interests determination, courts must consider all the factors that may be identified by statute or case law, as well as any relevant factors raised by the parties. If offering an opinion on the ultimate issues of custody and parenting time, evaluators are also expected to consider these factors, and when possible and appropriate, evaluators may use social science research to support their choice of methods, inferences, and opinions.

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<sup>87</sup> Jonathan W. Gould & David A. Martindale, *Specific-Questions Guide to Child Custody Investigations*, LAW J. NEWSL.: THE MATRIMONIAL STRATEGIST (2009), <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2009/04/28/specific-questions-guide-to-child-custody-investigations/?slreturn=20201122210820>.

<sup>88</sup> JONATHAN W. GOULD & DAVID A. MARTINDALE, *THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS* 101 (2007).

<sup>89</sup> See Gould & Martindale, *supra* note 87.

#### 4. *Multiple methods of data collection*

In conducting comprehensive child custody evaluations, evaluators apply theory, research, and scientific methodology.<sup>90</sup> Evaluators seek information from five types of independent data sources: (a) document or record review; (b) interviews, including individual interviews of the parties and, when appropriate, the children, as well as joint and group interviews, when appropriate; (c) psychological testing; (d) direct observations of parent-child relationships via home or office visits; and (e) contacts with collateral sources or witnesses.

Before proceeding, it is important to recognize that agreement about these types of data collection does not always translate into agreement about the actual methodologies that are used. Different evaluators collect different data, and different evaluators may assign different weight to data.<sup>91</sup> Some evaluators may rely differently on different portions of the evaluation in developing their hypotheses and opinions. For example, non-psychologists are less likely to include psychological testing in their evaluation procedures. These evaluators must answer the same questions but may use records, interviews, observations, and contacts with collaterals to address the questions for which a psychologist uses testing. Evaluators unable to effectively use one methodology (e.g., testing) will be expected to develop ways to investigate issues using tools within their competence. The shortcomings of any individual data collection tool require the evaluator to design methods of investigating the relevant issue in other ways. The evaluator's approach throughout the evaluation process involves choices. For each important issue or data point, does the evaluator immediately query and follow up or accept an answer in order to move on? Does the evaluator compare data or a fact to a claim or hypothesis and again query and challenge, or do they accept and move on?

The record keeping of evaluators can become an issue. Some have claimed forensic evaluators have a heightened duty to docu-

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<sup>90</sup> See LESLIE DROZD, NANCY OLESON & MICHAEL SAINI, *PARENTING PLAN & CHILD CUSTODY EVALUATIONS: INCREASING EVALUATOR COMPETENCE & AVOIDING PREVENTABLE ERRORS* (2013).

<sup>91</sup> Jonathan W. Gould, H.D. Kirkpatrick, William G. Austin & David A. Martindale, *Critiquing a Colleague's Forensic Advisory Report*, 1(3) *J. CHILD CUSTODY* 37, 39 (2004).

ment their work.<sup>92</sup> Some evaluators take copious notes, while others contemporaneously type questions and answers into a computer during interviews. Some evaluators audio record interviews, and others do not. Currently, evaluators who choose to record must have written permission of the parties. It is unclear, however, whether the parents could provide permission for the evaluator to record a child or whether an attorney or some other kind of representative would be needed to assist a child in making the decision about consent to the evaluator recording such contacts.

##### 5. *Multitrait-multimethod matrix: Data analysis and interpretation*

In managing their data collection, constructing hypotheses, and developing conclusions or opinions about the factors and psycholegal questions, evaluators have applied the multitrait-multimethod matrix, triangulation strategies, and the concepts of convergent and discriminant validity. In CCEs, the multitrait-multimethod matrix refers to use of multiple data collection methods and a process for analyzing the data.<sup>93</sup>

This method recognizes that the behaviors and competencies of individuals are multiply determined,<sup>94</sup> and that the study of complex phenomena requires an active process of developing possible hypotheses and inferences from an evolving data set. Within this process, evaluators seek to avoid bias by maintaining even hovering attention to these multiple hypotheses,<sup>95</sup> remaining vigilant to established methods and protocols that they have established, and adjusting the hypotheses as new data and issues are collected. Any deficiency in data collection in one area can be remedied by additional inquiry or by applying a different methodology to get that information. The multitrait-multimethod

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<sup>92</sup> See Martindale & Gould, *supra* note 65.

<sup>93</sup> Campbell & Fiske, *supra* note 82.

<sup>94</sup> Robert Waelder, *The Principle of Multiple Function: Observations on Over-Determination*, 5(1) PSYCHOANALYTIC Q. 45 (1936).

<sup>95</sup> See SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 10 (1953-1974) (referencing the technique, first articulated by Freud within psychoanalysis, to describe how analysts – and others using expressive, non-directive therapy – should listen to their patients with even hovering or suspended attention as to the possible meanings of each of the patient’s behaviors or verbalizations).

approach is the evaluator's best defense against claims of bias or overreliance on simple answers to complex questions.<sup>96</sup>

Data analysis strategies using the multitrait-multimethod matrix heavily rely upon triangulation.<sup>97</sup> Triangulation involves using more than one approach or more than one data source to study, in this instance, a factor or question. Triangulation enhances reliability and validity by cross-checking or cross-referencing data or by combining different perceptions of the same event to provide a more robust and holistic picture.<sup>98</sup> Triangulation also includes cross-checking data from multiple methods, sources, theories, and/or data types to get a more detailed and balanced picture of the situation.<sup>99</sup> The term "convergent validation" is used to describe when data from independent procedures support or validate the same conclusion or opinion, and the term "discriminant validation" is used to describe when data from independent procedures fail to support the same conclusions or opinions.<sup>100</sup> There also may be times when evaluators must explain seemingly divergent data. CCEs also usually involve one or more hypothesis or theory about the meaning of various facts and events in the case. "Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible."<sup>101</sup> In addition, while unique facts can be disclosed or discovered during any part of a CCE, there is generally no one-to-one correspondence between any single

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<sup>96</sup> See Tess M.S. Neal & Stanley L. Brodsky, *Forensic Psychologists' Perceptions of Bias and Potential Correction Strategies in Forensic Mental Health Evaluations*, 22 PSYCHOL., PUB. POL'Y & L. 58 (2016).

<sup>97</sup> See William G. Austin & H. D. Kirkpatrick, *The Investigative Component in Forensic Mental Health Evaluations: Considerations for Parenting Time Assessments*, 1(2) J. CHILD CUSTODY 23 (2004).

<sup>98</sup> Lesley Vidovich, *Methodological Framings for a Policy Trajectory Study*, in QUALITATIVE EDUCATIONAL RESEARCH IN ACTION: DOING AND REFLECTING 78 (Tom O'Donoghue & Keith Punch eds., 2003).

<sup>99</sup> HERBERT ALTRICHTER, ALLEN FELDMAN, PETER POSCH & BRIDGET SOMEKH, *TEACHERS INVESTIGATE THEIR WORK: AN INTRODUCTION TO ACTION RESEARCH ACROSS THE PROFESSIONS* 147 (2008).

<sup>100</sup> Campbell & Fiske, *supra* note 82.

<sup>101</sup> Am. Psychol. Ass'n, *Specialty Guidelines for Forensic Psychology*, 68(1) AM. PSYCHOL. ASS'N 7, 15 (2013) ("When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.").

evaluation methodology and any best interests factor or psycholegal question. This is especially true when evaluating various kinds of competencies (e.g., parenting competence), where data from multiple sources are relevant.

Evaluating each hypothesis or theory involves a combination of scientific and clinical thinking.<sup>102</sup> The scientific method calls for testing alternative hypotheses or theories and collecting evidence that confirms or disconfirms either an individual hypothesis or unifying theory. Coherence-based reasoning also applies to the evaluator's data analyses as one attempts to integrate numerous, complex, and sometimes contradictory inferences into a coherent theory about the case.<sup>103</sup> Understanding the implications of any particular hypothesis or theory and the interrelationships between the data and facts of the case is central to determining whether any fact confirms, disconfirms, supports, or disproves that particular hypothesis or theory.

In sum, each evaluator must design a study of the best interests factors and the psycholegal questions that are relevant to each case. There are both common elements to every CCE and unique, case-specific elements to every CCE. The approach is not totally experimental. Whereas scientific experiments seek to eliminate or minimize experimenter bias through methodological design, the custody evaluator's task is to manage a dynamic process while remaining balanced, objective, and as free as possible from bias.

### C. *Professional Best Practice Guidelines*

It is important to note that, in most situations, there are no binding or published documents reflecting professional "standards" for child custody evaluations, only guidelines. Several professional organizations have promulgated guidelines. For example, the American Psychological Association has published guidelines for forensic psychology, generally,<sup>104</sup> and for child cus-

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<sup>102</sup> See Madelyn S. Milchman, *The Complementary Roles of Scientific and Clinical Thinking in Child Custody Evaluations*, 12 J. CHILD CUSTODY 97 (2015).

<sup>103</sup> See Steven Charman, A.B. Douglass & A. Mook, *Cognitive Bias in Legal Decision Making*, in *PSYCHOLOGICAL SCIENCE AND THE LAW* (Neil Brewer & Amy Bradfield Douglass eds., 2019).

<sup>104</sup> Am. Psychol. Ass'n, *supra* note 101.

tody evaluations, specifically.<sup>105</sup> The Association of Family and Conciliation Court's (AFCC) *Model Standards of Practice for Child Custody Evaluations* and the American Academy of Matrimonial Lawyer's *Child Custody Evaluation Standards* also provide guidance for evaluators and attorneys. Use of the word "standards" in some professional documents can be confusing. For example, both the AFCC and AAML documents include the word "standards," but neither of these organizations have any enforcement mechanisms and each document acknowledges it does not have force of law.<sup>106</sup>

It is important to distinguish between aspirational guidelines and standards. The American Psychological Association's (APA) *Criteria for Practice Guideline Development and Evaluation*<sup>107</sup> note that:

The term guidelines refers to statements that suggest or recommend specific professional behavior, endeavor, or conduct for psychologists. Guidelines differ from standards. Standards are mandatory and, thus, may be accompanied by an enforcement mechanism; guidelines are not mandatory, definitive, or exhaustive. Guidelines are aspirational in intent. They aim to facilitate the continued systematic development of the profession and to promote a high level of professional practice by psychologists. A particular set of guidelines may not apply to every professional and clinical situation within the scope of that set of guidelines. As a result, guidelines are not intended to take precedence over the professional judgment of psychologists that are based on the scientific and professional knowledge of the field (Ethics Code, Std. 2.04, APA, 2002d; APA, 2010a).<sup>108</sup>

It is easy to become confused about aspirational best practice guidelines, ethical thresholds, and enforceable standards, particularly where advocates within the adversarial processes of the legal process may have an interest in making anything less

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<sup>105</sup> Am. Psychol. Ass'n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65(9) AM. PSYCHOL. ASS'N 863 (2020).

<sup>106</sup> Task Force for Model Standards of Practice for Child Custody Evaluations, *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 70 (2007); see also AMERICAN ACADEMIC OF MATRIMONIAL LAWYERS, *CHILD CUSTODY EVALUATION STANDARDS* (2011); S. P. Herman, *Practice Parameters for Child Custody Evaluation*, 36(10) J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY, SUPPLEMENT 578 (1997).

<sup>107</sup> Am. Psychol. Ass'n, *Professional Practice Guidelines: Guidance for Developers and Users*, 70(9) AM. PSYCHOL. ASS'N 823 (2015).

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

than aspirational best practices look like an ethical or professional failure. In 2014, two of the authors of this paper (Dale & Gould) wrote about this and referred to this form of advocacy as “making the ceiling look like the floor.”

Simultaneous use of guidelines or standards designed to be aspirational and ethical codes involving the language of minimal obligations that should supersede an evaluator’s independent judgment can create confusion about what should be considered a best practice and what an evaluator is minimally required to do. Within the child custody community, there are very real debates about “ceilings,” or best practices, and “floors,” or minimum standards, for evaluations and expert consultation in child custody. Attorneys need to know these controversies. To the extent that certain things can be made to appear obligatory rather than discretionary in court, the process of “making the ceiling look like the floor” can be a very effective cross-examination technique.<sup>109</sup>

In general, it is certainly fair for a party challenging an adverse evaluation report to argue there are perceived methodological or inferential shortcomings based on what they perceive might have been a potentially better methodology. Aspirational guidelines can provide ideas for such a challenge. One would also expect the party favored by the report to proffer that the evaluator’s methodology was sufficiently reliable even if all of the aspirational guidelines were not followed. What is most important is a recognition that aspirational guidelines are best practices that must be distinguished from minimum ethical thresholds and that it is inappropriate to present a failure to follow aspirational guidelines as if this was automatically an ethical violation. The standard for competent practice is conduct of a reasonably prudent forensic practitioner engaged in similar activities in similar circumstances and should be viewed along a continuum of adequacy. “Minimally competent” and “best possible” are usually different points along that continuum.<sup>110</sup>

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<sup>109</sup> Dale & Gould, *supra* note 84, at 15.

<sup>110</sup> See Am. Psychol. Ass’n, *supra* note 101, at 8.

### **Part III. Models for Reviewing Evaluators and Evaluations**

Each of the models for reviewing evaluations emphasize an evidence-based approach to data gathering, data integration, and opinion formation. There is also an emphasis on professional and scientific knowledge guiding the evaluator's analysis of the data rather than formulating opinions about parenting and parent-child relationships based upon personal or idiosyncratic ideas that have little, if any, support in the peer-reviewed literature. Three models for reviewing evaluations are outlined below.

#### *A. The "Forensic Model": Jonathan W. Gould and David Martindale*

In 2004 in a seminal article, "*The Forensic Model: Ethics and Scientific Methodology Applied to Custody Evaluations*," David Martindale and Jonathan Gould argued that CCEs can be more consistent, more predictable, and more helpful if scientific principles are used by the evaluator.<sup>111</sup> The *Forensic Model* clearly distinguished between child custody evaluations as forensic evaluations and clinical approaches to treatment. The essential components of the *Forensic Model* are:

- (a) The evaluator's role, the purpose of the evaluation, and the focus of the evaluation are defined by the court;
- (b) Where possible, the evaluator obtains (at the outset) a list of specific psycholegal issues concerning which the court seeks advisory input;
- (c) The evaluator conducts all professional activities in accordance with regulations and/or guidelines promulgated by state regulatory boards;
- (d) The procedures employed by the evaluator are informed by . . . documents developed by organizations that conceptualize the child custody evaluation as an inherently forensic psychological activity;
- (e) The selection of instruments is guided by [professional standards] and particular attention is given to the established reliability and validity of instruments under consideration;

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<sup>111</sup> Martindale & Gould, *supra* note 65.

- (f) Detailed records of all aspects of the evaluation are created, preserved, and made available in a timely manner to those with the legal authority to inspect or possess them; and,
- (g) All professional activities are performed with a recognition of the investigative nature of the task, an acknowledgment of the limitations inherent in our evaluative procedures, and understanding of the distinction between psychological issues and the specific psycho-legal questions before the court, and an appreciation of the need not to engage in therapeutic endeavors before, during, or after the evaluation.<sup>112</sup>

In the *Forensic Model*, scientific method refers to “the rules or standards and community practices by which science proceeds.”<sup>113</sup> For each data point or method used by the evaluator, Martindale and Gould suggested comparing the evaluator’s act or process with their ethical code, any available best practices guidelines, and any research that might aid in the determination of relevance or reliability. The *Forensic Model* emphasizes the standards and guidelines of various professional groups and posited that the evaluator (and anyone reviewing the evaluator) needs to be familiar with the APA’s *Ethical Principles of Psychologists and Code of Conduct*,<sup>114</sup> *Guidelines for Child Custody Evaluations in Family Law Proceedings*,<sup>115</sup> *Standards for Educational and Psychological Testing*,<sup>116</sup> and *Record-Keeping Guidelines*,<sup>117</sup> *The Specialty Guidelines for Forensic Psychology*,<sup>118</sup> and the AFCC’s *Model Standards of Practice for Child Custody Evaluation*.<sup>119</sup>

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<sup>112</sup> *Id.* at 2.

<sup>113</sup> Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gatekeeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 4 (2004).

<sup>114</sup> See Am. Psychol. Ass’n, *Ethical Principles of Psychologists and Code of Conduct*, 57 AM. PSYCHOL. ASS’N 1060 (2002).

<sup>115</sup> See Am. Psychol. Ass’n, *supra* note 105.

<sup>116</sup> See AM. PSYCHOL. ASS’N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999).

<sup>117</sup> See AM. PSYCHOL. ASS’N, RECORD KEEPING GUIDELINES (1993).

<sup>118</sup> See Am. Psychol. Ass’n, *supra* note 101.

<sup>119</sup> Ass’n Fam. & Conciliation Cts., *Model Standards of Practice for Child Custody Evaluations*, 45 FAM. CT. REV. 70 (2007).

The *Forensic Model* seeks to make scientific method and the data generated by the scientific method central to child custody evaluations.<sup>120</sup> “In explaining, predicting, and controlling the world around us, science is by far the most powerful intellectual technique known.”<sup>121</sup> Understanding human behavior begins with the development of systematic procedures used for reliable observation and recording. When child custody evaluators attend to the methodological integrity of their data gathering process, the court is able to place greater weight on the scientific foundation of the evaluation process.<sup>122</sup> What is scientific includes both process and fact. Science is a *process* for developing and investigating theoretical explanations about the world that are subject to further testing and refinement.

Insomuch as science can be viewed as “fact,” it is the outcome of scientific process, or an orderly body of knowledge with clearly articulated principles.<sup>123</sup> The task of Federal Rule of Evidence 702 may be best understood as regulating the supply of facts to the judge “in a manner that states a preference for science as the preeminent methods for discovering facts.”<sup>124</sup> One important task of a child custody evaluator is as a gatekeeper of reliable psychological data upon which the court may rely. The reliability that comes from scientifically informed processes is the foundation for both psychological investigation and expert psychological testimony.

Scientific methods and procedures are intended to reduce human error. When conducting child custody evaluations, evaluators need to be concerned with scientific method and process. The scientific methodology used in forensic mental health assessment, in general, and used in child custody evaluations, in particular, places a high value on intellectual honesty. Being as objective and scientific as possible includes an explicit acknowledgement that one’s beliefs could be wrong and that the scientific

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<sup>120</sup> See JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS (2d ed. 2006); see also GOULD & MARTINDALE, *supra* note 87; see also Gould & Martindale, *supra* note 65.

<sup>121</sup> MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY 47 (David L. Faigman, et al. eds., 2d ed. 2002).

<sup>122</sup> Ramsey & Kelly, *supra* note 113, at 4.

<sup>123</sup> MODERN SCIENTIFIC EVIDENCE: THE LAW & SCIENCE OF EXPERT TESTIMONY, *supra* note 121, at 47.

<sup>124</sup> *Id.*

process with its emphasis on considering rival alternative hypotheses is designed to protect us from fooling ourselves.<sup>125</sup> Because of the complexity of CCEs, they may be particularly vulnerable to use of poor methodologies and different kinds of biases.<sup>126</sup> This complexity can also make these evaluations difficult for attorneys and the courts to understand. In contrast to most examinations that focus on evaluating one person, the typical child custody evaluation involves examination of a number of persons (e.g., mother, father, child or children, and potential or actual stepparents) and interviews with additional collateral informants. Emotions in cases of contested custody typically run high, further compounding what is an already complicated evaluation process. The high emotions often affect how parents behave during interviews, how they respond when administered psychological tests, and how they communicate with their children and with each other. Parents often attempt to paint an overly positive picture of themselves, a more negative picture of the other parent, and a glowing description of the children's experiences with them.<sup>127</sup>

Given the profound importance of the underlying psychological issues (i.e., the best interests of the children and the ability of the parents to meet those interests), attorneys cross-examining the evaluator need to examine the depth of investigation into the nature and quality of parenting across multiple domains. Attorneys need to examine the degree that evaluators have reliably assessed parenting behaviors and parent-child interactions across a variety of situations.

Best practice guidelines illustrate how scientific principles can be applied to specific tasks. Forensic mental health evaluators can easily underestimate the prevalence and severity of distorting influences on their work without developing the correct safeguards for minimizing distorting biases. How the evaluator approaches an examination of parenting, who the evaluator in-

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<sup>125</sup> See Scott O. Lilienfeld, *Can Psychology Become a Science?*, 49 *PERSONALITY & INDIVIDUAL DIFFERENCES* 281 (2010).

<sup>126</sup> See Jonathan W. Gould & Milfred D. Dale, *Reviewing Child Custody Evaluations: Using Science to Maximize Reliability & Minimize Bias*, in *FORENSIC PSYCHOLOGY AND NEUROPSYCHOLOGY FOR CRIMINAL AND CIVIL CASES* (H. Hall ed., 2d ed. forthcoming 2021); see also David A. Martindale, *Confirmatory Bias and Confirmatory Distortion*, 1 *J. CHILD CUSTODY* 31 (2005).

<sup>127</sup> DANIEL J. HYNAN, *CHILD CUSTODY EVALUATION: NEW THEORETICAL APPLICATIONS AND RESEARCH* (2014).

interviews, what questions the evaluator asks, and how the evaluator records the questions and answers of the evaluation can be critical in helping the court understand the quality of the investigative rigor of the evaluation. These factors affect the evaluator's ability to accurately assess the family dynamics and assist the court in developing a parenting plan for the families' future.

The *Forensic Model* posits that comprehensive cross-examination of an expert's child custody evaluation can reveal to the court the strengths and deficiencies of the evaluator's work. A comprehensive cross-examination can offer commentary on the methodology employed by the evaluator, the assessment devices utilized, the interpretation of assessment data, and the nexus between information gathered and opinions expressed. A focused cross-examination may reveal to the court what is and what is not the most reliable and trustworthy data based upon the professional and scientific knowledge of the child custody profession.

Cross-examination should focus on the reliability and relevance of the information gathered during the evaluation, the manner in which the evaluator integrated current professional and scientific knowledge of the discipline into the report, and the degree to which the expert opinions proffered in the evaluation appear logically or scientifically related to the collected data. An effective cross-examination should address three broad areas and, within each of these, several specific elements: (1) methodology, (2) formulation of opinions, and (3) communication of findings and opinions to the court.

Below are twelve dimensions or factors that may be the focus of a comprehensive cross-examination:

1. The use (or lack thereof) of appropriate procedural safeguards. Issues in this category include ascertaining whether the purpose of the evaluation, the scope of the evaluation, those to whom the report is to be disseminated, the manner in which the report is to be disseminated, and those to whom the file will be made available have all been specified in writing in advance of the evaluation. Additionally, such issues as the sequence in which evaluative sessions have been conducted should be examined.
2. The techniques employed in interviewing the parents. The attorney examines whether systematic procedures

were employed that would increase the probability that the evaluator will obtain pertinent historical information and current information bearing on functional abilities related to parenting and will not be distracted by information that is not pertinent to the evaluative task.

One often ripe area of cross-examination is asking what data were gathered during parent, child, and collateral interviews that *directly* addressed answering the questions that defined the scope of the evaluation. Although there is little empirical examination of forensic interviewing of parents engaged in child custody evaluations, the evaluator should gather information sufficient to address the specific questions guiding the evaluation. The specific questions should be identified either in the court order or in correspondence from the attorneys.

The cross-examining attorney should examine whether the evaluator asked each parent about the allegations posed by the other parent and what additional collateral sources were pursued that might help support his/her position. The attorney should also examine whether the evaluator asked each parent to address reasonable alternative explanations (plausible rival hypotheses) and the parents' view of how their proposed solutions serve the best interests of their children.

3. Cross-examination should also address the manner by which information has been obtained from children. The attorney should examine the interview techniques that were employed, to see whether they were tailored to the cognitive development and expressive and receptive language abilities of the child. Additionally, the cross-examining attorney should consider the reliability and validity of any special techniques employed.

The cross-examining attorney should inquire about any video or audio tape recordings of the child interviews. Significant research has revealed threats to reliability from notetaking and from attempts to accurately recall who said what during an interview.<sup>128</sup> When

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<sup>128</sup> See Rita T. Cauchi, Martine B. Powell & Carolyn H. Hughes-Scholes, *A Controlled Analysis of Professionals' Contemporaneous Notes of Interviews of Alleged Child Abuse*, 34 CHILD ABUSE & NEGLECT 318 (2010); Stephen J.

searching for bias, for example, one should compare the contents of the evaluator's contemporaneously taken notes with the evaluator's description of factors supporting opinions included in a report or testimony.<sup>129</sup>

4. Another rich area for cross-examination is the methods employed in conducting observational sessions between the two parents and between each parent and the children and how such observation information was recorded. To be maximally useful, observations should be conducted in some systematic manner, evaluators should know in advance what types of information they wish to gather, and whatever data are gathered should be gathered in a structured manner.

The examining attorney should examine whether the parent-child observations were structured in a manner to gather information useful in answering the specific questions guiding the evaluation. The attorney should also explore whether the evaluator was engaged in the parent-child observation – that is, actively participating in discussions with parents and/or children rather than passively observing – thereby changing the parent-child observation to a parent-child-evaluator observation. Inquiry should also focus on what steps the evaluator took to minimize involvement in the observational interactions.

The attorney should explore whether the evaluator conducted follow-up interviews with the parents and children, if old enough, to explore the degree to which the parent-child observations are representative of everyday behavior. Although the attorney should never assume the accuracy of the parent or child's perspective on

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Ceci & Maggie Bruck, *Why Judges Must Insist on Electronically Preserved Recordings of Child Interviews*, 37 *CT. REV.* 10 (1999); Michael E. Lamb, Yael Orbach, Kathleen J. Sternberg, Irit Hershkowitz & Dvora Horowitz, *Accuracy of Investigators Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24(6) *LAW & HUM. BEHAV.* 699 (2000).

<sup>129</sup> David A. Martindale, *Cross-examining Mental Health Experts in Child Custody Litigation*, 29(4) *J. PSYCHIATRY & L.* 483, 488 (2001).

the representativeness of the observational data,<sup>130</sup> comparing parent and child perspectives on the representativeness of their observed interactions against information obtained from collateral sources is critical.

5. The cross-examining attorney should examine the extent to which pertinent documents were utilized by the evaluator and the ways in which such information might have influenced the evaluator's approach to the assessment. Evaluators must take great care not to view uncritically certain types of documents as constituting verification of oral reports from litigants. Some documents presented to evaluators are no more than written records of oral reports made earlier to different people.

Information presented to evaluators will have an influence on how they proceed in data gathering, data interpretation, and opinion formation. The effects of relevant and irrelevant information on the evaluator's understanding of the issues in the case are important areas for examination. Examining the degree to which the evaluator has included in the evaluation report information that is irrelevant to the issues before the court yet paint a favorable or unfavorable picture of a parent should be explored.

Too many evaluators include in their written reports information that is unrelated to the issues before the court. This irrelevant contextual information<sup>131</sup> may bias the evaluator in understanding the issues, and may bias the reader in viewing the qualities about the parent that are unrelated to whether the individual is a competent parent, i.e., a parent's history of pole dancing or history of early pregnancy during high school.

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<sup>130</sup> Jonathan W. Gould & Christopher Mulchay, *Child Custody Evaluations*, in OXFORD HANDBOOK OF PSYCHOL. & L. (David DeMatteo & Kyle Scheir eds. forthcoming 2021).

<sup>131</sup> Itiel E. Dror, *The Paradox of Human Expertise: Why Experts Get It Wrong*, in THE PARADOXICAL BRAIN 177 (Narinder Kapur ed. 2011); see Itiel E. Dror, *Cognitive and Human Factors in Expert Decision-Making: Six Fallacies and the Eight Sources of Bias*, 92 ANALYTIC. CHEM. 7998 (2020); see also Itiel E. Dror, *Human Expert Performance in Forensic Decision Making: Seven Different Sources of Bias*, 49 AUSTRALIAN J. FORENSIC SCI. 541 (2017).

6. Cross-examination should also address the manner in which the evaluator selected collateral sources of information, obtained information from those sources, and assessed the reliability of the information obtained. William Austin and H.D. Kirkpatrick<sup>132</sup> have called attention to the fact that as psychological distance from the custody dispute increases, so, too, does objectivity. School personnel are likely to provide more objective information than neighbors. Yet, evaluators who limit their collateral source inquiries to those who are deemed to be objective are likely to overlook information that, despite its delivery by subjective sources, is nevertheless potentially enlightening.
7. A fruitful area of examination is often the methods employed by the evaluator to corroborate information on which he or she relied. Despite overwhelming evidence that psychologists are not particularly impressive as human lie detectors,<sup>133</sup> far too many evaluators trust their clinical intuition to tell who is being forthright and who is being disingenuous. The cross-examining attorney should examine which parent-assertions were verified through third party information.

Often overlooked by attorneys is a critical examination of the criteria employed in the selection of assessment instruments. Although in some jurisdictions the criteria to be employed in assessing custodial suitability are statutorily defined, in many jurisdictions, evaluators must decide for themselves what constitutes effective parenting and what observable indices can be utilized.

Tess Neal and her colleagues recently reviewed the use of psychological assessment tools in the courtroom and concluded:

We find that many of the assessment tools used by psychologists and admitted into legal contexts as scientific evidence actually have

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<sup>132</sup> See Austin & Kirkpatrick, *supra* note 97.

<sup>133</sup> See Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10(3) *PERSONALITY SOC. PSYCHOL. REV.* 214 (2006); see also Bella M. DePaulo, Kelly Charlton & Harris Cooper, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1(4) *PERS. SOCIAL PSYCHOL. REV.* 346 (1997).

poor or unknown scientific foundations. We also find few legal challenges to the admission of this evidence. Attorneys rarely challenge the expert evidence and, when they do, judges tend not to subject psychological assessment evidence to the legal scrutiny required by law.<sup>134</sup>

Neal et al. reported that there is no relationship between the psychometric qualities of a test and its likelihood of being challenged in court. Their data suggested that some of the weakest tools tend to get a pass from the courts. “Our bottom-line conclusion is that evidentiary challenges to psychological tools are rare and challenges to the most scientifically suspect tools are even rarer or are nonexistent.”<sup>135</sup>

8. Also often overlooked by attorneys is the manner in which assessment instruments were administered. Evaluators should administer assessment instruments in accordance with the instructions in the manuals that accompany the instruments and should be responsive to the admonitions that appear in the *Standards for Educational and Psychological Testing*. Deviation from standard administration instruction undermines the reliability of the test data and, as a result, adversely affects the trustworthiness of opinions drawn from those data.
9. Another area ripe for cross-examination is the accuracy of the evaluator’s scoring and interpretation of assessment data. Many evaluators have become dependent upon computer-generated interpretive reports, despite the clarity of APA Ethical Standard 9.09(c), which reminds psychologists that they “retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.”<sup>136</sup> Theodore Millon, Roger Davis and Carrie Millon have noted that automated reports use configurational interpretations that have not been empirically val-

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<sup>134</sup> Tess M.S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping “Junk Science” Out of the Courtroom*, 20 PSYCHOL. SCI. PUB. INT. 135, 155 (2019).

<sup>135</sup> *Id.* at 154.

<sup>136</sup> Am. Psychol. Ass’n, *supra* note 114, at 1972.

idated, reflect interpretive stereotypes rather than individualized descriptions, and, because they restrict interpretations to significant clinical elevations, tend to portray only the more negative or problematic portions of the examinee's personality.<sup>137</sup> More recent concerns have been raised by Sol Rappaport, Jonathan Gould, Milfred Dale, David Martindale, and James Flens.<sup>138</sup>

11. Cross-examining attorneys should also examine the degree to which the evaluator engaged in activities that protected the integrity of the evaluation process. Model standard 8.1 of the AFCC's *Model Standards of Practice for Child Custody Evaluation* calls attention to the fact that "[t]he responsible performance of a child custody evaluation requires that evaluators be able to maintain reasonable skepticism, distance, and objectivity." An evaluator's objectivity may be impaired when they currently have, have had, or anticipate having a relationship with others involved in the case (e.g., the parents or children being evaluated, the attorneys for the parties or the children, or the judges). These potential conflicts can introduce bias or potential bias into the process, allowing reviewers to call attention to the ways in which evaluator objectivity may have been impaired as a result.
12. Finally, the cross-examination should investigate the evaluator's compliance with ethical standards, laws, and regulations governing the creation, maintenance, and production of appropriate records. Ethical guide-

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<sup>137</sup> THEODORE MILLON, ROGER DAVIS & CARRIE MILLON, *MCCI-III MANUAL* 134 (2d ed. 1997).

<sup>138</sup> Jonathan W. Gould, David A. Martindale & James R. Flens, *Responsible Use of Psychological Tests: Ethical and Professional Practice Concerns*, in *THE OXFORD HANDBOOK OF CHILD PSYCHOLOGICAL ASSESSMENT* (D. Saklofske, C. Cecil Reynolds & V. Schwane eds., 2013); Jonathan W. Gould, David A. Martindale & James R. Flens, *Responsible Use of Psychological Tests in Child Custody Assessment*, in *SCIENTIFIC BASIS OF CHILD CUSTODY EVALUATIONS* 85 (R. Galatzer-Levy, L. Kraus & B. Galatzer-Levy eds., 2d ed. 2009); *See also* Sol R. Rappaport, Jonathan Gould & Milfred D. Dale, *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 *J. AM. ACAD. MATRIM. LAW.* 405 (2018).

lines admonish psychologists engaged in forensic psychological activities to maintain their records with an eye toward their review by others.

B. *The Psychology-Law Analysis (PLAN): John Zervopolous*

In 2008 in *Confronting Mental Health Evidence: A Practical Plan to Examine Reliability and Experts in Family Law*,<sup>139</sup> John Zervopolous introduced the PLAN approach for reviewing child custody evaluations. This book, and a companion book, *How to Examine Mental Health Experts: A Family Lawyer's Handbook of Issues and Strategies*,<sup>140</sup> are now both in their second editions. The PLAN (psychology-law analysis) model integrates two features of *Daubert* caselaw and mental health testimony.<sup>141</sup> In this approach, the reviewer of an evaluation must consider an analysis of the expert's qualifications and an analysis of the methods and procedures used by the expert.

The four-step PLAN approach includes (1) determination of the expert's qualifications; (2) determination of whether the expert's methods conform to relevant professional practice standards (methods reliability); (3) determination of the empirical and logical connections between the data obtained from the use of reliable methods and the expert's social-science based conclusions (reasoning reliability); and (4) determination of the connection between the expert's conclusions and the proffered expert opinions.<sup>142</sup>

Like the *Forensic Model*, Zervopolous posits that a proper comprehensive cross-examination should utilize both legal and psychological perspectives. The cross-examining attorney must address the legal factors related to the rules of evidence, applicable statutes or rules, and knowledge of relevant case law addressing the admissibility and reliability of expert witness testimony. The psychological factors include the expert's professional ethics, professional practice guidelines, and the relevant scientific and

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<sup>139</sup> See JOHN ZERVOPOLOUS, *CONFRONTING MENTAL HEALTH EVIDENCE: A PRACTICAL PLAN TO EXAMINE RELIABILITY AND EXPERTS IN FAMILY LAW* (2d ed. 2015).

<sup>140</sup> See JOHN ZERVOPOLOUS, *HOW TO EXAMINE MENTAL HEALTH EXPERTS: A FAMILY LAWYER'S HANDBOOK OF ISSUES AND STRATEGIES* (2014).

<sup>141</sup> See ZERVOPOLOUS, *supra* note 139.

<sup>142</sup> *Id.*

professional literature. “In short, courts, when assessing the reliability and quality of expert testimony, do not apply legal principles in a vacuum. Rather, courts apply legal principles (the legal perspective) to the methodology and reasoning (the psychological perspective) that support testifying experts’ opinions.”<sup>143</sup>

Zervopolous stresses the importance of the cross-examining attorney knowing the subject matter of the expert’s testimony. The attorney can retain a consultant to assist in organizing relevant literature, drafting examination questions, and assisting at deposition and/or trial. All too often, cross-examining attorneys are unfamiliar with the subject matter and employ a general approach to their cross. While many clients do not have the monetary resources to retain a trial consultant, attorneys should consider developing relationships with mental health professionals familiar with state-of-the-art CCE literature and practices. A phone call or email asking for citations to current literature can add immeasurably to an effective cross-examination without adding significant cost.

The PLAN approach emphasizes the concept of *trustworthiness* as a legal term that may be more acceptable to attorneys and the courts. Zervopolous argues that *trustworthiness*, while not having a precise definition, “is quickly understood. It has the feel you want to convey to the court: *Is the expert’s testimony sufficiently trustworthy to inform the trier of fact as they decide the issues in the case?* Let *trustworthiness* orient your critiques of expert testimony.”<sup>144</sup> Zervopolous suggests interchangeably using the terms *reliability* and *trustworthy* in both argument and cross-examination.

In cross-examining an expert on qualifications, Zervopolous recommends obtaining a current copy of the expert’s resume or curriculum vita and asking questions about the expert’s expertise concerning the specific issues in the case about which the expert intends to offer opinions. Questions about the number of child custody evaluations the expert has conducted are often less useful than asking about the number of relocation cases, or domestic violence cases, or same-sex marriage cases. Also consider examining the expert’s specialized training in each procedure utilized

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

in the assessment. For example, ask about the expert's specialized training in forensic interviewing of parents, forensic interviewing of children, forensic use and interpretation of each psychological test administered in the evaluation, use of collateral information in child custody assessment, and forensic psychological ethics.

Another area of examination is the expert's professional objectivity. Questions exploring the expert-attorney relationship, or the expert-litigant relationship might reveal information that can be used to argue bias.<sup>145</sup> Some attorneys use their retained consultants as testifying experts, "blurring the line that distinguishes the purposes of those two different expert roles."<sup>146</sup>

There is no clear professional consensus regarding the line between trial consultant and testifying expert. Earlier scholarship drew a bright line between the trial consultant role and the testifying expert role.<sup>147</sup> Subsequent scholarship has challenged the rigid notion of roles and suggested that examining the activities in which the mental health expert is involved is a more useful approach. As Dale and Gould have previously argued, all testifying experts need to consult with the attorney who retains them prior to agreeing to testify in order to clarify the purpose and scope of testimony.<sup>148</sup> There may be other consulting activities that do not introduce bias or conflict, but may often serve to undermine the perception of the testifying expert's credibility.

Another topic for cross-examination in the qualifications area is the expert's history of testifying. Examination might focus on whether the expert has been disqualified from testifying in previous cases or has not been qualified as an expert in particular areas. Explore the expert's fees in the case, the nature of the expert's relationship to the attorney in past cases, the extent to which the expert has reviewed material relevant to the case, and whether the material reviewed reflects a comprehensive examination of the file material or whether the reviewed materials

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See Jonathan W. Gould, David A. Martindale, Timothy M. Tippins & Jeffrey P. Wittmann, *Testifying Experts and Non-Testifying Trial Consultants: Appreciating the Differences*, 8(1/2) J. CHILD CUSTODY 32 (2011).

<sup>148</sup> See Dale & Gould, *supra* note 84.

have been cherry-picked resulting in the expert having a one-sided understanding of the facts in the case.

Step Two in the PLAN model is determination of the reliability of the expert's methods of data gathering. Legal challenges may utilize applicable statutes and case law. It is also important to examine the expert's use of methodology and whether it is sufficiently reliable for use in forensic settings. Cross-examination should address the selection of data-gathering tools and the support found in the relevant literature for the use of each data-gathering tool in similar cases. For example, there are peer-reviewed articles describing the frequency of use of specific psychological tests and measures in child custody evaluations and the usefulness (read: reliability) of those assessment tools when used in a child custody context. There also may be case law addressing the admissibility of certain psychological tests as scientific instruments, i.e., MMPI-2.

"Good data is [sic] a product of reliable methods; If the methods are inadequate, the data's quality is compromised; Compromised data cannot support reliable expert conclusions and opinions."<sup>149</sup> Psychological challenges to the expert's methodology can be based on the applicable professional standards. These include use of applicable ethical standards and professional practice guidelines such as those promulgated by the American Psychological Association (APA) and the Association of Family and Conciliation Courts (AFCC). Another valuable resource is the peer-reviewed literature addressing generally accepted methods or protocols. Among the relevant peer-reviewed literature are the numerous studies in which survey data have been reported about the general approach to custody assessments endorsed by those engaged in child custody assessment and the books and articles describing how to conduct child custody evaluations.

There is a generally accepted methodology utilized in child custody evaluations. Child custody evaluations include multiple interviews with each parent, interview(s) with each child and/or direct observation of each parent with each child (or children); interviews with collateral witnesses; record review of relevant documents and court filings; and psychological testing when ap-

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<sup>149</sup> ZERVOPOLOUS, *supra* note 139, at 28.

appropriate. A frequent area of rich examination is collateral interviews. Too often, child custody evaluators interview individuals who know the parent and do not ask for examples of specific behaviors observed. Instead, the collateral persons who are interviewed will often provide opinions about the parent or about the parent-child relationship without providing relevant information about the behaviors that form the basis of their opinions. Another area rich for examination is the use of psychological tests and the degree to which the tests are commonly used in child custody assessment and whether the tests have peer-reviewed information about their use in child custody assessment. Note the distinction between whether a test is commonly used versus whether data support its use in the child custody context.

Step Three of the PLAN model evaluates the empirical and logical relationship between the data gathering during the evaluation and the expert's social science-based conclusions. Zervopoulos refers to this as reasoning reliability.<sup>150</sup> "*Conclusions* are psychology-based inferences that experts decide best link and explain their evaluation data and case facts. *Opinions* apply those conclusions to legal standards addressed in the case."<sup>151</sup>

Cross-examination should focus upon the connections among the data gathered during the evaluation with the inferences made based upon those data and the expert opinion developed from those inferences. The cross-examining attorney must explore the degree to which the expert opinions are based upon inferences drawn from all of the data rather than drawn from a selective set of data. Too often, expert witnesses exclude from their analyses data and inferences drawn from those data that do not support their expert opinion. Examining the data that have been excluded from the expert's analysis is often as useful as examining the data that have been included in the expert's analysis.

The *Joiner* Court<sup>152</sup> described the analytic gap test: "A court may conclude that there is simply too great an analytic gap between the data [for example, interpretations of child's drawings] and the [conclusion] opinion proffered [for example, the opinion that the child has been abused]."<sup>153</sup> The larger the gap

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<sup>150</sup> *Id.* at 31.

<sup>151</sup> *Id.* at 31-32.

<sup>152</sup> *Joiner*, 522 U.S. at 146.

<sup>153</sup> ZERVOPOLOUS, *supra* note 139, at 32.

between the data and the inference, the less confidence in the trustworthiness of the expert's opinion. If the gap is too great, the expert's opinion is no more than speculation.<sup>154</sup>

During Step Three, cross-examination should also focus attention on the expert's consideration of reasonable alternative explanations of the data. A hallmark of the scientific process is consideration of rival alternative hypotheses. An expert is expected to rule out alternative possible causes with reasonable certainty<sup>155</sup> and the failure to consider plausible alternative hypotheses and/or causes renders expert opinion as little more than speculation.<sup>156</sup> North Carolina appellate courts have cited similar language and asked the trial court to determine whether the expert has adequately accounted for obvious alternative explanations.<sup>157</sup>

It is important for attorneys to obtain the evaluator's entire file to examine whether there are any notes indicating consideration of plausible alternative hypotheses. Deposition testimony might also be sought to determine whether the evaluator considered reasonable alternative explanations. Effective cross-examination of an expert's consideration of reasonable alternative explanations of the data, whether conducted during a deposition or at trial, might include asking the expert to explain the scientific basis of each reasonable alternative explanation and how the data from this particular evaluation argues in favor of one alternative over another.

Step Four in the PLAN model examines the connection between the expert's conclusions and opinions. Two critical factors are addressed in Step Four. The first factor to examine is whether the expert has properly defined the legal standard. For example, has the expert utilized a definition of the legal standard that reflects the expert's personal beliefs and values rather than correctly articulating the legal standard in the jurisdiction? In relocation cases, examine whether the expert was guided by the factors articulated in a state's relocation statute or in a best inter-

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<sup>154</sup> *Id.* at 32.

<sup>155</sup> *Merrell Dow Pharm., Inc. v. Hayner*, 953 S.W.2d 706, 720 (Tex. 1997).

<sup>156</sup> *E.I. Dupont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 599 (Tex. 1995).

<sup>157</sup> *See State v. McGrady*, 787 S.E.2d 1 (N.C. 2016).

est analysis did the expert evaluate each of the relevant best interest factors identified in statute or case law?

The second factor to examine in Step Four is whether the recommendations are relevant, reliable, and practical.

Recommendations are *relevant* if they remain within the scope of the evaluation's specific referral questions from the court. Recommendations are *reliable* if they derive from sound conclusions developed from reasoning that sufficiently connects the conclusions with data derived from reliable methods. Recommendations are *practical* if they can be implemented effectively in the family's daily life.<sup>158</sup>

### C. *The Custody Assessment Analysis System (CAAS): Jeffrey Wittmann*

In 2013 in *Evaluating Evaluations: An Attorney's Handbook for Analyzing Child Custody Reports*,<sup>159</sup> Jeffrey Wittmann articulated the Custody Assessment Analysis System (CAAS). The CAAS system is developed from a combination of the author's multi-year experience as a retained expert reviewing child custody evaluations conducted in jurisdictions across the country and relevant treatises and research on assessment issues. Perhaps because Wittmann is based in New York, which retains the *Frye* general acceptance standard for admissibility of expert testimony, the CAAS system focuses on comparing the evaluator's conduct to ethical standards and professional guidelines. Wittmann argues that the references in the ethical codes and guidelines for the variables in the CAAS system should be considered as "professional norms" against which evaluator performance can be compared.<sup>160</sup>

The CAAS system organizes examination of a child custody evaluation around four general dimensions, each of which consists of three to five variables. The four dimensions are (1) management of professional relationships; (2) data adequacy; (3) technique adequacy; and (4) reasoning adequacy. Each of the general dimensions is broken down into more specific factors that delineate areas of targeted examination.

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<sup>158</sup> ZERVOPOLOUS, *supra* note 139, at 36.

<sup>159</sup> JEFFREY P. WITTMANN, *EVALUATING EVALUATIONS: AN ATTORNEY'S HANDBOOK FOR ANALYZING CHILD CUSTODY REPORTS* (2013).

<sup>160</sup> *Id.* at 5.

The CAAS requires,

at a minimum, (1) an understanding of the ethical and preferred-practice standards of the evaluator's discipline; (2) clarity about the boundaries of the specialized knowledge base of the profession; (3) access to the key treatises and research that should undergird the evaluator's method and reasoning; (4) an understanding of the nature of certain technical processes such as the nature of computer test interpretation that can suggest evidentiary challenges; and (5) an appreciation for the literature that elucidates the biases and judgment errors that can derail the forensic reasoning process.<sup>161</sup>

The CAAS offers comprehensive lists of dimensions or factors for each evaluator activity. The CAAS system "requires knowing the assessment principles and the custody-relevant portions of the empirical literature in the psychological library, knowledge not easily acquired in the push and pull of legal practices."<sup>162</sup>

The CAAS is conceptualized as a "red flag" analysis: a catalog of weaknesses or threats to reliability that appear to characterize a particular custody or access assessment.<sup>163</sup> Pinpoint citations to the supporting ethical codes, guidelines, or professional literature are offered for each possible threat to reliability. While all evaluations likely have some degree of error contamination, the CAAS's "most useful contribution is to aid in deciding if the particular errors and threats to reliability present in a given report rise to a level suggesting that the report is vulnerable to attack or should be either weighed lightly by the court or thrown out completely."<sup>164</sup>

## **Part IV: Cross-Examination Models**

### *A. Destructive Cross-Examination: Irving Younger & Stephen Easton*

Traditionally, Irving Younger is viewed as having established the gold standard for destructive cross-examination,<sup>165</sup> a process within which thinly sliced fact statements are offered as declara-

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 14.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Irving Younger, *The Art of Cross Examination*, in *THE ART OF CROSS EXAMINATION: ESSAYS FROM THE BENCH AND BAR* (Charles Gibbons

tive statements in the form of “questions.”<sup>166</sup> For many years, Younger was considered the quintessential “teacher of trial lawyers” about the craft of trying lawsuits.<sup>167</sup> He insisted that lawyers learn ten commandments for cross-examination questions and learn them so well they became second nature. By writing every cross-examination question consistent with these ten commandments, cross-examining lawyers could control adverse witnesses through a process that, in theory, allowed for one of only four possible answers to any question on cross: “yes,” “no,” “I can’t answer that question yes or no,” or “I don’t know.”<sup>168</sup> For Younger and other advocates of destructive cross-examination, if the question does not comply with the commandments, it should not be asked.

Stephen Easton developed into somewhat of a standard bearer for Younger’s legacy and, like several others, wrote to update this approach to cross-examination. In a 2002 paper honoring Younger, Easton added ten suggestions, each in response to one of Younger’s original ten commandments.<sup>169</sup>

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ed. 2014) (proceedings of a speech given by Prof. Younger at the American Bar Association’s Annual Meeting in Montreal, Canada on Aug. 12, 1975).

<sup>166</sup> See Barton, *supra* note 39, at 8.

<sup>167</sup> See Stephen D. Easton, *Irving Younger’s Ten Commandments of Cross-Examination: A Refresher Course with Additional Suggestions*, 26 AM. J. TRIAL ADVOC. 277 (2002).

<sup>168</sup> See Barton, *supra* note 39, at 8.

<sup>169</sup> See Easton, *supra* note 167.

**Table 1**

	Irving Younger's Ten Commandments	Stephen Easton's Suggestions
1	Be Brief	Do Not Just Tell Them, Show Them!
2	Ask Short Questions, Using Plain Words	Get One Fact Per Question
3	Ask Leading Questions	Write Questions That Must Be Answered "Yes"
4	Ask Only Questions to Which You Already Know the Answer	Be Ready to "Prove Up" Your Questions Immediately
5	Do Not Let the Witness Merely Repeat Direct Testimony	Bait and Set the Trap Before Springing It
6	Do Not Let the Witness Explain	Secure the Right to Control the Witness
7	Listen to the Witness's Answer	Record Important Testimony in Witness's Own Words
8	Do Not Quarrel with the Witness	Do Not Improve the Witness's Prior Statements
9	Avoid the "One Question Too Many"	Stay Well Clear of "the Door"
10	Save the Argument for Summation	Resist the Temptation to Wrap Your Cross into a Neat Package
	Stop	

Younger posited that the largest purpose of cross is to set up arguments you wish to make during closing. He suggested limiting cross-examination to three points with each witness. Easton added that proper preparation requires annotating each cross-examination question with a reference to the supporting evidence. Having the means to "prove up" your question somewhere in your files is not enough. The questioning lawyer should ask "yes" questions, not "yes or no" questions. Particularly at trial, the lawyer should provide information in their question instead of requesting it. The lawyer should "tell" rather than ask. In addition, if there is anything other than a "yes" answer, the lawyer

must be able to immediately access the evidence supporting the question.<sup>170</sup>

Easton recommends writing cross-examination questions in advance, word for word.<sup>171</sup> Each question should then be reviewed and edited for compliance with the commandments and suggestions because “a simple change of a word or phrase can turn an otherwise effective cross-examination question into a violation of one of the commandments.”<sup>172</sup> Writing more questions than will actually be used allows the lawyer to be prepared and, when necessary, to decide to skip questions if or when issues become less important. Effectively drafting questions “on the fly” in the courtroom is only possible if the lawyer has an intuitive knowledge of the commandments. Easton notes, “Great cross-examinations are created in the office, not the courtroom.”<sup>173</sup>

#### B. *Destructive Cross-Examination of Experts – Stephen Easton*

Easton’s book, *Attacking the Adverse Expert*, describes his approach to this task.<sup>174</sup> He suggests:

During the attack portion of a destructive cross-examination, the lawyer should ask himself two questions about every possible question they are considering asking the expert:

1. Can I force the expert to admit this truth (or look silly if he denies it)?
2. Will this truth help me establish that he is wrong about the key issue(s) in the case?<sup>175</sup>

Establishing that an expert is wrong is a process where the seeds for this assertion are planted in the lawyer’s opening statement, where cross-examination questions set up the expert for attack and force the expert to admit to errors or incorrect elements in his analysis, and where the proof of these errors occurs in the lawyer’s case in chief. The questioning lawyer should thwart the temptation to try to prove that the expert is wrong but instead attempt to identify “truths” supporting his challenge to which the expert must admit. The questioning lawyer must be

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<sup>170</sup> *Id.* at 283-84.

<sup>171</sup> *Id.* at 281.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 282.

<sup>174</sup> STEPHEN D. EASTON, *ATTACKING ADVERSE EXPERTS* (2008).

<sup>175</sup> *Id.* at 494.

prepared to prove up at any time any assertions of errors alleged to have been made by the expert. Any analysis of erroneous statements made by the expert in cross-examination should be included in the attorney's case-in-chief and during rebuttal on the way to providing the basis for closing argument.

Easton suggests it is important to not under-attack or over-attack. The questioning attorney must force the expert to admit undeniable truths or look silly denying them. Establishing that the expert's theory and testimony are incorrect may be proven by inconsistent prior statements (from depositions or even other cases), by contrasting these statements with statements of other experts in learned treatises, or by simply proving the expert is wrong about the facts or the theory that he or she applied to the facts of the case.

Easton also recommends identifying "credibility themes" tied to specific weaknesses in the expert's report or testimony. These might include: (1) references to the adverse expert not being sufficiently knowledgeable about the subject matter or the facts of the case; (2) challenges to the expert's objectivity including the possibility of dishonesty, bias, or prejudice; and/or (3) assertions the expert did not adequately investigate or does not possess the facts of the case for what the proponent of his testimony has suggested his testimony should be.<sup>176</sup> Easton also recommends that the questioner "stop before the last step" and to use closing argument rather than any portions of cross-examination to explain points made or arguments supported during cross-examination.

Other writers have also added to Younger's ten commandments. For example, Charles Hvass, Jr. drafted three additional commandments, noting that cross-examination questions should always (1) help your case; (2) hurt the witness; or, (3) if all else fails, neutralize the witness.<sup>177</sup>

Numerous legal scholars caution about the risks of destructive cross examination. Destructive cross risks making the attorney look overly partisan, as if they are not interested in the whole truth, but only in their client's one-sided and thin-sliced

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<sup>176</sup> *Id.* at 492.

<sup>177</sup> See Charles Hvass Jr., *The New Commandments of Cross-Examination*, 28(4) LITIG. J. 26 (2002).

version of the truth.<sup>178</sup> The goal is to be seen by the trier of fact as the one pursuing justice, not just winning.

Easton cautions that destructive cross-examination can backfire. Since the attack occurs on the expert's territory, it is not advisable to launch a full attack on the expert's scientific analysis unless winning this battle is certain.<sup>179</sup> James McElhaney, an advocate for constructive cross-examination provides the following cautions about destructive cross-examination.

Whatever the reasons, a destructive cross-examination is often a mistake, and its price is high. It can create sympathy for the witness when there was none before. Worse, it can create animosity toward the lawyer who does it. A destructive cross-examination may push a witness into making his testimony more adverse than it would have been. And a needlessly hostile cross-examination over something that does not seem to matter creates the impression that you are completely unreasonable, a perception that can infect their jury's view of your entire case. It all suggests that you should conduct a destructive cross-examination only when you must. That means you will declare war on a witness only when you have weighed the benefits against the risks, and have decided they are worth it.<sup>180</sup>

### C. *Destructive Cross-Examination in Child Custody: Timothy Tippins*

Perhaps the most well-known advocate of destructive cross-examination in child custody cases is Timothy Tippins. The focus on child custody evaluations separates Tippins' writings from those of others cited in this article. For Tippins, the targets for cross-examination of an evaluator or expert extend beyond the expert's performance of a child custody evaluation to include the "science" upon which the expert purports to rely. This, in and of itself, is not necessarily problematic. In fact, Tippins has worked, written, and presented extensively with Dr. Jeff Wittmann, author of the Custody Assessment System, as well as with Dr. David Martindale and Dr. Jonathan Gould, authors of the *Forensic Model*. But the level to which Tippins demands evaluators be "scientific" makes his approach controversial.

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<sup>178</sup> See Barton, *supra* note 39.

<sup>179</sup> EASTON, *supra* note 174, at 492.

<sup>180</sup> James McElhaney, *Trial Notebook: Constructive Cross-Examination*, 14(2) LITIG. J. 49, 49 (1988).

Tippins writes about the limitations of using science in child custody evaluations. In many ways, Tippins is the cross-examination “point person” for a perspective that views child custody evaluators who make recommendations as guilty of reaching beyond what the science of their disciplines can legitimately support.<sup>181</sup> For Tippins, cross-examination involves identifying and isolating each inference embraced by the expert’s opinion and requiring the evaluator to support each inference by citation to the empirical research. Tippins asserts that the major premise for expert inference comes from the knowledge base of the expert’s profession and that this premise provides the possibilities for the minor premise, or the constellation of case-specific data points collected through the evaluation process.<sup>182</sup> Tippins has advocated for

A tightly drafted appointment order that mandates specific citation of supporting professional literature will put evaluators on notice that the court is aware of the essentiality of empirical support and adherence to scientific method and that it will hold them accountable for scientific shortcoming. By mandating that such citations be included in the written report, the custody court can have the salutary effect of reigning in those evaluators who have lost touch with the scientific method that was once the benchmark of their profession.<sup>183</sup>

Tippins’s position is that evaluators should not offer custody opinions or recommendations because the status of the relevant psychological literature supporting an evaluator’s opinion on the ultimate issue is tenuous or non-existent.<sup>184</sup> Tippins notes that “no empirical work has been done in which a matched set of children with similar test and interview data is placed into different custodial arrangements to examine the overall effectiveness of one placement over another.”<sup>185</sup> However, the extent to which Tippins pursues these principles and his requests for strict empirical proof for everything an evaluator does is controversial and

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<sup>181</sup> See Emery, Otto & O’Donohue, *supra* note 10; see also O’Donohue & Bradley, *supra* note 10.

<sup>182</sup> Timothy M. Tippins, *Custody Evaluations – Part VI: Mastering the Professional Literature*, 88 N.Y.L.J. 3, 4 (2004).

<sup>183</sup> *Id.*

<sup>184</sup> See Tippins & Wittmann, *supra* note 9, at 193.

<sup>185</sup> *Id.* at 216.

seen by many as an unrealistic limitation that ignores the court's need for expert assistance with best interests determinations.<sup>186</sup>

Tippins is also a strong advocate for transparency regarding the child custody evaluation process, the evaluator's records, and the evaluation report.

The only way proper cross-examination can be planned and a responsive rebuttal case built is through analysis of the evaluator's report and its conclusions, the underlying basis of the adverse opinion and the totality of the circumstances surrounding the evaluation. Therefore, the first and most critical step is to carefully analyze the entire evaluation process, not simply the report but the entire process, that led to the conclusions expressed in the report, as well as each and every potential basis for its conclusions and facts that contraindicate those conclusions. This requires that the practitioner obtain all underlying information, the raw data upon which the evaluator has based his or her conclusions.<sup>187</sup>

#### D. *Modern Constructive Cross-Examination: Larry Pozner & Roger Dodd*

In *Cross-Examination: Science and Technique*,<sup>188</sup> Larry Pozner and Roger Dodd develop a comprehensive methodology they describe as modern "constructive cross-examination." This methodology emphasizes using opposing witnesses to build the theory of the case over challenging opposing witnesses on the opponent's theory of the case. Modern constructive cross-examination has its roots in the "yes/no question" tradition of destructive cross-examination, but there are clear philosophical and technique differences. In modern constructive cross, the attorney is conceptualized as a teacher or guide rather than an advocate set on persuading people.

Pozner and Dodd emphasize promoting the lawyer's theory of the case through the "marshalling of facts in support of a se-

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<sup>186</sup> See Joan B. Kelly & Janet R. Johnston, *Commentary on Tippins and Wittmann's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance"*, 43(2) FAM. CT. REV. 233 (2005) (noting this commentary focuses on "several points of disagreement and suggesting alternative remedies for the shortcomings and ethical problems described in child custody evaluations"); see also Nicholas Bala, *Tippins and Wittman Asked the Wrong Question: Evaluators May Not Be "Experts," But They Can Express Best Interests Opinions*, 43(4) FAM. CT. REV. 554 (2005).

<sup>187</sup> *Tippins*, *supra* note 182, at 4.

<sup>188</sup> See POZNER & DODD, *supra* note 21.

ries of previously identified goals.”<sup>189</sup> It involves organizing packages or “chapters” of facts to enable the triers of fact to learn and follow the lawyer’s theory of the case. This case theory is shared in the opening statement and reinforced throughout each aspect of the case (e.g., direct examinations, cross-examinations, and closing argument). The primacy of facts in building the theory of the case is important. “Facts create theories, facts support theories, facts limit theories, and facts extinguish theories.”<sup>190</sup> Certain facts are rewarded by the law and courts, others are not. Identifying factual goals and theories early in the case puts the lawyer in a better position to find and use facts that support the client. In sum, “the facts come first, and the theory follows.”<sup>191</sup>

Under the modern theory of constructive cross, opposing witnesses are used to build the attorney’s theory of the case. “Constructive cross expands the purpose of cross; it is an opportunity to introduce or reinforce facts that build the lawyer’s theory of the case, not simply to limit the damage the opponent has done to that case or to attack the points the opponent has attempted to make in support of their own theory of the case.”<sup>192</sup> A central task of constructive cross with an opposing witness is to use leading questions to get the witness to admit or verify facts that support the theme line or phrase. The focus is always on the underlying facts that support one’s theory of the case, not conclusions. Lawyers using modern constructive cross continuously ask themselves two questions: (1) “Does this witness possess facts that can build or strengthen my theory of the case?” and (2) “Has this witness hurt my theory of the case, and if so, do I have material available that will allow me to challenge the witness in those areas?”<sup>193</sup>

In constructive cross, the topic in court is the lawyer’s theory of the case during both direct and cross examination. Pozner and Dodd posit that “time = importance.” In this view, the traditional approach to cross, that spends time undermining, making unbelievable, and destroying the opponent’s theory of the case,

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<sup>189</sup> *Id.* at 1443.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2919.

<sup>192</sup> *Id.* at 3807.

<sup>193</sup> *Id.* at 3801.

spends too much time talking about the opponent's theory of the case rather than on teaching the lawyer's own theory of the case.<sup>194</sup> This approach can also allow for a more positive and more controlled presentation of the case because a well scripted cross often affords the lawyer more control than eliciting facts on direct examination. Pozner and Dodd emphasize that using the opponent's witnesses can also be more powerful and persuasive than presenting a case through one's own witness.

Like the other systems for cross examination, the modern constructive cross approach provides guidance for how to write and frame questions for the witness. The three rules are: (1) leading questions only; (2) one new fact per question; and (3) a logical progression toward specific goals. The adept cross-examiner never uses questions that invite uncontrolled, unpredictable, or unending answers, such as questions that begin with: who, what, when, where, how, why, or explain.<sup>195</sup> Words that describe the theory or theme lines of the case are woven into the chapters, which are sequenced in an order that aids communication of the theories and themes. *Cross-Examination: Science and Technique* is a comprehensive trial guide that educates about specific cross-examination techniques (like trilogies, loops, and double looping), as well as how to handle objections or other difficulties that arise in court.

E. *The Rules of the Road Approach and Technique: Rick Friedman & Patrick Malone*

In *The Rules of the Road*, Rick Friedman and Patrick Malone articulate an approach to constructing a case strategy that can be used as a technique with witnesses, including expert witnesses.<sup>196</sup> The Rules of the Road technique was initially designed for plaintiffs attorneys in civil cases who have the burden of proving all of the elements in their cases and who viewed ambiguity, confusion, and complexity as helpful to defendants, not plaintiffs. This technique is easily extended to all aspects of child custody cases where the very nature of the best interests of the child task is ambiguous, confusing, and complex. The focus is on

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<sup>194</sup> *Id.* at 3869.

<sup>195</sup> *Id.* at 6801.

<sup>196</sup> RICK FRIEDMAN & PATRICK MALONE, *RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY* (2d ed. 2010).

creating a case story involving case themes that define and solve the ambiguities and confusing elements of the problem before the court, including the ultimate issues. The approach is “to breathe life into ambiguous legal standards and create an indisputable standard for everyone . . . to see. The standard must be as clear as the double yellow line on a highway.”<sup>197</sup>

At its most basic level, the purpose of the Rules of the Road technique is to educate the trier of fact about basic principles that *require* the dispute to be resolved in the client’s favor. The term “*require*” could be applied to “rules” referencing laws where there is mandatory authority the court must follow, or “rules” that become persuasive authority or principles leading the trier of fact to believe and award a desired outcome.

Constructing, refining, and updating the “Rules” in the case is a dynamic process that begins upon meeting the client and extends throughout case preparation and discovery. Each good rule must have five attributes. A Rule of the Road in a custody case should:

1. *Include a requirement that the witness did, or did not do, something.* The rule must be prescriptive, not descriptive, and aimed squarely at its target;
2. *Be easy for the judge to understand.* While the sources of rules vary considerably, simplicity is the advocate’s friend as they attempt to define and solve what might otherwise seem ambiguous, confusing, or complex without the rule;
3. *Include a requirement the other party cannot credibly dispute.* To be useful, a rule must be endorsed by the other party and its witnesses or be so persuasive that the other party loses credibility by resisting it;
4. *Include a requirement the other party has violated or otherwise breached the spirit of the rule.* “Ideally, [the attorney] will be able to prove, beyond all doubt, that the [other party] violated a specific Rule in very definite ways. You never want to use a Rule with which the [other party] can prove it complied”<sup>198</sup>; and,

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<sup>197</sup> *Id.* at 3.

<sup>198</sup> *Id.* at 28.

5. *Be important enough in the context of the case that proof of its violation will significantly increase the chance of a favorable court decision for your client.* “Not every Rule violation is worthy of attention at trial”<sup>199</sup> because “your case does not get better in proportion to the number of Rules you add to your list.”<sup>200</sup> The focus is on keeping things simple and solving problems.

Throughout discovery, the attorney is looking to add rules to the list, garner support for rules already drafted, and identify agreement or disagreement from the opposing experts regarding your Rules.<sup>201</sup> Improving Rules usually means making them more specific and concrete in terms of what they require of the opposing party or the opposing party’s expert.<sup>202</sup> The Rules, not the Rule violations, should be the focus of the case story.

In this approach, Friedman and Malone distinguish between principles and rules. They describe a principle as a major truth about the other party’s behavior or conduct that might lead to possible problems (such as injuries or serious other trouble). While principles can be used within cross-examination, rules include the requirement that the other party has violated the principle and/or rules. Rules gain their moral force from the possibility of future harm if they are not followed.<sup>203</sup>

The seven Rules of the Road for one’s own expert or a friendly expert help to *Daubert*-proof the expert. These seven rules are:

- Rule 1: Find a methodology appropriate for the expert’s field, and make sure the expert follows it.
- Rule 2: Find literature support for the expert’s theory.
- Rule 3: Make the expert read the relevant literature.
- Rule 4: Go to the top in your search for experts.
- Rule 5: Avoid experts who won’t explain the basis for their opinions.
- Rule 6: Enlist help from the other side’s experts (via agreements, concessions, or stipulations about methodologies).

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<sup>199</sup> *Id.* at 29.

<sup>200</sup> *Id.* at 30.

<sup>201</sup> *Id.* at 79.

<sup>202</sup> *Id.* at 104.

<sup>203</sup> *Id.* at 56.

- Rule 7: Attack the other side's experts.<sup>204</sup>

Discovery (including but not limited to depositions) is seen as a place where Rules may be refined and where new Rules may be developed. These processes are also a place to secure agreement or disagreement from the opposite party or their experts, as well as the "why" reasons for agreement or disagreement. After reviewing Rules issues, discovery techniques are also invaluable for identifying violations of the Rules.

And finally, the Rules of the Road approach and technique seeks to "spoon-feed" to the judge the case story, the evidence organized by rules, and the opposing party's violation of the rules with the goal of making your rules the Judge's rules.<sup>205</sup>

Questions to pare down a lengthy cross-examination include:

- What is here that you do not need?
- For what do you not have sufficient impeaching material, so that the line or point should be dropped?
- What is cumulative?
- What questions are directed to a witness who lacks personal knowledge or other necessary foundation?
- What is too risky to ask?
- Have any why questions crept into the examination that will enable the witness to make a harmful speech?
- Is there anything else here that will just give the witness an opportunity to make a harmful speech?
- What is better covered with another witness?<sup>206</sup>

#### F. *The "Look Good" Constructive Cross: Terence MacCarthy*

Terence MacCarthy suggests an approach to cross-examination that he admits is "contrarian" in nature, but is designed for use "on every witness, and particularly on experts."<sup>207</sup> The "system" proposed by MacCarthy focuses on style in cross-examination and is "contrary to the conventional wisdom, contrary to

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<sup>204</sup> *Id.* at 59-70.

<sup>205</sup> *Id.* at 129.

<sup>206</sup> See Charles J. Faruki, *Cross-Examination that Hurts the Witness, Not You*, 33(3) LITIG. J. 38, 39 (2007).

<sup>207</sup> MACCARTHY, *supra* note 45, at 7.

what you have been taught, and contrary to how most of you are now doing cross-examinations.”<sup>208</sup>

Unlike other forms of cross-examination, MacCarthy’s main goal is not “to destroy the witness.”<sup>209</sup> Instead, MacCarthy’s main goal is for the lawyer doing cross to “look good.”<sup>210</sup> “Looking good” makes the jury like the cross-examining lawyer and “is more important than the substantive points you seek to make” during cross-examination.<sup>211</sup> MacCarthy argues that juries see form, not substance; therefore, the cross-examiner should be more focused on form than substance. To demonstrate this point, MacCarthy suggests that lawyers and witnesses are on a teeter-totter, and the witness automatically starts in the “up” position of the teeter-totter. The lawyer’s goal is to reverse that teeter-totter. Every time the lawyer “looks good,” their side goes up a notch and the witness’s side goes down a notch. Every time the witness looks bad, the witness goes down a notch, and the lawyer goes up a notch. “Importantly, ‘looking bad’ is more impactful than ‘looking good.’ The movement in terms of notches is multiplied.”<sup>212</sup> Since the teeter-totter moves when the lawyer looks good and the witness looks bad, the lawyer must find a way to make the witness look bad while making the lawyer look good. If the cross-examiner focuses on “destroying the witness,” the witness may look bad, but the lawyer looks worse as the jury views the lawyer as a bully.<sup>213</sup>

To accomplish this, the lawyer must focus on how he or she communicates during cross-examination. MacCarthy provides three basic housekeeping rules: 1) avoid standing behind lecterns during cross-examination, 2) do not read from notes, reference them quickly, and then move your eye contact back to the jury, and 3) do not hold a writing instrument in your hand while cross-examining – if something is important enough to write down, it is important enough to write on the blackboard for the jury to see.<sup>214</sup> In addition to the three housekeeping rules, the concepts

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 8.

<sup>210</sup> *Id.* at 39.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 43.

<sup>213</sup> *Id.* at 34.

<sup>214</sup> *Id.* at 46.

of primacy and recency, which are generally applied to opening and closing statements, should be used in cross-examination as well. During cross, lawyers should avoid the stereotypical introductions and pleasantries that are seen in almost every modern cross-examination, and instead, lawyers should start with an important and positive theme, and end with the same.<sup>215</sup>

Once lawyers are past the previous points concerning basic communication, MacCarthy's system of cross-examination has three parts: 1) short, 2) statements, and 3) control.<sup>216</sup> These parts create an equation: SHORT + STATEMENTS = CONTROL. This equation emphasizes that control of the witness is the outcome, not the goal.

"Short" refers to the style of questions a cross-examiner should ask. There are three reasons to use short (approximately one to five words) questions: 1) the length of the question generally determines the length of the answer, the long question is "stupid," creating more confusion than clarity, and 3) the lawyer will be less likely to look bad using short questions.<sup>217</sup> One can make questions short by eliminating prefixes, eliminating suffixes, and using transitions.<sup>218</sup> These short questions should be statements that can (and should) be answered "yes" or "no" and they should tell a clear story. If the cross-examination goes well, the witness will never have a chance to expound on their "yes" or "no" answer because the question would not allow for it.

"Statements" refers to the kind of question that should be asked. Instead of asking regular or open-ended questions, cross-examiners should use statements phrased as questions. This is a kind of "leading question" but is not the typical leading question that ends with something to the effect of "isn't that correct?"<sup>219</sup> Instead, cross-examiners say the part of the story they want the witness to agree with or disagree with, and use their voice to make the "statement" a "question."<sup>220</sup> How statements are crafted is especially important. Since the goal is to look good and tell a story, cross-examiners want to avoid any statements that

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<sup>215</sup> *Id.* at 45-46.

<sup>216</sup> *Id.* at 65.

<sup>217</sup> *Id.* at 66-67.

<sup>218</sup> *Id.* at 67.

<sup>219</sup> *Id.* at 73.

<sup>220</sup> *Id.* at 80.

are not clearly provable, and only state facts, not opinions.<sup>221</sup> In this approach, if the statement gives the witness any leeway to expound on their answer, the statement needs to be re-crafted.

“Control” is the outcome of using short statements during cross-examination. It is not the main goal, and it is possible that the witness will refuse to be controlled. However, by using short statements, “[t]here will come a time in this system when we give the witness a choice between being controlled or looking like an idiot.”<sup>222</sup> If this system is used correctly, the cross-examiner will have total control of the witness since they will only answer “yes” or “no” as the lawyer tells the story.<sup>223</sup> A lawyer should not use abrasiveness to control the witness (this will make the lawyer look bad), but instead control should be accomplished by speaking in a quicker pace and listening for phrases that can be easily used against the witness if they stray from “yes” or “no.”<sup>224</sup> For example, witness statements expressing uncertainty or less than full confidence in the assertions adverse to the lawyer’s theory of the case can be emphasized as part of the challenge to the witness’s credibility.

MacCarthy posits that there are some exceptions to these rules, but they are minimal.<sup>225</sup> Generally, the system works for three reasons: 1) “It allows the cross-examiner to tell a story,” 2) “It allows the cross-examiner to make a good impression,” and 3) “It allows the cross-examiner to reasonably control the witness.”<sup>226</sup> Under this theory, when cross-examining, you are “‘looking good’ and telling your ‘story’ by using ‘short statements.’”<sup>227</sup>

#### G. *The Endgame in Cross-Examination: Steven Lubet*

In describing the “endgame” for cross examination, Steven Lubet noted that the lawyer’s closing point on cross-examination must be undeniable, documented and proven, and consist of “bedrock fact” without anything that approaches a characteriza-

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<sup>221</sup> *Id.* at 91.

<sup>222</sup> *Id.* at 113.

<sup>223</sup> *Id.* at 114.

<sup>224</sup> *Id.* at 115.

<sup>225</sup> *Id.* at 135-42.

<sup>226</sup> *Id.* at 143.

<sup>227</sup> *Id.* at 144.

tion. According to Lubet, one's closing point must be stated with conviction:

It is crucial that you plan carefully the last point that you intend to make on cross-examination. It must be a certain winner, the proposition on which you are willing to make your exit. Indeed, you should write the last few questions at the bottom of your notepad, underlined and in bold letters. Your final point should stand alone, with nothing to obscure it or distract you from it. Then, if disaster strikes, you can skip to the bottom of the page, deliver your fail-safe zinger proudly announce, "Your witness, counsel," and sit down.<sup>228</sup>

## Conclusions

The *Daubert* trilogy and the emphasis on scientific methodology and process have significantly impacted child custody evaluators. Evaluators were quickly encouraged to be more scientific or at least scientifically informed in the procedures used to collect data and in the analysis of those data in light of the peer-reviewed literature and the particular needs of the family.<sup>229</sup> Approaches to cross-examination of the child custody evaluator that developed were reflected first in the *Forensic Model*, then later in the PLAN and CAAS approaches. All of these approaches combined the legal evidentiary changes regarding the admissibility of expert witness testimony with ethical principles, professional and scientific knowledge in the field, and professional practice guidelines in an attempt to make evaluations more reliable and the opinions of experts more trustworthy. For the past fifteen years, attorneys have been using these models as tools to understand and challenge child custody evaluators and child custody evaluations. The models have become invaluable aids to developing coherent and effective cross-examination strategies.

The techniques of cross-examination that attorneys have developed have evolved from the inflexible (and sometimes unrealistic) application of the rules of destructive cross to approaches that gather facts and concessions from the opposing or adverse witness to telling the client's story through others – even the adverse expert. From within the legal community, this evolution has often been additive. Rather than totally replacing the time-

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<sup>228</sup> See Steven Lubet, *Cross-examination: Endgame*, 17(2) LITIG. J. 40, 40 (1991).

<sup>229</sup> See GOULD, *supra* note 120.

honored techniques, new techniques are added and sometimes combined with these approaches, making choice of technique more contextual than commitment and rigid adherence to a single approach. To the extent the facts and situation allow the lawyer to look good, the lawyer should seek to capitalize on that dynamic. In sum, the modern family lawyer has a duty to learn how to cross-examine expert evaluators because “[i]f there are good grounds to prove that the adverse expert representing your opponent is wrong, it is part of your job as a lawyer to convince a [judge] that this is so.”<sup>230</sup>

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<sup>230</sup> EASTON, *supra* note 174, at 3.



## **Digital Espionage in Matrimonial Cases: Drawing the Line Between Legitimate Self-help and Unlawful Interception of Electronic Communications**

by  
Nicholas G. Himonidis\*

### **Introduction**

*“It is appallingly obvious that our technology has exceeded our humanity.”* The source of this ‘infamous’ quote (often attributed to Albert Einstein) is uncertain. This much is certain: matrimonial litigants often convince themselves that the key to a successful outcome is getting their hands on their spouse’s data, particularly emails, texts, and other electronic communications. In an alarming number of cases, both reported and unreported to which this author can attest, parties utilize a wide range of methods from hacking of email accounts, setting up auto-forward rules, or accessing the spouse’s iCloud through a separate (sometimes a child’s) device, to the installation of spyware programs on devices used by their spouse. Although there are certain, *limited circumstances* in which the exercise of “self-help” to collect Electronically Stored Information (“ESI”) outside of formal discovery by a spouse in a matrimonial case may be legal, much of the conduct described above, which this author has investigated on occasions too numerous to count, violates state and federal criminal statutes, gives rise to statutory claims for civil damages, results in evidence that is inadmissible by statute or case law, and

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can also result in direct and serious sanctions against the offending spouse in the matrimonial action itself.

This article will discuss the various state and federal laws that criminalize electronic hacking and surveillance and give rise to the other liabilities and sanctions mentioned above. The article will also discuss the limited circumstances in which “self-help” may be legal – and attempt to distinguish those situations from the unlawful interception of ESI in the form of electronic communications under applicable law. Section I explores the reasons why parties to matrimonial cases engage in this conduct, and why, in the author’s opinion, there has been such a dramatic rise in the frequency of this conduct, and the number of cases dealing with this issues in recent years. Section II sets forth the statutory prohibitions under both federal and many state laws, which criminalize much of this conduct, provide statutory civil rights of action for damages to victims of this conduct, and discusses the issue of whether evidence obtained in contravention of these statutes may still be admissible. Section III presents what the author believes to be a novel case in which a matrimonial court, faced with evidence of digital spousal espionage including the interception of electronic communications, and evidence of spoliation which the court concludes was designed to cover up the misconduct, issued the ultimate sanction against the ‘guilty’ party and dismissed their pleading(s). In Section IV we distinguish between lawful, legitimate self-help by a spouse in gathering ESI outside of formal discovery – and conduct that violates the statutes discussed in this article, and potentially others, often with drastic consequences. In the Conclusion, we restate the key point of this article – that intercepting the electronic communications of your current or estranged spouse (or anyone else), without the consent of at least one of the parties to the communication, is criminal, sanctionable, gives rise to monetary damages, and usually results in evidence that is inadmissible. We conclude by suggesting in the strongest possible terms, that since the number of cases involving this conduct are sharply on the rise (as a result of the relative ease with which it can be done using modern technology) that matrimonial attorneys would be doing their clients a tremendous service by affirmatively counseling them at the outset of a representation regarding the myriad of

legal consequences for this conduct, and to convince them, wherever possible, that the end certainly does not justify the means.

## **I. Why Do They Do It?**

The emotional motives of adverse litigants is nowhere more prevalent than in matrimonial (and custody) cases. In the author's experience, however, most of the individuals who engage in electronic surveillance conduct are searching for evidence they believe will give them a legal or strategic advantage in their pending or soon to be filed case. Relevant "evidence" is any information which tends to prove or disprove a fact in controversy. By the year 2007 almost 95% of the information in the world was created and stored digitally.<sup>1</sup> What follows is that 95% of potential evidence exists in digital form – *and a great deal of that evidence exists only in digital form.*

Increasingly, businesses and households have gone totally "paperless" – never generating a paper record of a transaction – or destroying the paper records once they are saved electronically. Personal computers, smartphones, tablets and "smart watches" are everywhere. Emails and "texting" (including SMS, iMessage, and messaging through platforms like WhatsApp), along with messaging through social media platforms, has largely replaced telephone (and in person) conversation as the predominant mode of business and personal communication. These are the realities of modern society.

More than 80% of Americans own a "smartphone."<sup>2</sup> People carry them and use them almost everywhere they go, creating digital breadcrumbs to their whereabouts and activities. Almost 90% of Americans with bank accounts access those accounts online at least sometimes; and almost 70% of them manage their bank accounts primarily or exclusively online.<sup>3</sup> Virtually every bank and credit card company now offers a "paperless" option to

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<sup>1</sup> Rebecca Boyle, *All the Digital Data in the World Is Equivalent to One Human Brain*, POPULAR SCI. (Feb. 11, 2011), <https://www.popsoci.com/technology/article/2011-02/new-study-inventories-all-data-world-and-measures-how-its-stored-and-shared/>.

<sup>2</sup> *Internet & Technology Mobile Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>3</sup> I. Mitic, *Everything You Need to Know About Online Banking: Statistics and Facts*, FORTUNLY (Apr. 30, 2020).

their customers. Once enrolled, the customer never again receives any paper statements or transaction records.

Bitcoin (BTC) and other cryptocurrencies have become mainstream investments – but they are also commonly used as vehicles to hide funds and conduct anonymous transactions. As of this writing, nearly \$27 billion worth of BTC changes hands every day.<sup>4</sup> There is literally no paper trail when BTC transactions are done peer-to-peer (i.e. without the involvement of a broker) and there is no one upon whom to serve a subpoena for information about such transactions.

Facebook had over 256 million monthly active users in the United States (and Canada) in the second quarter of 2020.<sup>5</sup> There are more than 48 million active Twitter users in the United States<sup>6</sup> – contributing to an average volume of more than 500 million Tweets per day worldwide.

Desktops and laptops with hard drives of multiple terabytes are now commonplace in homes. A one terabyte hard drive can store more than 100 million pages of text, millions of emails, over 300,000 digital photos, 1,000 hours of digital video footage – or any combination of the same as well as other forms of ESI too numerous to list.

There is certainly good reason for litigants and their counsel to seek out this evidence. Unfortunately, a disturbing trend has developed whereby parties are taking matters into their own hands. Without proper advice from counsel, or the assistance of knowledgeable professionals, these parties will often utilize methods suggested to them by well-meaning friends, “the IT guy at work,” or which they discover online, to engage in all manner of digital espionage. When the conduct and methods are limited to accessing and/or copying *STATIC* ESI from computing devices or data stores in the marital home, this conduct may be permissible. When it crosses the line to the interception of electronic

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<sup>4</sup> COINMARKETCAP.COM, <https://coinmarketcap.com/> (last visited Nov. 15, 2020) listing the top 100 cryptocurrencies, their current market price, market cap, circulation and 24 hour trading volume.

<sup>5</sup> [www.statista.com/statistics-number-of-monthly-active-facebook-users-worldwide](http://www.statista.com/statistics-number-of-monthly-active-facebook-users-worldwide)

<sup>6</sup> Omnicore: Twitter by the Numbers: Stats, Demographics & Fun Facts; (Feb. 10, 2020).

communications “in transit” however, it is almost always unlawful and there can be severe criminal and civil consequences.

It is essential for matrimonial attorneys to be aware of the frequency with which this occurs, and to counsel clients early, and often, regarding the serious consequences that can result from crossing the line between legitimate “self-help” and unlawful interception.

## **II. Statutes Prohibiting Interception of Electronic Communications**

Title 18 of the United States Code, covering federal crimes and criminal procedure, may seem an unlikely place to begin a discussion of conduct engaged in by parties to matrimonial litigation. It is, however, at the very core of this topic. The Omnibus Crime Control and Safe Streets Act of 1968 as updated and amended by the 1986 Electronic Communications Privacy Act<sup>7</sup> (the “ECPA”) expressly prohibits the interception of wire, oral or electronic communications.<sup>8</sup> It also expressly prohibits the disclosure or “use” of any such intercepted communications.<sup>9</sup> The ECPA defines “electronic communication” as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.”<sup>10</sup> In short, all forms of modern communication fall under the ECPA prohibitions on interception, including phone calls, emails, social media messages, and all forms of text messages.<sup>11</sup>

Interceptions violate the provisions of the ECPA if done without the knowledge and consent of at least one party to the

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<sup>7</sup> 18 U.S.C. §§ 2510-2523 (2018).

<sup>8</sup> 18 U.S.C. § 2511(1)(a).

<sup>9</sup> 18 U.S.C. § 2511(1)(c)(d).

<sup>10</sup> 18 U.S.C. § 2511(12). However, the definition does not include: (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

<sup>11</sup> 18 U.S.C. § 2511(1)(a).

communication<sup>12</sup> and violators are subject to incarceration for up to five (5) years and fines of up to \$10,000 *per violation*.<sup>13</sup> In addition, the ECPA provides a direct civil right of action by victims against violators, with civil penalties including (i) actual damages capped at \$1,000; (ii) punitive damages; and (iii) reasonable attorney's fees and other litigation costs.<sup>14</sup> While federal criminal prosecutions under the ECPA arising out of matrimonial cases are rare, civil cases arising from matrimonial fact patterns seeking damages under the private right of action provisions of the ECPA are not. Examples as far back the early 1970's are cited and discussed below. Early cases dealt with the unlawful interception (and recording) of phone calls (since email, texting, and social media did not exist at the time) but the provisions of the ECPA relevant to this discussion are the same (with the exception of provisions of the ECPA dealing with suppression that distinguish between oral and wire, and electronic communications).<sup>15</sup>

Section 2511 of the ECPA provides as follows:

- (1) Except as otherwise specifically provided in this chapter any person who-
  - (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
  - ...

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<sup>12</sup> 18 U.S.C. § 2511(2)(d): "It shall not be unlawful under this chapter [ §§ 2510-2520 of this title ] for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

<sup>13</sup> 18 U.S.C. § 2511(4)(a).

<sup>14</sup> 18 U.S.C. § 2520(b)(1)(2)(3).

<sup>15</sup> See 18 U.S.C. § 2515 (emphasis added): "Whenever any *wire or oral communication* has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . .

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .

. . .

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

Many states have penal statutes that are modeled after the ECPA (or its predecessor, the 1968 Act),<sup>16</sup> or which in some fashion prohibit the same conduct.<sup>17</sup> New York Penal Law Article 250, the New York “Eavesdropping Statute,” for example, pre-dates the ECPA (and the 1968 Act) but criminalizes the interception of electronic communications as follows: “A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, *or intercepting or accessing of an electronic communication*. Eavesdropping is a class E felony.”<sup>18</sup> The New York Penal Law defines an “electronic communication” as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system.”<sup>19</sup> Just as with the ECPA, “electronic communications” clearly encompasses email, any form of text message, and/or any form of direct social media messaging under the New York Penal Law.<sup>20</sup>

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<sup>16</sup> *E.g.*, N.J. STAT. § 2A:156A-2.

<sup>17</sup> *E.g.*, CAL. PENAL CODE § 637.2 (2019) (Invasion of Privacy); CONN. GEN. STAT. § 52-570d (2019) (Action for Illegal Recording of Private Telephonic Communications); FLA. STAT. § 934.27 (2019) (Security of Communications; Surveillance); 720 ILL. COMP. STAT. § 5/14-2 (from ch. 38, ¶14-2); MASS. GEN. LAWS ch. 272, § 99 (2019) (Interception of Wire and Oral Communications); N.Y. PENAL LAW § 250.05 (Eavesdropping).

<sup>18</sup> N.Y. PENAL LAW § 250.05 (emphasis added).

<sup>19</sup> N.Y. PENAL LAW § 250.00(5).

<sup>20</sup> *See generally* CC V. AR, 100 N.Y.S.3d 609 (N.Y. Sup. Ct. 2018).

The ECPA, and many of the state penal statute corollaries, make it a criminal offense for a spouse to intercept the text messages, emails or other electronic communications of the other spouse without consent, and some, including the federal statute, also *criminalize the dissemination or “use”* of any such intercepted communications, either by the interceptor *or any other person*, provided that the user or disseminator knows the source of the material in question.<sup>21</sup> These provisions make it absolutely essential for matrimonial counsel to know exactly how their client acquired something that purports to be the other party’s phone call(s), email(s) or text message(s) – lest counsel find themselves on the wrong side of a “United States v.” or “People v.” suit – or named as a defendant in a state or federal civil suit for damages under the private right of action under the ECPA or one of its state law corollaries.<sup>22</sup>

Nowhere in the ECPA does it state – or imply – that any exception exists for a spouse who engages in the proscribed conduct within the marital relationship, within the marital home, or in connection with a matrimonial proceeding (absent consent of one party to the communication). It is simply not there. Nonetheless, there is a line of cases starting with *Simpson v. Simpson* in 1974,<sup>23</sup> that erroneously read such an implied exemption into the ECPA. *Simpson* was followed by other federal and state court decisions for a time,<sup>24</sup> but this line of cases – and its faulty reasoning – has been abandoned and no recent cases seem to follow this outdated and erroneous holding.

In 1974 the issue facing the Fifth Circuit Court of Appeals in *Simpson* was whether the interception by a husband of his wife’s conversations with a third party over the telephone in the marital

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<sup>21</sup> 18 U.S.C. § 2511(1)(c); 720 ILL. COMP. STAT § 5/14-2(3) (Illinois Wiretapping Statute); N.H. REV. STAT. ANN. ch. 570-A (New Hampshire Wiretapping and Eavesdropping Statute); 18 PA. CON. STAT. ANN. §§ 5701-5781

<sup>22</sup> See, e.g., *Zaratzian v. Abadir*, No. 10-cv-9049, 2015 WL 5474246 (S.D.N.Y. July 8, 2015), *aff’d*, No. 15-1243-cv (2d Cir. May 26, 2017) (the husband’s attorney was named as a defendant along with the husband, where the husband provided to the attorney, and the attorney received and used the emails the plaintiff’s wife alleged that the husband had intercepted in violation of the ECPA).

<sup>23</sup> 490 F.2d 803 (5th Cir. 1974).

<sup>24</sup> *Stewart v. Stewart*, 645 So. 2d 1319 (Miss. 1994); *Baumrind v. Ewing*, 279 S.E.2d 359 (S.C. 1981); *Beaber v. Beaber*, 322 N.E.2d 910 (Ohio 1974).

home violated the ECPA. The husband suspected his wife of being unfaithful and obtained a device for tapping and recording telephone conversations and deployed it within the marital residence, intercepting and recording conversations between his wife and another man. Using the recordings as leverage, Mr. Simpson convinced his wife to agree to an uncontested divorce. Mrs. Simpson sued Mr. Simpson in federal district court seeking civil damages under the ECPA.<sup>25</sup> The district court found that the interception by a husband using electronic equipment of the conversations between his wife with a third party over the telephone in the marital home was not covered under the ECPA.<sup>26</sup> Mrs. Simpson appealed.

After what the Fifth Circuit described as “an independent search of legislative materials regarding the ECPA,” which the court referred to as “long, exhaustive and inconclusive,”<sup>27</sup> the court held that Congress did not intend for the ECPA (despite its inclusive language) to extend to cases involving a husband and wife.<sup>28</sup> The court stated that it found due to “inconclusive legislative history” that Congress did not intend to prohibit a person from intercepting a family member’s telephone conversations by use of an extension phone in the family home.<sup>29</sup> The holding in *Simpson* was an egregious example of a court ignoring the plain meaning of an unambiguous and inclusive statute, inserting instead its own meaning based on what the court apparently felt was the proper result from a policy standpoint.

Because many state statutes prohibiting this conduct were modeled on the ECPA and its predecessor the 1968 Act, some state court cases followed the *Simpson* holding in similar fact patterns. In the 1981 South Carolina case of *Baumrind v. Ewing*,<sup>30</sup> the wife in a matrimonial action sought to suppress certain recorded telephone conversations between herself and third parties made by her husband without her knowledge or consent. The court held that “the husband’s conduct is beyond the grasp of [the 1968 Act]. Domestic conflicts are traditionally and properly

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<sup>25</sup> *Simpson*, 490 F.2d at 803.

<sup>26</sup> *Id.* at 804.

<sup>27</sup> *Id.* at 806.

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

<sup>29</sup> *Id.* at 809.

<sup>30</sup> 279 S.E.2d 359.

matters of state interest.”<sup>31</sup> Apparently, the *Baumrind* court was asserting – what the *Simpson* court might have been thinking but stopped short of saying – that Congress somehow lacks the authority to criminalize conduct between two persons who happen to be married.

The 1994 Mississippi case of *Stewart v. Stewart*<sup>32</sup> also involved the issue of whether an audio tape of a wife’s conversation made by the husband violated the ECPA and should be allowed into evidence. The court held, following *Simpson* and the 1977 Second Circuit case of *Anonymous v. Anonymous*,<sup>33</sup> that since the husband and wife were married, and living in the same house, and both had access to the phones, the husband was within his rights to pick up an extension phone and listen to such conversation – and apparently therefore record it. “As such conduct is explicitly exempted from [the ECPA’s] wiretapping prohibition, it can rationally be inferred that [the ECPA] does not prohibit a person from taping a conversation, within his own home, that he is legally authorized to listen to by picking up an extension phone.”<sup>34</sup>

In 2003, the U.S. Court of Appeals for the Eleventh Circuit in *Glazner v. Glazner*<sup>35</sup> in a well-reasoned decision following time honored traditions of judicial review of statutes, affirmatively stated that the *Simpson* decision was wrong. *Glazner* held that there is no implied exception in the ECPA for interspousal wiretapping within the marital home.<sup>36</sup> Here the husband during a divorce proceeding placed a recording device on a telephone in the marital home and recorded conversations between his wife and a third party without either party’s consent. The wife filed a complaint in the U.S. District Court for the Northern District of Alabama seeking damages under the ECPA. The district court, relying on the implied inter-spousal exemption from the *Simpson* line of cases, granted the husband’s motion for summary judgment. On appeal, the Eleventh Circuit Court of Appeals examined the language of the ECPA and found it to be

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<sup>31</sup> *Id.* at 353.

<sup>32</sup> 645 So.2d 1319 (Miss. 1994).

<sup>33</sup> 558 F.2d 677 (2d Cir. 1977).

<sup>34</sup> *Stewart*, 645 So. 2d at 1321.

<sup>35</sup> 347 F.3d 1212 (11th Cir 2003).

<sup>36</sup> *Id.* at 1213.

unambiguous and stated the language of the statute made “no distinction between married and unmarried persons or between spouses and strangers. It plainly applies to ‘any person’ on both sides of the violation.”<sup>37</sup> The court stated further that “the ECPA expressly gives ‘any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of the [ECPA]’ the right to bring a civil action against ‘the person or entity . . . which engaged in that violation.’”<sup>38</sup> The court held that under the ECPA both husband and wife are “any person” and that the wife’s conversations that her husband caused to be intercepted and recorded were indeed “any wire, oral, or electronic communication” within the plain language of the ECPA.<sup>39</sup> The *Glazner* court properly noted that “[a] court may only properly look beyond the plain language of a statute when giving effect to the language used by Congress would lead to a truly absurd result.”<sup>40</sup>

Prior to *Glazner*, other federal courts had concluded that the court in *Simpson* improperly read an exception into the 1968 Act which simply was not there. The court in *Heyman v. Heyman*<sup>41</sup> found that the *Simpson* court’s “search for congressional intent ignored the accepted canon of statutory construction that resort to legislative history is not ordinarily undertaken unless a statutory provision is unclear or ambiguous.”<sup>42</sup>

Some of the strongest early criticism of *Simpson* came just five years after it was decided. In the 1979 case of *Krantz v. Krantz*<sup>43</sup> the husband hired a third party to install a tap on the family phone and recorded calls which disclosed his wife’s extra-marital affair. Upon discovery of the tap, the wife and her lover sued for damages under the 1968 Act. The husband argued that

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<sup>37</sup> *Id.* at 1215.

<sup>38</sup> *Id.* at 1215, citing 18 U.S.C. § 2520(a).

<sup>39</sup> *Id.* at 1215.

<sup>40</sup> *Id.* at 1215, citing *United States v. Maung*, 267 F.3d 1113, 1121 (11th Cir. 2001), *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997).

<sup>41</sup> 548 F. Supp. 1041 (N.D. III. 1982).

<sup>42</sup> *Id.* at 1045, citing *United States v. Oregon*, 366 U.S. 643, 648 (1961). By the general rules of statutory construction, legislative history is not ordinarily examined, since the best evidence of congressional intent is the text of the statute itself. *Patagonia Corp. v. Board of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 813 (9th Cir. 1975).

<sup>43</sup> 477 F. Supp. 463 (E.D. Pa. 1979).

interspousal wiretapping was not actionable under the statute. This argument was rejected by the court, which held that “the [1968 Act] means what it says, and prohibits all interceptions of wire communications, by any person, unless expressly provided.”<sup>44</sup> The 1968 Act expressly states all of the exceptions that are provided for in such statute.<sup>45</sup> The legislative history of the 1968 Act is “not inconclusive, but evinces a congressional awareness of the widespread use of electronic eavesdropping in domestic cases, and a congressional intent to prohibit such eavesdropping.”<sup>46</sup>

It does not appear that any reported case has followed the *Simpson* holding or reasoning after the *Glazner* case was decided in 2003 – making it clear that the provisions of the ECPA – both criminal and civil – should apply to conduct engaged in by a spouse in a matrimonial case or situation. Although federal criminal prosecutions for “spousal interceptions” under the ECPA are rare,<sup>47</sup> state criminal prosecutions for similar violations are more common,<sup>48</sup> as are federal civil cases seeking damages under the private right of action under the ECPA.<sup>49</sup>

#### A. *Statutory Civil Actions for Damages Arising from Violation of Criminal Statutes Prohibiting Interception of Electronic Communications*

18 U.S.C. Section 2520 provides that “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter” may sue to recover civil damages.<sup>50</sup> Damages under this provision of the ECPA may include equitable or declaratory relief (injunction(s),

<sup>44</sup> *Id.* at 467.

<sup>45</sup> *Id.* at 468.

<sup>46</sup> *Id.* at 470.

<sup>47</sup> *See, e.g.*, *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

<sup>48</sup> *See, e.g.*, *State v. Jock*, 404 A.2d 518 (Del. Super. Ct. 1979); *State v. Lombardo*, 738 N.E.2d 653 (Ind. 2000); *People v. Walker*, No. 304593, 2011 WL 6786935 (Mich. Ct. App. Dec. 27, 2011); *Williams v. Stoddard*, C.A. No. PC 12-3664, 2015 WL 644200 (R.I. Super. Ct. Feb. 11, 2015); *State v. King*, 437 S.W. 3d 856 (Tenn. Crim. App. 2013); *Duffy v. State*, 33 S.W. 3d 17 (Tex. App. 2000).

<sup>49</sup> *See, e.g.*, *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979); *Heyman v. Heyman* 548 F. Supp. 1041 (N.D. Ill. 1982); *Resnik v. Coulson*, 17-CV-676 (PKC) (SMG), 2020 WL 5802362 (E.D.N.Y. Sept. 28, 2020).

<sup>50</sup> 18 U.S.C. 2520 (a) (1986).

actual damages, statutory damages of \$10,000 or \$100 per day of violation, whichever is greater, punitive damages and reasonable attorneys fees and litigation costs.<sup>51</sup>

Several states have statutes modeled after 18 U.S.C. § 2520 or that closely follow the federal statute and provide a similar private civil right of action.<sup>52</sup> Other states, like New York and New Jersey, have statutes that criminalize the interception of electronic communications but do not provide any private civil right of action under the statute.<sup>53</sup>

Connecticut is one of the states that does provide for a private civil right of action for violation of its state's eavesdropping and wiretapping statute. Connecticut General Statute § 52-570(d) provides that "any person aggrieved by a violation of subsection (a) of this section may bring a civil action in the Superior Court to recover damages, together with costs and a reasonable attorney's fees"<sup>54</sup> The "subsection (a)" referred to is the provision of Connecticut General Statutes which prohibits the interception (and recording) of an oral private communication without the consent of all parties thereto.<sup>55</sup>

The District of Columbia also provides for a private right of action for violations of its 'wiretapping' statute following almost verbatim the ECPA.<sup>56</sup>

In 2016 the U.S. Court of Appeals for the Seventh Circuit in *Epstein v. Epstein*<sup>57</sup> held that a husband had the right to bring a civil action against his wife pursuant to 18 U.S.C. § 2520 where the wife had intercepted his emails in violation of the ECPA. In

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<sup>51</sup> 18 U.S.C. 2520 (b), (c) (1986).

<sup>52</sup> *E.g.*, FLA. STAT. § 934.27 (2019); 720 ILL. COMP. STAT. § 5/14-6; MASS. GEN. LAWS ch 272 § S99 (2019); MICH. COMP. LAWS § 750.539h (2019); 18 PA. CONS. STAT. § 5747 (2019); TEX. CIV. PRAC. & REM. CODE § 123.002 (2019).

<sup>53</sup> *See* N.Y. PENAL LAW art. 250; N.J. STAT. ANN. 2A:156-24, *et seq.*

<sup>54</sup> CONN. GEN STAT § 52-570d (2019).

<sup>55</sup> CONN. GEN STAT § 52-570(a) (2019). Note: unlike New York and other "one party" states which permit interception when one party to the communication has consented, consistent with federal law, Connecticut and a handful of other states (California, Florida, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania, and Washington) require the consent of all parties for an interception or recording of electronic communication to be lawful).

<sup>56</sup> D.C. CODE § 23-554.

<sup>57</sup> 843 F.3d 1147 (7th Cir. 2016).

*Epstein*, the wife surreptitiously placed an auto-forwarding “rule” on husband’s email accounts that automatically forwarded the email messages to herself.<sup>58</sup> The ECPA makes it unlawful to “intentionally intercept [or] endeavor . . . to intercept . . . any wire, oral, or electronic communication.”<sup>59</sup> The ECPA also prohibits the intentional “Disclos[ure] or use . . . of the contents of an unlawfully intercepted electronic communication.”<sup>60</sup> “[I]ntercept” is defined as “the aural or other acquisition of the contents of any wire, electronic, or oral communication.”<sup>61</sup> “[E]lectronic communication,” is “any transfer of signs . . . of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system.”<sup>62</sup>

The parties argued in great detail about whether or not the ECPA requires a “contemporaneous interception” of an electronic communication, in other words, “an interception that occurs during the transmission rather than after the electronic message has come to rest on a computer system.”<sup>63</sup> The court found that there was in fact a contemporaneous interception of an electronic communication based on the “auto forwarding” of the emails.<sup>64</sup> Here the court found that the “interception of an email need not occur at the time the wrongdoer receives the email; . . . [t]he copying at the server was the unlawful interception.”<sup>65</sup>

The distinction drawn by the court regarding the contemporaneous nature of the interception based on the email forwarding is important – since many factual situations that presented in these types of cases involve interception through similar means – whether through email forwarding rule, spyware interception programs, or services being exploited to “auto forward” copies of

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<sup>58</sup> *Id.* at 1149.

<sup>59</sup> 18 U.S.C. § 2511(1)(a).

<sup>60</sup> *Id.* at § 2511(1)(c), (d).

<sup>61</sup> *Id.* at § 2510(4).

<sup>62</sup> *Id.* at § 2510(12).

<sup>63</sup> *Epstein*, 843 F.3d at 1149, citing *United States v. Szymuszkiewicz*, 622 F.3d 701, 703 (7th Cir. 2010). Several circuits have held that the Wiretap Act covers only contemporaneous interceptions—understood as the act of acquiring an electronic communication in transit.

<sup>64</sup> *Id.* at 1151.

<sup>65</sup> *Id.* at 1150, citing *Szymuszkiewicz*, 622 F.3d at 704.

text messages.<sup>66</sup> These all represent unlawful interceptions under the ECPA.

In 2012, the U.S. District Court for the Eastern District of Tennessee in the matter of *Klumb v. Goan*<sup>67</sup> found that a wife had violated the ECPA and the Tennessee Wiretap Act<sup>68</sup> by installing spyware on her husband's computers without his consent to intercept his incoming email in connection with an ongoing matrimonial action. Tennessee Code § 39-13-603 (the "TWA") is Tennessee's counterpart to 18 U.S.C. § 2520. It states in relevant part: "any aggrieved person whose wire, oral or electronic communication is intentionally intercepted, disclosed, or used in violation of § 39-13-601 . . . may in a civil action recover from the person or entity that engaged in that violation."<sup>69</sup> The court awarded the plaintiff statutory, liquidated damages of \$10,000 for each violation of the ECPA and the TWA, punitive damages of \$10,000, and reasonable attorney's fees and expenses.<sup>70</sup>

There is nothing in the language of the ECPA that would make a criminal prosecution or conviction under the Act a condition precedent to maintaining or prevailing in a civil suit for damages under the private right of action provided in the statute and there does not appear any to be any reported case holding that a prior conviction is required. On the contrary, it appears that most civil cases brought under the Act and corollary state statutes are brought in the absence of any such criminal proceeding(s).<sup>71</sup>

As is clear from the statutes and cases discussed above, the use of any mechanism or method to intercept the emails, text messages or other electronic communications of one's spouse is a criminal offense in every state and territory of the United States, and gives rise to statutorily authorized civil damages. The dissemination or use of such intercepted communications is also a criminal offense, and there is civil liability by statute not only against

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<sup>66</sup> See *infra* discussion in text at notes 72-73.

<sup>67</sup> 884 F. Supp. 2d 644 (E.D. Tenn. 2012).

<sup>68</sup> TENN. CODE ANN. § 39-13-601.

<sup>69</sup> *Klumb*, 884 F. Supp. 2d at 660.

<sup>70</sup> *Id.* at 665-67.

<sup>71</sup> *Resnick v. Coulson*, 1:17-cv-00676-PKC-SMG (E.D.N.Y. Mar. 30, 2019). See, e.g., *Klumb*, 884 F. Supp. 2d 644; *Epstein*, 843 F.3d 1147; *Glazner*, 347 F.3d 1212.

the “interceptor” but also against any person who disseminates or uses such material with knowledge of its source under federal law, and many concomitant state statutes.

As serious as these consequences may seem, however, they are apparently insufficient to deter what this author has observed to be a steady increase in this prohibited conduct by all manner of ingenious (and not so ingenious) methods. In one recent case, the estranged husband, who was living outside the marital residence during the divorce proceedings, visited with his children at the marital home. While the husband was taking a dip in the pool with the kids, the wife took his smartphone from the kitchen counter where he had laid it down and before it could auto lock she used the browser on the phone to visit the cell carrier’s website and sign up for a service known as Verizon Messaging Plus. The carrier sent several confirmation texts to the husband’s phone, which the wife promptly deleted. The wife did not “install” anything on the phone, merely activated a service provided by the carrier at the network level. This service allowed her to input an alternate cell number to which the carrier would contemporaneously send copies of all the husband’s incoming and outgoing text messages. Using this service, the wife continued to receive all of the husband’s text messages for six months before a forensic examination of the husband’s phone discovered the deleted text messages showing the phone was subscribed to this service (and when). Over the past several years, the author has seen cases like this at the rate of at least one per week. Clearly, our technology has exceeded our humanity.

*B. Prohibition on Use of Intercepted Communications as Evidence*

If the criminal and civil penalties for unlawful interception are not enough to dissuade would be spousal interceptors, there are still other, independent reasons why engaging in this conduct is simply not worth the risks.

Although many states continue to follow the common law rule that illegally obtained evidence may be admissible if it is relevant and material, this common law rule applies only in the absence of some statutory or constitutional provision to the

contrary.<sup>72</sup> Many states do in fact have statutory provisions that specifically prohibit unlawfully intercepted electronic communications from being used as evidence.<sup>73</sup> While federal law mandates the exclusion of intercepted “wire or oral communications” from evidence in any federal or state court proceedings,<sup>74</sup> this exclusionary provision does not extend to intercepted “electronic communications” (such as emails or text messages).<sup>75</sup> The reasons for this are unclear, but the language of the statute is not.

There are, to be sure, a number of state court decisions holding that intercepted electronic communications may be admissible in a matrimonial case despite the potential criminality of the conduct in obtaining them. In the 1974 case of *Beaber v. Beaber*,<sup>76</sup> the Court of Common Pleas in Stark County, Ohio, held that neither the Ohio statutes, the Ohio Constitution, nor the federal Constitution as it related to the right of privacy, prevented the admission of evidence obtained in violation of Ohio’s eavesdropping and wiretapping statutes in a matrimonial action. Prior to the commencement of the matrimonial action in that case, the husband had tapped his home phone and recorded conversations between his wife and a third party. Based on those recordings and other factors, the husband commenced a matrimonial action and sought to bring the tapes into evidence.

The court considered various Ohio statutes regarding eavesdropping and wiretapping along with the 1968 Act as the predecessor to the ECPA. The court found no Ohio cases directly on point, and ironically enough cited *Sackler v. Sackler*,<sup>77</sup> a 1964 case from New York State’s highest court, decided before the 1968 Act was enacted, which held that just because evidence was obtained illegally did not destroy its credibility or admissibility

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<sup>72</sup> See, e.g., *Sackler v. Sackler*, 15 N.Y.2d 40 (1964); *Stagg v. NYC Health & Hosp. Corp.* 162 A.D.2d 595 (N.Y. App. Div. 1990).

<sup>73</sup> See, e.g., CONN. GEN. STAT. §§ 54-41a – 54-41t (Connecticut Wiretap Statutes); KAN. STAT. ANN. § 22-2517 (Kansas Wiretap Act); MD. CODE ANN. CTS. & JUD. PROC. § 10-402 (Maryland Wiretap Act); N.Y. C.P.L.R. § 4506; 18 PA. CONS. STAT. ANN. § 5721 (Pennsylvania Wiretap and Electronic Surveillance Act).

<sup>74</sup> 18 U.S.C. § 2515.

<sup>75</sup> See *United States v. Steiger*, 318 F.3d 1039, 1050-52 (11th Cir. 2003); *United States v. Jones*, 364 F. Supp. 2d 1303, 1308-09 (D. Utah 2005).

<sup>76</sup> 322 N.E. 2d 910 (Ohio Com. Pleas 1974).

<sup>77</sup> 15 N.Y. 2d 40, 203 N.E. 2d 481, 255 N.Y.S.2d 83 (1964).

provided it was otherwise relevant and material.<sup>78</sup> What the *Beaber* court failed to mention, however, is that while *Sackler* did arise out of a matrimonial action, and did involve the question of whether to suppress unlawfully obtained evidence, the evidence sought to be suppressed in *Sackler* (and was ultimately ruled admissible by the New York Court of Appeals), was evidence obtained by means of an illegal forcible entry into the wife's home by the husband and private investigators - *not illegally intercepted electronic communications*.<sup>79</sup> In ruling that the evidence in question was not inadmissible merely because of the manner in which it was obtained, the Court of Appeals in *Sackler* made reference to New York statutes, stating "the New York Legislature, when it has found necessity for outlawing evidence because it was secured by particular unlawful means, has provided specific statutory prohibitions *such as those against the use of proof gotten by illegal eavesdropping*."<sup>80</sup>

The *Beaber* court stated, "neither the Fourth Amendment to the U.S. Constitution nor the prohibition against unreasonable search and seizures in the federal and state constitutions applied to acts by nongovernmental persons — in this case the defendant — and such provisions do not apply in civil cases."<sup>81</sup> The court also cited *Simpson v. Simpson*, and held that "neither the statutes, the Ohio Constitution, the federal Constitution as it related to the right of privacy, nor the Act prevent the admission of said tapes."<sup>82</sup>

While Ohio would appear to allow unlawfully intercepted electronic communications into evidence in a matrimonial action, many other states, including Connecticut, Kansas, Maryland, New York, and Pennsylvania, would not.<sup>83</sup> So even if a party were willing to risk the serious criminal and civil liabilities for violating the ECPA and similar state statutes prohibiting inter-

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<sup>78</sup> *Id.* at 44

<sup>79</sup> *Id.* at 42.

<sup>80</sup> *Id.* at 44, citing N.Y. C.P.L.R. § 4506.

<sup>81</sup> *Beaber*, 322 N.E.2d at 914 (emphasis added).

<sup>82</sup> *Id.* at 104.

<sup>83</sup> See CONN. GEN. STAT. §§ 54-41a – 54-41t (Connecticut Wiretap Statutes); KAN. STAT. ANN. § 22-2517 (Kansas Wiretap Act); MD. CODE ANN. CTS. & JUD. PROC. § 10-402 (Maryland Wiretap Act); N.Y. C.P.L.R. § 4506; 18 PA. CONS. STAT. ANN. § 5721 (Pennsylvania Wiretap and Electronic Surveillance Act).

ception of electronic communications, in many jurisdictions they would be prohibited from using the fruits of their unlawful endeavors as evidence in their matrimonial case.

### **III. Direct Sanctions in Matrimonial Court for Interception of Electronic Communications**

For many years it seemed matrimonial courts did not wish to get sidetracked delving into the alleged misdeeds of parties before them when those allegations consisted of unlawful recording or interception of electronic communications. Perhaps the sentiment was that parties aggrieved by such conduct had remedies elsewhere: they could file a criminal complaint or civil action for money damages and/or injunctive relief outside of the matrimonial litigation. That sentiment, if it existed, seems to be waning. Recent matrimonial cases have tended to pay more attention to these allegations (especially when the alleged interception involved privileged communications) and have imposed direct and substantial sanctions in the matrimonial case against the party who violated the ECPA and/or similar state statutes. In at least one such case, the court went so far as to strike the guilty party's pleadings upon a finding that the party had unlawfully intercepted the opposing party's communications, including privileged communications, and had engaged in spoliation of evidence regarding that conduct.

In the 2018 case of *CC v. AR*<sup>84</sup> the New York Supreme Court in Kings County, upon a finding that the plaintiff husband (the non-monied spouse in that case) had, among other things, installed spyware on his wife's iPhone to track her movements using GPS, and intercept her emails, texts, and phone conversations, determined the appropriate sanction was to strike the plaintiff husband's pleadings related to all claims for financial relief (except for the issue of possible child support should he be awarded custody).<sup>85</sup> The foundation for the court's decision in that case was extensive discovery and detailed reports of the court appointed attorney referee, supported by voluminous reports of computer forensic professionals confirming that the husband had installed the spyware in question on the wife's iPhone

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<sup>84</sup> 100 N.Y.S.3d 609 (N.Y. Sup. Ct. 2018).

<sup>85</sup> *Id.* at 639.

and had intercepted her electronic communications through that method. Evidence was also presented that the husband engaged in the use of wiping programs to permanently erase data from his own computing devices – which the court presumed was further evidence of the husband’s misconduct in this regard.<sup>86</sup> In the decision, Judge Sunshine wrote:

Under the unique facts and circumstances of this case, a lesser spoliation sanction—including issue preclusion—would neither address the gravity of the plaintiff’s contemptuous behavior nor restore defendant to an ability to participate on equal footing with the plaintiff given plaintiff’s egregious conduct both of months of surreptitious spyware monitoring of defendant’s attorney-client privileged communications and meetings and his intentional and bad faith destruction of the key evidence when he learned that his computing devices were going to be seized.<sup>87</sup>

The court in *CC v. AR* was, as far as this author can determine, the first matrimonial court to actually strike a party’s pleadings based on these facts.

#### **IV. Distinguishing Unlawful Interception from Lawful Collection and Preservation of “Static ESI” from Computing Devices in the Marital Residence (or Domain) – a/k/a “Clandestine Imaging”**

While the interception of electronic communications through virtually any means is a criminal offense absent consent, and gives rise to civil liability under the federal and many state statutes, and the evidence thus obtained is often deemed inadmissible, the collection and preservation of “static ESI” from a computing device or devices within the marital residence (referred to by this author as “clandestine imaging”<sup>88</sup>) is in certain

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> “Imaging” is a term of art, referring to a method of copying data from a computing device in a forensically sound manner, which involves the creation of a bit for bit copy of the data which can be verified and authenticated at all future times through a process known as “hashing.”

cases legal and appropriate, and the evidence obtained may be perfectly admissible.<sup>89</sup>

The benefits of clandestine imaging are undeniable. Because the opposing party does not know that the information is being gathered, that party does not have an opportunity to manipulate or destroy it, and cannot “lose” the entire computing device or conveniently have it suffer a fatal crash prior to its discovery and inspection through formal discovery mechanisms. In short, the opposition does not have an opportunity to engage in spoliation through wiping as occurred in the case of *CC v. AR*, discussed above.<sup>90</sup>

Clandestine imaging can be extremely useful, even when no immediate analysis of the acquired data is contemplated or pursued. Simply securing a forensic image of the hard drive of a family computer in the marital residence gives the litigant who collects that data an “ace in the hole.” That party now possesses a forensically perfect duplicate of all data on that device, “frozen in time,” before the other spouse has notice of the litigation or a motion to compel production of the device(s) for discovery and inspection. This “ace in the hole” can be used to keep the other side honest, for example by using it to randomly audit the completeness and accuracy of financial discovery provided by the other spouse. Take the example of a laptop computer in the marital home, primarily used by the monied spouse, but occasionally utilized by the non-monied spouse. The non-monied spouse has the hard drive of that laptop computer forensically imaged prior to the commencement of the litigation. The data is secured, but not analyzed. The case then begins, and discovery ensues. The monied spouse provides information requested in discovery, but the non-monied spouse and/or their counsel suspects that the information produced in discovery is incomplete or not authentic. An examination of the acquired hard drive image can proceed at that point to determine if responsive information exists that was not produced, or if the information produced was altered or manipulated in any way. Another strategy is for counsel representing the spouse who has engaged in the clandestine imaging to

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<sup>89</sup> See, e.g., *Byrne v. Byrne*, 650 N.Y.S.2d 499 (N.Y. Sup. Ct. 1996); *Moore v. Moore*, N.Y.L.J. (N.Y. Sup. Ct. 2008); *Gurevich v. Gurevich*, 24 Misc. 3d 808 (N.Y. Sup. Ct. 2009).

<sup>90</sup> See *supra* discussion in text at notes 81-82.

notify the other side after commencement of the case, that his/her/their client has a forensic image of the computing device in question as of a specific date. Such “notice” will obviously tend to dissuade the opposing party from any effort to destroy, manipulate, or otherwise make discoverable data “unavailable.”

Given the benefits of clandestine imaging, it is important to examine the legality of this conduct. Case law in a number of states is directly on point, and clearly indicates that under certain circumstances, this type of self-help – *which does not involve the contemporaneous interception of any electronic communications* – is legal, and the resulting evidence should be admissible.

Three New York cases on point are particularly illustrative on the issue of the legality and admissibility of data retrieved from a computer in a matrimonial situation without the knowledge of the other party. Pertinent state statutes must also be considered since they may be directly controlling on these issues and vary from state to state. The relevant New York statutes are discussed below.

The seminal New York decision on this issue is *Byrne v. Byrne*<sup>91</sup> decided in 1996. Despite its age, *Byrne* remains good law and has been cited numerous times for the proposition that a computer in the marital residence is the equivalent of a filing cabinet. Each spouse has access to the computer in much the same way either could physically open a filing cabinet. In *Byrne*, the court arrived at this decision even though the computer was admittedly the property of the husband’s employer and not actually owned by either spouse. The decision hinged on the computer’s presence in the home and its physical availability to both spouses.

The real issue is not who possesses the computer but rather who has access to the computer’s memory. The computer memory is akin to a file cabinet. Clearly, a plaintiff could have access to the contents of a file cabinet left in the marital residence. In the same fashion she should have access to the contents of the computer. The plaintiff seeks access to the computer memory on the grounds that defendant stored information concerning his finances and personal business records in it. Such material is obviously subject to discovery. Therefore, it is determined that the

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<sup>91</sup> 650 N.Y.S.2d 499 (N.Y. Sup. Ct. 1996)

plaintiff did nothing wrong by obtaining the physical custody of the notebook computer.<sup>92</sup>

The 2008 case of *Moore v. Moore*<sup>93</sup> involved a laptop computer that a wife had taken from her husband's car. This laptop was turned over to the wife's counsel and the attorneys for both spouses stipulated that the husband's password would be provided, and that discovery would be permitted from the computer. Apparently having second thoughts, the husband sought to suppress the contents of the laptop pursuant to New York Civil Practice Law and Rules § 4506, claiming that the wife had violated Article 250 of the New York Penal Law, discussed above, which makes it a Class E felony to intercept an electronic communication without the consent of at least one party.

The court disagreed with the husband and ruled that there was no eavesdropping offense, no penal law violation and no need to suppress anything from the computer's hard drive.<sup>94</sup> The court stated that the hard drive's record of *past communications* is not susceptible to "interception" under the statute. This analysis is key to understanding why this type of self-help in the context of spouse versus spouse in a matrimonial action is in most cases perfectly legal, as opposed to the deployment or use of spyware or other methods that actually intercept emails, instant messages or other electronic communications in real time.

The case of *Gurevich v. Gurevich*<sup>95</sup> presents a slightly different set of circumstances, and is the case that is most often referred to by those who would argue clandestine imaging in the marital context is potentially a violation of the criminal law. A careful analysis of this case, and the statutes referenced and discussed in the decision is required. In *Gurevich*, the wife, a software developer, had used the husband's password to access the husband's email account and obtain his emails after the divorce action commenced. The husband's attorney attempted to exclude from evidence the emails obtained by the wife, citing New York New York Civil Practice Law and Rules § 4506, discussed above, which makes evidence obtained in violation of New York Penal Law Article 250 inadmissible in any civil pro-

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<sup>92</sup> *Id.* at 499.

<sup>93</sup> N.Y.L.J. 26 (N.Y. Sup. Ct. Aug. 14, 2008).

<sup>94</sup> *Id.* at 26, col 1.

<sup>95</sup> 24 Misc. 3d 808 (N.Y. Sup. Ct., Kings Co. May 5, 2009).

ceeding in New York. The court held that there was no eavesdropping violation under Penal Law § 250 (citing *Moore*).<sup>96</sup> In this case the court reviewed the legislative history of New York Penal Law § 250.05 for guidance. In doing so, the court determined from a reading of the statute, legislative history, and case law that the purpose of Penal Law § 250.00 is to prohibit individuals from intercepting communications going from one person to another. The court found that the e-mail was not “in transit” but stored in the e-mail account, and accordingly failed to fall within the scope of § 4506.<sup>97</sup> This should have ended the inquiry, however, the court went on to state, in dicta, that there may have been a violation of the computer tampering/computer trespass statutes under New York Penal Law Article 156<sup>98</sup> without providing any further analysis or reasoning for that statement. The court said it did not need to reach a conclusion on this issue because suppression under § 4506 applies only to evidence obtained in violation of Penal Law Article 250, which the court already concluded had not been violated.

Admissibility of evidence issues aside, the court’s reference in *Gurevich* to a possible violation of New York Penal Law § 156.10 (Computer Trespass, a Class E Felony) is certainly serious enough to warrant concern, at least until the issue is thoroughly analyzed. While the court in *Gurevich* did not discuss (understandably, because it was not adjudicating a criminal matter) when suggesting that the collection of the evidence by the wife in this case “might” be a violation of New York Penal Law §§ 156.05 and 156.10 (Unauthorized Use of Computer, Computer Tampering, Computer Trespass) is that Article 156 of the New York Penal Law contains an express defense to any charge under that article. Such express defense is that if “the defendant had reasonable grounds to believe that he had authorization to use the computer” or “had reasonable grounds to believe that he had

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<sup>96</sup> *Moore*, N.Y.L.J., at 26, col 1. There the court held that Penal Law § 250.05 did not apply to the facts presented because in accessing the disputed files, the plaintiff did not intercept, overhear, or access electronic communications. The communication was saved to the hard drive by the husband, and the wife’s subsequent access to that material downloaded and saved to the hard drive of the computer was not the result of an intercepted communication and did not constitute a violation of Penal Law § 250.05.

<sup>97</sup> *Gurevich*, 24 Misc. 3d at 811.

<sup>98</sup> *Id.* at 813.

the right to copy, reproduce or duplicate in any manner the computer data or the computer program.”<sup>99</sup>

In light of *Byrne v. Byrne*,<sup>100</sup> *Moore v. Moore*,<sup>101</sup> and similar cases it is difficult to imagine a persuasive argument that a spouse would not have “reasonable grounds to believe” that they had authorization to access a computer in the marital residence, or copy, reproduce, or duplicate data on that computer in the context of seeking potential evidence relevant to a matrimonial litigation. In addition, under the New York Penal Law, a defense such as the defense to Article 156 described above, is distinguished from an “affirmative defense” in that a defense need merely be raised by a defendant and must thereafter be *disproved beyond a reasonable doubt* by a prosecutor whereas an “affirmative defense” must be pleaded and proved by the defendant.<sup>102</sup> Given this framework, it is nearly impossible to imagine a prosecutor bringing a criminal case against a spouse who merely copies data from a computing device in the marital residence (or as seemingly expanded by the court in *Moore* to the “marital domain” since the laptop in question in that case was removed by the wife from the husband’s car) as opposed to “intercepting” their spouse’s electronic communications, which is without question a criminal offense under federal law and the laws of most states absent consent.

## Conclusion

When “digital spousal espionage” includes the interception of electronic communications, it can result in extremely serious consequences including criminal charges, civil suits for statutory damages and attorneys’ fees, extreme sanctions against the guilty party in a matrimonial litigation (up to and including the striking of pleadings), not to mention the likelihood of the ‘evidence’ gathered being ruled inadmissible. Covert collection (*i.e. clandestine copying – not intercepting*) of data from a computing device in the marital residence however, may be perfectly permissible in many jurisdictions (and is certainly not unlawful

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<sup>99</sup> N.Y. PENAL LAW §156.50 (1), (2) and (3).

<sup>100</sup> 168 Misc. 2d 321, 650 N.Y.S. 2d 499 (N.Y. Sup. Ct. 1996).

<sup>101</sup> N.Y.L.J. (N.Y. Sup. Ct. Aug. 14, 2008).

<sup>102</sup> See N.Y. PENAL LAW § 25 Defenses; Burden of Proof.

under federal law), but the interception of electronic communications through virtually any means, without consent, is almost certain to be a violation of law. The spectrum of extremely serious consequences notwithstanding, this author has witnessed (and reported cases and media stories in recent years corroborate) a sharp rise in cases involving the unlawful interception of electronic communications in matrimonial (and other domestic relations) cases. There are only two rational conclusions that can be drawn from these facts: either matrimonial litigants do not know what they are doing is illegal and can have potentially severe consequences, or they simply do not care and are willing to take the risk. This author has been witness to cases where the latter is true. The author believes however, that in the vast majority of cases, it is the former, and the “guilty” party did not know that their conduct was “illegal” – or more precisely, they had no idea ‘just how illegal it was!’. If this is true, then matrimonial attorneys would be doing their clients a tremendous service by counselling them early on in the representation, and without waiting for the issue to come up, what ‘interception of electronic communications’ entails, how it occurs, how it is different from ‘copying’ data from a computing device in the marital home, and just how serious the consequences of unlawful interception can be. In addition to helping an “ignorant” client who might be contemplating such conduct to avoid the potentially serious consequences of same, counsel will also be alerting clients who have no intention of engaging in such conduct, that this type of conduct not only occurs, but how prevalent it has become through such a wide variety of methods, and to be on the lookout for any indication that they may be a victim of same. If there are indications that unlawful interception may have occurred, given the potential remedies available, counsel would be wise to enlist the assistance of computer forensic professionals to collect and preserve the evidence of same.

## Working with Experts and Families with Special Needs Children

by

Sarah E. Kay\* and Maria C. Gonzalez\*\*

### Introduction

One size does not fit all when it comes to families, particularly families with minor children. Any doubts about this statement are quickly dissipated with a review of some recent statistics. It is estimated that about one in every fifty-four children has Autism Spectrum Disorder (ASD).<sup>1</sup> The most recent National Survey of Children's Health reveals that almost 10% of children under the age of 18 have had an Attention Deficit Hyperactivity Disorder (ADHD) diagnosis at some point during their childhood.<sup>2</sup> The World Health Organization estimates that about 34 million children have disabling hearing loss and, by 2050, about one in every ten people will have disabling hearing loss.<sup>3</sup> Down Syndrome, the most commonly occurring chromo-

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<sup>1</sup> *Data and Statistics on Autism Spectrum Disorder*, U.S. DEPT. OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/data.html> (last updated Sept. 25, 2020). Autism Spectrum Disorder is a developmental disorder affecting an individual's communication and behavior. As of the publication of the *Diagnostic and Statistical Manual of Mental Disorders (DSM) V* published in 2013, this diagnosis now includes a number of prior diagnoses and labels including Autistic disorder, Asperger's, and pervasive developmental disorder not otherwise specified (PDD-NOS). For more on ASD, see generally *Autism Spectrum Disorder*, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml>, NATIONAL INST. OF MENTAL HEALTH (last updated Mar. 2018).

<sup>2</sup> *ADHD: Data & Statistics*, U.S. DEPT. OF HEALTH & HUM.SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/adhd/data.html> (last updated Sept. 4, 2020).

<sup>3</sup> *Deafness and Hearing Loss: Key Facts*, WORLD HEALTH ORG., <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> (last updated Mar. 1, 2020).

somal condition, is estimated to occur in approximately one in every seven hundred births.<sup>4</sup> Approximately one thousand new cases of Cystic Fibrosis, a genetic disease affecting major organs including the lungs, are reported each year, most of which are identified in children two and younger.<sup>5</sup> More than four hundred babies are born with hemophilia, an inherited bleeding disorder negatively affecting the blood's ability to clot.<sup>6</sup> These statistics are by no means comprehensive. Hundreds more illnesses and diseases affecting minor children exist, some of which require extraordinary parental and professional support to ensure the child's success.<sup>7</sup>

The Model Rules of Professional Conduct call for the lawyer to provide clients with "competent representation," which is defined as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>8</sup> It is important to note that competence goes beyond simple legal knowledge to include skill, thoroughness, and preparation that is reasonably necessary to represent the client.<sup>9</sup> The *Bounds of Advocacy* published by the American Academy of Matrimonial Lawyers in 1991 provides "[t]hat knowledge is not limited to legal information . . . custody and visitation cases require knowledge of child development and, at times, understanding of mental and emotional disorders."<sup>10</sup> Families with one or more

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<sup>4</sup> *Down Syndrome Facts*, NATIONAL DOWN SYNDROME SOC'Y, <https://www.ndss.org/about-down-syndrome/down-syndrome-facts/> (last visited Oct. 13, 2020).

<sup>5</sup> *About Cystic Fibrosis*, Cystic Fibrosis, CYSTIC FIBROSIS FOUNDATION, <https://www.cff.org/What-is-CF/About-Cystic-Fibrosis/> (last visited Oct. 13, 2020).

<sup>6</sup> *Data & Statistics on Hemophilia*, U.S. DEPT. OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/hemophilia/data.html> (last updated Sept. 14, 2020).

<sup>7</sup> For a comprehensive overview of the various definitions of *special needs*, see Margaret A. "Peggy" Graham, *The Many Meanings of "Special Needs"*, FAM. ADVOC., Winter 2020 [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/the-many-meanings-special-needs/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/the-many-meanings-special-needs/).

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2020).

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

<sup>10</sup> *Bounds of Advocacy*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, § 1.1 (2000), <https://aaml.org/store/viewproduct.aspx?id=12875928>. Adapted and updated in 2018, The Florida Bar Family Law Section, *Bounds of*

children who have a unique medical, educational, or emotional need face additional stressors and challenges often on a daily basis.<sup>11</sup> The challenges and complications of daily life can be exacerbated when the family unit experiences a major transition such as divorce, death, or separation.<sup>12</sup> It is, therefore, of paramount importance that a lawyer representing a parent of a special needs or disabled child be familiar with the unique challenges involved in the day-to-day life of that child to help advocate for that client's interests and needs throughout the course of representation.

The world of children with special needs and disabilities are full of special terminology and acronyms which may be new to a family law practitioner. To begin, four key terms used throughout this article should be defined: First, *family law cases* references proceedings involving conflict within a family, such as child custody, child support, support unconnected with divorce,

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*Advocacy*, [https://familylawfla.org/wp-content/uploads/2018/05/Fla-Bar-Magazine\\_5-18\\_text\\_final\\_electronic-version.pdf](https://familylawfla.org/wp-content/uploads/2018/05/Fla-Bar-Magazine_5-18_text_final_electronic-version.pdf).

<sup>11</sup> See generally *Parenting Children with Special Needs*, Boston University, <https://www.bu.edu/fsao/resources/parenting-children-with-special-needs/> (last visited Oct. 13, 2020) (discussing the challenges frequently faced by raising special needs children and providing help and resources to faculty and staff); Michelle Diament, *Autism Moms Have Stress Similar to Combat Soldiers*, DISABILITY SCOOP, <https://www.disabilityscoop.com/2009/11/10/autism-moms-stress/6121/> (Nov. 10, 2009) (discussing two studies published in the *Journal of Autism and Developmental Disorders* which reveal that mothers of adolescents and adults on the autism spectrum experience chronic stress comparable to combat soldiers); Vidya Bhushan Gupta, *Comparison of Parenting Stress in Different Developmental Disabilities*, 19 J. DEV. & PHYSICAL DISABILITIES 417 (2007) (comparing levels of stress experienced by parents of children with differing disabilities and special needs).

<sup>12</sup> See generally *The Unfortunate Reality of Divorce in Couples with a Child with Special Needs*, MYCHILD AT CEREBRALPALSY.ORG, <https://www.cerebralpalsy.org/blog/the-unfortunate-reality-of-divorce-in-couples-with-a-child-with-special-needs> (Aug. 9, 2016) (discussing the additional challenges faced by parents of special needs children who divorce); Tina Persels, Shena McAuliffe, & Gina Pola-Money, *When Parents of Children with Disabilities Divorce*, MEDICAL HOME PORTAL, <https://www.medicalhomeportal.org/living-with-child/legal-issues/when-parents-of-children-with-disabilities-divorce>, (last updated Jan. 2019) (discussing special considerations for divorcing or separating parents who have special needs children).

parenting plan or custody agreement, parentage,<sup>13</sup> temporary custody by extended family members, concurrent custody, dependency, and adoption. Second, *child* refers to a person under the age of 18 and not otherwise emancipated under the law. Third, *special needs child* references a child who has been determined by a qualified expert to require assistance beyond what is required by similarly situated children in education, medical attention, emotional health, or behavior, and, will include a child with a disability. And, finally, *parenting plan* refers to a document that outlines decision making authority<sup>14</sup> over the child and a timesharing schedule<sup>15</sup> identifying with which parent the child is spending time.<sup>16</sup>

A family law practitioner representing a parent of a special needs child should take special care to gain a general understanding of the family's unique situation. This may involve asking additional questions during the initial consultation process,<sup>17</sup> reviewing documents that may provide additional insight, and speaking with third party professionals. This article is intended to provide the family law practitioner with a high-level overview of terminology, common professionals who might be involved, and issues that often arise during family law cases involving special needs children or children with disabilities. This is not meant

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<sup>13</sup> Recently, the term "parentage" has been substituted for what has traditionally been termed "paternity." This term is intended to mean a proceeding that determines the legal parents of a minor child.

<sup>14</sup> The term "parental responsibility" may be used throughout this article interchangeably with the term "decision making authority" or "legal custody" to reference a person's rights to make major decisions about a child's health and welfare.

<sup>15</sup> The term "timesharing schedule" may be used interchangeably throughout this article with the term "visitation schedule" or "physical custody" to reference a person's rights to have time with a child and the schedule followed for that time.

<sup>16</sup> A parenting plan may also be known as "custody agreement" or another similar name. The term "parenting plan" will be consistently used throughout this article to reference such document.

<sup>17</sup> For more suggestions on specially tailoring initial consultations for parents of children with special needs, see generally Beth C. Manes & Amanda S. Trigg, *Initial Consults with Clients with Special Needs Children: The Good, The Bad, and The Necessary*, FAM. ADVOC., Winter 2020, at 11, 12, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/initial-consults-clients-special-needs-children-good-bad-and-necessary/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/initial-consults-clients-special-needs-children-good-bad-and-necessary/).

to be a comprehensive list or a detailed handbook, but rather a primary starting point to help the practitioner better understand clients as well as identify areas that may require additional research as well as provide resources to help in those efforts.

Part II introduces the family law practitioner to professionals with whom families who have special needs children will work. Part III provides the practitioner with a broad overview of educational considerations for families with special needs children, best practices for drafting parenting plans, and essential documents that the family law practitioner should consider reviewing. Part IV explores caregiver resources comprised of respite care and parenting skills. Part V identifies unique considerations for families with special needs children during the child's transition into adulthood. Part VI lists community resources for further reading and resources for both the family law practitioner and the child's caregivers.

## II. Essential Professionals

As much as each child with special needs is unique, so are the professionals and experts with whom the child's family may work. This section is designed to provide a overview of common professionals available to help meet the needs of the special needs child. Depending on the nature of the case, these professionals may simply serve as resources of information for the family law practitioner, or it may become necessary for the practitioner to hire one as an expert witness<sup>18</sup> or as a consultant to educate the judge as to the child's best interest. To begin, the family law practitioner should become familiar with common titles and roles.

### A. Educational Professionals

The three primary groups of professionals that families may wish to use to help advocate for their child's academic success

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<sup>18</sup> For more on using experts in custody cases involving special needs children, see generally Margaret "Pegi" Price, *The Use of Experts in Custody Cases*, FAM. ADVOC., Winter 2020, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/the-use-experts-custody-cases/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/the-use-experts-custody-cases/).

are: the educational institution's compliance personnel, educational advocates, and a special education attorney.<sup>19</sup>

1. *School and District Coordinators and Compliance Officers*

All educational institutions will have an individual who is responsible to coordinate and monitor compliance with Section 504, Title II of the ADA, and IDEA. For public schools, typically it is a team with personnel at the school district administration level all the way down to each individual school. It is not unusual for the school-level personnel to be holding multiple roles and, therefore, have more of a superficial understanding of the laws than their counterparts higher up in administration. Therefore, if a parent is questioning proper adherence to the laws, the best practice is to work up through the hierarchy to discuss the matter with district-level personnel. Often, this is most easily achieved with help of an educational advocate or special education attorney.

2. *Educational and Family Advocates*

These are trained professionals who can assist families in advocating for the educational rights of a child with special needs under Section 504 and IDEA. In many jurisdictions, no formal certification or training process for these professionals exists, although many have college degrees or higher in special education or related fields.<sup>20</sup> Often, they are other parents who have had to advocate for their own children's rights, a former school em-

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<sup>19</sup> For more on different types of advocacy, see generally *What Is Advocacy?*, LEARNING DISABILITIES ASS'N OF AM., <https://ldaamerica.org/advocacy/what-is-advocacy/> (last visited Oct. 14, 2020).

<sup>20</sup> However, three popular sources for training exist: COPAA offers Special Education Advocacy Training (SEAT) training. See generally *SEAT*, COUNCIL OF PARENT ATT'YS & ADVOC., <https://www.copaa.org/page/SEAT> (last visited Oct. 21, 2020). William & Mary Law School offers the Institute of Special Education Advocacy Summer Conference. See generally *The William & Mary Law Institute of Special Education Advocacy Summer Conference*, WILIAM & MARY LAW SCHOOL, <https://law.wm.edu/academics/programs/jd/electives/clinics/specialed/isea/index.php> (last visited Oct. 21, 2020). And Wrightslaw offers programs and clinics normally sponsored by non-profit organizations. See generally *Full Schedule of Programs*, WRIGHTSLAW, <https://www.wrightslaw.com/speak/schedule.htm> (last visited Oct. 21, 2020).

ployee, or a related services employee – such as a speech language pathologist – who learned through their own professional experiences and either changed fields or advocates for special needs children as a side business. It is not unusual for a family to find an educational advocate through word-of-mouth referrals from other parents. However, one of the most respected nationwide organizations for educational advocates and special education attorneys is the Council of Parents Attorneys and Advocates (COPAA)<sup>21</sup> which has a member directory and parent resources to assist in the selection process. Educational advocates can assist families with many aspects of educational advocacy except when it spills into what would be considered the practice of law, such as initiating a legal proceeding on the child's behalf. At that point, a special education attorney's assistance is required.

### 3. *Special Education Attorneys*

Special education attorneys are licensed attorneys who practice law in state and/or federal courts to advocate for a child's educational rights.<sup>22</sup> It is not unusual for an educational advocate to have a professional relationship with a special education attorney. The special education attorney can and will attend IEP (individualized education plan) meetings at a parent's request or can simply provide consultations and advice to parents who prefer to attend meetings on their own or with their educational advocate. The special education attorney can draft and review settlement agreements, initiate legal actions such as due process proceedings, Office of Civil Rights complaints, and state complaints. Families usually use their services when all other efforts to resolve the issues have failed.

### B. *Medical Professionals*

When a child has special needs, multiple professionals may be involved with the child's evaluation, treatment, and support. Below is an alphabetical list of common experts that may be in-

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<sup>21</sup> COPAA's website and additional information is available in the Community Resources section below.

<sup>22</sup> For more on special education training and advocacy clinics for law students and attorneys, see generally *So You Want to Go to Law School? Special Education Law & Advocacy Clinics*, WRIGHTSLAW, <https://www.wrightslaw.com/lawschool/> (last updated Oct. 23, 2019).

volved with children with which a family law practitioner should be familiar:

1. *Applied Behavior Analysis (ABA) Therapy*:<sup>23</sup> This is therapy based on learning and behavior focused on increasing helpful behaviors and decreasing harmful behaviors or those that negatively affect learning. The child is evaluated by a Board Certified Behavior Analyst® (BCBA®) who then develops a treatment plan and supervises its implementation often by a Board Certified Assistant Behavior Analyst® (BCaBAs®) and Registered Behavioral Technician (RBT).
2. *Board Certified Behavior Analyst® (BCBA®)*:<sup>24</sup> This is a graduate-level certification in behavior analysis. Professionals holding this certification are independent practitioners who may provide behavior analysis services. BCBAAs can evaluate a child to develop a behavior treatment plan and supervise its implementation by a Board Certified Assistant Behavior Analyst® (BCaBAs®) and Registered Behavioral Technician (RBT). A professional who has completed doctoral training in behavior analysis may qualify for a Board Certified Behavior Analyst-Doctoral™ (BCBA-D™) designation.
3. *Board Certified Assistant Behavior Analyst® (BCaBA®)*:<sup>25</sup> This is an undergraduate-level certification in behavior analysis. These professionals work under the supervision of a professional holding a BCBA® level degree or higher to implement a behavior treatment plan such as ABA therapy.
4. *Clinical Psychologist*: A clinical psychologist may be necessary to provide regular and periodic treatment to a child with special needs or other disabilities. Determine

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<sup>23</sup> *Applied Behavior Analysis (ABA)*, AUTISM SPEAKS, <https://www.autismspeaks.org/applied-behavior-analysis-aba-0> (last visited Oct. 13, 2020).

<sup>24</sup> *Board Certified Behavior Analyst (BCBA)*, BEHAV. ANALYST CERTIFICATION BOARD, <https://www.bacb.com/bcba/> (last visited Oct. 13, 2020).

<sup>25</sup> *Board Certified Assistant Behavior Analyst (BCaBA)*, BEHAV. ANALYST CERTIFICATION BOARD, <https://www.bacb.com/bcaba/> (last visited Oct. 13, 2020).

if the psychologist is a board certified child and adolescent psychologist or if they treat children and adolescents with behavioral disorders and children with disabilities.

5. *Forensic Psychiatrist*: To assess a child's special needs, it may be necessary to have a forensic psychiatrist evaluate the child for diagnosis and/or appropriate treatment of mental disorders. A forensic psychiatrist is a medical doctor with training in psychiatry and a forensic psychiatrist blends the world of mental health with the law.
6. *Occupational Therapist (OT)*:<sup>26</sup> Occupational Therapists help people participate in desired activities and life functions through the therapeutic use of everyday activities. Occupational therapy is often used to help persons with disabilities fully participate in educational and social settings and persons with injuries regain lost skills. Occupational therapists can evaluate a person's home and common environments (such as a school or work setting) and make recommendations for adaptive equipment as well as provide training in its use.
7. *Physical Therapist (PT)*:<sup>27</sup> Physical Therapists focus on movement to improve their clients' lives through prescribed exercise, education, and hands-on care. Physical therapy can occur in a wide range of environments including hospitals, outpatient clinics, fitness facilities, offices, educational environments, assisted living facilities, schools, and the home.
8. *Registered Behavior Technician® (RBT®)*:<sup>28</sup> This is a paraprofessional certification in behavior analysis. These paraprofessionals normally work under the guidance or supervision of a professional holding a BCaBA® designation or higher. Their primary service

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<sup>26</sup> *About Occupational Therapy: What Is Occupational Therapy?*, AMERICAN OCCUPATIONAL THERAPY ASSOCIATION, <https://www.aota.org/About-Occupational-Therapy.aspx> (last visited Oct. 13, 2020).

<sup>27</sup> *Becoming a PT: What Physical Therapists Do*, AM. PHYSICAL THERAPY ASS'N, <https://www.apta.org/your-career/careers-in-physical-therapy/becoming-a-pt> (last visited Oct. 13, 2020).

<sup>28</sup> *Registered Behavior Technician (RBT)*, BEHAV. ANALYST, <https://www.bacb.com/rbt/CERTIFICATION BOARD> (last visited Oct. 13, 2020).

is usually to implement a behavior treatment plan such as ABA therapy.

9. *Speech Language Pathologist (SLP)*:<sup>29</sup> These professionals evaluate and treat individuals who have special needs or disabilities affecting their abilities in any of the following areas: articulation or comprehension in sounds, comprehension and use of language, literacy, pragmatics (social communication), voice, fluency (stuttering), cognitive communication, and dysphagia (feeding and swallowing). Speech language therapy can occur in a wide range of environments, including hospitals, outpatient clinics, educational environments, rehabilitation centers, assisted living facilities, schools, and the home.
10. *Vision Therapist (VT)*:<sup>30</sup> Vision therapy is a drug-free intervention implemented to retrain the learned aspects of visual skills such as tracking. The goal of visual therapy is to alter how the patient processes or interprets visual information to improve visual comfort and efficiency. Vision therapy is not meant to improve visual acuity (the “20/20” aspect to vision which is often achieved through glasses) but rather the visual skills.

### III. EDUCATIONAL CONSIDERATIONS

Among the major lessons that the COVID-19 pandemic of 2020 taught was the enormous role that school plays in the physical, financial, academic, and emotional wellbeing of families with children. School does not exist simply to give out grades, but also serves as a center of nutrition, and a source for cultivating essential life skills, trade skills, socialization, and career planning. When a child struggles in school, it can have immediate and massive effects on the entire family and potentially life-long effects for the child. Conversely, securing success in school for a special needs child can represent not just improving the academic, physi-

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<sup>29</sup> *Who Are Speech-Language Pathologists, and What Do They Do?*, AM. SPEECH-LANGUAGE-HEARING ASS'N, <https://www.asha.org/public/Who-Are-Speech-Language-Pathologists/> (last visited Oct. 14, 2020).

<sup>30</sup> *What Is Vision Therapy?*, COLLEGE OF OPTOMETRISTS IN VISION DEV., [https://www.covd.org/page/vision\\_therapy](https://www.covd.org/page/vision_therapy) (last visited Oct. 13, 2020).

cal, and emotional health of the child, but also provide a positive financial and emotional impact on the child's family. This section will discuss the primary laws that exist to help promote success in school for a special needs child, a brief overview of advocating for a special needs child in school, and general education considerations when drafting or modifying a parenting plan.<sup>31</sup>

#### A. Essential Laws

The two primary laws that protect and assist children with special needs and disabilities within educational environments are: Section 504 of the Rehabilitation Act of 1973, as amended (Section 504)<sup>32</sup> and the Individuals with Disabilities Education Act (IDEA).<sup>33</sup> A child with a disability may be entitled to accommodations under Section 504, often referred to as a *504 Plan*, or special services and accommodations under an individualized education plan (IEP) or both. All students who qualify to receive an IEP qualify for protections under Section 504; however, not all students who qualify for protections and accommodations under Section 504 qualify to receive an IEP.<sup>34</sup> Each will be briefly explained in turn.

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<sup>31</sup> For an overview of educational plans and their implementation in public schools, see generally Andrew M. I. Lee, *Introduction to Educational Plans in Public Schools*, FAM. ADVOC., Winter 2020, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/introduction-educational-plans-public-schools/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/introduction-educational-plans-public-schools/).

<sup>32</sup> 29 U.S.C. § 794 (2020). Subsection (a) states, in part “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” Title II of the Americans with Disabilities Act of 1990, 28 C.F.R. Part 35 (2020), extends the prohibition of discrimination on the basis of disability afforded by Section 504 to all services, activities, and programs by state and local governments, irrespective of if they receive federal financial assistance. *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEP'T JUST. CIV. RTS. DIVISION, [https://www.ada.gov/ada\\_title\\_II.htm](https://www.ada.gov/ada_title_II.htm) (last visited Oct. 13, 2020). For purposes of this Article, only Section 504 will be discussed.

<sup>33</sup> 33 U.S.C. §§ 1400-1482 (2020).

<sup>34</sup> For an easy to understand general overview of the difference between Section 504 and the IDEA, see generally *Understanding the Differences: IEP vs. 504 Plan*, OFF. OF THE STUDENT ADVOC., <https://sboe.dc.gov/sites/default/>

1. *Section 504 of the Rehabilitation Act of 1973, as Amended*

Among the first civil rights laws passed in the United States was Section 504 of the Rehabilitation Act of 1973.<sup>35</sup> The law, in short, prohibited a program receiving federal funds from discriminating against a *qualified* person based on the person's disability. To be protected by Section 504, the person has to be a *qualified handicapped person* as defined by the applicable federal regulations.<sup>36</sup> For purposes of education, Section 504 protects persons with disabilities who are of an age for which preschool, elementary, secondary, or adult education services are provided or required by law and who has "any condition or characteristic" that renders a person as "handicapped" as defined within the regulations.<sup>37</sup> The definition of "handicapped" is a "physical or mental impairment which substantially limits one or more major life activities" such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>38</sup> Section 504 is relevant because public schools receive federal funding. The resulting 504 Plan will outline what accommodations will be implemented to provide access to the child with a disability.<sup>39</sup>

A simple example of Section 504 in action would be as follows: If a child requires a wheelchair for mobility, Section 504 prohibits a public school from denying the child access to the school or access to transportation to the school due to that disability. Under Section 504, the school must make reasonable accommodations so the child may participate in the school like the non-disabled peers such as providing ramp access into the school or wheelchair-friendly transportation to the school. Section 504 is not as focused on protecting the child's academic progress as it

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files/dc/sites/sboe/publication/attachments/Understanding%20the%20Differences%20-%20IEP%20vs%20504%20Plan%20.pdf (last visited Oct. 13, 2020).

<sup>35</sup> Kitty Cone, *Short History of the 504 Sit In*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> (last visited Oct. 13, 2020).

<sup>36</sup> 45 C.F.R. § 84 (2020).

<sup>37</sup> 45 C.F.R. § 84 (l) (2020).

<sup>38</sup> 45 C.F.R. § 84 (j) (2020).

<sup>39</sup> *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEPT. OF EDUC. OFF. OF CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (last updated Jan. 1, 2020).

is getting the child access to education in the publicly funded school through accommodations such as ramps, interpreters, preferred seating, and the like. IDEA focuses in on promoting the child's academic success inside the school through a specialized education program tailored to the child's unique educational needs.

## 2. *Individuals with Disabilities Education Act (IDEA)*

In 1975, Congress passed landmark legislation<sup>40</sup> titled the Education for All Handicapped Children Act (sometimes called EACHA or EHA, or Public Law (PL) 94-142) which compelled all public schools receiving federal funding to provide “free and appropriate public education” (FAPE), evaluate the children, and create educational plans for the children with their parents’ input that would help emulate as closely as possible the disabled children’s educational experiences to those of their non-disabled peers.<sup>41</sup> EACHA evolved over the years until the Individuals with Disabilities Education Act was re-authorized in 2004 and is now known as IDEA 2004.<sup>42</sup> Like its predecessor laws and unlike Section 504, IDEA was not created merely to ensure that children with disabilities and special needs are simply accessing the school, the laws seek to ensure that the children are also accessing the *education* and *learning* that are taking place within the school through the creation of an IEP for each qualifying child.

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<sup>40</sup> For a succinct history of the genesis of special education laws, see generally *History: Twenty-Five Years of Progress in Education Children with Disabilities through IDEA*, U.S. OFF. OF SPECIAL EDUC. PROGRAMS, <https://www2.ed.gov/policy/speced/leg/idea/history.pdf> (last visited Oct. 13, 2020).

<sup>41</sup> Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1400 (2004)). The full text of the original statute is available at <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg773.pdf> (last visited Oct. 13, 2020). For a comprehensive history of the statute, see generally Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 PL 94-142: Its History, Origins, and Concepts*, 161 J. EDUC. 5 (Summer 1979).

<sup>42</sup> 20 U.S.C. § 1400-1482 (2020). For a brief history of special education laws, see generally Pete Wright, *The History of Special Education Law*, WRIGHTSLAW, <https://www.wrightslaw.com/law/art/history.spec.ed.law.htm> (last updated Jan. 6, 2020). The federal regulations governing special education are found at 34 C.F.R. § 300.1-300.818 (2020).

Under the IDEA, public schools that receive federal funding must identify and locate all children from birth through age 21 who have disabilities of any severity and evaluate them to determine if they qualify for special education and related services.<sup>43</sup> For children not yet of traditional school age, states will have a program in place often called “Child Find” which a parent or caregiver can call to initiate the evaluation process. For children who are already enrolled in school, the process can be initiated by making the request of the school administration. Once a parent’s consent to evaluate is given, the school has a timeline to follow to complete the evaluation, meet with the parents, and decide if the child qualifies for special education or related services under the IDEA. If the answer from the school is no and the parents disagree, the parents can appeal the determination through a due process hearing before an administrative law judge. If the answer is yes, then an IEP is written with input from the teachers, related services personnel, parents, and school administration (IEP Team). The IEP Team meets annually to discuss the child’s progress and what, if any, changes should be made to the IEP to ensure the child is making “progress appropriate in light of the child’s circumstances.”<sup>44</sup>

To secure federal funding, each state has adopted state statutes and administrative codes which implement the mandates of Section 504, Title II of the ADA, and the IDEA within the state’s public educational system. The state laws cannot contradict the federal laws and must provide qualified children and their parents *at least* the same protections *or better* than what the federal laws afford. If a parent, educational advocate, or special education attorney suspect that the public school or district is not following the mandates of Section 504, Title II of the ADA, IDEA, or their state equivalents, then they can advocate for the child’s rights.

### B. *Educational Advocacy*

If a child is experiencing difficulties in school, whether they are behavioral issues or academic, and the parent or a treating

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<sup>43</sup> Pamela Wright & Pete Wright, *The Child Find Mandate: What Does It Mean to You?*, WRIGHTSLAW, <https://www.wrightslaw.com/info/child.find.mandate.htm> (last updated Jan. 8, 2019).

<sup>44</sup> *Andrew F. v. Douglas Cnty. Sch. Dist.*, Re-1, 137 S. Ct. 988 (2017).

professional suspects those issues may be caused by a special need or disability, a parent has the right to request that the school evaluate the child to determine eligibility for supports and services under the IDEA.<sup>45</sup> Normally a precursor to initiating the evaluation process is implementing less robust support systems called Response to Intervention,<sup>46</sup> however, that can be implemented simultaneously with the evaluation process. The evaluations can include, but are not limited to: psychoeducational evaluation,<sup>47</sup> Functional Behavioral Analysis (FBA),<sup>48</sup> occupational therapy evaluations, vision evaluation, physical therapy evaluation, assistive technology evaluation,<sup>49</sup> psychological evaluation, speech language evaluation, cognitive/intelligence evaluation, verbal intelligence evaluation, nonverbal intelligence evaluation, auditory evaluation, motor skills evaluation, and more. It is not uncommon for a parent to obtain a private evaluation and present it to the school for use in determining the child's eligibility for exceptional student education (ESE) services<sup>50</sup>; however, under special education laws, the school is required to provide the evaluation free of charge to the family *and* the school is not required to accept the private evaluation results

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<sup>45</sup> 20 U.S.C. §§ 1400-1482 (2020).

<sup>46</sup> Response to intervention is normally referred to by its acronym RTI.

<sup>47</sup> Chad C. Nelson, *A Parent's Guide to Psychoeducational Evaluations*, AM. FOREIGN SERV. ASS'N, <https://www.afsa.org/parents-guide-psychoeducational-evaluations> (last visited Oct. 19, 2020).

<sup>48</sup> *What Is a Functional Behavioral Assessment and How Is It Used? An Overview for Parents*, PACER CTR., <https://www.pacer.org/parent/php/php-c215a.pdf> (last visited Oct. 19, 2020). Once completed, the FBA may result in the drafting of a Personal Behavior Improvement Plan (PBIP) which identifies supports to implement to promote a child's success in the learning environment. PBIPs seek to implement *replacement* behaviors that are constructive within the academic, home, and/or community environment(s).

<sup>49</sup> Assistive technology is defined as "any item, piece of equipment, or product system, whether required commercially off of the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401 (1)(a) (2020). For more on assistive technology devices and services, see generally *Assistive Technology*, WRIGHTSLAW <https://www.wrightslaw.com/info/atech.index.htm> (last updated Aug. 21, 2017).

<sup>50</sup> Many people consider ESE (also known as special education) services to be for disabilities only; however, gifted programs are considered part of ESE services. 20 U.S.C. § 1481 (d)(3)(J); *see also* 25 C.F.R. § 39.115 (2020) (explaining the identification and qualification of gifted and talented students).

as valid, although sometimes they do “validate” the results to use as their own.

Sometimes simply initiating the evaluation process requires a significant amount of advocacy by the parent, educational advocate, or special education attorney. Other times the school or district will be the one advocating to have the child evaluated and receive special education and related services. Regardless, one thing is certain – parents are an integral part of the process and, under federal and state laws, considered key members of the “team” that assembles to determine what, if any, services and supports the child’s needs to succeed in school. A parent<sup>51</sup> must receive prior notice of all meetings, must provide consent for the school to evaluate the child, and can provide input throughout the evaluation, drafting, and IEP revision process.

If the mandates of Section 504, Title II of the ADA, the IDEA, or their corresponding state rules are not being followed, the parent or school district<sup>52</sup> may initiate administrative proceedings in state court called *due process proceedings*, a parent may file a complaint with the U.S. Department of Education Office of Civil Rights (OCR),<sup>53</sup> or a case may be initiated in federal court. Which of these paths is most appropriate will depend on the facts and circumstances of the situation. If a client is reporting issues with their special needs child in school, a family law practitioner’s best practice is to refer the client to consult with an

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<sup>51</sup> Under federal laws, only one parent’s consent is required for the child to be evaluated for ESE services. See 34 C.F.R. § 300.300 (2020) (referencing only “parental consent” and “the parent” when discussing parental consent for an initial evaluation under the IDEA). This conflicts with the shared decision-making presumptions or requirements under family laws in many states. See e.g. FLA. STAT. § 61.13(2)(c)(2) (providing for a presumption in favor of shared parental responsibility); FLA. STAT. § 61.046 (17) (defining shared parental responsibility as a relationship “in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly).

<sup>52</sup> The school district is required to initiate a due process proceeding in some instances. Details of the process are beyond the scope of this article.

<sup>53</sup> The U.S. Department of Education has an Office of Civil Rights whose mission is “to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools. *Office of Civil Rights*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/index.html> (last updated June 29, 2020).

educational advocate or a special education attorney to understand what options exist to help the child succeed.

*C. Best Practices and Parenting Plan Considerations*<sup>54</sup>

Parents are often unaware of the existence of educational advocates and special education attorneys. In the courtroom setting, it is not uncommon for judges to rotate between the civil, criminal, dependency, domestic violence, probate, and family divisions. As a result, some judges in the family division may also be unaware of the existence of these important educational professionals who can assist children and families that appear before them. It is also not unusual for parents to not fully understand their and their child's rights under Sections 504 or the IDEA and to follow statements or guidance from ineffectively informed school-level personnel. So, a best practice for family law practitioners is to encourage their clients to consult with a special education attorney or educational advocate to help the parents make informed decisions about how to meet their child's educational needs and ensure their progress.

Often government-funded scholarships are available to pay for private school tuition and related services, normally as an alternative to the child attending public schools.<sup>55</sup> Parents should be aware of circumstances where the scholarship amounts can be adjusted, and the best practice is to consult with an experienced educational advocate or special education attorney before submitting a scholarship application. Also, parents should be mindful of application deadlines because some scholarships can become depleted.

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<sup>54</sup> For additional suggestions on best practices for drafting parenting plans for families with special needs children, see generally Lynne C. Halem, *Creating Parenting Plans for Families with Children with Special Needs*, Winter 2020, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/creating-parenting-plans-families-children-special-needs/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/creating-parenting-plans-families-children-special-needs/).

<sup>55</sup> In Florida, the two biggest ones are the McKay Scholarship and the Gardiner (also known as Step Up for Students) Scholarship. Information can be found at: *McKay Scholarship*, FLORIDA DEPT. OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/mckay/> (last visited Oct. 14, 2020); *Gardiner Scholarship*, STEP UP FOR STUDENTS, <https://www.stepupforstudents.org/for-parents/special-needs/how-the-scholarship-works/> (last visited Oct. 14, 2020).

School grades and standardized test scores are often a poor indicator of potential success for a child with special needs or disabilities, so parenting plans favoring the parent “whose address is in a school with the highest ranking in academic grading, i.e. ‘A’ versus ‘D’” are likely not in the child’s best interest. A better practice when discussing educational concerns while drafting or modifying a parenting plan is to discuss the following topics with the client:

1. What schools in the area receive the best and worst reviews and parent feedback on resources and attitudes about special needs children like your child?<sup>56</sup>
2. Have there been any recent OCR resolutions for any of the local schools or school districts that may affect children with special needs or disabilities like your child?<sup>57</sup>
3. What types of related services (OT, SLP, PT, VT, FBA, PBIP, ABA Therapy, etc.) does your child need or do you *think* your child needs to succeed at school? Does the school actively advertise having those services? What does the school counselor say when you ask him/her about them? What of these services can be obtained through a well-written IEP at the public school versus paying out of pocket at a private school or through insurance?
4. What steps does the school take to promote understanding and inclusion for special needs children? Does the school celebrate one or more disability-awareness days? How frequently do the school staff receive training on disability rights and disability awareness?
5. How many ESE and related services personnel are posted as staff on the school’s website?
6. Federal laws do not require the consent of both parents to initiate evaluations under IDEA.<sup>58</sup> How do you propose handling it if you and the other parent disa-

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<sup>56</sup> This can often be answered by on-line searches.

<sup>57</sup> Case resolutions can be found at: *Reading Room*, U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html> (last updated Aug. 28, 2020).

<sup>58</sup> See 34 C.F.R. § 300.300 (2020) (referencing only “parental consent” and “the parent” when discussing parental consent for an initial evaluation under the IDEA).

- gree about whether an evaluation should be done or disagree with the outcome of an evaluation?
7. Are you and your spouse able to attend IEP meetings together? Why or why not? If not, how do you propose the scheduling of IEP team meetings given that federal laws consider both parents part of the IEP team?
  8. Are there government-funded scholarships available to pay for private school tuition or disability-related expenses? Are those monies available regardless if the child attends public or private schools? How should the parents address use of the scholarship funds?
  9. Are there any local educational advocates or special education attorneys with whom one or both parents should consult to discuss experiences at the local schools for children with special needs or disabilities similar to your child?
  10. What transportation services are needed for the child to attend the school? What practical considerations are needed to ensure the transportation services can be provided to and from both homes?
  11. What before and after-care programs are offered at the school? How special-needs friendly are the programs? What steps do the programs take to promote understanding and inclusion for special needs children? How frequently are the program personnel trained on disability rights and disability awareness?
  12. For older students, what kinds of vocational training, life skills training, and transition services are offered at the school? Are there any other schools in the area where transportation is provided?

#### D. *Essential Documents*

A family law practitioner representing a parent of a special needs child or child with disabilities should take special care to gain a general understanding of the family's unique situation. This may involve asking additional questions during the initial

consultation process,<sup>59</sup> reviewing documents that may provide additional insight, and speaking with third party professionals.

1. Psychoeducational evaluations
2. Psychological evaluations
3. Speech language evaluations
4. Occupational therapy evaluations
5. ABA session notes and behavioral charts
6. FBA evaluations and PBIPs
7. School grades, counselor notes, quizzes, tests, and examinations
8. Copies of all IEPs and 504 plans
9. Medical progress notes
10. Medical treatment records
11. Special needs trusts
12. ABLE account statements
13. Applications for government benefits
14. Social security applications and related documents
15. Records pertaining to any Medicaid waiver support coordinator
16. Letters of intent or letter of instruction from a child's caretaker to future caretakers of the child
17. Estate planning documents
18. Advanced directives
19. Life insurance policies and beneficiary designations

## **IV. Caregiver Resources**

### *A. Respite Care*

At first glance, when one thinks of respite care, someone who needs assistance because they are engaged in the care of an elder may come to mind. However, an estimated 2.8 million families, or 1.3% of families in the United States, reported raising

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<sup>59</sup> For more suggestions on specially tailoring initial consultations for parents of children with special needs, see generally, Beth C. Manes & Amanda S. Trigg, *Initial Consults with Clients with Special Needs Children: The Good, The Bad, and The Necessary*, FAM. ADVOC., Winter 2020, at 11, 12, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/initial-consults-clients-special-needs-children-good-bad-and-necessary/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/initial-consults-clients-special-needs-children-good-bad-and-necessary/).

two or more children with a disability.<sup>60</sup> Likewise, the National Alliance for Caregiving estimates that 29% of the adult U.S. population (65.7 million) served as family caregivers for an ill or disabled relative.<sup>61</sup> It is important to care for a child with disabilities, but it is equally important that the loved one who serves as the primary caretaker get a break, both physically and mentally. Caretakers have numerous options for levels of respite care. For example, respite care can be for a number of hours, days, or weeks dependent on the need. The family may opt for in-home care, a day care facility, or a temporary residential care facility. Forms of respite care include meal preparation, running errands, bathing, dressing, and medication management.

### B. Parenting Skills

“Parenting” skills is truly a misnomer because raising a child is broader than just the parents and the practitioner should not ignore or minimize that many other family and non-family members also serve the role of a traditional “*parent*” in many families. For example, stepparents, grandparents, siblings, aunts and uncles, and significant others or partners also fill this role. Whoever serves the role of caretaker for a child with special needs would be best served to draft a letter of intent outlining important day-to-day living needs of the child. The client should resist the temptation to be the only parent with all (or most) of the valuable information regarding the proper care of the special needs child. Instead, insist that the other parent be equally informed and further arrange for other back-up emergency caretakers who are equally informed. Doing so will insure protection for the child in the primary caretaker’s absence. Consider including the following in a letter of intent or letter of instruction to a future caretaker<sup>62</sup>:

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<sup>60</sup> *M&L Special Needs Planning*, citing “Disability and American Families: US Census Bureau Report,” <https://specialneedsplanning.net/statistics/> (last visited Oct. 31, 2020).

<sup>61</sup> *Who Are Family Caregivers?*, AM. PSYCHOL. ASS’N, [www.apa.org/pi/about/publications/caregivers/faq/statistics](http://www.apa.org/pi/about/publications/caregivers/faq/statistics) (last visited Oct. 31, 2020) (reporting data from the National Alliance for Caregiving).

<sup>62</sup> For more ideas and information on letters of intent or letters of instruction to future caretakers, see Jerry S. D’Aniello & A. Nichole Cipriani, *The Divorce Case Involving Children with Special Needs*, 32 N.J. FAM. LAW. 57

1. Detail all prescription medications and over the counter medications
2. Medical history
3. Certified copy of birth certificate
4. Physician contact information
5. Tests or evaluations performed
6. Test results
7. Location of vital records
8. Detail of all medical devices utilized
9. Therapists' contact information
10. Counselors' contact information
11. Educational history and needs
12. Copies of any IEPs and dates for follow-up IEPs
13. Camps history
14. Detail of all government benefits received
15. Bed-time rituals
16. Family contact information
17. Favorite activities
18. Detail any sources of income, assets, special needs trusts
19. Goals for the child
20. Calendar of follow up due dates

Support, education, and resources are a powerful combination to assist parents and caretakers in improving their parenting skills when caring for a special needs child or child with disabilities. The ultimate goal of a parent should be to see their child reach their full potential. Improving or sharpening parenting skills will help achieve this goal. The client should consider implementing the following, in no particular order of importance:

1. Read one or more parenting books with particular focus on special needs children.
2. Consult blogs as an excellent means of information and insight to learn about successes and failures of other families in a similar situation.
3. Learn about alternative forms of education.
4. Closely monitor homework and schoolwork.

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(Sept. 2011), <https://norrismclaughlin.com/pdf/JSD%20and%20ANC%20-%20Special%20Needs%20article%202011.pdf>.

5. Be prepared to fully participate in the child's treatment plans.
6. Locate local community-based organizations such as *Best Buddies International*<sup>63</sup> which match individuals with disabilities with typical peers in a social setting.
7. Learn about safety, both inside the home and out in the real world, including water safety and drowning awareness and prevention.
8. Provide effective supervision of the child.
9. Be prepared to implement consistency, structure, and routine in the child's schedule.
10. Acquire the ability to consult with professionals to perform the appropriate and necessary assessments, evaluations, and treatment for the child.
11. Comply with administration of prescribed medications.
12. Acquire the ability to apply for available educational scholarships and grants.
13. Attend parenting and co-parenting skills classes.
14. Research employment resources for when the time comes for the child to reach adulthood.
15. Consider the unique needs of the child and how to meet them with the transportation to facilitate timesharing.<sup>64</sup>

In light of the importance of acquiring and improving parenting skills, it is important for parents to share resources and information with each other and with other caretakers involved in the day-to-day responsibilities of caring for a special needs child. It should come as no surprise in this age of remote technology that numerous applications or “apps” exist which offer a variety of

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<sup>63</sup> *Mission*, BEST BUDDIES INT'L, <https://www.bestbuddies.org/what-we-do/mission-vision-goals/> (last visited Oct. 31, 2020), is a nonprofit 501(c)(3) organization dedicated to establishing a global volunteer movement that creates opportunities for one-to-one friendships, integrated employment, leadership development, and inclusive living for individuals with intellectual and developmental disabilities.

<sup>64</sup> Certain forms of transportation, such as air travel, present unique challenges for special needs children. To read more on the challenges that air travel presents for persons with intellectual and developmental disabilities, see generally *Making the Skies Friendlier for Everyone*, THE ARC, <https://thearc.org/our-initiatives/travel/> (last visited Oct. 20, 2020).

different means to improve communication between parents. Here are some suggested apps to consider:

<b>Co-Parenting App</b>	<b>Website</b>
2Houses	2houses.com
AppClose	Appclose.com
Coparently	Coparently.com
Coparenter	Coparenter.com
Cozi	Cozi.com
Divorceify	Divorceify.com
Fayr	Fayr.com/
Google Docs, Drive, & Calendar <sup>65</sup>	Google.com
Mend	Letsmend.com
Our Family Wizard	Ourfamilywizard.com
SupportPay	Supportpay.com
Talking Parents	Talkingparents.com

## V. Adulthood

Under most laws, a person is considered to have reached adulthood and legal independence upon reaching their eighteenth birthday. However, persons with special needs and disabilities may require additional support and have resources available to them to meet all their needs.<sup>66</sup> This section will talk about training, employment, guardianship, and financial considerations to assist the child as the child transitions into adulthood.

### A. Training and Employment

As a child with disabilities sees adulthood on the horizon, parents are encouraged not to hesitate and to seek out information in their local community for organizations and businesses

<sup>65</sup> Google is not a co-parenting *app*; however, families can use shared Google calendars and documents as a central location to communicate with each other.

<sup>66</sup> For more on the considerations for a special needs child transitioning to adulthood, see generally Sheila O. Zakre, *My Child Is an Adult – Now What? Guardianship, Powers of Attorney, and Other Options*, FAM. ADVOC., Winter 2020, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/winter/my-child-an-adultnow-what-guardianship-powers-attorney-and-other-options/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/winter/my-child-an-adultnow-what-guardianship-powers-attorney-and-other-options/).

that help educate, train, and employ persons with disabilities. Many organizations provide quality programs which exist with these goals in mind. For example, the Massachusetts Department of Career Services provides an excellent template to consider when the family is ready to explore employment opportunities for the adult child.<sup>67</sup> Also, the Job Accommodation Network (JAN) is a leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues.<sup>68</sup> Some of the areas in which the child may benefit from assistance include:

1. How to prepare a resume
2. How to interview
3. Recruiting
4. Job and skills training
5. Professional training
6. Career development

Another source for career development and employment opportunities include vocational schools as well as higher education institutions such as colleges and universities which offer training and positions for special needs children on the spectrum. As an example, *The College Program for Students with Autism Spectrum Disorder* at Marshall University in West Virginia offers “academic, social and independent living skills support to individuals with autism spectrum disorders, so that they may have a successful college experience and learn skills necessary to enter a competitive workforce.”<sup>69</sup> The family can research local colleges and universities for similar comprehensive programs.<sup>70</sup>

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<sup>67</sup> See generally *MassHire Department of Career Services Helping Workers with Disabilities Find Employment*, MASS.GOV, <https://www.mass.gov/service-details/helping-workers-with-disabilities-find-employment> (last visited Oct. 20, 2020).

<sup>68</sup> Homepage, JOB ACCOMMODATION NETWORK (JAN), <https://askjan.org/> (last visited Oct. 20, 2020).

<sup>69</sup> For more on the program and links to additional resources, see generally *The College Program for Students with Autism Spectrum Disorder Sponsored by the West Virginia Autism Training Center at Marshall University*, <http://mucollegesupport.blogspot.com/> (Jan. 8, 2014); *WV Autism Training Center*, <https://www.marshall.edu/atc/> (last visited Oct. 20, 2020).

<sup>70</sup> For further information about colleges and universities that are specially tailored for students with learning differences, see MARYBETH KRAVETS

B. *Guardianship and Guardian Advocates*

**Guardianships:** A legal guardian is a surrogate decision-maker appointed by the court to make either personal and/or financial decisions for a minor or for an adult with mental or physical disabilities. A guardian may be appointed for the person, property, or both of the ward. The scope of the guardianship may be limited or plenary. In an adult guardianship, the court may determine whether a person is totally or partially incapacitated. If found to be incapacitated in any respect, the court recommends that a guardian be appointed as a guardian to perform only those rights that the ward is incapable of exercising or a plenary guardian to perform all rights. Typical legal rights reviewed by the court include the right to marry, vote, maintain employment, apply for government benefits, choose a residence and social environment, maintain a driver's license, and enter into contracts, among others.

**Guardian Advocate:** Depending on the laws in the particular jurisdiction, a guardian advocate<sup>71</sup> may be appointed by court order to assist and enable an adult with developmental disabilities (i.e., retardation, spina bifida, cerebral palsy, autism, Prader-Willi syndrome) to be as independent as possible. The Florida statute, for instance, is limited to these five developmental disabilities. This type of proceeding does not remove any rights from the adult who continues to retain their legal rights, but, instead, permits the guardian advocate to have authority to make decisions for the adult child. Unlike a guardianship proceeding discussed above, the adult child is not adjudicated incapacitated. The adult child merely “lacks the decision making ability to do some, *but not all*, of the decision making tasks necessary to care for his or her person or property.”<sup>72</sup>

In the case of separated or divorced parents, the parents should discuss and agree whether one or both parents will be appointed as either guardian, co-guardians, guardian advocate, or

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& IMY F. WAX, *K&W GUIDE TO COLLEGES FOR STUDENTS WITH LEARNING DIFFERENCES*, 14th Edition: 338 Schools with Programs or Services for Students with ADHD, ASD, or Learning Differences (College Admissions Guides) (2019).

<sup>71</sup> FLA. STAT. ch. 393.

<sup>72</sup> FLA. STAT. § 393.12(2)(a).

co-guardian advocates prior to the child turning eighteen years of age. If a parental conflict arises relating to the appointment of either parent to act on behalf of the adult child, and a need for a guardianship or guardian advocate arises, the family law practitioner should consider discussing whether a petition should be filed to be able to properly care for the adult child and avoid the need for appointment on an emergency basis.

### C. *Financial Consideration*

It is important to better understand the healthcare system and available benefits and resources to meet the family's needs. Consider an evaluation by a legal nurse consultant to assist the parent or family caretaker in accomplishing long-term goals. Doing so may provide great comfort and emotional relief and benefits. The legal nurse consultant can develop a comprehensive special needs financial life plan or life care plan. The plan looks at what the costs for the life of the special needs child are presently and when their parent or caretaker is gone. A life care plan is specific to the individual based on their needs. It considers medical care and medical management, the cost, frequency and replacement of services and equipment over time, medications, diagnostic testing, support services, respite care, therapies, personal care, housing, transportation, and travel.

A government benefits specialist or counselor is aware of what government benefits are available to assist the child such as Medicaid and/or Medicare, social security disability income (SSDI), or supplemental social security income (SSI).

#### 1. *Social Security Income*

Children who have one or more qualifying disability<sup>73</sup> may be eligible to receive monthly payments from Social Security, known as Social Security Income (SSI).<sup>74</sup> Many rules and regula-

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<sup>73</sup> The Code of Federal Regulations for Social Security defines "disability" as "the inability to any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 404.1505 (2020).

<sup>74</sup> *Benefits for Children with Disability (2020)*, SOC. SECURITY ADMIN., <https://www.ssa.gov/pubs/EN-05-10026.pdf> (last visited Oct. 15, 2020); *Childhood Disability: Supplemental Security Income Program A Guide for Physi-*

tions governing who qualifies for the payments and income levels exist, and those will affect eligibility to receive payments. The qualification and application process is sufficiently complex to cause some attorneys to specialize in assisting parents or caregivers interested in applying for SSI on behalf of their minor children.

## 2. *Public Assistance Programs*

Several public assistance programs exist to help persons with disabilities, including cash assistance, Medicaid, and food assistance.<sup>75</sup> Cash assistance programs include SSI, optional state supplementation (OSS), and home care for the disabled adult (HCDA). Medical assistance is available through Medicaid, a federal and state program which is administered by each state. Food assistance programs help persons with low-income to purchase food. Eligibility for some food assistance programs can be automatic upon eligibility for other public assistance programs.<sup>76</sup>

## 3. *Medicaid Waiver*

Each state has the authority to establish its own Medicare and Medicaid program's eligibility, premiums, cost-sharing schedules, optional benefits, payments to providers, and system for delivery; however, federal laws establish minimum standards regarding eligibility criteria<sup>77</sup> and the federal agency Centers for

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*cians and Other Health Care Professionals*, SOC. SECURITY ADMIN., <https://www.ssa.gov/disability/professionals/childhoodssi-pub048.htm> (last visited Nov. 11, 2020) (describing the SSI program for professionals).

<sup>75</sup> For example, for an overview of information regarding these types of programs, see generally *SSI-Related Medicaid Programs Fact Sheet*, FLORIDA DEPT. OF CHILDREN & FAMILIES, <https://www.myflfamilies.com/service-programs/access/docs/ssifactsheet.pdf> (last visited Oct. 15, 2020).

<sup>76</sup> See *supra* note 67 (providing an example of assistance programs and eligibility requirements).

<sup>77</sup> *Medicaid Waivers in the States, Seven FAQs*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/medicaid-waivers-in-the-states-seven-faqs.aspx#:~:text=in%202016%2C%20all%2050%20states,active%20HCBS%20Waiver%20programs%20nationwide> (last visited Oct. 20, 2020).

Medicare & Medicaid Services (CMS)<sup>78</sup> oversees administration of the programs. States can apply to CMS for waivers to offer alternative benefit plans for a certain group of enrollees, extend coverage for additional populations not otherwise eligible to receive benefits, or other flexibility to specially tailor their Medicaid and Children's Health Insurance Programs (CHIPs). Therefore, Medicare and Medicaid programs vary greatly throughout the nation.

Some states, such as Florida, have used this waiver to establish programs where families with a child who has a qualifying disability, may be eligible to receive Medicaid benefits regardless of the family's income. In Florida this is called a Medicaid Crisis Waiver<sup>79</sup> which can be applied for through Florida's Agency for Persons with Disabilities (APD),<sup>80</sup> the state's administering program. Often attorneys who specialize in representing families with special needs children seeking to obtain social security income for the child are familiar with the state's Medicaid benefits programs. So, if a client has a child with a severe disability, the best practice for a family law practitioner is to encourage the client to speak with an attorney knowledgeable regarding the state's Medicaid eligibility criteria to help the client familiarize him/herself with all the governmental benefits that may be available to the child.

#### 4. *Special Needs Trusts*

A special needs trust (SNT)<sup>81</sup> is a specialty trust designed to support a special needs child or adult without the beneficiary be-

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<sup>78</sup> For more on CMS, see generally *About CMS*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/About-CMS/About-CMS> (last visited Oct. 20, 2020).

<sup>79</sup> FLA. ADMIN. CODE 65G-1.047, *Waiver Enrollment for Children in the Child Welfare System* (2007), <https://www.flrules.org/gateway/ruleno.asp?id=65G-1.047>.

<sup>80</sup> For more about APD, see generally *Agency for Persons with Disabilities*, AGENCY FOR PERSONS WITH DISABILITIES, <https://apd.myflorida.com/> (last visited Oct. 20, 2020).

<sup>81</sup> For more on special needs trusts, see generally Rebecca A. Iannantuoni & Keith Bradoc Gallant, *For Children with Special Needs: Special Needs Trusts and Other Planning Options*, FAM. ADVOC., Winter 2020 [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2020/](https://www.americanbar.org/groups/family_law/publications/family-advocate/2020/)

coming disqualified from receiving government assistance.<sup>82</sup> SNTs are like any other trust in that they can provide creditor protection and they are overseen by one or more trustees. Three common types of SNT exist. Each is briefly described below.

- (1) *Self-Settled or First Party Trust*: This type of trust may be used if the beneficiary owned property whether outright or received property from a third party such as through a court settlement or inheritance. Upon the passing of the beneficiary of a self-settled trust, the remaining assets must be used to reimburse any states that provided Medicaid benefits to the trust's beneficiary during her or his lifetime.
- (2) *Third Party Trust*: A third party funds this kind of trust for the benefit of the person with a special need (beneficiary). Unlike the self-settled trust, a third-party trust can allow the grantor control over the disposition of remaining funds upon the beneficiary's passing.
- (3) *Pooled Special Needs Trusts*<sup>83</sup>: These trusts are organized by a non-profit organization, often experienced in caring for similarly situated persons with disabilities. Pooled SNTs may be appropriate for grantors who cannot identify or decide on an appropriate trustee or if insufficient resources exist to establish a stand-alone First Party or Third Party Trust. Assets are pooled together, and separate sub-trusts are established for the benefit of the various beneficiaries. Upon the beneficiary's passing, the circumstances will dictate the disposition of the remaining funds, including possible payback back to the state for medical assistance services, retention of the funds by the non-profit manager, or distribution to the

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winter/for-children-special-needs—special-needs-trusts-and-other-planning-options/.

<sup>82</sup> For a basic general overview of special needs trusts, see generally Rob Clarfeld, *Special Needs Trusts: What They Do and How They Work*, FORBES (Dec. 17, 2018), <https://www.forbes.com/sites/robclarfeld/2018/12/17/special-needs-trusts-what-they-do-and-how-they-work/#2ef044395dc7>.

<sup>83</sup> For an overview of pooled SNTs, see generally *An Introduction to Pooled Special Needs Trusts*, THE ARC WISCONSIN WEBINAR SERIES (Sept. 12, 2018), <https://arcwi.org/content/uploads/sites/17/2018/08/The-Arc-Wisconsin-Special-Needs-Pooled-Trust-Webinar-9-12-18.pdf>.

remainder beneficiary(ies) named in the trust agreement.

### 5. *ABLE Accounts*

ABLE accounts are the result of the Stephen Beck Jr. Achieving a Better Life Experience Act of 2014, also known as the ABLE Act.<sup>84</sup> They are tax-free savings accounts which can be used to pay for qualified disability expenses.<sup>85</sup> ABLE accounts are designed to largely not affect the beneficiary's eligibility for government assistance through social security income, Medicaid, and programs such as FAFSA, SNAP/food stamps, and HUD. Only individuals whose disabilities had an onset prior to the individual's twenty-sixth birthday are eligible for an ABLE account. Any individual may make contributions to an ABLE account; however, third party contributions cannot exceed the annual gift tax exemption under IRS regulations.<sup>86</sup>

### 6. *Family Law Considerations*

A family law practitioner should be aware of these potential sources of funds from third parties or tax-advantaged payments. These may benefit not just the child, but the client as well, and it is not unusual for parents, particularly those with children who are newly diagnosed, to be unaware of all the options and resources available to them. Some of the financial matters involved in raising a special needs child may impact certain family law calculations such as child support calculations and parental responsibility to pay for out-of-pocket, educational, or activity expenses. Depending on the financial circumstances of the family, it may be best to prepare a child support trust.<sup>87</sup> Given that

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<sup>84</sup> Pub. L. 113-295, *The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act)* (Dec. 19, 2014). For a comprehensive explanation of ABLE accounts, see generally SI 01130.740, *Achieving a Better Life Experience (ABLE) Accounts*, SOC. SECURITY PROGRAMS OPERATIONS MANUAL SYS. (POMS) (2020), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740>.

<sup>85</sup> *Spotlight on Achieving a Better Life Experience (ABLE) Accounts – 2020 Edition*, SOC. SECURITY, <https://www.ssa.gov/ssi/spotlights/spot-able.html#:~:text=the%20Stephen%20Beck%2C%20Jr.%2C,to%20cover%20qualified%20disability%20expenses> (last visited Oct. 14, 2020).

<sup>86</sup> For 2020 the amount cannot exceed \$15,000; I.R.S. Rev. Proc. 2019-44.

<sup>87</sup> For more on child support trusts, see generally Laura W. Morgan, *The Child Support Trust*, FAM. ADVOC., Fall 2015, at 26.

many of the financial considerations are particular to special needs children or, in some cases, specific disabilities, family law practitioners who have clients with one or more children with special needs or disabilities should keep handy the contact information of individuals or organizations which specialize in each of these areas to provide referrals to clients and to educate themselves on the issues.

## **VI. Resources**

### *A. Community Resources*

“If you’re not sure where you’re going, you’re liable to end up someplace else. If you don’t know where you’re going, the best made maps won’t help you get there.”<sup>88</sup> This Article was intended to serve as a high-level road map for the family law practitioner to help identify major landmarks and common road travelled by a family with a special needs child. There is a vast ocean of organizations and literature available to help provide the practitioner and the child’s family with more detailed information to help meet the child’s unique needs. This section is intended to provide information about national and local community organizations that are available to assist the family law practitioner and families with children with special needs or disabilities through research, education, training, support groups, and more.

1. *ABLE National Resource Center*: This organization was created to provide an inclusive source of information about federal and state-related ABLE activities and programs as well as links to relevant federal agencies and other organizations. Website: <https://www.ablenrc.org/>
2. *American Academy of Child & Adolescent Psychiatry (AACAP)*: AACAP’s mission is “to promote the healthy development of children, adolescents, and families through advocacy, education, and research, and to meet the professional needs of child and adolescent

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<sup>88</sup> Attributed to Robert Mager, psychologist, writer, and educator. PAM WRIGHT & PETE WRIGHT, *FROM EMOTIONS TO ADVOCACY* 115 (2d ed. Harbor House Law Press, Inc. 2006)

- psychiatrists throughout their careers.” Its website provides a wealth of resources for families and youth, medical students, and residents, and for its general membership. Website: <https://www.aacap.org/>
3. *American Psychiatric Association*: The vision of this organization of psychiatrist is “to ensure humans care and effective treatment for all persons with mental illness, including substance abuse disorders,” to be “the voice and conscience of modern psychiatry,” and to help build “a society that has available, accessible quality psychiatric diagnosis and treatment.” Website: <https://www.psychiatry.org/>
  4. *Anxiety and Depression Association of America (ADAA)*: This organization was founded in 1979 to help prevent, treat, and cure anxiety, depression, obsessive compulsive disorder, post-traumatic stress disorder, and co-occurring disorders “through education, practice, and research.” Website: <https://www.adaa.org/>
  5. *The ARC*: This organization “promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes.” The website contains a vast amount of links and resources on policy, advocacy, initiatives, employment, and more. The ARC has chapters throughout the United States. Website: <https://thearc.org/>
  6. *Autism Society of America (ASA)*: Dr. Bernard Rimland, Dr. Ruth Sullivan, and other parents of children on the autism spectrum founded ASA in 1965 to provide a leading and trusted source of information about the disorder. ASA proudly hosts a well-attended national conference on ASD each year. Website: <http://autism-society.org/>
  7. *Autism Speaks*: A non-profit organization dedicated to advocacy and support for individuals on the autism spectrum and their families. Website: <https://www.autismspeaks.org/about-us>
  8. *Center for Appropriate Dispute Resolution in Special Education (CADRE)*: This National Center on Dis-

pute Resolution in Special Education is focused on “encouraging the use of mediation, facilitation, and other collaborative processes as strategies for resolving disagreements between parents and schools about children’s educational programs and support services. It is funded by the Office of Special Education Programs at the U.S. Department of Education.” Website: <https://www.cadreworks.org/>

9. *Consortium for Citizens with Disabilities*: This is among the largest of coalitions of national organizations focused on advocating for “federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.” Website: <http://www.c-c-d.org/>
10. *Council of Parent Attorneys and Advocates (COPAA)*: This is an independent and non-profit organization of attorneys, advocates, parents, and related professionals whose mission is to protect “the legal and civil rights of and secure excellence in education on behalf of tens of thousands of students with disabilities and their families each year at the national, state and local levels.” Website: <https://www.copaa.org/>
11. *Learning Disabilities Association of America (LDA)*: LDA was formally created and incorporated in 1964 “to create opportunities for success for all individuals affected by learning disabilities through support, education, and advocacy.” Website: <https://ldaamerica.org/>
12. *M&L Special Needs Planning*. This website provides links to resources, workshops, and statistics relevant to families with children with disabilities or special needs. Website: <https://specialneedsplanning.net/resources/>
13. *National Center for Education Statistics (NCES)*: This is a branch of the U.S. Department of Education which tracks statistics relevant to educational matters including statistics related to the implementation of the IDEA such as the number of students aged 3-21 served under the IDEA by disability type. Website: [https://nces.ed.gov/programs/coe/indicator\\_cgg.asp](https://nces.ed.gov/programs/coe/indicator_cgg.asp)

14. *National Institute of Mental Health (NIMH)*: This is the lead federal agency providing research on mental disorders. It provides research, events, and resources on mental health issues including schizophrenia, depression, bipolar disorder, suicide, post-traumatic stress disorder, eating disorders, autism spectrum disorder, anxiety disorders, and more. Website: <https://www.nimh.nih.gov/index.shtml>
15. *Next for Autism: Advancing Futures for Adults with Autism (AFAA)*: This organization's mission is to transform "the national landscape of services for people with autism by strategically designing, launching, and supporting innovative programs." Website: <https://www.nextforautism.org/>
16. *Office of Disability Employment Policy (ODEP)*: This is an agency within the U.S. Department of Labor whose mission is "to develop and influence policies and practices that increase the number and quality of employment opportunities for people with disabilities." The website contains a wealth of resources, research, news, publications, and other information relevant in some way to all persons with disabilities. Website: <https://www.dol.gov/agencies/odep>
17. *Pacer Center*: An information and training center for families of children and youth who have any kind of disability. The center is located in Minneapolis; however, it serves families across the nation through publications, workshops, and other resources to help parents make decisions about education, employment, training, and other services for their children. Website: <https://www.pacer.org/>
18. *Stetson University National Conference on Special Needs Planning and Special Needs Trusts*: For more than twenty years, Stetson University has hosted a conference on special needs planning and special needs trusts to provide "an in-depth review of major issues presented in the creation, administration, monitoring and planning of special needs trusts." The conference often includes "boot camps" and intensive pre-conference trainings for related issues including the mechan-

ics of the Social Security Administration, tax laws, and veterans' benefits. Typically, the event is held each October. Website: <https://www.stetson.edu/law/conferences/snt/index.php>

19. *University of Miami-Nova Southeastern University Center for Autism & Related Disabilities (UM NSU CARD)*: This is a free community-based program hosted by the University of Miami and Nova Southeastern University and funded by the Florida Department of Education through an annual grant. The organization is "dedicated to optimizing the potential of people with autism spectrum disorders (ASD), dual sensory impairment, sensory impairments with other disabling conditions, and related disabilities." The related disabilities include deaf-blindness, sensory impairments, and developmental delays. Website: <https://www.umcard.org/home/>
20. *University of South Florida Center for Autism and Related Disabilities (CARD at USF)*: This is a free community-based program hosted by the University of South Florida and funded by the Florida Department of Education through an annual grant. CARD's mission is to provide "support and assistance with the goal of optimizing the potential of people with autism and related disabilities." Website: <http://card-usf.fmhi.usf.edu/index.html>
21. *U.S. Department of Education IDEA*: This is a website dedicated to providing information about IDEA, reports, and resources from the U.S. Department of Education. Website: <https://sites.ed.gov/idea/>
22. *U.S. Department of Health and Human Services: Parenting a Child with a Disability*: This website has a comprehensive list of questions and answers by the U.S. Department of Health and Human Services on programs for families with children. Website: <https://www.hhs.gov/answers/programs-for-families-and-children/index.html>

## B. Secondary Sources

This section provides additional resources that go more in-depth in discussing the various topics addressed within this article. This section is by no means a comprehensive bibliography, but rather a sampling of resources that inspired the authoring of this article or that hold particular esteem within their community.

1. *Navigating a Divorce with a Child with Special Needs*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, <https://aaml.org/store/viewproduct.aspx?id=12928785>.
2. *A Guide to the Individualized Education Program*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/parents/needs/spced/iepguide/index.html> (last updated Aug. 30, 2019).
3. Ingrid A. Keller, *Raising Children on the Spectrum in Florida: Navigating Roads Less Traveled*, 83 FLA. B.J. 35 (Jan. 2009).<sup>89</sup>
4. JENNIFER LAVIANO, *YOUR SPECIAL EDUCATION RIGHTS: WHAT YOUR SCHOOL DISTRICT ISN'T TELLING YOU* (Skyhorse, 2017).
5. MARGARET "PEGI" S. PRICE, *A GUIDE FOR PARENTS: DIVORCE AND THE SPECIAL NEEDS CHILD* (Jessica Kingsley Publishers 2010).<sup>90</sup>
6. MARGARET "PEGI" S. PRICE, *THE SPECIAL NEEDS CHILD AND DIVORCE: A PRACTICAL GUIDE TO EVALUATING AND HANDLING CASES* (ABA 2009).<sup>91</sup>
7. WILLIAM B. REICHHARDT, *Legal Considerations when Advocating for Children with Special Education Needs*, 21 J. VA. TRIAL L. ASS'N. 5 (2010).
8. Karl W. Topor, *Resource Guide for Attorneys Representing Families with Children with Special Needs*, Fam. Advoc., Winter 2020. <https://www.americanbar.org/>

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<sup>89</sup> Also available at <https://www.floridabar.org/the-florida-bar-journal/raising-children-on-the-spectrum-in-florida-navigating-roads-less-traveled/>

<sup>90</sup> Margaret "Pegi" S. Price also authored a brief article highlighting suggestions for the family law practitioner. Margaret "Pegi" S. Price, *Essential Issues when Handling Cases with Special Needs Children*, FAMILYLAWYERMAGAZINE.COM, <https://familylawyermagazine.com/articles/handling-cases-with-special-needs-children/> (last visited Oct. 14, 2020).

<sup>91</sup> Available for purchase at <https://www.americanbar.org/products/inv/book/214329/>.

groups/family\_law/publications/family-advocate/2020/winter/resource-guide-attorneys-representing-families-children-special-needs/.

9. PAUL WEHMAN, VALERIE BROOKE, & JOSHUA TYALOR, ET AL, *ESSENTIALS OF TRANSITION PLANNING* (Brookes Pub., 2d ed., 2020).
10. BRIAN A. WILK, *A LIFETIME OF LESSONS FROM THE PARENT OF A SPECIAL NEEDS CHILD: A CARE-TAKER'S GUIDE TO DISABILITY MANAGEMENT* (Outskirts Press, 2020).
11. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSLAW: ALL ABOUT IEPs*, (Harbor House Law Press, Inc. 2010).
12. PETER W.D. WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSLAW: SPECIAL EDUCATION LAW* (2d ed., Harbor House Law Press, Inc. 2007).

## VII. Conclusion

Mark Twain is attributed with the quote: “It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so.”<sup>92</sup> It is very easy for a practitioner to manage a case involving a special needs child like any other case; however, doing so could cause a child to miss out on significant opportunities to receive services that could improve social, educational, emotional, or medical growth. Conversely, if the practitioner manages the case appropriately, it should result in a child receiving valuable benefits which will likely change the course of that child’s world and which in turn provide a positive economic impact for the entire family. This article is by no means a comprehensive *How-to Manual* for family law cases involving children with special needs. Instead, it highlights certain fundamental areas so family law practitioners will recognize that they may not have all the answers and gives them some direction and resources necessary to know what questions to ask, where to look and how to best meet their client’s and the child’s needs.

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<sup>92</sup> Peter Alfeld, *Favorite Quotes: Alphabetical by Author*, UNIVERSITY OF UTAH DEPT. OF MATHEMATICS, <http://www.math.utah.edu/~alfeld/quotes.html> (last visited Oct. 20, 2020).

This is critical because one size does not fit all when it comes to society's most unique individuals – special needs children.



## **Enforcement of International Foreign Judgments, Is That Even a Thing?**

by  
Elisha D. Roy\*

In this ever-shrinking world, where travel and mobility have become the norm rather than the exception, clients come forward with a myriad of issues that increasingly have an international overlay. Whether the issue is citizenship in another country, assets in another country, or jurisdiction regarding a party residing in another country, an understanding of international law and its application to family law is becoming increasingly important to the practitioner. In addition to being able to identify these issues when clients come in with an initial dissolution of marriage case, understanding how to assist a client who has already been divorced in a foreign country is equally as important.

There are a variety of different mechanisms, statutes, and theories of law under which an international order can be enforced in the United States. At the time of this writing, there is no uniform mechanism for the enforcement of foreign judgments. The United States is not currently a signor of any treaty or convention that provides for the recognition or enforcement of foreign judgments. However, there is case law under the concept of comity as well as uniform laws adopted by the various states regarding enforcement of money judgments, support, and custody orders that can provide avenues for the enforcement of foreign judgments.

This article is not intended to be an exhaustive list of every possible method of enforcing foreign judgments; rather, the purpose of this article is to provide information regarding those that are the most effective and generally the most successful. The discussion in this article will concentrate on a variety of uniform acts from the Uniform Laws Commission (ULC), previously the National Commission on Uniform State Laws (NCCUSL), that were developed to make it much easier to enforce not just judg-

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ments between states, but judgments from foreign jurisdictions outside of the United States. In addition, this article will discuss the concept of comity, inherent in the uniform laws, but also an independent common law concept, to address the enforcement of foreign judgments.

Part I will be a concise, general overview of the various laws on enforcement of foreign judgments. As will be evident, the type of order being enforced will largely impact the methodology of enforcement undertaken. The remainder of the article will be broken into the types of orders that are likely to be enforced in dissolution of marriage actions. Part II will discuss enforcement of foreign judgment on purely property settlement agreement or orders. Part III will address enforcement of orders from foreign jurisdictions that have been reduced to money judgment. Part IV will explain enforcement of support orders. Finally, Part V will discuss enforcement of foreign custody orders. While there is no one way to effectuate enforcement of a foreign judgment, it will be clear there are preferred methods to accomplish the goal for the client.

## **I. General Overview of the Enforcement of Foreign Judgments**

There is no one, uniform method to enforce foreign judgments in the United States.<sup>1</sup> It is important in the discussion of enforcement of foreign judgments to recognize that while the United States is a signatory to multiple Hague conventions that can be utilized in the effective management of a family law case, like the Hague Service Convention and the Hague Convention on International Child Abduction, the United States is not a signatory to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.<sup>2</sup> There is certainly the necessity of international uniformity on enforcement of foreign judgments, and there is discussion on that, but since that does not yet exist,

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<sup>1</sup> U.S. Dep't of State, *Enforcement of Judgments*, Travel St. Gov, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html> (last visited Oct. 24, 2020).

<sup>2</sup> See *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=80> (last visited Dec. 30, 2020).

it is necessary to look to common law and or state statutory law to proceed. This article will discuss the concepts of comity, the Uniform Foreign Money Judgments Recognition Act of 1962 (UFMFRA) and the amendment to it in 2005, the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), and the Uniform Interstate Family Support Act (UIFSA). In family law cases, these are the primary mechanisms to seek enforcement of international foreign judgments.

In broad terms, when seeking to enforce a foreign judgment, there is a method to follow. This means there are certain steps to take to determine the best path to enforcement. Thus, it is important to first know the type of order a client is seeking to have enforced. A foreign custody order will be treated differently than a foreign support order, for example, and a different process is required for each. While they are similar, it is important to follow the necessary procedures to have the greatest success in enforcement. What is unique about the enforcement of foreign judgments as it pertains to family law is that a variety of different aspects of a divorce require different types of jurisdiction. Jurisdictional requirements to simply issue a divorce dissolving the marriage differ from the requirements to order spousal support, and those differ from the requirements to determine custodial designations, which differ from the jurisdictional requirements for child support. Thus, it is possible that portions of a foreign judgment may be enforceable while others are not. For example, for a court in the United States to recognize a divorce entered in a foreign country there must first be a determination that the foreign country had proper jurisdiction over the parties to issue a divorce.<sup>3</sup>

Once a determination has been made regarding the type of order to be enforced, the next step is to ascertain the foreign country or tribunal that entered the order and, most importantly, gain an understanding of the legal system of that issuing tribunal. It is strongly recommended to hire local counsel for any international case. In the fifty states, the basic requirements for enforcement of a foreign order would include due process, an acknowledgement of personal and/or subject matter jurisdiction,

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<sup>3</sup> *Clafin v. Clafin*, 288 So. 3d 774 (Fla. 1st Dist. Ct. App. 2020), *review denied*, SC20-237, 2020 WL 4049717 (Fla. July 20, 2020).

and that the law establishing the underlying order seeking to be enforced is not contrary to public policy. One of the most important steps prior to enforcing any foreign judgment in any state is to ensure a good understanding of how the order sought to be enforced was obtained.

A vital step to enforcing any foreign judgment is knowing the legal processes and law in the issuing location. This part of the process is absolutely necessary, since enforcement will depend on due process having been followed in the issuing country as well as evidence that the issuing country has similar, while not identical laws to where enforcement is sought.<sup>4</sup>

Assuming the constitutional requirements of due process have been met, it is likely that most states in the United States will enforce an order so long as the underlying law was not void against public policy. What is void against public policy may vary from state, so it would be necessary to understand the specific policies in the state where enforcement is sought. This does not mean, however, that the laws of the issuing tribunal must be exactly like the law of the state that is enforcing the order, nor that it is even similar.<sup>5</sup> If it is determined that the issuing country failed to adhere to basic due process or that the laws are violative of public policy in the forum where enforcement is sought, it is likely that there will not be enforcement of the foreign judgment.<sup>6</sup>

With the knowledge of the type of order and necessary information regarding the issuing tribunal, the next step in the process is a determination of the proper method to utilize for enforcement. Has the state in which enforcement is sought enacted uniform laws like UIFSA and the UCCJEA? With the exception of Massachusetts, the answer to that would be yes for any state in the United States.<sup>7</sup> Massachusetts, notwithstanding the law regularly being proposed in its legislature, has yet to adopt the UCCJEA and still functions under the UCCJA.<sup>8</sup> However,

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<sup>4</sup> *In re Marriage of Malak*, 227 Cal. Rptr. 841 (1986).

<sup>5</sup> *Id.* at 1025.

<sup>6</sup> See *Clafin*, 288 So. 3d at 779.

<sup>7</sup> Uniform Law Commission, *Interstate Family Support Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb> (last visited Dec. 30, 2020).

<sup>8</sup> *Id.*

the basic issues discussed herein with enforcement of foreign custody orders will apply similarly whether under the UCCJA or UCCJEA. While thirty-three states have enacted the Uniform Foreign Money Judgments Recognition Act (UFMJRA)<sup>9</sup> and twenty-six have adopted the Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA),<sup>10</sup> both specifically state that their purpose is not to enforce support in domestic relations cases. Thus, enforcement of support is most successful by utilizing UIFSA. However, awards of specific dollar amounts may be enforceable under either the UFMJRA or the UFCMJRA, even if rising from a dissolution of marriage action in a foreign country.<sup>11</sup>

Before detailing the process of enforcing final judgments under one of the statutory concepts discussed above, it is important to examine the concept of comity and its application to the enforcement of foreign judgments.

## II. Common Law and Comity

While this part of the article concentrates on the enforcement of foreign judgments incorporating property settlement agreements or requiring the distribution of property, the principles discussed in this section can arguably be used for the enforcement of all foreign judgments, but they may not be the most direct or simplest method. As previously indicated, there is no uniform law or federal legislation regarding the enforcement of foreign divorce final judgments. Thus, the evaluation of the methodology of enforcement turns to a review of the law in the individual states. A caveat, while most states similarly apply the laws as explained in this article, there are variations and it is im-

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<sup>9</sup> Uniform Law Commission, *Foreign Money Judgments Recognition Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc> (last visited Dec. 30, 2020).

<sup>10</sup> Uniform Law Commission, *Foreign-Country Money Judgments Recognition Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=AE280c30-094a-4d8f-b722-8dcd614a8f3e> (last visited Dec. 30, 2020).

<sup>11</sup> *In re Marriage of Srichanchao v. Reedstrom*, C5-95-130, June 13, 1995 WL 351556 (Minn. Ct. App. 1995); *Jeong Suk Bang v. Joon Hong Park*, 321 N.W.2d 831 (Mich. Ct. App. 1982)

perative to ensure how the state in which enforcement is sought addresses foreign judgments.

While the concept of the constitutional theory of full faith and credit does not technically extend to foreign judgments, the concept of comity really ensures that state courts are applying full faith and credit to foreign judgments in family law cases.<sup>12</sup> “States, however, are not required to give full faith and credit to foreign country judgments; dismissal based on comity is a matter of discretion.”<sup>13</sup> Assuming certain requirements are met, most states will enforce foreign divorce judgments under the theory of comity.<sup>14</sup> Absent a showing of fraud or a violation of public policy, comity should be used to uphold foreign judgments.<sup>15</sup> For example, in *Aleem v. Aleem*, the Maryland court would not give comity to a foreign divorce obtained in Pakistan by the husband that provided the wife no opportunity for equitable distribution unless the husband granted her such a right.<sup>16</sup> This requirement for the husband to provide permission for the wife to receive equitable distribution violated Maryland’s constitutional Equal Rights Amendment and therefore violated public policy for the State of Maryland.<sup>17</sup> Similarly, if a foreign judgment or agreement is sought to be enforced but was obtained by fraud, the court can permit an attack as to validity because of the fraud, even if the foreign state would not permit such a collateral attack.<sup>18</sup>

The starting point for a discussion of the enforcement of foreign judgments under the theory of comity is *Hilton v. Guyot*.<sup>19</sup> In *Hilton* the U.S. Supreme Court established the basis for acknowledgement of a foreign judgment and its enforcement in the United States. The essential determination, which is truly the underlying theme for the enforcement of any foreign judgment, hinges on a determination that the following occurred in the issu-

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<sup>12</sup> Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029 (2014).

<sup>13</sup> *Ashfaq v. Ashfaq*, 467 S.W.3d 539, 541 (Tex. App. 2015).

<sup>14</sup> *Hilton v. Guyot*, 159 U.S. 113, 169-70 (1895).

<sup>15</sup> *Badawi v. Awel Mounir Alesawy*, 135 A.D.3d 792, 792 (N.Y. App. Div.).

<sup>16</sup> *Aleem v. Aleem*, 947 A.2d 489, 500 (2008).

<sup>17</sup> *Id.* at 422.

<sup>18</sup> *Feinberg v. Feinberg*, 40 N.Y.2d 124, 126 (N.Y. 1976).

<sup>19</sup> *Hilton*, 159 U.S. 113.

ing jurisdiction: that there was a full and fair trial, before a court of competent jurisdiction that followed procedures allowing adverse parties to present their cases, with a system of laws that provides impartial justice for the citizens, and that there is no evidence of fraud; if all of these requirements are met, then the United States should recognize the foreign judgment.<sup>20</sup> The *Hilton* case involved a French order, and all of these due process basics were found; however, the French would not provide the same reciprocity to an order of the United States, so no enforcement was available.<sup>21</sup>

This 1895 case is the benchmark on an understanding of comity as it applies to foreign judgments, and the *Hilton* case added another required factor before a foreign judgment would be enforced, and that was the requirement of reciprocity.<sup>22</sup> Essentially, for the United States to enforce a foreign judgment, there needed to be evidence that the country issuing the foreign judgment would similarly enforce an order from the United States. This made it very difficult to enforce foreign judgments because many countries would not enforce U.S. issued judgments. Many states have laws that dispense with the need for reciprocity which eases the requirements under *Hilton* and can be an aid to enforcement under the theory of comity. This is of particular importance since under the uniform laws discussed later in this article, it is necessary for reciprocity of laws to exist, so a theory of comity may be the only method of enforcement.

For example, in the case of *S.B. v. W.A.*, out of New York, the former wife utilized the theory of comity and sought to enforce an order from Abu Dhabi, awarding her custody and child support. She filed for a declaratory action in New York, asking the New York court to treat the final judgment of divorce from the Abu Dhabi court as if it had been issued in New York and enforce it.<sup>23</sup> The order of divorce from Abu Dhabi also included a lump-sum deferred dowry payment owed to the wife of \$250,000 under a duly signed Mahr Agreement executed prior to the parties' marriage.<sup>24</sup> In this case, the husband made interest-

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<sup>20</sup> *Id.* at 202.

<sup>21</sup> *Id.* at 210.

<sup>22</sup> *Id.*

<sup>23</sup> *S.B. v. W.A.*, 959 N.Y.S.2d 802, 807 (N.Y. Sup. Ct. 2012).

<sup>24</sup> *Id.* at 815.

ing arguments, fighting the enforcement of the Abu Dhabi divorce, alleging the parties were still married because they were not divorced in New York and he disputed the payment of the deferred dowry under the Mahr Agreement with a separation of church and state argument.<sup>25</sup> The New York court found that “[t]he general principle of law is that a divorce decree obtained in a foreign jurisdiction by residents of this State, in accordance with the laws thereof, is entitled to recognition under the principle of comity unless the decree offends the public policy of the state of New York.”<sup>26</sup> Moreover, the New York court upheld the enforcement of the Mahr Agreement, determining that it was completely within the parties’ rights to enter into such an agreement and that under the UFCMJRA (discussed more fully below), the funds were owed to the wife. Prevalent throughout the ruling is the court’s determination of the proper jurisdiction of the Abu Dhabi court to divorce the parties and enter the various rulings, including the money judgment under the terms of the Mahr. Moreover, the New York court in a detailed evaluation determined that no part of the rulings violated public policy, concluding that even if the laws of Abu Dhabi were different, they afforded the same basic principles and guidelines as the New York court system:

Recognition of a foreign judgment may be withheld where (1) it is contrary to the public policy of the state where the recognition is sought, (2) the country in which the decree was rendered does not recognize American decrees, or (3) the judgment was obtained in bad faith, by fraud, or by taking advantage of the foreign law.<sup>27</sup>

As a side note, it is not necessary for a foreign country’s judgment to be enforced that the country is a signatory to any of the Hague conventions. Simple comity is enough; however, comity is a matter of discretion and a failure to comply with due process will foreclose the enforcement of a foreign judgment under its principles.<sup>28</sup> This is why involving a lawyer in the jurisdiction of the issuing order is so important to enforcing a foreign judgment.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 799.

<sup>27</sup> *Hager v. Hager*, 274 N.E.2d 157, 159 (Ill. App. Ct. 1971), *see also In re Marriage of Muruges & Kasilingam*, 993 N.E.2d 1109 (Ill. App. Ct. 2013).

<sup>28</sup> *Ashfaq*, 467 S.W. 3d 539.

### **III. Money Judgments**

As discussed at the outset, and highlighted in the *S.B.* case above, multiple types of enforcement may be needed for the various parts of a dissolution of marriage ruling arising from a foreign jurisdiction. This can include traveling under common law theories, like comity, as well as state statutory constructs. Like in *S.B.*, the theory of comity was necessary to recognize the Abu Dhabi court's jurisdiction and authority to divorce the parties, but the New York court applied a state statute to enforce the payment owed to the wife under the Mahr Agreement. In seeking to enforce the monies owed her, the wife was simply asking the court to recognize a foreign country money judgment and convert it to a New York judgment.<sup>29</sup> By adopting the Uniform Foreign Country Money-Judgments Recognition Act, the state of New York had established a statutory construct for the enforcement of foreign money judgments.<sup>30</sup> Again, it is therefore integrally important to the enforcement of any foreign judgment to know what laws are applicable in the state in which enforcement is sought.

Both the UFMJRA and UFCMJRA clearly indicate the purpose of these uniform laws is not to be used for the enforcement of awards of support from domestic relations foreign orders. So it is necessary to turn to other methods for enforcement.

### **IV. Support Orders – Alimony and Child Support**

In 2008, the Uniform Laws Commission (UCL) (formerly the National Conference of Commissioners of Uniform State Laws—NCCUSL) set forth the Uniform Interstate Family Support Act (UIFSA).<sup>31</sup> UIFSA has been adopted by all fifty states and the District of Columbia.<sup>32</sup> It is the preferred method of enforcement for support orders whether from the United States or abroad. The 2008 UIFSA provided updates to the 1992 and 2001 Interstate Support Act, to add provisions and reconcile discrep-

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<sup>29</sup> See *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 222 (N.Y. 2003).

<sup>30</sup> *S.B.*, 959 N.Y.S.2d at 802.

<sup>31</sup> Uniform Law Commission, *supra* note 7.

<sup>32</sup> *Id.*

ancies with the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. The United States signed the convention at The Hague on November, 2007, indicating its intent to bring the convention into force. However, the signature by the United States still requires each state to create necessary implementing laws.<sup>33</sup> In addition, in 2014, Public Law 113-183, was signed by the President enacting the treaty.<sup>34</sup> All states adopted UIFSA by 2016.<sup>35</sup>

UIFSA provides for the establishment of child support, as well as the recognition of paternity, and the enforcement of child support both interstate and from foreign countries. For purposes of this article, the concentration will be on the ability to enforce foreign support orders. As previously indicated, not all the states have adopted UFMJRA or UFCMJRA, so UIFSA is the primary way to enforce support orders issued in another country or tribunal. The enforcement can be for child support, alimony, spousal support, health insurance and health related expenses as well as fees and costs associated with the same. As with all foreign judgments, prior to seeking enforcement it is wise to consult with counsel in the jurisdiction where the order originated. It is necessary to determine that the court issuing the order had personal and subject matter jurisdiction over the case, that the laws of the country provide similar safeguards to those that are expected in the United States, and that due process was followed, including notice and an opportunity to be heard. In addition, local counsel will be necessary to obtain documents required to seek enforcement.

Each state has enacted UIFSA and they are essentially identical to that which can be found on the ULC website but conformed to meet the statutory sections and language as adopted by each state.<sup>36</sup> A strict following of the requirements of the enacted statute in the jurisdiction in which one is seeking enforcement is recommended for successful enforcement to occur. The first step in the process of seeking enforcement under UIFSA is

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<sup>33</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT, prefatory note, at 5 (Nat'l Conf. of Comm'rs on Unif. State Laws 2018).

<sup>34</sup> *Id.* at 7.

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

<sup>36</sup> CAL. FAM. CODE § 5700; TEX. FAM. CODE § 159; WIS. STAT. ANN. § 769.

to register the foreign support order in the state where enforcement is sought.<sup>37</sup> This is done by instituting an action in the appropriate court seeking registration and providing the court, to then be served on the responding party, two copies of the order that is to be registered, one of which must be a certified copy. If the order is not in English, it would be appropriate to also file a copy of the order translated and certified by the translator. There can be hurdles to obtaining a certified copy of the foreign order which is why local counsel is beneficial and, frankly, necessary.<sup>38</sup>

Once the registration action has been filed, the foreign order is enforceable and should be enforced as an order of the state where registration occurred.<sup>39</sup> Upon registration, notice is to be given to the non-registering party at which point, the obligor can contest the validity of the order or enforcement of the order.<sup>40</sup> To contest the validity or enforcement of a registered support order the person seeking to vacate it has a variety of defenses to claim. The most common are similar to those that have arisen with other types of enforcement, like a lack of due process or lack of personal jurisdiction by the issuing tribunal.<sup>41</sup> Other defenses include, but are not limited to, that the order was obtained by fraud, that the order is not the final order, that the issuing tribunal stayed the order pending an appeal, that there is an adequate defense under the law of the enforcing state, or that full or partial payment has been made.<sup>42</sup> Should one of these defenses be successful, enforcement of the foreign order is unlikely. A support order entered without proper notice, or in violation of the public policy of the state where enforcement is sought, will likely result in a vacating of the registration and an inability to enforce.<sup>43</sup> This is why knowing the details surrounding the order before the filing of an enforcement is action is the preferred method of practice.

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<sup>37</sup> *Id.* § 601.

<sup>38</sup> *Id.* § 602.

<sup>39</sup> *Id.* § 603.

<sup>40</sup> *Id.* § 606.

<sup>41</sup> *Id.* § 607.

<sup>42</sup> *Id.*

<sup>43</sup> *In re E.H.*, 450 S.W.3d 166 (Tex. App. 2014).

## V. Custody Orders

In 1997, the Uniform Law Commission introduced the Uniform Child Custody Jurisdiction and Enforcement Act.<sup>44</sup> At the time of this writing every state, except Massachusetts, has adopted the UCCJEA.<sup>45</sup> It has been introduced as a bill to the Massachusetts State legislature numerous times, to no avail. Prior to the 1997 UCCJEA, all fifty states, the District of Columbia, and the Virgin Islands had enacted the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>46</sup> However, each state enacted the UCCJA differently so there was a lack of uniformity to the “uniform” law.<sup>47</sup> The Uniform Law Commission recognized that the lack of uniformity and enforcement of child custody awards was an issue. Depending upon where the child and the parent were and where the enforcement was taking place would require different methodologies to enforce custody orders. The goals with the UCCJEA were to decrease the cost of enforcement, increase the certainty of an outcome, and reduce the length of time required to enforce foreign judgments.<sup>48</sup>

In addition, the Parental Kidnapping Prevention Act (PKPA) was enacted to deal with international custody issues and required full faith and credit be given to foreign custody orders.<sup>49</sup> There were conflicts between the PKPA and the UCCJA, so the ULC set out to remedy these issues with the creation of the UCCJEA. There were multiple purposes for the UCCJEA, including more clarification about jurisdiction for an initial determination of child custody and clarifications regarding modification, but the relevant purpose for this article was the creation of enforcement mechanisms which were haphazard and not uniform prior to the UCCJEA and did not necessarily apply to foreign

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<sup>44</sup> Uniform Law Commission, *Child Custody Jurisdiction and Enforcement Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d> (last visited Dec. 31, 2020).

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

<sup>46</sup> Uniform Law Commission, *Child Custody Jurisdiction Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=020a80d7-902e-412b-9b44-112a1693760c> (last visited Dec. 31, 2020).

<sup>47</sup> UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT 1, 9 U.L.A. 690 (Nat'l Conf. of Comm'rs on Unif. State Laws 2007).

<sup>48</sup> *Id.* at prefatory notes.

<sup>49</sup> 28 U.S.C. § 1738A (2019).

judgments.<sup>50</sup> While there was underlying law regarding jurisdictional issues and the need for proper due process, there was little guidance, if any, on the actual enforcement of orders.

Article 3 of the UCCJEA is entirely about the enforcement of custody awards. In this article, reference is made to the ULC version of the UCCJEA. Each state that has adopted the UCCJEA does so within the statutory constructs of their specific state, but the general concepts are the same as the ULC's UCCJEA. As is the overriding theme in the enforcement of foreign judgments, most states will enforce a foreign custody order so long as the parties had notice and an opportunity to be heard and the laws of the issuing tribunal do not violate public policy. Assuming the order that is sought to be enforced can meet these principles, the UCCJEA can be used to enforce child custody determinations from foreign jurisdictions.<sup>51</sup> It is likely common for most jurisdictions, when considering the enforcement of foreign custody awards, to default to The Hague Convention on International Child Abduction, but that goes beyond the confines of this article. While the Hague Convention on International Child Abduction is likely the preferred method in dealing with return of a child when taken from their habitual residence, that could be an article all on its own.<sup>52</sup>

For purposes of this article from an enforcement perspective, the UCCJEA is the most effective method of enforcement when not dealing with issues of a wrongfully removed child. For example, if all parties are now living in the United States and there is an issue with the enforcement of a custody award, the UCCJEA is the most effective mechanism and truly the only mechanism with which to seek enforcement. When a child has been wrongfully removed from the United States to a foreign jurisdiction or vice versa, it is best to consult with an international attorney to determine the proper legal mechanism to trigger, either under the The Hague Convention on International Child Abduction or the UCCJEA. It is also important to note that The

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<sup>50</sup> UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, prefatory notes, at 1.

<sup>51</sup> U.S. Dep't of State, *supra* note 1.

<sup>52</sup> See also *In re T.L.B.*, 272 P.3d 1148, 1154 (Colo. App. 2012); *Child Abduction Section*, <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> (last visited Dec. 31, 2020).

Hague Convention on the Civil Aspects of International Child Abduction is not intended to be used to enforce visitation orders but rather to determine the child's habitual residence, which can then enforce its custody order. So, the UCCJEA would be the mechanism to enforce an order made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

To enforce a foreign custody order, the same steps as with enforcement of all foreign judgments should be followed. A review of the custody order seeking to be enforced must first involve a determination of the laws of the issuing tribunal. If the issuing tribunal provides notice and follows principles of due process, it is likely the award is enforceable. It is also necessary that the law of the issuing tribunal has similar jurisdictional requirements as the UCCJEA (as enacted in the state in which enforcement is sought) provides. The next issue to be evaluated is whether the issuing tribunal has laws that violate public policy. For example, a Sharia court order from Gaza giving custody to a father would not be recognized because the law did not take into consideration the best interest of the child and simply awarded custody to fathers.<sup>53</sup> Similarly, a Massachusetts court determined that a Lebanese custody order should not be recognized because the laws of the issuing court provide that a father gets custody even if both parents are fit and proper to serve the role.<sup>54</sup> The violation of public policy by the laws of the issuing tribunal are the primary basis on which a state court would not recognize or enforce a foreign judgment.

Assuming the order entered from the foreign jurisdiction is not violative of due process, in every state but Massachusetts the UCCJEA would be the appropriate mechanism for enforcement. The statute has been adopted, with essentially the same language, in all states other than Massachusetts. Thus, following the registration requirements provided for in the statutory language is necessary for enforcement. The first step, as with UIFSA, requires the filing of a request for registration with two copies of the foreign judgment, one of which must be certified. If the original order or judgment is not in English, it should be translated,

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<sup>53</sup> *Ali v. Ali*, 652 A.2d 253, 336 (N.J. Super. Ct. Ch. Div. 1994).

<sup>54</sup> *Charara v. Yatim*, 937 N.E.2d 490, 498 (Mass. App. Ct. 2010).

and a certified translation should also be filed. Again, local counsel in the jurisdiction that issued the order is a true necessity to effectuate successful enforcement. The non-registering party can contest jurisdiction, alleging the issuing tribunal did not have jurisdiction, that the order sought to be enforced is not the last order entered, or that notice was not given prior to the custody award being entered. If any of these defenses are proven, the foreign order will likely not be enforced. However, if no defenses are raised or the defenses are rejected, the foreign order likely will be enforced. Under the UCCJEA, the court can then enforce the foreign order as if it were its own, including issuing a warrant to take physical custody of the child.

The importance of understanding the foreign jurisdiction's law cannot be stressed enough. Many tribunals or countries may have laws that are different than the UCCJEA and each state's custody statutes, but if the issuing tribunal's law are substantially similar, it is likely the foreign order will be enforced. This does not mean that the laws of the issuing tribunal must be exactly like the law of the state that is enforcing the order.<sup>55</sup> In *In re Marriage of Malek*, the California court determined that notwithstanding the fact that the law in Lebanon was different than that in California, the custody order entered followed proper due process prior to its entry and the laws, while different than California's, did not violate public policy. The *Malek* case is interesting and informative in that the California court determined that notwithstanding the fact that the laws of Lebanon were different, they were substantially in compliance with the UCCJEA in that both parents were in Lebanon at the time the order was entered, Lebanon had significant connections to the family, and while the language is different the laws appear to look at the best interest of the child.

Similarly, a Maryland court that determined that a Pakistani order granting custody to the father in the absence of the mother at the hearing should be recognized under both the UCCJEA and principles of comity.<sup>56</sup> This was primarily predicated on the fact the mother was given notice and an opportunity to be heard,

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<sup>55</sup> *In re Marriage of Malek*, 227 Cal. Rptr. 841 (1986).

<sup>56</sup> *Hosain v. Malik*, 309 671 A.2d 988, 1000 (Md. Ct. Spec. App.1996).

just as the UCCJEA provides that “failure to appear may result in a decision adverse to that party.”<sup>57</sup>

## **VI. Conclusion**

The clear thread that runs through enforcement of any foreign judgment, regardless of the topic, has to do with the way the judgment was obtained. Does the foreign tribunal entering the order have similar concepts of personal and subject matter jurisdiction as the United States? If so, that is one step towards a probable enforcement of an order. Does the foreign tribunal follow the concepts of due process, such as providing notice and the opportunity to be heard? If these two thresholds are met, enforcement is likely. However, the main hindrance at that point has to do with the actual law in the issuing tribunal. It cannot be violative of the public policies of the state where enforcement is sought. A court order awarding custody to one parent, without a hearing or based simply on the sex of the parent, is far less likely to be enforced than an order where evidence was taken and both parties were present. It is imperative to have a thorough understanding of the laws in the jurisdiction where the order was entered and where enforcement is sought.

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<sup>57</sup> *Id.* at 999.

## **Playing Catch with a Hand-Grenade: How to Deal with an Unreported Foreign Bank Account in a Divorce**

by  
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Caroline Rule\*\*

When it comes to unreported foreign bank accounts, there is good news and bad news. The good news is that a previously unreported foreign bank account can dramatically increase the value of a divorcing couple's marital estate and may even make it easier to divide the assets and resolve the divorce. The bad news is that an unreported foreign bank account can result in large amounts of tax, tax penalties, and interest due to the IRS; can trigger large civil monetary penalties apart from taxes; and can even lead to criminal prosecution for this failure. Sometimes the risk that an unreported foreign account will explode into a huge problem is so high that nobody wants to admit having any connection to the account, but it nevertheless is something that must be addressed directly.

It is surprising how many people have an unreported foreign bank account, often without intending to hide assets from the IRS.<sup>1</sup> Maybe they inherited it from a relative, maybe they worked abroad in the past, or maybe they just like to have a bank

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<sup>1</sup> During various iterations of the IRS's Offshore Voluntary Disclosure Program ("OVDP"), which launched in 2009 and ended in September 2018, more than 56,000 United States taxpayers came forward to disclose their previously-unreported bank accounts, and paid a total of \$11.1 billion in back taxes, interest and penalties. See IRS, *IRS to End Offshore Voluntary Disclosure Program* (Mar. 13, 2018), <https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now>. It is unknown how many other taxpayers who own foreign bank accounts did not come forward during the OVDP or have not come forward since.

account while on vacation. Unreported foreign accounts often surface during a divorce as the spouses inventory the marital estate. The primary issue that must be considered is whether one or both of the spouses “willfully” failed to report the account and whether criminal prosecution or huge civil money penalties are likely. Divorce lawyers with high net-worth clients must be sensitive to the issues and risks surrounding foreign accounts and know when to bring in a tax specialist.

Part I of this article summarizes the reporting requirements for United States taxpayers who have an interest in one or more foreign bank accounts, and describes the issues regarding criminal and civil penalties that are presented by unreported foreign bank accounts. Part II reviews case law which suggests that courts are inclined to rule in favor of the government when it seeks to collect civil penalties assessed by the IRS for failure to report a foreign account. Part III examines two recent cases that addressed these civil penalties in the context of a divorce. Part IV explains how these civil penalties do not apply jointly and severally even if spouses filed joint income tax returns, but also how the same penalties may apply separately to each spouse. Part V reviews the alternatives that spouses with unreported foreign accounts should consider when deciding how to proceed. Finally, Part VI sets out a simple, straightforward framework for deciding what to do when an unreported foreign account surfaces during a divorce proceeding.

## **I. Reporting Requirements for Foreign Bank Accounts, and Criminal and Civil Penalties for Failure to Meet These Requirements**

### *A. Reporting Requirements*

Foreign bank and financial accounts must be reported to the Treasury Department in three different ways: on Schedule B of

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As an indication of how many United States persons have interests in foreign bank accounts, in 2019 more than 1.2 million Reports of Foreign Bank and Financial Accounts or “FBARs” were filed to report ownership of foreign bank accounts during 2018. *Agency Information Collection Activities*, 85 Fed. Reg. 73129 (Nov. 16, 2020), <https://www.federalregister.gov/documents/2020/11/16/2020-25216/agency-information-collection-activities-proposed-renewal-comment-request-renewal-without-change-of#footnote-9-p73130>.

Form 1040, U.S. Individual Income Tax Return<sup>2</sup>; on Schedule 8938 to Form 1040; and on a separately filed Report of Foreign Bank and Financial Accounts or “FBAR.” To make matters more complicated, each of these schedules and forms have their own filing thresholds and requirements.

First, every individual taxpayer who has a financial interest or signature authority over a foreign financial account, regardless of the amount in the account, must report this on Schedule B, Part III, Question 7a. of Form 1040.<sup>3</sup> The taxpayer must check a “Yes” or “No” box in response to the question: “At any time during [the tax year], did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country?” Question 7a continues: “If ‘Yes,’ are you required to file Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements.” This extra language is intended to alert taxpayers that they may have to file an FBAR.

Second, every taxpayer who has an interest in a foreign financial account with a value of more than \$50,000 on the last day of the year, or more than \$75,000 on any day during the year, must file an IRS Form 8938.<sup>4</sup> The Form 8938 is attached to the IRS Form 1040.

Third, any taxpayer who has a financial interest in, or signature authority over, foreign financial accounts whose aggregate value exceeded \$10,000 at any time during the prior calendar year must file an FBAR. The FBAR is filed on FinCEN Form 114 and must be sent electronically to FinCEN, the Financial

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<sup>2</sup> U.S. Dep’t of the Treasury, IRS Form 1040, *U.S. Individual Income Tax Return*, <https://www.irs.gov/pub/irs-pdf/f1040.pdf>.

<sup>3</sup> U.S. Dep’t of the Treasury, IRS, Schedule B (Form 1040), <https://www.irs.gov/pub/irs-pdf/f1040sb.pdf>.

<sup>4</sup> U.S. Dep’t of the Treasury, IRS Form 8938, *Statement of Specified Foreign Financial Assets*, <https://www.irs.gov/pub/irs-pdf/f8938.pdf>. Form 8938 “requires disclosure of a wide variety of foreign financial assets, including bank accounts, foreign stock or securities, ownership interests in a foreign entity, and any financial instrument or contract that has an issuer or counterparty that is not a U.S. person.” Matthew D. Lee, *Uncovering Offshore Assets Using U.S. Tax Reporting Requirements as a Discovery Tool*, ABA FAM. ADVOC., Fall 2020, at 36, 37.

Crimes Enforcement Network.<sup>5</sup> This FBAR is completely separate from the IRS Form 1040 tax return. The FBAR must be filed by April 15 of the year following the year in which the taxpayer had the reportable interest. If the taxpayer does not file the FBAR on April 15, there is an automatic extension of time to file until October 15.

The result of all these separate reporting requirements is that a foreign bank or financial account, no matter what it is worth, must be reported on a tax return, and an account worth more than \$50,000 must be reported in three different places each year. In addition, there are many other reporting requirements for foreign assets other than bank or financial accounts. For example, IRS Forms 5471<sup>6</sup> and 8865<sup>7</sup> must be filed to report a taxpayer's interest in or ownership of, respectively, certain foreign corporations or partnerships. IRS Form 3520<sup>8</sup> must be filed to report transactions with foreign trusts or the receipt of gifts from a foreign person. The universe of foreign asset reporting requirements and related penalties is large and complex, and a full discussion of all the potential foreign asset reporting penalties is beyond the scope of this article, which will focus solely on foreign bank accounts.

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<sup>5</sup> FinCEN is a bureau within the Department of the Treasury and is distinct from the IRS.

Until 2013 (and cases discussed in this article generally involve FBARs from before 2013), the FBAR was Form TD F 90-22.1, which was very similar to FinCEN Form 114, but was filed with the IRS on June 30 for the previous year. Prior to 2013, the question on Schedule B, Part III, Question 7a read, for example, "At any time during 2009, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See instructions on back for exceptions and filing requirements for Form TD F 90-22.1."

<sup>6</sup> U.S. Dep't of the Treasury, IRS Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, <https://www.irs.gov/pub/irs-pdf/f5471.pdf>.

<sup>7</sup> U.S. Dep't of the Treasury, IRS Form 8865, *Return of U.S. Persons with Respect to Certain Foreign Partnerships*, <https://www.irs.gov/pub/irs-pdf/f8865.pdf>.

<sup>8</sup> U.S. Dep't of the Treasury, IRS Form 3520, *Annual Return To Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*, <https://www.irs.gov/pub/irs-pdf/f3520.pdf>.

*B. Penalties for Failure to Report Foreign Bank Accounts*

Criminal and/or civil penalties may be imposed for failure to report foreign bank accounts. Criminal penalties and the most significant civil penalties apply only if a taxpayer “willfully” failed to report a foreign account. Thus, evaluating whether the taxpayers acted willfully is one of the most important steps in determining how to handle an unreported foreign account. To make matters confusing, courts have interpreted the term “willfully” to mean different things in the criminal and civil penalty contexts. In criminal cases the government must prove willfulness by demonstrating beyond a reasonable doubt either that the taxpayer actually knew the account had to be reported but failed to do so, or at least that the taxpayer was “willfully blind,” i.e. that he made “a conscious effort to avoid learning about reporting requirements.”<sup>9</sup> In the civil context, courts have expanded the concept of willfulness to include reckless behavior as well.<sup>10</sup> While this article describes potential criminal penalties for failure to report a foreign bank account, we concentrate on case law regarding imposition of civil penalties.

*1. Criminal Penalties for Failure to Report a Foreign Bank Account*

A person who willfully fails to file an FBAR may be imprisoned for up to five years.<sup>11</sup> If a person fails to file an FBAR while violating another U.S. law, or as a pattern of any illegal activity involving more than \$100,000 in a twelve-month period, the penalty is increased to not more than ten years imprisonment.<sup>12</sup> In addition to incarceration, civil penalties for willful failure to file an FBAR, discussed below, may be imposed as well.<sup>13</sup> Criminal failure to file an FBAR may also be charged as, or along with, various tax offenses, including:

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<sup>9</sup> United States v. Sturman, 951 F.2d 1466, 1476-77 (6th Cir. 1991).

<sup>10</sup> See Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 57 (2007) (in the civil context, willfulness includes recklessness).

<sup>11</sup> 31 U.S.C. § 5322(a) (2001).

<sup>12</sup> 31 U.S.C. § 5322(b) (2001).

<sup>13</sup> 31 U.S.C. § 5321(d) (2004).

- Tax evasion, if tax is not paid on earnings from a foreign account, a felony subject to up to five years' imprisonment and/or \$100,000 fine.<sup>14</sup>
- Filing a false tax return, a felony subject to up to three years' imprisonment and/or a fine of up to \$100,000.<sup>15</sup>
- Corruptly impeding the administration of the IRS, a felony subject to up to three years' imprisonment and/or a fine of up to \$5,000.<sup>16</sup>
- Conspiracy to commit an offense against or to defraud the United States, a felony subject to up to five years imprisonment.<sup>17</sup>

The U.S. Sentencing Guidelines determine whether a taxpayer convicted for failure to file an FBAR will be imprisoned. The Sentencing Guidelines indicate a range of sentences based on the size of the unreported foreign account. The likelihood of imprisonment increases dramatically as the amount in the unreported account increases. In general, a \$500,000 unreported foreign account can trigger a prison sentence of 27 to 33 months, whereas an \$1 million unreported foreign account can trigger a prison sentence of 33 to 41 months.<sup>18</sup> Of course, there are many

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<sup>14</sup> I.R.C. § 7201 (1982).

<sup>15</sup> I.R.C. § 7206(1) (1982) “Declaration under penalties of perjury” A defendant is guilty if he “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.”; *See United States v. Quiel*, 595 Fed. Appx. 692, 694 (9th Cir. 2014) (affirming convictions for willfully filing false tax returns under I.R.C. § 7206(1) and willfully failing to file FBARs under 31 U.S.C. § 5322).

<sup>16</sup> I.R.C. § 7212(a) (1954): A defendant is guilty if she “corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title.”; *See United States v. Little*, 828 Fed. Appx. 34, 36 (2d Cir. 2020) (affirming conviction under § 7212(a), conspiracy to defraud the U.S., and failure to file tax returns and FBARs after defendant amassed offshore assets of the deceased taxpayer, and disbursed assets purportedly as gifts to the surviving spouse and family members).

<sup>17</sup> 18 U.S.C. § 371 (1994); *See Little*, Fed. Appx. at 36.

<sup>18</sup> *See United States Sentencing Guidelines* § 2S1.3; 2B1.1; Sentencing Table; *See also United States v. Simon*, No. 3:10–CR–00056(01)RM, 2011 WL 924264 at \*9 (N.D. Ind. Mar. 14, 2011) (applying U.S. Sentencing Guideline § 2S1.3 to criminal failure to report foreign bank accounts).

facts and arguments that can reduce these sentencing ranges in certain circumstances.

The IRS and DOJ very actively pursue criminal cases involving unreported foreign bank accounts. The IRS and DOJ have prosecuted more than 120 criminal cases involving unreported foreign bank accounts. On October 15, 2020, the IRS and DOJ announced two of the largest criminal tax investigations ever, both involving unreported foreign accounts. One was against a private equity billionaire who admitted that he evaded more than \$200 million of income by using secret foreign accounts in the Caribbean and Switzerland.<sup>19</sup> The other was against the owner of a software company who was indicted and charged with hiding nearly \$2 billion of income from the IRS from 2000 through 2018 by using secret offshore accounts.<sup>20</sup> This does not mean that the IRS prosecutes only large dollar accounts. Several prosecutions have involved accounts of less than \$1 million and one prosecu-

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<sup>19</sup> This investigation ended with an unusual non-prosecution agreement, but the billionaire still admitted to committing crimes including failure to report his ownership of the secret foreign accounts, and his fifteen-year involvement in an illegal scheme to conceal income and evade taxes by using an offshore trust structure that he secretly controlled. See Exhibit A to Robert F. Smith Non-Prosecution Agreement, Statement of Facts (signed Oct. 9, 2020), <https://www.justice.gov/opa/press-release/file/1327911/download>. For the press release see U.S. Dep't of Justice, *Private Equity CEO Enters into Non-prosecution Agreement on International Tax Fraud Scheme and Agrees to Pay \$139 Million, to Abandon \$182 Million in Charitable Contribution Deductions, and to Cooperate with Government Investigations* (Oct. 15, 2020), <https://www.justice.gov/opa/pr/private-equity-ceo-enters-non-prosecution-agreement-international-tax-fraud-scheme-and-agrees>.

<sup>20</sup> *United States v. Brockman*, Case No. 3:20-cr-00371 (N.D. Ca. Oct. 1, 2020). The 39-count indictment charges criminal failure to file FBARs, conspiracy to defraud the United States by committing tax evasion, and substantive counts of tax evasion; and wire fraud, money laundering, and other offenses stemming from a scheme to defraud investors in debt securities issued by the defendant's company. The indictment is available at <https://www.justice.gov/opa/press-release/file/1327921/download>. For the press release see U.S. Dep't of Justice, *CEO of Multibillion-dollar Software Company Indicted for Decades-long Tax Evasion and Wire Fraud Schemes* (Oct. 15, 2020), <https://www.justice.gov/opa/pr/ceo-multibillion-dollar-software-company-indicted-decades-long-tax-evasion-and-wire-fraud>.

tion involved an unreported foreign account worth only \$152,000.<sup>21</sup>

## 2. *Civil Penalties for Failure to Report a Foreign Bank Account*

The civil FBAR penalty statute provides two very distinct penalties: the non-willful penalty and the willful penalty. The *baseline* penalty, under subsection (B)(i) of the statute, applies to a non-willful violation of the FBAR filing requirement (the “non-willful civil FBAR penalty”).<sup>22</sup> The non-willful civil FBAR penalty is capped at \$10,000 per year. The IRS can assess a \$10,000 non-willful civil FBAR penalty for each of multiple years.<sup>23</sup>

A taxpayer who can prove that a non-willful “violation was due to reasonable cause” may avoid penalties altogether.<sup>24</sup> But reasonable cause for failure to report a foreign bank account can be difficult to establish. The IRS often takes the position that reasonable cause relief will be granted only if the taxpayer can prove that she told her accountant about the foreign account and the accountant mistakenly failed to report the account or gave incorrect advice that the account need not be reported.<sup>25</sup>

<sup>21</sup> See, e.g., Remy Farag, *HSBC Client Prosecuted After Quiet Disclosure*, 22 J. INT’L TAX’N 8 (Aug. 2011) (describing the prosecution of a defendant who had a high balance of \$152,566 in a single undeclared foreign bank account).

<sup>22</sup> 31 U.S.C. § 5321(a)(5)(B)(i).

<sup>23</sup> See, e.g., *Moore v. United States*, No. C13–2063RAJ, 2015 WL 4508688 at \*1 (W.D. Wa. July 25, 2015) (“the IRS’s decision to assess Mr. Moore FBAR penalties of \$10,000 for each year from 2005 through 2008 was not arbitrary, not capricious, and not an abuse of its discretion”); See also Internal Revenue Serv., Internal Revenue Manual (“IRM”) § 4.26.16.6.4.1 (Nov. 6, 2015) (“Penalty for Nonwillful Violations – Calculation”) (“in most cases, examiners will recommend one penalty per open year,” although “[f]or multiple years with nonwillful violations, examiners may determine that asserting nonwillful penalties for each year is not warranted”).

<sup>24</sup> 31 U.S.C. § 5321(a)(5)(B)(ii).

<sup>25</sup> See Paul Marcotte, Jr., *Pain Relief from Undisclosed Offshore Holdings: IRS International Penalty Procedure and Strategy*, 25 J. INT’L TAX’N 26, 32 (Mar. 2014) (emphasis added):

The Service routinely scrutinizes claims for penalty relief related to delinquent international information returns when reliance on a tax advisor is asserted as the ground for reasonable cause. *In particular,*

The baseline \$10,000 non-willful civil FBAR penalty is increased for willful FBAR violations. The willful penalty provisions (the “willful civil FBAR penalty”), read:

(C) Willful violations.—In the case of any person willfully violating, or willfully causing any violation of, any provision of [a section of the Bank Secrecy Act of 1970<sup>26</sup> under which the Secretary of the Treasury requires a resident or citizen of the United States to file certain reports of foreign transactions (“the BSA provision”)<sup>27</sup>]

(i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—

(I) \$100,000, or

(II) 50 percent of the amount determined under subparagraph (D).

(D) Amount.—The amount determined under this subparagraph is—

....

(ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.<sup>28</sup>

As the statute indicates, a willful failure to report a foreign bank account can bring crushing civil penalties of as much as 50% of the value of the unreported foreign account. The statute of limitations is six years so, theoretically, the IRS could impose six 50% penalties equal to a total of 300% of the value of the

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*the Service demands proof that the advisor knew of the undisclosed account or activity for which a return was not filed timely.*

See also Khrista McCarden, *Offshore Tax Enforcement and Divorce*, 80 OHIO ST. L.J. 521, 537 n.56 (2019) (“If a taxpayer can prove reasonable cause for failing to file an FBAR, e.g., the taxpayer told a tax preparer who neglected to file the FBAR about the foreign account(s), no penalty will be imposed.”).

Compare with *Jarnagin v. United States*, 134 Fed. Cl. 368, 378-79 (Fed. Ct. Cl. 2017) (finding no reasonable cause where taxpayers “neither requested nor received any advice one way or the other from their accountants regarding whether they were required to file FBARs”); *United States v. Schwarzbaum*, Case No. 18-cv-81147-BLOOM/Reinhart, 2020 WL 1316232 at \*\*9-10 (S.D. Fla. 2020), *appeal filed*, 11th Cir. Case No. 20-13989 (Oct. 23, 2020) (discussing reasonable cause in connection with non-willfulness rather than penalty relief, but holding that a taxpayer’s reliance on an accountant’s incorrect advice that only accounts with connection to the United States need be reported constituted reasonable cause).

<sup>26</sup> Pub. L. No. 91-508, 84 Stat. 1114 and amendments (31 U.S.C. §§ 5311-5314, 5316-5330, 5331, 5332; 12 U.S.C. §§ 1829, 1951-1959).

<sup>27</sup> 31 U.S.C. § 5314 (1982).

<sup>28</sup> 31 U.S.C. §§ 5321(a)(5)(C) & (D).

account. In practice, the IRS has not imposed quite such draconian penalties. However, the IRS has in many instances imposed penalties, taxes, and interest that have exceeded the value of an unreported account, and in one case imposed the 50% penalty for three years.<sup>29</sup>

## II. Case Law Regarding Civil FBAR Penalties

The great majority of federal district courts that have ruled on the government's suits to collect civil FBAR penalties have involved willful civil FBAR penalties,<sup>30</sup> and the courts have usually ruled in the government's favor, holding that the taxpayers did willfully fail to report a foreign account, either after a hearing on the government's motion for summary judgment or after a bench trial. Most of these decisions have focused on how the taxpayer answered Schedule B, Part III, Question 7a. of Form 1040, about whether he or she had an interest in a foreign bank account, and have reasoned that a taxpayer who answered "No" to this question acted willfully – or recklessly, which equates to willfulness in the civil penalty context – requiring imposition of the huge 50% willful FBAR penalty. Some courts have essentially relied solely on the fact that a taxpayer signed tax returns with this question answered falsely, while other courts have required additional evidence of the taxpayer's willfulness or recklessness.

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<sup>29</sup> MICHAEL SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 12.04[3](b) at \*7 & n.475.1 (2020) (citing IRM § 4.26.16.6.5.3 (Nov. 6, 2015)):

The Service takes the position that the 50 percent willful penalty can apply to each year for which the statute of limitations is open. In a well-publicized case, the Service asserted the maximum penalty for three years. The IRM says that, "in most cases, the total penalty amount for all years under examination will be limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination." The key qualification to this internal guidance is that it is the general rule, and examiners may propose a willful penalty higher or lower than these amounts.

<sup>30</sup> It is within the IRS or the government's discretion whether to assess the willful civil FBAR penalty or the non-willful civil FBAR penalty, and the great majority of reported cases involve the willful penalty. For one case where the non-willful penalty was imposed, see *United States v. Hidy*, 471 F. Supp. 3d 927 (D. Neb. 2020) (rejecting the taxpayers' argument that the reasonable cause exception applied).

A. *United States v. Williams* and *United States v. McBride*

Two seminal cases from 2012, *United States v. Williams*,<sup>31</sup> and *United States v. McBride*,<sup>32</sup> both effectively held that taxpayers who have an interest in a foreign bank account and who checked the “No” box in response to question 7a. on Schedule B of their tax return have acted recklessly, and that this is sufficient to trigger the willful civil FBAR penalty. The courts reasoned that, by signing a tax return under penalty of perjury, a taxpayer has constructive knowledge of Question 7a. on Schedule B, Part III, requiring the taxpayer to check the box “Yes” or “No” concerning whether he or she owns a foreign account, and the taxpayer therefore has constructive knowledge of that question’s follow up reference to the need to file an FBAR. According to the courts, a taxpayer therefore has constructive knowledge of her duty to file an FBAR, and is reckless and/or “willfully blind”—and hence “willful” as that term has been defined in context of civil tax penalties<sup>33</sup>—if she fails to file a timely or accurate FBAR. In both *Williams* and *McBride*, the courts affirmed the 50% civil penalty for willfully failing to file an FBAR.

*Williams* was the first federal appellate case to address the willful civil FBAR penalty. Setting out a theory of constructive knowledge combined with “willful blindness,” the court wrote:

A taxpayer who signs a tax return will not be heard to claim innocence for not having actually read the return, as he or she is charged with constructive knowledge of its contents. . . .

Nothing in the record indicates that Williams ever consulted [the FBAR form] or its instructions. In fact, Williams testified that he did not read line 7a and “never paid any attention to any of the written words” on his federal tax return.

. . . Thus, Williams made a “conscious effort to avoid learning about reporting requirements,” and his false answers on both the tax organizer [where his accountant asked if he had a foreign bank account] and his federal tax return evidence conduct that was “meant to con-

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<sup>31</sup> 489 Fed. Appx. 655 (4th Cir. 2012).

<sup>32</sup> 908 F. Supp. 2d 1186 (D. Utah 2012).

<sup>33</sup> *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (in cases “where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well”).

ceal or mislead sources of income or other financial information.” . . .  
This conduct constitutes willful blindness to the FBAR requirement.<sup>34</sup>

The court concluded that “at a minimum, Williams’s undisputed actions establish reckless conduct, which satisfies the proof requirement” for imposition of willful civil FBAR penalties.<sup>35</sup>

The court’s reliance on “constructive knowledge,” recklessness, and “willful blindness” was unnecessary, however, because the facts demonstrated that Williams was *knowingly* willful. Most significant was Williams’ admission in open court as part of his guilty plea that: “*I knew that I had the obligation to report to the IRS and/or the Department of the Treasury the existence of the Swiss accounts, but I chose not to* in order to assist in hiding my true income from the IRS and evade taxes.”<sup>36</sup> This irrefutable *direct* evidence of Williams’ intentional choice not to file FBARs when he knew he was required to do so established his willfulness, and the court did not need to come up with its theories of indirect proof.

The district court decision in *United States v. McBride* held that McBride was liable for willful civil FBAR penalties for 2000 and 2001. The court titled a section of its opinion unequivocally: “Constructive Knowledge of the Reporting Requirement Is Imputed to Taxpayers Who Sign Their Federal Tax Returns.”<sup>37</sup> It concluded that, because McBride signed his tax returns for 2000 and 2001, he was charged with having reviewed the returns; having understood that they asked if he held a foreign bank account during the tax year and that they referenced the FBAR form; and

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<sup>34</sup> *Id.* at 659. The court imported from criminal cases the concepts of a “conscious effort to avoid learning about reporting requirements,” *id.* at 658 (quoting *Sturman*, 951 F.2d at 1476, a criminal FBAR case), and “willful blindness,” which may be inferred where “a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts that point to such liability,” *id.* (quoting *United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011), a criminal tax case).

<sup>35</sup> *Id.* at 660. See *Safeco Ins. Co.*, 551 U.S. at 57 (“where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well”).

<sup>36</sup> *Id.* at 659 (emphasis added); Additional evidence of Williams’ willfulness was that he opened two Swiss bank accounts in the names of British corporations, and he answered “no” to the question in his accountant’s annual tax organizer about whether he had a foreign account. *Id.* at 656.

<sup>37</sup> 908 F. Supp. 2d at 1207.

therefore having had constructive knowledge of the requirement to file FBARs.<sup>38</sup>

The court went even further, however, relying on *Lefcourt v. United States*<sup>39</sup>—an inapplicable case which did not involve a civil FBAR penalty and never mentioned either “constructive knowledge” or “willful blindness”—to hold it was *irrelevant* that McBride *subjectively believed* he was not required to file FBARs.<sup>40</sup> The court thereby imposed strict liability for a willful civil FBAR penalty, and essentially left no room for application of the non-willful penalty:

“Once it is determined, as it was here, that the failure to disclose . . . information was done purposefully, rather than inadvertently, it is irrelevant that the filer may have believed he was legally justified in withholding such information. The only question that remains is whether the law required its disclosure.” . . . *The government does not dispute that McBride’s failure to comply with FBAR was the result of his belief that he did not have a reportable financial interest in the foreign accounts.* However, because it is irrelevant that McBride “may have believed he was legally justified in withholding such information, [t]he only question that remains is whether the law required its disclosure.” . . . Here, the FBAR requirements did require that McBride disclose his interests in the foreign accounts during both the 2000 and

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<sup>38</sup> *Id.* at 1207-08. The court acknowledged cases holding that a taxpayer’s signature on a tax return does not by itself prove that the taxpayer knew what was in the return, but used tortured reasoning to distinguish “knowledge of what entries and submissions are made by the taxpayer or the taxpayer’s preparer” on the tax return form, from “knowledge of what instructions are contained within the form [which] is directly inferable from the contents of the form itself, even if it were a blank.” *Id.* at 1207. This distinction is meaningless, however, because checking the “Yes” or “No” box about whether a taxpayer had an interest in a foreign account *is* an entry on the form that must be made by the taxpayer or the taxpayer’s preparer.

<sup>39</sup> 125 F.3d 79 (2d Cir. 1997).

<sup>40</sup> The court also held that even if an accountant “failed to properly advise McBride to report his interests in the foreign accounts, this would not excuse McBride. The taxpayer, not the preparer, has the ultimate responsibility to file his or her return and pay the tax due.” *Id.* at 1213. This contradicts the statutory reasonable cause exception under 31 U.S.C. § 5321(a)(5)(B)(ii), discussed above, where a taxpayer’s reliance on a tax professional’s advice that she need not file FBARs may constitute reasonable cause to avoid any penalties at all.

the 2001 tax years. As a result, McBride's failure to do so was willful.<sup>41</sup>

*Williams* and *Lefcourt*, an irrelevant case,<sup>42</sup> were the *only* authorities on which the *McBride* court relied for its extraordinary conclusion that a taxpayer's belief that he is not required to file an FBAR is irrelevant to the taxpayer's willfulness. As in *Williams*, however, the facts of *McBride* amply supported a finding that McBride was willful without any need for the court to address "constructive knowledge" or a purposeful act as opposed to inadvertence. "McBride was aware that he was engaged in a plan to avoid income taxes by hiding his interest in assets in over-

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<sup>41</sup> *Id.* at 1213-15 (emphasis added; brackets in original)(quoting *Lefcourt*, 125 F.3d at 83, and citing *Williams*).

<sup>42</sup> *Lefcourt* had no application to the civil willful FBAR penalty. It addressed a completely different penalty, under I.R.C. § 6721(e)(1990) for "intentional disregard" of the requirement to file IRS Form 8300, "Report of Cash Payments Over \$10,000 Received in a Trade or Business." The case involved a law firm's *intentional* refusal to reveal on Form 8300 the identity of a client who faced criminal charges, citing the client's constitutional protections and the lawyers' professional responsibility. *Id.* at 81. It was "uncontested that *Lefcourt* was aware that Form 8300 asked for its client's identity and nonetheless *chose* to refuse to provide the name." *Id.* at 83 (emphases added). It was against this background that the court wrote its inflexible language distinguishing inadvertence from a voluntary act based on an unsupported belief that filing is not required. *McBride's* asserted belief that he did not have to file FBARs was in no way comparable to an *awareness* that he was required to file FBARs and a *choice* not to do so.

In addition, because the *Lefcourt* decision mentioned neither constructive knowledge nor willful blindness, it was unwarranted for the *McBride* court to engraft *Lefcourt's* strict line between a voluntary act (which in *Lefcourt* really meant a *knowing and intentional* act) and an inadvertent act onto the willful civil FBAR penalty. The IRS itself has recognized that: "The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, in itself, to establish that the FBAR violation was attributable to willful blindness," and this fact should be coupled with other facts "such as the efforts taken to conceal the existence of the accounts and the amounts involved" in order to conclude that an FBAR violation was due to willful blindness. IRM § 4.26.16.6.5.1(5)(Nov. 6, 2015).

Finally, the tax penalty that *Lefcourt* discussed, like the *non-willful* civil FBAR penalty, could be waived if the failure to file Form 8300 was due to reasonable cause. 125 F.3d. at 84-85. There is no such reasonable cause relief from a *willful* civil FBAR penalty, however, an additional reason why *Lefcourt's* strict application of a penalty was inapplicable to the situation in *McBride*.

seas shell corporations.”<sup>43</sup> He did not discuss foreign accounts he controlled with his personal accountant;<sup>44</sup> and, most importantly, he *knew* that the plan aimed to avoid disclosing foreign accounts, because he reasoned, “*if you disclose the accounts on the form, then you pay tax on them.*”<sup>45</sup> On these facts, there was no reason for the court’s reductive analysis of willfulness.

Both *Williams* and *McBride* are examples of the adage that bad facts make bad law because, in both cases, there was abundant evidence that the taxpayers actually knew they had to report their foreign accounts, so the concepts of constructive knowledge, willful blindness, and recklessness were irrelevant. The courts did not need to rely on these concepts to find the taxpayers liable for the willful civil FBAR penalty. The cases’ analyses have been criticized as essentially abrogating the non-willful civil FBAR penalty.<sup>46</sup>

#### B. *The Fourth Circuit’s Recent Possible Retreat From Williams*

In a very recent case, *United States v. Horowitz*,<sup>47</sup> the Fourth Circuit affirmed the district court ruling that the taxpayer acted willfully and was subject to the 50% civil FBAR penalty, but may have retreated somewhat from *Williams*, since it did not rely on a “constructive knowledge” theory of liability. The court adhered to *William’s* holding that willfulness in the civil FBAR context includes recklessness.<sup>48</sup> It then held, significantly, that the taxpayers’ repeated failure to review their tax returns (on which the box was checked “No” as to whether they owned foreign bank accounts) with enough care “at least to discover their misrepresentation of foreign bank accounts,” was only “*an aspect of their recklessness.*”<sup>49</sup>

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<sup>43</sup> *Id.* at 1205 (emphasis added). When McBride first learned of the plan, his reaction was: “This is tax evasion.” *Id.* at 1190, 1210.

<sup>44</sup> *Id.* at 1189, 1199.

<sup>45</sup> *Id.* at 1205 (emphasis added).

<sup>46</sup> See, e.g. Kyle Niewoehner, Comment, *Feigning Willfulness: How Williams and McBride Extend the Foreign Bank Accounts Disclosure Willfulness Requirement and Why They Should Not Be Followed*, 68 TAX LAW. 251, 257 (2014).

<sup>47</sup> 978 F.3d 80 (4th Cir. 2020).

<sup>48</sup> *Id.* at 88.

<sup>49</sup> *Id.* at 90. (emphasis added).

The court relied on other indicia of recklessness to uphold the penalty: The account was a numbered account with a “hold mail” instruction (which the bank itself admitted was a means to assist U.S. customers to conceal their assets); so, although the husband claimed not to have requested these aspects of the account, “he surely became aware of their effect as he thereafter communicated with the bank and received no mail from it. This conduct further evinces more than mere negligence.”<sup>50</sup> The court found that the taxpayers could not have overlooked the account, since it was the family’s “nest-egg retirement account,” and they traveled to Switzerland twice “specifically to look after it.”<sup>51</sup> Affirming the district court’s decision that the taxpayers were liable for willful civil FBAR penalties, the court concluded:

*Taking all of these circumstances together, the record indisputably establishes not only that the [taxpayers] “clearly ought to have known” that they were failing to satisfy their obligation to disclose their Swiss accounts, but also that they were in a “position to find out for certain very easily.” . . . Despite numerous red flags, they neither made a simple inquiry to their accountant nor gave even the minimal effort necessary to render meaningful their sworn declaration that their tax returns were accurate.*<sup>52</sup>

The Court of Appeals did not mention “constructive knowledge” (and so did not outright repudiate *Williams*’ reliance on that theory) and relied on cumulative circumstances in addition to the taxpayers’ signatures on their tax returns in determining that the taxpayers were willful. Accordingly, the decision could undermine the government’s arguments that simply answering “no” to the question about foreign bank accounts on an income tax return is sufficient, in itself, to create “constructive knowledge” of the FBAR requirement and, therefore, to support imposition of a willful civil FBAR penalty.

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

<sup>51</sup> *Id.* The taxpayers knew that their nearly \$2 million in a Swiss bank account was earning interest income, knew that domestic interest income was taxable, and so “could hardly conclude reasonably that the interest income from their Swiss accounts was not subject to taxes.” *Id.*

<sup>52</sup> *Id.* (emphasis added).

C. *Some Recent Cases Have Closely Followed Williams and McBride*

In 2018, the Court of Federal Claims in *Kimble v. United States*<sup>53</sup> rested its decision that the taxpayer was liable for the 50% willful civil FBAR penalty on two simple stipulations: “Plaintiff did not review her individual income tax returns for accuracy”; and “Plaintiff answered ‘No’ to Question 7(a) on her 2007 income tax return, falsely representing under penalty of perjury, that she had no foreign bank accounts.”<sup>54</sup> The court held that these two facts alone sufficed to “evidence conduct by Plaintiff . . . that exhibited a ‘reckless disregard’ of the legal duty under federal tax law to report foreign bank accounts to the IRS by filing a FBAR,” and so granted summary judgment to the government.<sup>55</sup>

In 2019, in *United States v. Rum*,<sup>56</sup> a court in the Middle District of Florida granted the government’s motion for summary judgment to collect on the IRS’s assessment of a 50% willful civil FBAR penalty, citing both *Williams* and *McBride*, and holding:

A taxpayer’s failure to review their tax returns for accuracy despite repeatedly signing them, along with “falsely representing under penalty of perjury” that they do not have a foreign bank account (by answering “no” to question 7(a) on Line 7a of Schedule B of a 1040 tax return) *in and of itself* supports a finding of “reckless disregard” to report under the FBAR.<sup>57</sup>

The court discussed additional evidence supporting that Rum was willful but emphasized that this evidence was “*not* necessary to establish willfulness.”<sup>58</sup>

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<sup>53</sup> 141 Fed. Cl. 373 (Ct. Fed. Cl. 2018). The taxpayer paid the civil willful FBAR penalty assessed by the IRS and then filed suit in the Court of Federal Claims seeking a refund.

<sup>54</sup> *Id.* at 385.

<sup>55</sup> *Id.* at 386.

<sup>56</sup> Case No. 8:17-cv-826-T-35AEP, 2019 WL 3943250 (M.D. Fla. Aug. 2, 2019).

<sup>57</sup> *Id.* at \*8. (emphasis in original).

<sup>58</sup> *Id.* (emphasis in original).

D. *Other Courts Have Directly Rejected Williams' and McBride's Constructive Knowledge Theory*

Two district courts have outright rejected *Williams'* and *McBride's* reasoning that Form 1040, Schedule B, Question 7a provides “constructive knowledge” of the FBAR filing requirement. These courts, however, agreed with other decisions that a taxpayer may be reckless and therefore willful in avoiding learning about the FBARs requirements—and held that recklessness may include not reading tax returns, at least when the taxpayer is a sophisticated businessman.

In a case from the Southern District of Texas in 2018, *United States v. Flume*,<sup>59</sup> the government sought summary judgment for the 50% willful civil FBAR penalty. Because Flume admitted that he failed to report his UBS account in tax years 2007 and 2008, the only question, was “whether a reasonable factfinder could conclude that this failure was not willful.”<sup>60</sup> The government relied on *Williams* and *McBride* to argue that Flume was willful simply because, by signing his 2007 and 2008 tax returns which contained references to the FBAR requirements, he constructively knew about those requirements. The court held, however, that those cases had the unwarranted result of “effectively making every taxpayer who fails to follow [a tax return’s direction to review the FBAR] requirements a ‘willful’ violator.”<sup>61</sup> The court found the constructive-knowledge theory “unpersuasive” because it “ignores the distinction Congress drew between willful and non-willful violations.”<sup>62</sup> It concluded: “If every taxpayer, merely by signing a tax return, is presumed to know of the need to file an FBAR, ‘it is difficult to conceive of how a violation could be nonwillful.’”<sup>63</sup>

As a result, the court could not presume on summary judgment that Flume knew about the FBAR requirements merely because he signed his 2007 and 2008 tax returns under penalties of perjury.<sup>64</sup> In addition, the court held that *Williams'* and *McBride's* constructive-knowledge theory was not based on sound

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<sup>59</sup> No. 5:16-CV-73, 2018 WL 4378161 (S.D. Tex. Aug. 22, 2018).

<sup>60</sup> *Id.* at \*1.

<sup>61</sup> *Id.* (emphases added)

<sup>62</sup> *Id.* at \*7.

<sup>63</sup> *Id.* (citing Niewoehner, *supra* note 46).

<sup>64</sup> *Id.*

policy, because “to have ‘constructive knowledge’ of something ‘means you don’t have [knowledge] of it but the law will pretend you do’ for policy reasons.”<sup>65</sup> But no policy requires use of “constructive knowledge” to prevent a taxpayer from escaping liability “by simply claiming he did not read what he was signing.”<sup>66</sup> Instead, because reckless disregard of the FBAR filing requirement may constitute willfulness, there was no “policy need to treat constructive knowledge as a substitute for actual knowledge.”<sup>67</sup>

The court then refused to grant summary judgment on the question of recklessness because Flume testified that he relied on his tax preparer’s competence so “it was arguably not reckless for him to not ‘bother’ reading the FBAR instructions”; and since Schedule B’s direction to see instructions for FBAR filing requirements mentions “exceptions” to those requirements, “Flume might understandably have reasoned that he did not have to file an FBAR because his preparer had determined that one of those exceptions applied.”<sup>68</sup>

In a later 2019 decision on the merits,<sup>69</sup> however, the court found that Flume was indeed willful, because, among other reasons, Flume’s offshore financial structure demonstrated “a sophisticated tax-evasion scheme”<sup>70</sup> and, because Flume disclosed a Mexican bank account on Schedule B of his tax returns, “he was aware of the foreign-account reporting requirement and made a conscious choice not to disclose his Swiss account.”<sup>71</sup> In

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<sup>65</sup> *Id.* (brackets in original).

<sup>66</sup> *Id.* (quoting the government’s argument).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*9.

<sup>69</sup> *United States v. Flume*, 390 F. Supp. 3d 847 (S.D. Tex. 2019).

<sup>70</sup> *Id.* at 855 (citing *United States v. Bohanec*, 263 F. Supp. 3d 881, 889–90 (C.D. Cal. 2016) (taking into account the defendants’ business experience and financial sophistication in determining that willful civil FBAR penalties were proper).

<sup>71</sup> *Id.* (citing *United States v. Kelley-Hunter*, 281 F. Supp. 3d 121, 123–24 (D.D.C. 2017) (finding that the defendant demonstrated her prior knowledge of the FBAR requirements by reporting foreign accounts other than the one in connection with which the IRS sought FBAR penalties).

In addition, *Flume* knew about the IRS’s investigation into UBS by mid-2008, but did not file delinquent FBARs until after UBS agreed to turn over to the United States its U.S. clients’ records, which strongly suggested that Flume knew he was breaking the law but thought he could get away with it until it

addition, while the court might have been “more lenient with an unsophisticated defendant who genuinely could not understand the language of his tax return,” Flume was “a sophisticated businessman,” who therefore “acted with extreme recklessness by failing to review his tax returns before signing them.”<sup>72</sup>

Schedule B’s question about foreign bank accounts is simple and straightforward and requires no financial or legal training to understand” so “the most cursory review of his tax return would have alerted Flume to the foreign-account reporting requirement.”<sup>73</sup>

The 2020 case of *United States v. Schwarzbaum*,<sup>74</sup> from the Southern District of Florida, is one of the few decisions rejecting the government’s attempt to assert the 50% willful civil FBAR penalty, but only for one of the years involved in the case. The court first rejected the government’s reliance on “the notion from case law that a taxpayer is charged with knowledge of the information on a tax return by virtue of signing it under penalties of perjury,” finding fault with *Williams* and *McBride*:

Imputing constructive knowledge of filing requirements to a taxpayer simply by virtue of having signed a tax return would render the distinction between a non-willful and willful violation in the FBAR context meaningless. Because all taxpayers are required to sign their tax returns, a violation of the FBAR filing requirements could never be non-willful. Yet, the statute provides for non-willful penalties.<sup>75</sup>

After a bench trial, the court held that Schwartzbaum was not liable for a willful civil FBAR penalty for 2006 based on a willful blindness analysis, because he believed from his accountant’s incorrect advice that a foreign account should have some connection with the United States before he was required to re-

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became clear that U.S. authorities would learn of his account. *Id.* at 856-57 (citing *Kelley-Hunter*, 281 F. Supp. 3d at 123 (willful civil FBAR penalties were proper in part because the defendant immediately filed a late FBAR after “she received a letter from UBS . . . that the bank had disclosed the existence of her account to the IRS”).

<sup>72</sup> *Id.* at 857 (citing *Bedrosian v. United States*, 912 F.3d 144, 152 (3d Cir. 2018) (in the FBAR context, willfulness “often denotes . . . conduct marked by careless disregard” about a taxpayer’s legal duties.).

<sup>73</sup> *Id.* (citing *McBride*). The court’s reliance on Schedule B’s “straightforward” question would seem to be limited to a “sophisticated” taxpayer.

<sup>74</sup> 2020 WL 1316232.

<sup>75</sup> *Id.* at \*8.

port it.<sup>76</sup> But with respect to 2007 through 2009, Schwarzbaum *was* willfully blind and liable for the willful civil FBAR penalty because “at least for 2007, he reviewed the instructions for the FBAR form” so he could no longer rely on his accountant’s prior advice.<sup>77</sup> The government has appealed the decision to the Eleventh Circuit.<sup>78</sup>

### III. Two Recent Cases Addressing the Civil FBAR Penalty in the Context of a Divorce

As noted, unreported foreign bank accounts often surface in divorce cases and one spouse may argue that she or he relied on the other spouse, or that the circumstances of the divorce somehow justified the failure to properly report the foreign account. Courts have been skeptical of these arguments and tend to hold divorcing spouses to the same standard as any other taxpayer in determining whether they willfully – or recklessly – failed to report the account.

In *United States v. DeMauro*,<sup>79</sup> the court found that Annette DeMauro was willful in failing to file FBARs.<sup>80</sup> In 1993, Annette initiated a divorce proceeding against her husband, Joseph, on the grounds of adultery. The litigation spanned nine years, after which the court awarded Annette a \$35 million cash judgment, which Joseph never paid, and three real estate properties.<sup>81</sup> Annette testified that, during the divorce, Joseph repeatedly harassed her, sent people to her home to threaten or intimidate her, attempted to set fire to her home, and once tried to run her off the road.<sup>82</sup> The divorce decree provided that Joseph would indemnify Annette for any income tax that might be owed. Annette testified at trial that her “understanding was that whatever I received from the – my divorce decree was mine and mine alone and that went for anything I received, and it was nontaxable.”<sup>83</sup>

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<sup>76</sup> *Id.* at \*10.

<sup>77</sup> *Id.* at \*\* 10-11.

<sup>78</sup> 11th Cir. Case No. 20-13989 (Oct. 23, 2020).

<sup>79</sup> No. 17-cv-640-JL, 2020 WL 5757466 (D.N.H. Feb. 28, 2020).

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

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

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

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

In 2002, after her divorce from Joseph was finalized, Annette opened a numbered account at UBS in Switzerland. She formed a relationship with a client advisor at UBS with whom she met twice, and who allegedly faxed to her account opening documents that she signed and sent back but did not fill out. At times, Annette consulted with UBS employees about her account.<sup>84</sup>

Annette went most of her life never having filed tax returns. The first return she filed was in 2001, to report the gain from her sale of a piece of real estate that she received from the divorce. Unfortunately, the return, which was prepared by Annette's advisors, did not report her foreign bank account. Annette failed to file any other tax returns from 2002 to 2012. In 2012, she filed delinquent returns for 2005 through 2010. She conceded at trial that, after she filed the 2001 tax return, she did not seek professional advice about whether she should file a federal tax return, nor about whether income earned on her foreign account was taxable.

In 2006, Annette moved her funds from UBS to Zurcher Kantonalbank because her contact at UBS moved to the new bank. In 2009, she traveled to Switzerland to close her account because her client advisor "told her that the Swiss government was making Americans close their Swiss accounts."<sup>85</sup> She transferred her funds to accounts in the Czech Republic. She then transferred over \$1.3 million from the Czech Republic to a domestic account, including a large sum after her ex-husband's death.<sup>86</sup>

In analyzing whether Annette was willful in failing to file an FBAR in 2008, the court noted that she took steps to conceal her foreign accounts, but "she credibly testified that she did so in an attempt to hide assets from her abusive ex-husband—an explanation that even the IRS investigator believed and found compelling—and because she trusted the many professionals around her to take care of the finer details of her finances."<sup>87</sup>

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<sup>84</sup> *Id.* at \*\*2-3.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*5.

<sup>87</sup> *Id.* at \*\*1, 11.

Based on these findings, the court held that Annette did not knowingly fail to file FBARs.<sup>88</sup> It concluded, however, that Annette was reckless because her explanation for failing to seek advice about her tax and reporting obligations “strains credulity”<sup>89</sup> Annette testified that she did not ask any professional for advice about the tax or reporting requirements with respect to her foreign accounts “because she believed, based on her own interpretation of her divorce decree, that she owed no taxes on anything received from her divorce, including interest she concedes she knew was accruing.” This explanation was “neither objectively reasonable nor subjectively credible,” and Joseph’s agreement to indemnify Annette did not translate into Annette not owing taxes.<sup>90</sup>

Annette was also willfully blind because she failed to seek advice from tax professionals or attorneys about whether she should file tax returns despite (1) her past practice of relying on professionals to handle her affairs, (2) her admission that she knew her foreign accounts were accruing interest, (3) her 2001 payment of taxes on a sale of property she acquired through her divorce decree, (4) her 2001 payment of taxes on interest earned from her domestic savings accounts, and (5) her representation to UBS that she had sought unspecified tax advice relating to her account.<sup>91</sup> Even if she was not willfully blind, the court held, again, that Annette acted recklessly.<sup>92</sup>

In *United States v. Cohen*,<sup>93</sup> another case involving a divorce, the court refused to grant summary judgment, imposing a 50% willful FBAR penalty as a matter of law against Fariba Cohen. Fariba was a self-employed licensed insurance agent, who filed for divorce from her husband, Saeed Cohen, in 2008.<sup>94</sup>

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<sup>88</sup> *Id.* at \*\*11-12.

<sup>89</sup> *Id.* at \*12.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Notably, the court’s conclusions about willfulness in the FBAR context were almost wholly based on its findings about Annette’s willful blindness to her *tax-filing* obligations, not on evidence specifically about what she knew or should have known about FBARs.

<sup>93</sup> No. CV 17-1652-MWF (JCx), 2019 WL 8231039 (C.D. Cal. Dec. 16, 2008).

<sup>94</sup> *Id.* at \*4.

With the assistance of their attorney, the couple had opened a foreign bank account while they were married over which they both had joint signature authority, and established offshore entities owned 50% by Saeed and Fariba, which in turn held foreign bank accounts.<sup>95</sup> Fariba's signature appeared on documents establishing these foreign bank accounts and she and Saeed met with representatives of at least two of the foreign banks.<sup>96</sup> Fariba asserted, however, that Saeed signed her name on official bank documents.<sup>97</sup> It was also undisputed that Fariba met with the attorney numerous times, although it is not clear whether she ever met with him alone.<sup>98</sup> The government contended that the attorney discussed the FBAR filing requirements with both Fariba and Saeed, while Fariba asserted that this discussion took place only between the attorney and Saeed.<sup>99</sup>

Saeed and Fariba used a CPA to prepare their joint federal income tax returns for 2003 through 2008. Fariba gave information about her income and expenses related to her insurance business to Saeed who then provided them to the CPA. On Schedule B of the returns, the box was checked "No" in response to the question whether the Cohens owned foreign bank accounts, and the returns reported no foreign income.<sup>100</sup>

Saeed was concerned about potential criminal prosecution for failure to report the foreign accounts and, in June 2011, after the divorce was already in process, Saeed and Fariba entered the IRS Offshore Voluntary Disclosure Initiative ("OVDI").<sup>101</sup> Saeed completed the OVDI and ultimately paid over \$25 million of taxes and penalties, including a 50% FBAR penalty. Fariba, however, opted out of the OVDI in the hopes of limiting her liability for the huge willful civil FBAR penalties and any past due taxes on the foreign accounts. Fariba filed delinquent FBARs for 2006 through 2008 on her own, outside of the OVDI, reporting her ownership or authority over various foreign bank

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<sup>95</sup> *Id.* at \*\*2-3.

<sup>96</sup> *Id.* at \*2.

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

<sup>98</sup> *Id.* at \*2.

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

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

<sup>101</sup> This program is no longer in effect. All of the IRS's various iterations of offshore voluntary disclosure programs ended on September 28, 2018.

accounts, including an account at Bank Leumi in Luxembourg. By filing delinquent FBARs outside of the OVDI, Fariba essentially took the position that she did not act willfully in failing to report those accounts, and she obviously hoped to pay only non-willful civil FBAR penalties. Nevertheless, the IRS asserted that Fariba was willful in failing to file FBARs for years when she was married to Saeed, and assessed a willful civil FBAR penalty of over \$1.5 million for 2008.<sup>102</sup>

The court deciding Fariba's case agreed with other decisions that willfulness under the civil FBAR penalty statute includes recklessness and willful blindness, but examined these standards separately.<sup>103</sup> The court ruled that it could not "determine *as a matter of law* that [Fariba] recklessly violated the FBAR requirement,"<sup>104</sup> pointing to conflicting evidence: While evidence suggested that Fariba was involving in opening the Bank Leumi account, she disputed that she knew it was a foreign account, because Saeed had domestic accounts at Bank Leumi; and the parties disputed whether Saeed signed Fariba's signature on paperwork regarding the foreign bank accounts. It was also disputed whether Fariba could easily have accessed the 2008 joint tax return because, while Fariba did interact directly with the CPA on several occasions, she asserted that Saeed controlled her ability to do so, and that she neither reviewed nor signed the return.<sup>105</sup> For the court to decide whether Fariba acted recklessly, it would have to make a determination of her credibility, which it could not do on summary judgment.<sup>106</sup>

For similar reasons, the court held that it could not determine as a matter of law that Fariba was willfully blind to the FBAR requirement. The government emphasized that Fariba went to college and ran a successful insurance business, she allegedly was "long included in the family finances," and she had signature authority over numerous foreign bank accounts with significant balances; consequently "the only way that [Fariba] could have avoided learning of the FBAR requirements was to

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

<sup>103</sup> *Id.* at \*6.

<sup>104</sup> *Id.* (emphasis in original).

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

<sup>106</sup> *Id.* at \*\* 1,8.

make a conscious effort to avoid learning of them.”<sup>107</sup> Fariba, on the other hand, disputed “whether she even had an opportunity to learn about the FBAR filing requirements,” because Saeed controlled her ability to interact with the CPA, who dealt almost exclusively with Saeed, and because Saeed controlled all the couple’s finances and was abusive during the marriage. The court concluded: “Because there are factual issues about recklessness, it is hardly surprising that there are factual issues about willful blindness.”<sup>108</sup>

Some take-aways from these two divorce-related cases are that, first, it is possible for divorcing spouses to deal with unreported foreign accounts separately, with one making a voluntary disclosure and the other taking his or her chances with the IRS. Second, evidence that a husband controlled the couple’s finances, including foreign bank accounts and foreign entities; signed the wife’s name on foreign bank account documents; and limited the wife’s access to the couple’s CPA, *may* suffice to avoid willful civil FBAR penalties (the wife’s testimony in *Cohen* to this effect at least precluded summary judgment).<sup>109</sup> Third, an ex-wife’s testimony that she opened a foreign account to protect funds from her very abusive ex-husband may mean that opening the account does not evidence a willful attempt to hide assets from the IRS. Finally, at some point, a divorce is so far in the past that even an ex-wife who relied on her ex-husband in all financial matters for decades cannot use this fact as evidence to support a claim of non-willfulness when facts subsequent to the divorce belie that claim.

#### **IV. The Willful Civil FBAR Penalty Does not Apply Jointly and Severally, but May Apply Separately to Both Spouses**

It is important to distinguish FBAR penalties from income taxes, tax penalties, and interest, which apply jointly and severally to both spouses who file a joint tax return, unless one spouse

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<sup>107</sup> *Id.*

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

<sup>109</sup> There is no subsequent available decision about whether Fariba was in fact found to be willful.

can claim protection as an “innocent spouse.”<sup>110</sup> Non-willful and willful civil FBAR penalties do not necessarily apply to both spouses, however. The IRS recognizes that: “There is no joint and severable liability with FBAR penalty cases.”<sup>111</sup> Prior IRS guidance provided in greater detail: “FBAR penalties apply and are assessed individually and not jointly (there should only be one individual under examination per FBAR case file). Married couples under FBAR examination are treated as individual cases.”<sup>112</sup>

Because the willful civil FBAR penalty is based on *an individual’s* knowing or reckless and/or willfully blind failure to comply with the FBAR filing requirements, the same penalty clearly cannot be imposed jointly on another individual who was not knowing or reckless and/or willfully blind. In *United States v. Schwartzbaum*, for example, the court held that to be liable for the willful civil FBAR penalty, a “*person* must have willfully failed to disclose the account and file a FBAR.”<sup>113</sup>

*On the other hand*, the IRS can obtain two civil FBAR penalties—one from each spouse—for each spouse’s failure to report a single jointly-held foreign account. This is true for both the non-willful and the willful civil FBAR penalties. In *Jarnagin v.*

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<sup>110</sup> I.R.C. § 6015 (2019).

<sup>111</sup> IRM § 8.11.6.2(11) (Sept. 27, 2018). *Cf.* IRM § 4.26.17.2.4(1) (Dec. 11, 2019) (“If an FBAR examination is initiated, the examiner will set up a separate FBAR case file, one for each individual/entity under FBAR exam. *A separate case file is required for each spouse under FBAR examination.*”) (emphasis added); IRM § 4.26.17.3.1.3(5) (Dec. 11, 2019) (If the IRS seeks a taxpayer’s consent to extend the FBAR statute of limitations: “Consent should be prepared separately for each US person for whom the examination is being conducted (even for spouses filing joint income tax returns)”).

<sup>112</sup> IRM § 8.11.6(5) (2013). *See also* IRM § 8.11.6.4(3), Note (Sept. 27, 2018) (“Married couples under FBAR examination are treated as individual cases and an extension [of the six-year statute of limitations] must be obtained from each individual under examination.”); IRM § 8.11.6.4(1), Note (Sept. 27, 2018) (“The FBAR penalty is assessed separately and *not* jointly. There should be *one* individual under examination per FBAR case file.”) (emphases in original).

<sup>113</sup> No. 18-cv-81147-BLOOM/Reinhart, 2019 WL 3997132 at \*3 (S.D. Fla. Aug. 23, 2019) (emphasis added). This was a prior decision to *United States v. Schwartzbaum* discussed above; the court denied Schwartzbaum’s motion for summary judgment that he was not subject to the willful civil FBAR penalty.

*United States*,<sup>114</sup> which involved non-willful civil FBAR penalties, the IRS “asserted that the Jarnagins were liable for the ‘Report of Foreign Bank and Financial Accounts (FBAR) penalty’ for 2006, 2007, 2008, and 2009, and demanded payment of \$40,000 *each* from Mr. and Mrs. Jarnagin.”<sup>115</sup> In *Cohen*, discussed above, the court addressed whether Fariba Cohen was personally liable for a willful civil FBAR penalty for 2008, including for not reporting at least one account held jointly with Saeed Cohen, the Bank Leumi account, even though this account was presumably reported on Saeed’s delinquent FBARs as part of his OVDI submission, which included 2008. Whatever Saeed might have reported on his delinquent FBARs had no effect on the IRS’s assessment of a willful civil FBAR penalty against Fariba, regardless of whether she in fact owned only a half interest in the account, because the willful civil FBAR penalty is based on 50% “of the balance” in an unreported account, without reference to a taxpayer’s percentage ownership of the account.<sup>116</sup>

The IRS confirms: “There may be multiple civil FBAR penalties if there is more than one account owner, or if a person other than the account owner has signature or other authority over the foreign account. Each person can be liable for the full

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<sup>114</sup> 134 Fed. Cl. 368 (Fed. Cl. 2017).

<sup>115</sup> *Id.* at 374 (emphasis added). The Jarnagins did not allege that this double imposition of penalties was incorrect, but instead argued (unsuccessfully) that they were eligible for the reasonable cause exception.

<sup>116</sup> *Cohen*, 2018 WL 6318837 at \*5; *See also* IRM § 4.26.16.4.4 (Nov. 6, 2015) (emphasis added):

FBAR Filing by Married Couples

- (1) Accounts owned jointly by spouses may be filed on one FBAR. The spouse of an individual who files an FBAR is not required to file a separate FBAR if the following conditions are met:
  - a. All the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse
  - b. The filing spouse reports the jointly owned accounts on a timely, electronically filed FBAR.
  - c. Both spouses complete and sign Part I of FinCEN Form 114a, Record of Authorization to Electronically File FBARs. . . .
- (2) If these conditions are not met (as when both spouses have individual accounts in addition to the jointly-owned accounts), both spouses are required to file separate FBARs, *and each spouse must report the entire value of the jointly-owned accounts.*

amount of the penalty.”<sup>117</sup> Accordingly, while there is no joint and several liability for FBAR penalties, there can be two separate penalties, one for each spouse.

## V. Options for Handling Unreported Foreign Bank Accounts During a Divorce

When an unreported foreign bank account surfaces in a divorce, it cannot be ignored. At a minimum, the taxpayers must start reporting the account correctly on their current year’s tax return. Otherwise, the taxpayers will be committing crimes each April 15th by intentionally filing false current and future years’ tax returns. Further, the taxpayers’ lawyers, advisors, and tax return preparers will now know that there are unreported foreign accounts, and it would be unethical, or even criminal, for a professional to participate (or conspire) in the failure to report the account on the current year’s return. Tax return preparers in particular will have no choice other than to either ensure the account is reported,<sup>118</sup> or withdraw from representing the taxpayers

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<sup>117</sup> IRM § 4.26.16.6(6) (Nov. 6, 2015).

<sup>118</sup> See Treas. Dep’t. Circular 230 (June 2014), *Regulations Governing Practice Before the Internal Revenue Service* (“Circular 230”) § 10.34(a) (effective for returns filed beginning Aug. 2, 2011) (“A practitioner may not willfully [or] recklessly . . . [s]ign a tax return that the practitioner knows or reasonably should know contains a position that . . . [l]acks a reasonable basis”). See also Circular 230 § 10.21 “Knowledge of client’s omission.”:

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

See also Treas. Dep’t, *Guidance to Practitioners Regarding Professional Obligations Under Treasury Circular No. 230, Selected Obligations Under Treasury Circular No. 230* (Aug. 2015) [https://www.irs.gov/pub/irs-utl/guidance\\_regarding\\_professional\\_obligations\\_under\\_circular\\_230.pdf](https://www.irs.gov/pub/irs-utl/guidance_regarding_professional_obligations_under_circular_230.pdf) (“*Errors and Omissions*. . . [citing Circular 230 § 10.21, and elaborating:] Depending on the particular facts and circumstances, the consequences of an error or omission could include (among other things) additional tax liability, civil penalties, interest, criminal penalties, and an extension of the statute of limitations.”); (“*Tax*

completely.<sup>119</sup>

The real question is what to do about the past non-compliance on prior years' returns. Fixing the past failure to report can be sensitive, time-consuming, and very expensive in terms of fees, taxes, and penalties. So, many spouses will prefer to let sleeping dogs lie and wait to see if the IRS ever discovers the unreported bank account. This can be a very risky approach, however, because the IRS has become adept at finding unreported foreign bank accounts and regularly collects information from foreign financial institutions about United States depositors.<sup>120</sup> Also, because the taxpayer must report the foreign account on the current year and future years' returns, the taxpayers

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*Return Positions.* You cannot sign a tax return . . . or advise a client to take a position on a tax return . . . that you know or should know, contains a position . . . for which there is no reasonable basis; . . . or . . . which is . . . a reckless or intentional disregard of rules or regulations.”) (emphases in original).

<sup>119</sup> AICPA Tax Section, *Statements on Standards for Tax Services No. 6, Knowledge of Error: Return Preparation and Administrative Proceedings*, Explanation ¶ 12:

If a member . . . is requested to prepare a tax return for a year subsequent to that in which [an] error occurred, the member should take reasonable steps to ensure that the error is not repeated. If the subsequent year's tax return cannot be prepared without perpetuating the error, the member should consider withdrawal from the return preparation.

*See also* Joseph J. Tapajna, *Ethics Rule Would Require CPAs to Discuss Suspected Illegal Acts with Clients*, AICPA, TAX ADVISOR (Feb. 1, 2018) (noting that proposed rules would require an AICPA member “who determines that a client's illegal or suspected illegal conduct is significant, and the client refuses “to take appropriate steps to address the matter,” must “consider whether withdrawal from the engagement or client relationship is necessary, or whether he or she needs to take further, more serious action”); *Cf.* I.R.C. § 6694(b) (2015) (imposing a minimum penalty of \$5,000 on a tax return preparer who prepares a return “with respect to which any part of an understatement of liability is due to . . . “a willful attempt in any manner to understate the liability for tax on the return . . . or . . . a reckless or intentional disregard of rules or regulations”).

<sup>120</sup> The Foreign Asset Tax Compliance Act (“FATCA”) requires foreign financial institutions (“FFI’s”) to scrub their records to determine whether any accounts have United States indicia, such as a U.S. passport, address, telephone number, etc. If the FFI determines that an account holder may be a U.S. person, it must report this to the IRS. A noncompliant FFI is subject to a 30% withholding tax on payments of interest “or other fixed or determinable annual or periodical gains, profits, and income” from the United States. I.R.C. § 1471 (a),(b) & (c) (2010).

themselves will be giving the IRS notice of the foreign account. Under these circumstances, waiting to see if the IRS will impose civil FBAR penalties, or worse, start a criminal investigation, is like embedding a ticking time bomb into the couple's divorce decree. The better course is to directly address the problem of the unreported foreign bank account and allocate the resulting liability (as well as the remaining asset) between the parties.

There are several ways to address the prior years' tax returns and failure to report the foreign accounts. One way is to quietly file amended tax returns with the necessary schedules and quietly file the past due FBARs. The problem with this approach is that, if the IRS detects the amended returns or the newly-filed FBARs, the chance of an audit and resulting penalties is very high. Fortunately, the IRS has provided other options for taxpayers who wish to come in from the cold and report their previously undisclosed foreign accounts.

The first set of options is for taxpayers who are certain that their failure to report the foreign account was not willful or reckless under the case law discussed above. These taxpayers may use a series of programs that the IRS has established to accept corrections of "innocent" failures to report, including the Streamlined Filing Compliance Procedures and the Delinquent FBAR Reporting Procedures.

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The United States has also entered into numerous intergovernmental agreements ("IGAs") to further the purposes of FATCA. The IGAs broadly take two forms. Under a "Model 1" IGA, a foreign government agrees to collect the financial information that FATCA would otherwise require FFIs to report, and the foreign government itself reports that information directly to the IRS; any FFI within that jurisdiction that sends accountholder information to the foreign government "shall be treated as complying with" FATCA. See U.S. Treasury, *Agreement Between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA* (Nov. 30, 2014), <https://home.treasury.gov/system/files/131/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf>.

Under a "Model 2" IGA, the foreign government agrees to modify its bank privacy laws to the extent necessary to enable its FFIs to report their United States account information directly to the IRS. See U.S. Treasury, *Agreement Between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA* (Nov. 30, 2014), <https://home.treasury.gov/system/files/131/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf>.

A. *The Streamlined Filing Compliance Procedures*

The Streamlined Filing Compliance Procedures (“Streamlined Procedures”) provide a simplified way for a taxpayer who did not willfully fail to report a foreign account and who is not already under audit to come into compliance with a minimal penalty. Note, however, that the IRS has stated that it may terminate these procedures at any time.

Currently, there are two different Streamlined Procedures: one for taxpayers who reside in the United States<sup>121</sup> and one for non-U.S. resident taxpayers.<sup>122</sup> The program for residents allows taxpayers to file only three years of amended tax returns and six years of past-due FBARs. Taxpayers who qualify for this program will owe a limited penalty equal to 5% of the highest balance of their unreported foreign assets during the preceding six years. The program for non-resident taxpayers also requires three years of amended returns and six years of past due FBARs, but is even more forgiving, imposing no penalty at all.<sup>123</sup>

There are, however, two extremely important limitations on participation in the Streamlined Procedures. First, the taxpayers must not have already been contacted by the IRS. Second, a taxpayer must be able to certify, under penalties of perjury, that she did not willfully fail to report her foreign account.<sup>124</sup> Indeed, a taxpayer is required to explain in detail all the facts and circumstances surrounding the foreign account to establish that her failure to report was not willful.<sup>125</sup> This non-willful certification is an

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<sup>121</sup> See IRS, *U.S. Taxpayers Residing in the United States* (Jan. 15, 2020), <https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-in-the-united-states>.

<sup>122</sup> See IRS, *U.S. Taxpayers Residing Outside the United States* (Sept. 19, 2020), <https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-outside-the-united-states>.

<sup>123</sup> The reasoning is that taxpayers who have not lived in the United States have less reason to know about United States tax filing requirements and so their non-willful violations of the FBAR reporting rules should not be subject to penalties.

<sup>124</sup> For U.S. residents, the certification is made on IRS Form 14654, <https://www.irs.gov/pub/irs-pdf/f14654.pdf>. Non-U.S. residents use IRS Form 14653, <https://www.irs.gov/pub/irs-pdf/f14653.pdf>.

<sup>125</sup> Both IRS Form 14654 and IRS Form 14653 require a taxpayer to “[p]rovide specific reasons for your failure to report all income, pay all tax,” and to “[i]nclude the whole story including favorable and unfavorable facts.”

integral part of the Streamlined Procedures, but it may be challenging given the expanded definition of willfulness outlined in the court decisions described above. The IRS reserves the right to audit streamlined submissions and challenge the certification of willfulness.<sup>126</sup> There is always a chance that the IRS will disagree with the certification and attempt to assert the 50% willful civil FBAR penalty or even initiate a criminal prosecution.

### B. *The Delinquent FBAR Submission Procedures*

There is an even more lenient path to compliance for taxpayers who completely failed to file prior year's FBARs but do not owe any additional tax for those prior years, and who have an excuse for why they did not file the FBARs. Taxpayers in this enviable situation, who have not already been contacted by the IRS, can simply file past-due FBARs for the preceding six years together with a statement explaining why they are filing the FBARs late, and the IRS will not impose any penalties for the delinquent FBARs.<sup>127</sup> This forgiving program is very limited in scope, available only to taxpayers who reported all income and paid all tax and simply missed the requirement to file a separate FBAR. As with the Streamlined Procedures, the IRS reserves the right to audit the taxpayer and determine whether he or she really qualifies for no penalty.

### C. *The Voluntary Disclosure Practice*

A third option is available to taxpayers who do not qualify for the foregoing programs and are concerned that a court could find that they willfully failed to file their required FBARs. If there is a real risk that one or both spouses willfully failed to report a foreign account, they should seriously consider using the

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A taxpayer must include a description of her personal and financial background; explain the source of funds in her foreign financial accounts; and explain her "contacts with the account/asset including withdrawals, deposits, and investment/management decisions." And, if the taxpayer relied on a professional advisor, she must provide their name, address, "and a summary of the advice."

<sup>126</sup> See *U.S. Taxpayers Residing in the United States*, *supra* note 121.

<sup>127</sup> See IRS, *Delinquent FBAR Submission Procedures* (Sept. 30, 2020), <https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures>.

IRS Voluntary Disclosure Practice (“VDP”). The VDP provides protection against potential criminal prosecution and is primarily for taxpayers who fear prosecution.<sup>128</sup> However, even if the taxpayer does not fear criminal prosecution for some reason, the VDP may also be the best option to limit civil penalties for taxpayers who were clearly willful and fear that the IRS may impose particularly severe willful civil FBAR and tax penalties.<sup>129</sup>

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<sup>128</sup> See IRS, *IRS Criminal Investigation Voluntary Disclosure Practice* (Oct. 20, 2020), <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-voluntary-disclosure-practice> (“Taxpayers who participate in the Voluntary Disclosure Practice intend to seek protection from potential criminal prosecution. If your violation of the law was not willful, you should consider other options including correcting past mistakes by filing amended or past due returns.”) See also Instructions for Form 14457, Voluntary Disclosure Practice Preclearance Request and Application (“Form 14457 Instructions”) at 7 (“You should not use the IRS-CI Voluntary Disclosure Practice if you did not commit any acts that rise to the level of tax or tax-related crimes.”)

While the IRS states that a “voluntary disclosure will not automatically guarantee immunity from prosecution,” because the IRS does not want to bind itself in the event that facts warranting prosecution later come to light, it also states that the objective of the VDP is to provide taxpayers with “a means to come into compliance with the tax law and avoid potential criminal prosecution.” Form 14457 Preclearance Instructions at 6. See also IRM § 9.5.11.9(i) & (ii) (Sept. 17, 2020) (“Voluntary Disclosure Practice”).

A taxpayer who made a voluntary disclosure of foreign bank accounts under the various iterations of the prior IRS Offshore Voluntary Disclosure Program (“OVDP”), which ended on September 28, 2018, is “not eligible to use the IRS-CI Voluntary Disclosure Practice where the OVDP disclosure period includes one or more overlapping tax years with the IRS-CI Voluntary Disclosure Practice disclosure period,” which is six years. Form 14457 Instructions at 7.

In addition, “[t]axpayers that made any prior voluntary disclosure will be subject to enhanced review by IRS-CI to determine whether accepting another voluntary disclosure violates the requirement of compliance following the disclosure period.” IRM § 9.5.11.9.4 (Sept. 15, 2020).

<sup>129</sup> See IRM § 4.26.16.6.5.3 (Nov. 6, 2015) (“Penalty for Willful FBAR Violations – Calculation”) (“For cases involving willful violations over multiple years, examiners may recommend a penalty for each year for which the FBAR violation was willful.”) *But see* IRM Exhibit 4.26.16-1 (“FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004”) (“manager approval is required to assert willful penalties that, in the aggregate, exceed 50% of the highest aggregate balance of all accounts to which the violations relate during the years at issue, and in no event can the aggregate willful penal-

One of the primary benefits of the VDP is that it limits the look-back period for assessing taxes and penalties to six years.<sup>130</sup> In addition to all the tax and interest due on unreported foreign income, penalties under the VDP include a one-time willful civil FBAR penalty equal to 50% of the highest balance in undeclared accounts during the six-year disclosure period. The IRS does retain the discretion to apply less than the maximum penalty in unusual cases.<sup>131</sup> In addition to the willful FBAR penalty, the IRS also will impose a civil fraud penalty of 75% of the tax due on the year with the highest tax deficiency, in lieu of any other accuracy-related penalties and delinquency penalties.<sup>132</sup> There will also be estimated tax penalties. Penalties for failure to file information returns (such as IRS Form 5471<sup>133</sup> and IRS Form 8938<sup>134</sup>) can be imposed at the IRS examiner's discretion.<sup>135</sup>

Taxpayers seeking to enter the VDP must first obtain "preclearance" by submitting IRS Form 14457-Part I, to allow IRS Criminal Investigation ("IRS C-I") to determine whether the taxpayer is eligible to make a voluntary disclosure. The most

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ties exceed 100% of the highest aggregate balance of all accounts to which the violations relate during the years at issue").

<sup>130</sup> Form 14457 Instructions, *supra* note 128, at 9.

<sup>131</sup> IRM § 4.26.16.6.5 (Nov. 6, 2015) ("Penalty for Willful FBAR Violations"). An IRS examiner has discretion not to impose the maximum civil willful FBAR penalties, after consideration of "all the available facts and circumstances of the case[.]" IRM § 4.26.17.3.6 (Dec. 11, 2019) ("Penalty Application").

<sup>132</sup> Form 14457 Instructions, *supra* note 128, at 6,8.

<sup>133</sup> *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, *supra* note 6.

<sup>134</sup> *Statement of Specified Foreign Financial Assets*, *supra* note 4.

<sup>135</sup> Form 14457 Instructions, *supra* note 128, at 8. An IRS memorandum that expired on November 20, 2020 indicated that a taxpayer could request that accuracy-related penalties be imposed instead of a civil fraud penalty, or non-willful civil FBAR penalties instead of willful penalties, but the memorandum stated that these requests would only be granted in exceptional circumstances. See Dep't of the Treasury, Nov. 12, 2018 Memorandum for Division Commissioners, Chief, Criminal Investigation (Expiration date: Nov. 20, 2020), Control Number: LB&I—09-118-014 ("Expired Nov. 20, 2018 Mem."), discussed in Isabelle Farrar & Hyungjoon Hah, *IRS Announces Voluntary Disclosure Program For Domestic and Offshore Assets* (Monday Feb 12, 2019), 2019 WLNR 5335004. Current IRS authority governing the VDP, i.e. the IRM. and Form 14457 Instructions, however, do not mention the possibility of a taxpayer seeking lesser penalties.

important factor in determining eligibility is “timeliness,” meaning the taxpayer must “come forward before the IRS has information about [the taxpayer’s] noncompliance.”<sup>136</sup> It is too late to make a voluntary disclosure if either spouse, or any related entity, has been notified that the IRS or other law enforcement authority intends to initiate an audit or criminal investigation.<sup>137</sup> In addition, a taxpayer cannot make a voluntary disclosure if income to be reported is from illegal sources.<sup>138</sup> Failure to pay tax on or otherwise report income earned on foreign accounts does not mean that this income is from an illegal source.

The IRS will provide written notification of a preclearance request’s approval or denial, after a minimum of thirty days but possibly much longer.<sup>139</sup> Once a taxpayer receives preclearance approval, she must apply for preliminary acceptance into the VDP. (Final acceptance only comes when an agreement is reached at the conclusion of a VDP examination.) A taxpayer applies for preliminary acceptance by submitting Form 14457-Part II, which is signed under penalties of perjury. Among other things, the taxpayer must estimate the unreported income and the highest balances in any unreported foreign account during the disclosure period. The taxpayer must also provide a comprehensive written narrative that details the whole story of her willful tax or tax-related noncompliance.<sup>140</sup> Married taxpayers submitting a joint Form 14457 must “indicate the intention to dis-

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<sup>136</sup> Form 14457 Instructions, *supra* note 128, at 11. *See also* IRM § 9.5.11.9.1(3) (Sept. 17, 2020) (“Voluntary Disclosure Process”).

<sup>137</sup> Form 14457-Part I, line 9.

<sup>138</sup> Form 14457 Instructions, *supra* note 128, at 7. Note that: “Income from activities determined to be legal under state law but illegal under federal laws is considered illegal source income for purposes of the IRS-CI Voluntary Disclosure Practice.”

<sup>139</sup> Form 14457 Instructions, *supra* note 128, at 11.

<sup>140</sup> The narrative must include “specific facts that detail the complete story of the willful tax or tax-related noncompliance” and “must truthfully and in complete detail explain your noncompliance from inception to the present.” A taxpayer must describe her personal background, including “age, health, education, and general financial history”; and summarize her work and business experience. Form 14457 Instructions, *supra* note 128, at 11, line 7. A taxpayer must also identify professional advisors “who aided in your willful noncompliance.” *Id.*

closure jointly and specify where facts are unique to each spouse.”<sup>141</sup>

If IRS-CI approves the taxpayer to participate in the VDP, it will provide the taxpayer with a Preliminary Acceptance Letter and forward the Form 14457 to an IRS civil section. An IRS examiner will then contact the taxpayer to start an examination.<sup>142</sup> This process can take several months. At the end of the VDP examination, the taxpayer may request IRS Appeals review of the IRS examiner’s assessment of tax and penalties.<sup>143</sup> The VDP is complete when the examination is complete, any appeal has been resolved, and the taxpayer signs a closing agreement and pays or makes arrangements to pay the full amount of tax, penalty and interest determined to be due. A taxpayer who is unable to make full payment may request in advance that the IRS consider other payment arrangements, such as an installment plan.<sup>144</sup>

A taxpayer participating in the VDP must be truthful and make full disclosure of all facts regarding her noncompliance. She must file FBARs and provide proof of their electronic filing. And a taxpayer must not only cooperate with the IRS in determining her tax liability and reporting requirements but must also cooperate in an IRS investigation of “any professional enablers who aided in the noncompliance.”<sup>145</sup> If a taxpayer does not cooperate fully, or provides materially false information during the VDP, her preliminary acceptance may be revoked, and her case may be referred back to IRS-CI for potential prosecution.<sup>146</sup> Or

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<sup>141</sup> Form 14457 Instructions, *supra* note 128, at 13.

<sup>142</sup> IRM § 9.5.11.9.2(5) (Sept. 17, 2020) (“Designated Criminal Investigation Employees”).

<sup>143</sup> The Expired *Nov. 20, 2018 Mem.*, *supra* note 135 provided that: “Taxpayers retain the right to request an appeal with the Office of Appeals.” The current IRM and Form 14457 Instructions, however, do not mention this right. The IRM provides that IRS-CI’s decisions concerning timeliness, completeness, truthfulness, rejection, and revocation of a voluntary disclosure are not subject to administrative or judicial review, 9.5.11.9(4) (Sept 17, 2020), but does not mention administrative review of the examiner’s conclusions at the end of a voluntary disclosure civil examination.

<sup>144</sup> Form 14457 Instructions, *supra* note 128, at 9.

<sup>145</sup> *Id.* at 11.

<sup>146</sup> *Id.* at 11. *See also* IRM § 9.5.11.9.7(1) (Sept. 17, 2020) (“Revocation of Voluntary Disclosure”) (“If it is determined that the taxpayer provided materially false information, the matter will be referred to CI for criminal evaluation

the examiner may expand the examination to include *all tax years* where there was willful noncompliance and apply all applicable penalties to all those years.<sup>147</sup>

Finally, while tax owed on joint returns is joint and several, if one spouse refuses to enter the VDP and the second spouse fears criminal liability, the second spouse may enter the VDP alone, although the IRS discourages this.<sup>148</sup> Then, if taxes and penalties determined to be owed at the end of a VDP examination are not paid in full by the spouse who entered the VDP, an agreement closing the VDP must be signed by both spouses<sup>149</sup> or, if the first spouse refuses to sign the agreement, the IRS will assess each spouse separately.<sup>150</sup> The bottom line is that a spouse who refuses to enter into a joint VDP submission may not end up avoiding liability for the taxes and penalties based on unreported foreign accounts during years when she filed joint returns with her spouse.

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and possible criminal investigation via the fraud referral process.”). Note that: “IRS-CI’s determinations, including but not limited to determinations concerning timeliness, completeness, truthfulness, rejection, and revocation decisions, are not subject to any administrative or judicial review or appeal process.” IRM § 9.5.11.9(4) (Sept. 17, 2020) (“Voluntary Disclosure Practice”).

<sup>147</sup> Form 14457 Instructions, *supra* note 128, at 9.

<sup>148</sup> “A spouse whose conduct was not willful is not required to make a voluntary disclosure but making a joint disclosure will ease the burden of a subsequent civil examination.” *Id.* at 10 (“Joint Returns and Disclosures”).

<sup>149</sup> *Id.* (“When only one spouse enters an agreement and full payment is not received, there will be administrative delays and extra compliance burdens.”)

<sup>150</sup> *Id.*; *See also* IRM § 4.10.8.5.4 (Aug. 11, 2006) (“Waiver of Assessment for Joint Returns”) (“When full payment is not received, and only one spouse signs the waiver, unagreed procedures should be followed for the non-signing spouse.”); IRM § 4.10.8.2.4.2(3) (Sept. 13, 2019) (“Execution and Receipt of Audit Reports and Waivers”) (same).

The “unagreed procedures” for the non-signing spouse will involve sending an IRS “30-Day Letter” to advise her of the outstanding liability and of the right to appeal to IRS Appeals. IRM § 4.10.8.13 (Sept. 13, 2019) (“Unagreed Case Procedures: Preliminary (30-Day) Letters (LB&I Examiners only)”); *see also* IRM § 4.10.8.12 (Sept. 13, 2019) (“Unagreed Case Procedures (SB/SE Field and Office Examiners only)”) (essentially the same).

## **VI. Steps for Deciding How to Handle an Undisclosed Foreign Account in a Divorce**

While discovering an unreported foreign bank account during a divorce proceeding can heighten tensions, create confusion, and pose significant risks for the parties, there is an organized way to address the problem. Of course, this will require a certain amount of cooperation and may take time and money to resolve.

### *A. First, Determine Whether the Failure to Report Was Willful*

The first and most important task after discovery of an unreported foreign account is to determine whether the taxpayers' failure to report could be considered willful under the standards outlined above. If it is clear that one or both spouses knew of the account and intentionally failed to include it on the tax return, there is a chance of criminal prosecution. In this case, the problem is very sensitive and the solution is likely to be expensive. Experienced outside counsel should be consulted.

If it is not clear that either spouse actually knew that the foreign account had to be reported, but there is a real risk that one or both spouses were "reckless," including by signing a joint return which answered the question about a foreign account by checking the box "No" (although, as discussed above, this alone may not be sufficient evidence of recklessness), there is a lesser risk of criminal prosecution, but large willful civil FBAR penalties still may apply.<sup>151</sup> Without the threat of prosecution, the decision of whether to correct the past non-compliance and how to do so becomes a "cost/benefit analysis" based on how best to reduce potential economic exposure.

### *B. Second, Determine the Best Way to Correct the Prior Years' Non-Compliance*

An evaluation of whether the failure to report a foreign account was willful is necessary to determine the best way to address the non-compliance. As noted above, simply ignoring the problem altogether is not an option. And it almost never makes sense to simply file amended tax returns and past due FBARs

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<sup>151</sup> See *supra* discussion of penalties in text at notes 26-30, and discussion of recklessness in text at notes 47-58 and 69-73.

without using one of the IRS programs discussed above, because these programs are designed to provide some protection and penalty relief.

If the taxpayers were clearly not willful (including not being reckless), depending on their facts, they may choose either the Streamlined Procedures or the Delinquent FBAR Procedures. A domestic taxpayer who owes taxes for the prior years but has reasonable cause for failure to report the foreign account may use the Streamlined Procedures and pay the 5% penalty. If no taxes are owed and a taxpayer simply failed to file FBARs, the taxpayer may be eligible for the Delinquent FBAR Procedures and the problem can be fixed with no penalties at all.

In cases where one or both spouses were obviously willful, and particularly where criminal prosecution is possible, the VDP will clearly be the best choice since it provides protection against prosecution and some certainty as to civil penalties. While the civil penalties imposed by the VDP are significant, even higher civil penalties could be imposed if the taxpayer were simply to file amended returns and delinquent FBARs, thereby running a material risk of an examination outside any IRS program and with no limitations on penalties.

*C. Finally, Determine How to Allocate the Tax Liability in the Divorce Proceedings*

The VDP will result in significant taxes and penalties for the parties. The Streamlined Procedures will be much less costly. Either way, however, there will be a tax bill to be paid to the IRS. Both programs require payment, but the IRS may allow payment over time if the taxpayers can prove that they do not have sufficient assets to pay the bill immediately. In a divorce, this will require agreement regarding which spouse will make these payments (or if they will be made jointly) and for how long these payments will be made.

As noted, in most cases, the liability for taxes due on a joint return will be joint and several, but the large willful civil FBAR penalty will be specific to either one or both spouses, which may raise difficult issues in a divorce. If both spouses participate in the VDP, the IRS is typically ambivalent about which spouse pays the taxes and penalties so long as they are in fact paid. However, if there is a chance that the taxes and penalties will not

be paid immediately as part of the VDP or the Streamlined Procedures, then the IRS will want both spouses to be liable.

If one spouse refuses to agree to the liability for taxes and penalties, the non-cooperative spouse will be considered to be outside whichever IRS program they both, or the other spouse, entered. In such cases, the IRS is very likely to audit the non-cooperative spouse and will consider imposing penalties that will not be limited by the terms of the IRS programs. This appears to be what happened to Fariba Cohen in the case of *United States v. Cohen* described above.<sup>152</sup> Mrs. Cohen withdrew from the VDP in the hope that she could avoid the FBAR penalties, but the IRS audited her and assessed civil willful FBAR penalties against her that would have been smaller if she had cooperated with her spouse inside the VDP, and the court upheld those penalties. Thus, there is significant risk for a spouse who does not cooperate in a disclosure if she or he had a significant connection to the account and might be determined to have willfully failed to report the account—but, if this risk is explained clearly to the spouse who does not want to cooperate, it may offer an incentive for that spouse to agree to a coordinated strategy in the divorce.

Regardless of which spouse actually pays the taxes and penalties to the IRS, the obligations to the IRS should be considered to be a liability of the marital estate, just like any other liability.<sup>153</sup> Matrimonial courts typically are not bound by IRS rules, nor by how the IRS goes about assessing and collecting taxes and

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<sup>152</sup> See *supra* discussion in text at notes 101-02, 116.

<sup>153</sup> See, e.g., *Barrow v. Barrow*, 716 S.E.2d 302, 307 (S.C. Ct. App. 2011) (ruling that where the wife “benefited from at least 50% of the total marital income,” she was liable for 50% of an “original tax liability incurred during the marriage”); *Meints v. Meints*, 608 N.W.2d 564, 569 (Neb. 2000) (“[i]ncome tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, we hold that income tax liability should generally be treated as a marital debt”); *Capasso v. Capasso*, 517 N.Y.S.2d 952, 968-69 (N.Y. App. Div. 1987) (“[v]iewing marriage as an economic partnership, . . . spouses should share . . . liabilities as well as assets incurred in the pursuit of marital wealth”; a wife benefitted from monies accumulated through illegal acts charged in an indictment against the husband alone, so “any taxes and interest that may be assessed against either or both of the parties . . . shall be paid and borne equally by them”). Cf. *Repka v. Repka*, 588 N.Y.S.2d 39, 41-42 (N.Y. App. Div. 1992) (deciding that the proceeds of sale of one spouse’s business would be divided equally but only after all applicable taxes owed by either spouse were paid).

penalties, and a state court is free to allocate the liability between the spouses as it sees fit.<sup>154</sup> Accordingly, the best course may be for the taxpayers to cooperate in minimizing the liability with respect to the IRS, and then present their separate cases to the matrimonial court to argue why one or the other should be more or less accountable for the liability arising from an unreported foreign account.

## Conclusion

Unreported foreign bank accounts can create uncertainty, tension, and significant risk during the divorce process. Nevertheless, there is a straightforward way to proceed: First, determine whether the failure to report was willful. Then, depending on whether the failure was willful, determine how to address the prior non-compliance; if done correctly, the parties can avoid the chance of criminal prosecution and minimize the taxes and civil penalties that will inevitably be due to the IRS. Finally, estimate the potential cost of correcting the failure to report the account, including fees, taxes, and penalties, and determine how to allocate those costs as part of the resolution of the divorce.

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<sup>154</sup> See *Estate of Ravetti v. United States*, 37 F.3d 1393, 1395 (9th Cir. 1994) (holding that the wife was an “innocent spouse” under federal law, and so not jointly liable for unpaid federal taxes, but federal law did not “control the state law determination of whether, as an equitable matter, [the wife] should have to contribute anything to [her husband]”); *Barrow*, 716 S.E.2d at 307 (determining that while the wife was liable for 50% of a tax liability incurred during the marriage, the husband was solely liable for penalties arising from his failure to file tax returns); *Meints*, 608 N.W.2d at 569 (determining that spouses were jointly liable for unpaid income tax even though they filed separate tax returns, but the wife who filed timely returns was not jointly liable for penalty and interest, which were “properly treated as a nonmarital debt, solely attributable to the husband’s late filings”); *Barner v. Barner*, 716 So. 2d 795, 798 (Fla. Dist. Ct. App. 1998) (ruling that the spouses were required to pay equal amounts toward back taxes owed the IRS, even though they filed separate tax returns, because monies earned by the husband supported the family unit during the dissolution proceeding and the husband “should not be punished because he is the only one who generates income”); *Capasso*, 588 N.Y.S.2d at 42 (holding that although the wife was jointly liable for taxes and interest due on marital wealth from her husband’s illegal acts, she was not jointly liable for civil fraud penalties that might be imposed because of acts charged in the indictment against her husband, nor for her husband’s criminal fine).

## Guardians Ad Litem: Confidentiality and Privilege

By

Jacqueline M. Valdespino and Laura W. Morgan\*

### Introduction

Every state<sup>1</sup> provides for the appointment of a guardian

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<sup>1</sup> Alabama: ALA. CODE § 26-2A-52 (2020); Alaska: ALASKA STAT. § 25.24.310 (2020); Arizona: 17B ARIZ. REV. STAT. RULES FAM. LAW PROC., r. 10 (2020); Arkansas: *Kimmons v. Kimmons*, 613 S.W.2d 110 (Ark. Ct. App. 1981); California: CAL. FAM. CODE § 3111 (2020) (child custody evaluator); Colorado: COLO. REV. STAT. § 14-10-116 (2020); Connecticut: CONN. GEN. STAT. § 45a-132 (2020); Delaware: DEL. CODE tit. 13, § 701 (2020); District of Columbia: D.C. CODE § 16-914 (2020); Florida: FLA. STAT. § 61.401 (2020); Georgia: GA. CODE § 19-9-3 (2020); Hawaii: HAW. REV. STAT. § 551-2 (2020); Idaho: IDAHO CODE § 32-704 (2020); Illinois: 750 ILL. COMP. STAT. § 5/506 (2020); Indiana: IND. CODE § 31-9-2-50 (2020); Iowa: IOWA CODE § 598.12 (2020); Kansas: KAN. STAT. ANN. § 38-2205 (2020); Kentucky: KY. REV. STAT. ANN. § 625.041 (2020); Louisiana: LA. STAT. ANN. § 9:345 (2020); Maine: ME. REV. STAT. ANN. tit. 4, § 1507 (2020); Maryland: MD. CODE, FAM. LAW, § 1-202 (2020); Massachusetts: MASS. GEN. LAWS c. 215, § 56A (2020); Michigan: MICH. COMP. LAWS § 722.24 (2020); Minnesota: MINN. STAT. § 518.165 (2020); Mississippi: MISS. CODE § 43-21-121 (2020); Missouri: MO. STAT. ANN. § 452.423 (2020); Montana: MONT. CODE § 40-4-205 (2020); Nebraska: NEB. REV. STAT. § 42-358 (2020), § 43-272.01 (2020); Nevada: NEV. REV. STAT. § 126N.101 (2020); New Hampshire: N.H. REV. STAT. § 461-A:16 (2020); New Jersey: N.J. STAT. ANN. § 9:2-4 (2020), N.J. R. CH. DIV. FAM. PT. I. 5:8B (2020); New Mexico: N.M. STAT. ANN. § 40-4-8 (2020), N.M. RULES CIV. P. FOR DIST. CTS. r. 1-053.3 (2020); New York: N.Y. FAM. CT. ACT § 249(a) (2020); North Carolina: N.C. R. CIV. P. r. 17(b)(3) (2020); North Dakota: N.D. CENT. CODE § 14-09-06.4 (2020), § 14-20-47 (2020); Ohio: OHIO REV. CODE § 3109.04 (2020); Oklahoma: OKLA. STAT. tit. 10, § 7700-608 (2020); OKLA. STAT. tit. 43, § 107.3 (2020); Oregon: OR. REV. STAT. § 107.425(1, 3) (2020); Pennsylvania: PA. R.

ad litem in a child custody case<sup>2</sup> as the court may deem necessary.<sup>3</sup> Generally, in a child custody case, a guardian ad litem acts as an independent advocate for a minor, representing not the child's stated wishes as an attorney would, but rather represent-

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CIV. P. r. 1915.11-2 (2020); Rhode Island: R.I. GEN. LAWS § 15-5-16.2(c)(1) (2020); South Carolina: S.C. CODE § 63-3-810 (2020); South Dakota: S.D. CODIFIED LAWS § 15-6-17(c) (2020); Tennessee: TENN. CODE § 36-4-132 (2020); Texas: TEX. FAM. CODE § 107.001(b) (2020); Utah: UTAH CODE § 30-3-11.2 (2020), § 78A-2-703 (2020); Vermont: VT. STAT. ANN. tit. 15, § 669 (2020), VT. FAM. CT. RULES r. 7 (2020); Virginia: VA. CODE ANN. § 16.1-266 (2020); Washington: WASH. REV. CODE § 26.12.175 (2020); West Virginia: W. VA. CODE § 48-9-302 (2020), W. VA. R. PRAC. & P. FAM. CT. 47 (2020); Wisconsin: WIS. STAT. ANN. § 767.407 (2020); Wyoming: *Fleet v. Guyette*, 466 P.3d 812 (Wyo. 2020).

<sup>2</sup> For purposes of this article, "child custody case" comprises determinations of parentage, legal and joint custody, and allocation of parenting time and responsibilities. This has been termed "private custody litigation." Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283, 288 (2004). This article does not address the use of a guardian ad litem in adoption cases, termination of parental rights cases, abuse, neglect, and dependency proceedings, and juvenile justice cases.

<sup>3</sup> For a history of the guardian ad litem, see Katherine Hunt Federle & Danielle Gadowski, *The Curious Case of the Guardian ad Litem*, 36 U. DAYTON L. REV. 337, 339-48 (2012) (providing an extensive discussion of history of the guardian ad litem dating from Roman times); George S. Mahaffey, Jr., *Role Duality and the Issue of Immunity for the Guardian ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 280 (2002) (noting that guardianship policy has its origins in ancient Greece and Rome, but the approach to it taken by courts in the United States is based on the English common law and the doctrine of *parens patriae*, which was appropriated by the colonies and applied to both minors and those incapable of caring for themselves in the form of court appointed guardians); Dana E. Prescott, *Inconvenient Truths: Facts and Frictions in Defense of Guardians ad Litem for Children*, 67 ME. L. REV. 43, 50-53 (2014) (historically situating the role of guardian ad litem from 1851); Charles P. Sherman, *The Debt of the Modern Law of Guardianship of Roman Law*, 12 MICH. L. REV. 124 (1913) (explaining that the concept of appointing a guardian ad litem to represent the interest of a minor finds its origins during the time of the Roman Empire, when the protector of the minor's interests was called a special curator); Ellen K. Solender, *The Guardian Ad Litem: A Valuable Representation or Illusory Safeguard* 2, 7 TEX. TECH. L. REV. 619 (1976) (noting that the United States paralleled the English common law in which the king was the protector of infants and incompetents and could issue a letter patent for the appointment of a guardian). *See also* *Morgan v. Getter*, 441 S.W.3d 94, 111-16 (Ky. 2014) (containing an extensive discussion of the history of courts utilizing guardians ad litem in custody proceedings and the problems arising from that).

ing the “best interests of the child.”<sup>4</sup> The generally accepted dif-

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<sup>4</sup> See generally Hastings, *supra* note 2, at 293 (observing that a guardian ad litem “is a legal representative appointed by the court to protect a child’s best interests in litigation before the court.”). See also UNIF. MARRIAGE & DIVORCE ACT § 310, 9A Part II U.L.A. 13 (1998); AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS FOR CHILDREN IN CUSTODY OR VISITATION PROCEEDINGS 2 (2011).

The roles are often confused. See Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63, 75 (2008) (“[M]any states routinely appoint lawyers as guardians ad litem without careful delineation between the roles.”); Donald N. Duquette & Julian Darwall, *Child Representation in America: Progress Report* From the National Quality Improvement Center, 46 FAM. L.Q. 87 (2012) (tracing the course of the debate over the suitability of these different roles); Victoria Sexton, *Wait, Who Am I Representing? The Need for States to Separate the Role of Child’s Attorney and Guardian Ad Litem*, 31 GEO. J. LEGAL ETHICS 831, 834-35 (2018); see also ABA, *American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131 (Summer 2003) (noting that the term “guardian ad litem” and the role of the guardian ad litem have become “too muddled through different usages in different states, with varying connotations”).

The blame for this confusion is hard to place: “Many states do not explicitly define the required duties and responsibilities of a GAL; as a result, the duties performed by GALs are likely to vary, not only from state to state, but often even from court to court.” Elizabeth Weyer, *Respecting Uncustomary Family Traditions: Reforming the Role of Guardians Ad Litem*, 17 J. GENDER RACE & JUST. 197, 205 (2014). See also Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L.Q. 105, 115–16 (2003) (rejecting outright the term “guardian ad litem” because of its inherent ambiguity); Martin Guggenheim, *The AAML’s Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter’s Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009) (explaining the different models of child representation prescribed by the AAML, ABA, the National Association of Counsel for Children, and the National Conference of Commissioners on Uniform State Laws); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L.REV. 255, 256–57 (1998) (noting that a guardian ad litem has been variously defined as: the person appointed by the court to serve as an investigator to gather information about the parents and the children and report back to the court recommending which parent should have custody; the lawyer appointed to represent the children; an advocate for the “best interests” of the children; a facilitator/mediator; and some combination of the above and more); see also, e.g., *Morgan*, 441 S.W.3d at 106 (“[T]he term ‘guardian ad litem’ is very much a chameleon. According to one commentator, the term is

ference between the child's attorney and the guardian ad litem was summarized in *Schult v. Schult*:<sup>5</sup>

Typically, the child's attorney is an advocate for the child, while the guardian ad litem is the representative of the child's best interests. As an advocate, the attorney should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference; as a guardian, the attorney might decide that, despite such a child's present wishes, the contrary course of action would be in the child's long term best interests, psychologically or financially.<sup>6</sup>

In essence, in its most important role as an advocate for the child's best interests, the guardian ad litem is not an attorney per se, but is an *investigator and reporter*.<sup>7</sup>

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employed in all of the United States' fifty-six jurisdictions, but in no two of them does it have exactly the same meaning.”).

<sup>5</sup> 699 A.2d 134 (Conn. 1997).

<sup>6</sup> *Id.* at 140.

<sup>7</sup> “Today the guardian ad litem serves at the statutory or common law discretion of the judge to play an intermediate (and often indeterminate) role by ferreting out information, gathering evidence, and making recommendations that are intended to protect and foster the best interest of the children.” Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?*, 22 U. ARK. LITTLE ROCK L. REV. 529, 557 (2000). See also Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 190 (2005); Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 46 (2011) (“The investigator role is by far the most common role for the GAL.”); Elizabeth R. Ellis, Comment, *Whose Role Is It Anyway? Deciphering the Role, Functions, and Responsibilities of Representing Children in Custody Matters*, 31 J. AM. ACAD. MATRIM. LAW. 533, 534 (2019) (“Generally, a GAL is appointed to investigate issues so that the court, with as much information as possible, can safeguard the best interests of the minor child.”); Hollis R. Peterson, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1094 (2005/2006) (describing the investigative function of the guardian ad litem); see also, e.g., 750 ILL. COMP. STAT. § 5/506 (2) (2020) (The GAL “shall investigate the facts of the case and interview the child and the parties.”); MASS. GEN. LAWS ch. 215, § 56A (2020) (“Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations.”); MICH. COMP. LAWS § 712A.17d(1)(c) (2020) (The GAL's duties include “determin[ing] the facts of the case by conducting an independent investigation.”).

[T]he attorney's role differs from that of a guardian ad litem . . . . A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate . . . and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed. A court-appointed guardian ad litem's services are to the court . . . . The [guardian ad litem] acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The [guardian ad litem] submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a [guardian ad litem] would be appointed.<sup>8</sup>

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A good summary of the role of the guardian ad litem as investigator is contained in Wisconsin Bar, *Wisconsin Guidelines for Guardians ad Litem in Family Court*, § III (2016), <https://www.wisbar.org/SiteCollectionDocuments/Publications/1-GAL-Practice-Guidelines-2016-Update.pdf>.

<sup>8</sup> *In re M.R.*, 638 A.2d 1274, 1283 (N.J. 1994). *Accord* *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001) (“A guardian ad litem is a person appointed by the court in custody proceedings to serve as an investigator and gather information); *Thunelius v. Posacki*, 220 A.3d 194, 203-04 (Conn. App. Ct. 2020); *Padilla v. Melendez*, 491 S.E.2d 905, 908 (Ga. Ct. App. 1997) (the role of the guardian ad litem is to protect the interests of the child and to investigate and present evidence to the court on the child's behalf); *Lee v. Bramlett*, No. 2017-CA-01202-COA, 2019 WL 925488, \*8 (Miss. Ct. App. Feb. 26, 2019) (“While there is not a single exhaustive list of duties generally expected of a guardian ad litem, one would certainly expect the guardian ad litem to interview the parties, investigate the potential custodial living arrangements, and ensure that the court has the information necessary to make a decision that is in the best interest of the minor child.”); *In re Marriage of Duvall*, 67 S.W.3d 736, 739 (Mo. Ct. App. 2002) (it is imperative that the guardian ad litem investigate and have input on the perspective of the child's best interest and present this to the trial judge); *Baumgart v. Baumgart*, 944 S.W.2d 572, 578-79 (Mo. Ct. App. 1997) (the guardian ad litem has a duty to conduct all necessary interviews with persons having knowledge or contact with the child); *In re Marriage of Campbell*, 868 S.W.2d 148 (Mo. Ct. App. 1993) (the guardian ad litem was acting within the scope of his responsibilities when he conducted discovery, interviewed the parties' older child, actively participated in the trial and offered recommendations to the court); *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 385 (Mo. Ct. App. 1993) (stating that it is imperative that the guardian ad litem investigate and present its perspective to the trial judge, thereby enabling the court to render a decision in accordance with the statutory standard of the best interests of the child); *Shemek v. Brown*, No. A-14-760, 2015 WL 3863168, \*4 (Neb. Ct. App. June 23, 2015) (the guardian ad litem's duties are to investigate the facts and learn where the welfare of the child lies and to report to the appointing court); *Smith v. Smith*, 623 N.W.2d 705, 710 (Neb. App. 2001) (“The guardian ad litem's duties

This key difference, the guardian ad litem as investigator and not attorney, means that unlike an attorney for a party, a guardian ad litem presents evidence to the court in the form of a report and/or testimony.<sup>9</sup>

The most common role of a guardian ad litem is investigator. In order to determine the best interests of a child, the guardian ad litem must investigate the facts, circumstances, and individuals

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are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.”); *Betz v. Betz*, 575 N.W.2d 406, 409 (Neb. 1998) (“The guardian ad litem’s duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.”); *Longo v. Longo*, 2014-Ohio-4880, 2014 WL 551084, \*5 (Ohio Ct. App. Nov. 3, 2014) (“A GAL’s primary duty is to investigate a child’s situation and request a court to act in accordance with the child’s best interests.”); *Kahre v. Kahre*, 916 P.2d 1355, 1362 (Okla. 1995) (the duty of a guardian ad litem in a custody dispute “has almost universally been seen as owing . . . to the court that appointed him, [and] not strictly . . . to the child”); *Kenney v. Hickey*, 486 A.2d 1079, 1081–82 (R.I. 1985) (approving of the use of a guardian ad litem in a custody proceeding to gather information, prepare a report, and make a recommendation to the court); *Creemeens v. Creemeens*, No. M2014-00152-COA-R3-CV, 2015 WL 1946165, \*4 (Tenn. Ct. App. Apr. 29, 2015) (noting that the guardian ad litem shall conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child); *In re Marriage of Swanson*, 944 P.2d 6, 11 (Wash. Ct. App. 1997) (the role of the guardian ad litem is to investigate the relevant facts concerning the child’s situation). *See generally* LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 12:7 at 1253-57 (2020 rev. ed) (describing the guardian ad litem’s “investigative function”); Robert J. Levy, *Custody Investigations in Divorce-Custody Litigation*, 12 J. L. & FAM. STUD. 431 (2010).

<sup>9</sup> *Seaton v. Tohill*, 53 P. 170, 172 (Colo. Ct. App. 1898) (conceiving of a guardian ad litem as an “agent of the court, through whom [the court] acts to protect the interests of the minor”); *James v. James*, 64 So. 2d 534, 536 (Fla. 1953) (“When a guardian is appointed . . . he is regarded as the agent of the court”); *In re Mark W.*, 888 N.E.2d 15, 20 (Ill. 2008) (“The traditional role of the guardian ad litem is . . . to make a recommendation to the court as to what is in the ward’s best interests.”); *Kennedy v. State*, 730 A.2d 1252, 1255 (Me.1999) (“in custody cases, the guardian ad litem has traditionally been viewed as functioning as an agent or arm of the court, to which it owes its principal duty of allegiance” ); *In re Billy W.*, 875 A.2d 734, 752, n.20 (Md. 2005) (discussing the “traditional role” for guardians ad litem in custody cases as the duty to determine the child’s best interests, make a recommendation to the court on that basis, and testify at the custody hearing); *Croghan v. Livingston*, 6 App. Pr. 350 (N.Y. 1858) (at common law “the guardian ad litem was but the agent of the court to attend to [the minor child’s] interests during litigation”).

involved in the case. This begins with interactions with the child and interviews with individuals involved in the child's life. The guardian ad litem will also review relevant school, medical, and family records. In combination with their investigative role, guardians ad litem function as court reporters. After conducting their investigation, guardians ad litem are required to draft reports of their findings and recommendations for the court. Depending on the prior court procedures, the report is either sealed or shared with the other parties in the proceeding.<sup>10</sup>

Because the guardian ad litem is presenting evidence based on investigation, issues concerning admissibility arise. Two prominent authors, Dana E. Prescott and Diane A. Tennes, recently noted in this Journal that over the last forty years, courts have ostensibly tossed all evidentiary rules to the wind:

[F]ederal law, state legislative enactments and state case law and rulemaking have, over the past four decades, created a unique exception to admissibility of guardian ad litem (GAL) facts and opinions in reports and testimony. This extraordinary exception to the rules of evidence and a century of case law essentially waives expert qualifications, methodology, and reliability thresholds, applicable in all other federal and state courts across the country. As such, by legislative fiat but within constitutional proscriptions, a GAL may provide data to the court in the form of hearsay or other third-party information and then select and connect the data to an opinion on the ultimate issue in a child custody or child maltreatment case.<sup>11</sup>

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<sup>10</sup> Sexton, *supra* note 4, at 835-36. *See also, e.g.,* S.G. v. D.C., 13 So. 3d 269, 282 (Miss. 2009) (a guardian ad litem is "obligated to investigate the allegations before the court, process the information found, report all material information to the court, and (if requested) make a recommendation. However, the guardian ad litem should make recommendations only after providing the court with all material information which weighs on the issue to be decided by the court, including information which does not support the recommendation. The court must be provided all material information the guardian ad litem reviewed in order to make the recommendation. Recommendations of a guardian ad litem must never substitute for the duty of a chancellor.").

<sup>11</sup> Dana E. Prescott & Diane A. Tennes, *The Lawyer as Guardian ad Litem: Should "Status" Make Expert Opinions "All-in" and Trump "Gatekeeping" Functions by Family Courts?*, 30 J. AM. ACAD. MATRIM. LAW. 379 (2018). Prescott and Tennes ultimately criticize courts and legislatures that allow guardian ad litem reports to repeat hearsay and opine as to the ultimate issues in the case. *See also* Resa M. Gilats, *Out-of-Court Statements in Guardian ad Litem Written Reports and Oral Testimony*, 33 WM. MITCHELL L. REV. 911 (2007); Emily Gleiss, *The Due Process Rights of Parents to Cross-Examine*

But beyond the issues of hearsay and testifying as to ultimate issues, which Prescott and Tennes so ably discuss,<sup>12</sup> are the issues of confidentiality and privilege.

This article focuses on issues of confidentiality and privilege that may arise for a guardian ad litem and the parties to the custody dispute. Part I will address the confidentiality of conversations with a guardian ad litem. Part II will discuss the degree to which, if any, the guardian ad litem is a holder of the child's privilege. Part III will discuss a related but distinct issue – whether the guardian ad litem can pierce privileges held by the parties.

The authors will conclude that blanket waivers of privilege by the parties should be eliminated. Waivers of privilege by the parties should be unique and tailored to the particular case. The authors will also conclude that if the mental health of the child or a party is in issue, the first resort of the court should be to order a mental health exam, with the clear knowledge by the child or a party that the results are not privileged; piercing the privilege of non-court ordered exams must be a last resort.

## **I. Confidentiality of Conversations with the Guardian Ad Litem**

Because the guardian ad litem is not the “attorney” per se for the child, attorney-client privilege does not extend to conversations between the guardian ad litem and the child, or indeed between the guardian ad litem and any other person.<sup>13</sup> This makes inherent sense because there can be no reasonable expect-

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*Guardians ad Litem in Custody Disputes: The Reality and the Ideal*, 94 MINN. L. REV. 2103 (2010); Steven N. Peskind, *Evidentiary Opportunities: Applicability of the Hearsay Rules in Child Custody Proceedings*, 25 J. AM. ACAD. MATRIM. LAW. 375 (2013); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About “The Best Interests of the Child”? An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 565-66 (1997).

Of course, as a practical matter, the parties can enter into an agreed order that the guardian ad litem can testify as to hearsay statements contained in the report and recommendations provided the guardian ad litem's report contains the name, address, telephone number, and email address of any and all witnesses contacted.

<sup>12</sup> Prescott & Tennes, *supra* note 11, at 379.

<sup>13</sup> “Whereas a child's relationship with the attorney is privileged, the relationship with the GAL is not.” Boumil et al., *supra* note 7, at 52.

tation that statements made to a guardian ad litem would be treated as confidential, given the guardian ad litem's role as reporter to the court.<sup>14</sup>

As stated in *Farris v. McKaig*,<sup>15</sup>

Perhaps the starkest difference between the two is that, unlike [a lawyer for the child], appointment of a GAL “does not create an attorney-client relationship,” and “[c]ommunications between that person and the guardian ad litem are not subject to the attorney-client privilege.”<sup>16</sup>

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<sup>14</sup> *E.g.*, *Robertson v. Central Jersey Bank & Trust Co.*, 834 F. Supp. 705, 710 (D. N.J. 1993) (communications between a minor's parents and a guardian ad litem were not made with the expectation of confidentiality). *Compare* *Green v. Green*, 593 N.W.2d 398, 401 n.2 (N.D. 1999) (“Lawyers who act as both a guardian ad litem and as an investigator should be aware of the conflict if examined by the parties as to statements made to the guardian under an expectation of confidentiality, and advise their clients accordingly.”). *See generally* Tara Lea Muhlhauser & Douglas D. Knowlton, *The Best Interest Team: Exploring the Concept of a Guardian ad Litem Team*, 71 N.D. L. REV. 1021 (1995) (advocating the “best interests team,” comprising a guardian ad litem, physician, mental health professional, each with clearly defined roles and ethical obligations).

<sup>15</sup> 920 N.W.2d 377 (Mich. Ct. App. 2018).

<sup>16</sup> *Id.* at 382. *Accord In re Gabriel C.*, 229 A.3d 1073, 1087 (Conn. App. Ct. 2020); *Linnell v. Linnell*, No. FA064010515, 2010 WL 1224368 (Conn. Super. Ct. Feb. 16, 2010) (holding that notes and materials prepared by a guardian ad litem are not protected from discovery under either the attorney-client privilege or work product doctrine); *In re Guardianship of Mabry*, 666 N.E.2d 16, 24 (Ill. App. Ct. 1996) (citing child representation statute and holding that no attorney-client privilege exists between guardian ad litem and ward because the guardian ad litem's duty is to serve the ward's best interests); *Deasy-Leas v. Leas*, 693 N.E.2d 90 (Ind. App. 1998) (Indiana Code § 31-1-11.5-28 does not confer an attorney/client privilege upon the guardian ad litem/child relationship in that the guardian ad litem is appointed to represent the child's best interests as opposed to the child himself or herself); *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988) (noting that the guardian ad litem represents the child's interests and holding, “Communications between a guardian ad litem and a minor child are not privileged”); *Culbertson v. Culbertson*, 2007-Ohio-4782, 2007 WL 2702450 (Ohio Ct. App. Sept. 17, 2007) (“the requested discovery and the guardian ad litem's Motion for Protective Order do not implicate any privileged matter such as attorney-client privilege or attorney work product. The Magistrate appointed the guardian ad litem in this case to serve as the guardian ad litem for the parties' daughter, not to serve as the attorney for the daughter”); *Radford v. Radford*, 371 P.3d 1158 (Okla. Civ. App. 2016) (there was no attorney-client privilege between the husband and the GAL to protect); *Townsend v. Townsend*, 474 S.E.2d 424, 429 (S.C. 1996) (a guardian ad litem has no absolute

The scholars surveying this area of law have similarly stated that the attorney must be available to testify at the request of the court about the attorney's conclusions regarding what the attorney believes to be the best interests of the child.<sup>17</sup>

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duty of confidentiality to his ward); *Runyon v. Zacharias*, 556 S.W.3d 732 (Tenn. Ct. App. 2018); *Clark v. Alexander*, 953 P.2d 145, 154 (Wyo. 1998) (“As legal counsel to the child, the attorney/guardian ad litem is obligated to explain to the child . . . that the attorney/guardian ad litem is charged with protecting the child’s best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship.”). *See also* R.I. GEN. LAWS § 15–5–16.2(c)(1)(iv)–(v) (2020) (communications between the guardian ad litem and the child are not privileged, but still identifying the child’s best interests as the focus of the court’s determination and the guardian ad litem’s duties); Alaska Bar Ass’n Ethics Op. #85-4 (1985) (stating that the lawyer-client privilege does not apply when the lawyer is appointed to be the child’s guardian ad litem); Ark. Sup. Ct. Admin. Order 15, Attorney Qualifications and Standards § 5(g) (“An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.”); Maine Guardian ad Litem Rules r. 5(g) (2016) (“The guardian shall exercise reasonable discretion about whether to disclose communications made by the child to the court, or to professionals providing services to the child or the family based on the guardian ad litem’s evaluation of the best interest of the child. Any decision by the guardian not to disclose such information, however, shall be subject to review by the court following an in camera review.”); Mass. Prob. & Family Ct. Standing Order 1–05, Standards for Guardians Ad Litem/Investigators §§ 1.3(c), 1.5 & cmt. (making clear that the child’s best interests control and that the guardian ad litem should adhere to professional standards, but also that “[t]here is no attorney-client confidentiality”). *But see* *Bentley v. Bentley*, 448 N.Y.S.2d 559 (N.Y. App. Div. 1982) (holding that communications between minor children and a guardian ad litem in a divorce and custody case are entitled to the lawyer-client privilege).

<sup>17</sup> Alberto Bernabe, *Guarding the Guardians: Should Guardians ad Litem Be Immune from Liability for Negligence?*, 51 LOY. U. CHI. L.J. 1001, 1023-24 (2020). *See also* Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833 (2012); Bruce Boyer, *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1372 (1996) (explaining that information disclosed to a “best interest guardian ad litem” can and should be disclosed when disclosure is in the best interest of the child); Note, *Lawying for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L. J. 1126 (1978); Sexton, *supra* note 4, at 837 (stating that information shared by the child with the guardian ad litem is not privileged); Roy T. Stuckey, *Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1805 (1996) (“In fact, there is a general reluctance by

Because there is no confidentiality as to what is said to a guardian ad litem, many states require that “non-confidentiality warnings” be given to any person or entity providing the guardian with information.<sup>18</sup> This requirement of a warning applies to the child as well.<sup>19</sup>

Nonetheless, at least a few courts have carved out an exception, holding that a guardian ad litem may offer confidentiality to a child and keep that promise if confidentiality is necessary to get the child to provide the guardian ad litem with information.<sup>20</sup> One author has argued that young children simply do not understand the role of a guardian ad litem, and assume that the “secrets” they tell the guardian ad litem will remain secret. In such a case, confidentiality should be the default.<sup>21</sup>

Another issue that arises with regards to the guardian ad litem holding the child’s confidences is that a guardian ad litem may in fact be a lawyer, or may hold other professional licensure such as psychologist, psychiatrist, therapist, social worker, or counselor.<sup>22</sup> Some professionals confuse the rules of confidentiality under a profession’s ethical guidelines and codes, on the one

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judges and legislators to recognize a privilege in any nonprofessional relationships other than between husbands and wives.”).

<sup>18</sup> Boumil, et al., *supra* note 7, at 55.

<sup>19</sup> *Id. E.g.*, DEL. CODE ANN. tit. 29, § 9007A(c) (2020) (“The attorney guardian ad litem’s duty is to the child. The scope of the representation of the child is the child’s best interests. The attorney guardian ad litem shall have the duty of confidentiality to the child unless disclosure is necessary to protect the child’s best interests.”). *See also* Stuckey, *supra* note 17, at 1792.

<sup>20</sup> *E.g.*, *In re Kalil*, 931 A.2d 1255 (N.H. 2011).

<sup>21</sup> Emily Buss, “*You’re My What?*” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699,1716 (1996).

<sup>22</sup> *See, e.g.*, MAINE GUARDIAN AD LITEM RULE (2)(b)(2)(A):

Credentials. The applicant must (i) Possess a current valid license to practice law in the State of Maine; (ii) Possess a current valid license to practice as a Licensed Clinical Social Worker (LCSW), Licensed Professional Counselor (LPC), Licensed Clinical Professional Counselor (LCPC), Licensed Master Social Worker (LMSW), Licensed Marriage Family Therapist (LMFT), Licensed Pastoral Counselor (LPaC), psychologist, or psychiatrist in the State of Maine; or (iii) Possess a Certification of Qualification by the Director of the CASA program, provided that a CASA Certification qualified individual may be appointed a guardian ad litem only pursuant to 22 M.R.S. § 4005; or (iv) Have been on the GAL roster on the effective date of the implementation of these Rules (September 2015), have completed the core

hand, with the role of the guardian ad litem and the guardian's duty to the court and child, on the other hand. The two overlap but are not co-extensive.<sup>23</sup> Thus, regardless of professional licensure, a guardian ad litem must follow the rules which guide the law in that jurisdiction vis a vis guardians ad litem, and operate carefully within that role. If a psychologist, for example, acting as a guardian ad litem decides to conduct testing, clinical evaluations, or therapeutic interventions, that role-confusion could create ethical and legal traps. The confidentiality as a guardian ad litem must be governed by that role above any others, because it is in this role that the guardian ad litem is reporting to the court.

## **II. The Guardian Ad Litem as Holder of the Child's Privilege**

A guardian ad litem engaged in the investigative role is the holder of the child's privilege. Thus, the guardian ad litem determines (sometimes as a recommendation to a judge, sometimes within his or her own powers) whether the child's privilege should be asserted or waived with regard to doctors, therapists,

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training required by these Rules, and if the applicant holds professional licenses, be in good standing.

In Massachusetts, see *Massachusetts Law About Child Custody and Parenting Time*, MASS.GOV, <https://www.mass.gov/info-details/massachusetts-law-about-child-custody-and-parenting-time> (last visited Nov. 3, 2020), and *Standards for Category F Guardian ad Litem Investigators*, MASS.GOV, <https://www.mass.gov/doc/standards-for-category-f-guardian-ad-litem-investigators/download> (last visited Nov. 3, 2020).

<sup>23</sup> See James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluation: Five Years After American Psychological Association Guidelines*, 32 *PROF. PSYCHOL.: RES. & PRAC.* 261 (2001); Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the "Legal Ethics" Perspective*, 73 *IND. L.J.* 665 (1998); Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 *KY. CHILD. RTS. J.* 15 (Mar. 1991).

As a matter of practice, the attorney should consider including in the order appointing the guardian ad litem a provision detailing the applicability of waivers of confidentiality if the guardian ad litem to be appointed is a professional whose professional code of ethics imposes duties and/or privileges that would be inapplicable when acting as a guardian ad litem.

and social workers who have treated the child.<sup>24</sup> The guardian ad litem, not the parents, has this power, because parents would necessarily have a conflict between their own interests and the child's in asserting or waiving privilege.<sup>25</sup>

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<sup>24</sup> Gil v. Gil, 892 A.2d 318, 331 (Conn. App. Ct. 2006) (holding that the child's guardian ad litem was in the best position to evaluate and to exercise the child's confidentiality rights, and thus the guardian ad litem invoked the child's psychologist-patient privilege; therefore, the testimony of the child's current psychologist was not admissible in a contempt proceeding brought against the ex-wife for denying the ex-husband his court-ordered visitation with the child); Garcia v. Guiles, 254 So.3d 637, 640 (Fla. Dist. Ct. App. 2018) (deciding that neither parent can waive a child's patient/psychotherapist privilege, in an action to modify the timesharing of the child, because the subject matter of the litigation is the child's welfare, and holding that the guardian ad litem holds the privilege); PO v. JS, 377 P.3d 50, 58 (Haw. Ct. App. 2018), *aff'd in part, vacated in part on other grounds*, 393 P.3d 986 (Haw. 2017); Evans v. Hess, NOS. 2013-CA-002072-ME, 2014-CA-001512-ME, 2015-CA-000043-ME, 2016 WL 1389799, \*8 (Ky. Ct. App. 2018) (when a guardian ad litem is appointed in a child custody proceeding, it is the guardian ad litem, not the parent, who may invoke or waive the child's psychotherapist-patient privilege); Miller v. Bosley, 688 A.2d 45, 54 (Md. Ct. Spec. App. 1997) (deciding that a court-appointed attorney representing the child in an action in which custody, visitation, or support is contested may exercise certain waivers of child's privileges, act as guardian ad litem, and serve as the court's investigator); Marina C. v. Dario D., 114 N.Y.S.3d 495, 497 (N.Y. Sup. Ct. 2019) (holding that the trial court erred by failing to appoint a guardian ad litem who could have objected to testimony by a child's therapist as to confidential discussions in therapy and the father's testimony regarding child's statements); *see also In re Zappa*, 631 P.2d 1245, 1251 (Kan. Ct. App. 1981) (holding that a parent cannot assert or waive the child's privilege in a termination of parental rights case); State v. S.H., 465 N.W.2d 238, 240 (Wis. Ct. App. 1990) (in a case in which the father was charged with assault of the children, the psychologist-patient privilege asserted by the guardian ad litem on behalf of the children supersedes the father's authorization for release of the children's treatment records); Alaska CINA r. 9(b)(3)(B) (2015) (noting that the child or the child's GAL holds the privilege during dependency and neglect proceedings); CAL. WELF. & INST. CODE § 317(f) (West Supp. I 2015); MASS. GEN. LAWS c. 233, § 20B (2014). *See generally* Boumil et al., *supra* note 7 (evaluating under what circumstances GALs have the power and at times the responsibility to waive children's privileges); Starla Doyal, *The Guardian Ad Litem as the Child's Privilege Holder*, 87 U. COLO. L. REV. 205 (2016); Donald Tye, *The Preferences and Voices of Children in Massachusetts and Beyond*, 50 FAM. L.Q. 471 (2016).

<sup>25</sup> L.A.N. v. L.M.B., 292 P.3d 942, 948 (Colo. 2013) (en banc) (holding that the child patient's parent cannot hold the child's psychotherapist-patient privilege when the parent's interests as a party in a proceeding involving the child might give the parent an incentive to strategically assert or waive the

### III. The Ability of a Guardian ad Litem to Pierce the Privilege of the Parties

A much more difficult question than those addressed above is the ability of the guardian ad litem to pierce the privilege of the parties to the child custody case and demand what would otherwise be privileged medical and mental health records.<sup>26</sup> The

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child's privilege in a way that could contravene the child's interest in maintaining the confidentiality of the patient-therapist relationship); *In re Berg*, 886 A.2d 980, 988 (N.H. 2005) (ruling that in divorce proceedings, the trial court or GAL instead of the father must determine if the waiver of privilege as to a psychologist's records is in the child's best interest); *Attorney ad Litem v. Parents of D.K.*, 780 So.2d 301, 307 (Fla. Dist. Ct. App. 2001) ("Where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child's behalf."); *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 409 (Mo. 1996) (determining that where the privilege is claimed on behalf of the parent rather than the child, and the welfare and interest of the child would not be protected by the parent, the parent should not be permitted to assert or waive the privilege); *Bond v. Bond*, 887 S.W.2d 558, 561 (Ky. Ct. App. 1994) ("custodial parent may not invoke the psychotherapist-patient privilege for a child in custody litigation"); *In re Adoption of Diane*, 508 N.E.2d 837, 840 (Mass. 1987) ("In a case such as this, where the parent and child may well have conflicting interests, and where the nature of the proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf."); *Compare Nagle v. Hooks*, 460 A.2d 49, 51 (Md. 1983) (it is "patent that [a parent involved in a custody battle] has a conflict of interest in acting on behalf of the child in asserting or waiving the privilege of nondisclosure," and, therefore, "the appointment of an attorney to act as the guardian of the child in the instant matter is required"), *with Berg*, 886 A.2d at 988 (holding that even if parents and a guardian ad litem agree that a child's therapist-client privilege should be waived, the child has a separate interest that the court must consider, and if the minor is mature enough to assert the privilege personally, that assertion may be given substantial weight).

<sup>26</sup> The court may generally obtain the records of a court ordered physical or psychological exam; there is no expectation of privilege for these exams, and claims of privilege are expressly waived for such exams. *E.g.*, *Johnston v. Weil*, 920 N.E.2d 494, 500 (Ill. App. Ct. 2009) (ruling that the ex-wife's participation in the evaluation performed by the court-appointed evaluator, who was a psychiatrist, did not constitute a therapeutic relationship, and thus, the ex-wife could not invoke the protections of the Mental Health and Developmental Disabilities Confidentiality Act with respect to communications made by the ex-wife to the psychiatrist); *Segarra v. Segarra*, 932 So.2d 1159, 1161 (Fla. Dist. Ct. App. 2006) (holding that no privilege obtained when there was no expectation

first issue that arises is, may a guardian ad litem, without an express and clear waiver from a parent,<sup>27</sup> obtain the confidential/

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of privacy, such as court-ordered counseling). *Compare In re Alethea W.*, 747 A.2d 736, 739 (Md. Ct. Spec. App. 2000) (explaining that since court ordered psychological examinations are performed for the benefit of the court and not the individual and with the understanding that no privilege of confidentiality applies, the purpose of the privilege, which is to aid in providing effective treatment by encouraging free and open communication between the therapist and the patient, is not served and, accordingly, does not apply), *with Gottschalk v. Gottschalk*, 715 S.E.2d 715 (Ga. Ct. App. 2011) (agreeing that the trial court erred in stating that the appellant had no privilege with regard to his therapy because it was court-ordered. “As the appellant’s relationship with the court-ordered therapist involves or *contemplates treatment*, his communications with the therapist are privileged.”) (emphasis added).

Just because these records are discoverable does not mean, however, that a court has the complete authority to order such an exam. Rather, there must be some articulable basis making such an examination necessary, i.e., that good cause exists for the examination. *E.g.*, *Lopes v. Ferrari*, 204 A.3d 1254 (Conn. App. Ct. 2019); *Oldham v. Greene*, 263 So. 3d 807 (Fla. Dist. Ct. App. 2018); *Kelly v. Kelly*, 451 P.3d 429 (Idaho 2019); *Jones v. Jones*, 274 So.3d 811 (La. Ct. App. 2019); *Le-Blanc v. Andrews*, 931 So. 2d 683 (Miss. Ct. App. 2006); *Siegeff v. Iqbal*, 122 N.Y.S.3d 328 (N.Y. App. Div. 2020); *In re Marriage of King*, 371 P.3d 1139 (Okla. Civ. App. 2015); *Jordan v. Jackson*, 876 A.2d 443 (Pa. Super. Ct. 2005); *Gentile v. Gentile*, No. M2008-02685-COA-R3-CV, 2010 WL 2812627 (Tenn. Ct. App. July 19, 2010); *Davis v. Davis*, No 13-01-707-CV, 2003 WL 21355239 (Tex. Ct. App. June 12, 2003); *Smith v. Rawson*, No. 2012-243, 2012 WL 6633514 (Vt. Dec. 13, 2012). *See also Schouw v. Schouw*, 593 So.2d 1200, 1201 (Fla. Dist. Ct. App. 1992) (“A court ordered psychiatric or psychological examination is the suggested method for balancing the court’s need to determine the parents’ mental health as it relates to the best interest of the child, and the need to maintain the confidentiality between a treating psychotherapist and the patient.”).

<sup>27</sup> *Garcia v. Guiles*, 254 So. 3d 637, 640 (Fla. Dist. Ct. App. 2018) (“In situations in custody cases where a parent’s mental health is called into question, allowing parties to directly access other’s medical records, over their objection, is departure from essential requirements of law; *but when privilege is waived*, the trial court is faced with an entirely different situation.”) (emphasis added); *Zarzaur v. Zarzaur*, 213 So. 3d 1115 (Fla. Dist. Ct. App. 2017) (holding that a wife’s participation in independent psychological evaluation did not waive privilege, but her *agreement* to provide past mental health records to the independent psychologist amounted to voluntary waiver of her psychotherapist-patient privilege with respect to mental health records that were actually provided to an independent psychologist) (emphasis added); *Weekley v. Weekley*, 972 N.Y.S.2d 376, 378 (N.Y. App. Div. 2013) (statements made by the mother’s fiancé to his counselor were not privileged and thus were not prohibited from being the subject of testimony during the hearing on the father’s petition to

privileged medical and psychological records of a parent merely because the parties are engaged in custody litigation.<sup>28</sup>

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modify a prior order awarding primary physical custody of the parties' child to the mother, where the mother's fiancé had *expressly authorized* his counselor to disclose privileged communications)(emphasis added); *Grosberg v. Grosberg*, 68 N.W.2d 725, 727 (Wis. 1955) (noting that the record on appeal in a divorce case did not establish that the trial court had required the wife's waiver of privilege as to the psychiatrist's testimony, but established that she had freely and voluntarily waived the privilege).

As noted by a child and family lawyer, however, parents waive their privilege all too often unknowingly:

For years, guardians ad litem and child representatives have given generic consent forms to parents, asking them to waive their personal therapist/patient privilege during litigation regarding their children. The parents (often blindly) sign consents on behalf of their minor children, also because their attorney or the GAL asks them to. Just one parent's consent is enough to waive a minor child's mental health privilege. If a child is over 12 years old, a parent usually tells them that they must sign the consent, and the child routinely complies. Many court-appointed experts begin their investigation, asking for consents to be signed by all.

Kathryn L. Ciesla, *It's Not Broken, So Don't Try to "Fix" It: Keep Counseling Confidential*, 34 CBA REC. 26 (July/Aug. 2020). See also JEFF ATKINSON, 2 MODERN CHILD CUSTODY PRACTICE § 14-5 (2d ed. Supp. 2019) (form release to guardian ad litem); CHILDREN'S LAW CENTER, 2020 GUARDIAN AD LITEM TRAINING MANUAL 3 (blanket release), <https://www.childrenslawcenter.org/sites/default/files/attachments/resources/Tab%2010.pdf>.

Implied waiver is discussed *infra* in text at notes 31-32.

<sup>28</sup> See Amy J. Amundsen, *Balancing the Court's Parens Patriae Obligations and the Psychological-Parent Privilege in Custody Disputes*, 28 J. AM. ACAD. MATRIM. LAW. 1 (2015) (surveying the states on the issue, and arguing that the studies that support the view that privilege should not be waived based on the argument that privilege encourages treatment are flawed); Boumil, et al., *supra* note 7; Marcia M. Boumil, Debbie F. Freitas & Cristina F. Freitas, *Waiver of the Psychotherapist-Patient Privilege: Implications for Child Custody Litigation*, 22 HEALTH MATRIX 1 (2012); Gale Humphrey Carpenter, *Overriding the Psychologist-Client Privilege in Child Custody Disputes: Are Anyone's Best Interests Being Served?*, 68 UMKC L. REV. 169 (1999); Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAW. 453 (2013); James K. Filan, Jr., *Psychotherapist-Patient Privileges in Child Custody Disputes: Connecticut and Beyond*, 13 BRIDGEPORT L. REV. 281 (Winter 1993) (focusing on Connecticut law); Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499 (2008); Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963, 981 (1998)

As stated by prominent scholars in this area,

The classic family courtroom drama over psychotherapist-patient privilege often revolves around whether litigants put their mental health at issue, or whether privilege should yield to the child's welfare. Contested child custody proceedings often add another wrinkle to the analysis: whether the patient waives her privilege by authorizing the psychotherapist to be interviewed by a guardian ad litem (GAL).<sup>29</sup>

Right now, more states than not have held that merely requesting custody, without more, does *not* put one's mental health in issue, with the plurality of states taking an intermediate position.<sup>30</sup> Thus, in most states, the mere allegation of mental insta-

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(arguing that an absolute psychotherapist-patient privilege is within the constitutional right to privacy, and that patients' interests in confidentiality of private affairs are included in the liberty interests protected by the Due Process Clause of the Fifth and Fourteenth Amendments); Ralph Slovenko, *Child Custody and the Psychotherapist-Patient Privilege*, 19 J. PSYCHIATRY & L. 163, 171 (1991); Carlton D. Stansbury, *Accessibility to a Parent's Psychotherapy Records in Custody Disputes: How Can the Competing Interests Be Balanced?*, 28 BEHAV. SCI. & L. 522 (July/Aug. 2010); Courtney Waits, *The Use of Mental Health Records in Child Custody Proceedings*, 17 J. AM. ACAD. MATRIM. LAW. 159 (2001).

It is worth noting that no physician or mental health professional privilege applies to court ordered examinations. ELROD, *supra* note 8, at § 9:18 at 1090. See *supra* sources in note 27.

<sup>29</sup> Boumil et al., *supra* note 29, at 20.

<sup>30</sup> For cases holding that a parent does not put his or her mental health in issue by a prayer for custody, see *Lester v. Lester*, 690 So. 2d 378, 380 (Ala. Civ. App. 1996); *Hodson v. Hodson*, No. S-10572, 2003 WL 22815939 (Alaska Nov. 26, 2003); *Darab Cody N. v. Olivera*, 242 Cal. Rptr. 3d 891, 897 (Cal. Ct. App. 2019); *In re Marriage Meteer*, No. B154682, 2003 WL 1084650 (Cal. App. Mar. 12, 2003) (rejecting the “[h]usband’s theory that by filing the marital dissolution petition and requesting child custody, [w]ife waived the psychotherapist-patient privilege”); *Simek v. Super. Ct.*, 172 Cal. Rptr. 564, 568 (Cal. Ct. App. 1981); *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990); *Reno v. Reno*, 282 So.3d 163, 170 (Fla. Dist. Ct. App. 2019); *Roper v. Roper*, 336 So. 2d 654, 657 (Fla. Dist. Ct. App. 1976); *Weksler v. Weksler*, 325 S.E.2d 874, 874-75 (Ga. 1985) (holding that the wife’s clinical records were admissible except for those portions that were privileged under the psychiatrist-patient privilege); *Barker v. Barker*, 440 P.2d 137, 139 (Idaho 1968); *L.G. v. S.L.*, 76 N.E.3d 157, 169 n.11 (Ind. Ct. App. 2017); *Laznovsky v. Laznovsky*, 745 A.2d 1054, 1066 (Md. Ct. Spec. App. 2000); *Navarre v. Navarre*, 479 N.W.2d 357, 358 (Mich. Ct. App. 1991) (“potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships.”); *Belding v. Belding*, 736 So. 2d 425, 431 (Miss. Ct. App. 1999); *State ex rel Husgen v. Stussie*, 617 S.W.2d 414 (Mo. Ct. App. 1981) (limited in part by *Roth v. Roth*, 793 S.W.2d 590, 592 (Mo. Ct. App. 1990),

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which held that a party may not invoke physician-patient privilege in any custody proceedings involving known or suspected child abuse or neglect); *Kinsella v. Kinsella*, 696 A.2d 556, 576-77 (N.J. 1997); *Spencer v. Spencer*, 301 S.E.2d 411, 413 (N.C. Ct. App. 1983); *Weaver v. Weaver*, No. 2003CA00096, 2004 WL 1784595, \*8 (Ohio Ct. App. Aug. 9, 2004); *Avery v. Nelson*, 455 P.2d 75, 78 (Okla. 1969) (finding that a party to litigation does not waive the privilege against compulsory disclosure of physician-patient communications simply by placing in issue in litigation his own physical condition or disability); *State v. Evans*, 317 P.3d 290, 293 (Or. Ct. App. 2013) (“[Oregon law’s] limited reach does not extend to psychotherapist-patient privileged statements that do not mention a child’s abuse, or the cause thereof.”); *Gates v. Gates*, 967 A.2d 1024, 1032 (Pa. Super. Ct. 2009); *Osdoba v. Kelley-Osdoba*, 913 N.W.2d 496, 505 (S.D. 2018); *Culbertson v. Culbertson*, 393 S.W.3d 678, 686 (Tenn. Ct. App. 2012) (*Culbertson I*); *Clausen v. Clausen*, 675 P.2d 562, 565 (Utah 1983); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 424 (Wis. 1995). *See also* 740 ILL. COMP. STAT. § 110/10(a)(1) (2020) (“[F]or purposes of this Act, in any action brought or defended under the [Marriage Act], or in any action in which pain and suffering is an element of the claim, mental condition shall not be deemed to be introduced merely by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or communication.”).

For cases holding that a parent *does* put his or her mental state in issue in a custody case, see *Pliego v. Hayes*, 86 F. Supp. 3d 678, 691 (W.D. Ky. 2017) (determining that the father put his mental health in issue by seeking return of his child under the Hague Convention); *Slaton v. Slaton*, 682 So.2d 1056 (Ala. Civ. App. 1996); *In re Marriage of Hall*, 241 P.3d 540, 543 (Colo. 2010) (en banc); *Shumaker v. Andrews*, 1992 WL 510196, \*4 (Del. Fam. Ct. Dec. 3, 1992) (holding that seeking visitation places a party’s mental condition at issue); *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990) [superceded by IND. CODE § 16-39-3 (“Release of Mental Health Records in Investigations and Legal Proceedings”)]; *Atwood v. Atwood*, 550 S.W.2d 465, 467 (Ky. 1976) (recognizing that a specific legislative exception to the psychiatrist-patient privilege applies by operation of law to a parent seeking custody); *Dawes v. Dawes*, 454 So. 2d 311, 312-13 (La. Ct. App. 1984); *Clark v. Clark*, 371 N.W.2d 749, 752 (Neb. 1985) (relying on NEB. REV. STAT. § 27-504(4)(c)); *Smith v. Gayle*, 834 S.W.2d 105 (Tex. App. 1992).

As noted in *Culbertson v. Culbertson*, 455 S.W.3d 107, 134 (Tenn. Ct. App. 2014), however, there is an “intermediate approach” whereby the court will conduct an in camera review to determine what may be admitted or disclosed:

Some jurisdictions that follow this less protective approach mitigate its harsh effects by directing trial courts to review the privileged documents in camera to determine whether the relevancy of the documents is outweighed by the prejudicial effect. *See Kinsella*, 696 A.2d at 581-82 (citing *Owen*, 563 N.E.2d at 608; *Morey v. Peppin*, 353 N.W.2d 179, 183 (Minn. Ct. App. 1984) [noting that before disclosing therapy records, the court is required to review the records in camera in or-

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der “to prevent disclosures that are irrelevant to the custody question or otherwise annoying, embarrassing, oppressive, or unduly burdensome”), *rev’d on other grounds*, 375 N.W.2d 19 (Minn. 1985); *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749, 752–53 (1985) [stating that since seeking custody “does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant,” a court must review evidence in camera for relevance before disclosure]; *Kirkley v. Kirkley*, 575 So.2d 509, 510–11 (La. Ct. App.1991).

In addition to Minnesota, Nebraska, Louisiana, and New Jersey cited in *Culbertson*, New York takes this intermediate position, holding that while it is true that parties to a contested custody proceeding place their physical and mental condition at issue, the court has broad discretionary power to limit disclosure and grant protective orders in a custody case. *Stephen KK v. Kristina KK*, 69 Misc. 3d 186, 2020 WL 3096292 (N.Y. App. Div. Apr. 15, 2020); *Ryan v. Nolan*, 21 N.Y.S.3d 469 (N.Y. App. Div. 2015); *Wilson v. Hendrickson*, 931 N.Y.S.2d 170 (N.Y. App. Div. 2011); *Matter of Cool v. Malone*, 887 N.Y.S.2d 334 (N.Y. App. Div. 2009); *Garvin v. Garvin*, 556 N.Y.S.2d 699 (N.Y. App. Div. 1990).

Massachusetts apparently takes this intermediate position as well. In *P.W. v. M.S.*, 857 N.E.2d 38, 44-45 (Mass. App. Ct. 2006), the court stated:

If there is no genuine issue of visitation, then there is no basis for an order requiring disclosure of the father’s medical or psychiatric records. If there is a genuine issue regarding visitation, then the judge must make a determination whether the medical and psychiatric records are relevant to the resolution of the terms of visitation. The judge should issue an order, reasonably tailored in time, for the father to produce the records. The father may then segregate the records he alleges are privileged and make an appropriate claim of privilege supported by affidavit. It is the judge’s responsibility then to determine whether the records are privileged and, if so, whether their relevance and importance to the welfare of the children outweigh the privilege. If the judge determines that privileged material should be disclosed to the GAL, he or she may enter such an order with appropriate limitations on its disclosure and orders of confidentiality.

For other states adopting this intermediate approach, see *Lowdermilk v. Lowdermilk*, 825 P.2d 874, 879 (Alaska 1992); *Blazek v. Superior Ct.*, 869 P.2d 509, 516 (Ariz. Ct. App. 1994) (stating that the court conducts an in camera review to determine what information may lead to admissible evidence); *In re Marriage of Kiister*, 777 P.2d 272, 275-76 (Kan. Ct. App. 1989) (“In child custody matters and visitation rights, the court’s paramount concern is the welfare the child. Thus, it was error to have failed to grant the discovery order. In-camera inspection is available to prevent disclosure of irrelevant evidence at trial.”); *Sweet v. Sweet*, No. 2004-A-0062, 2005 WL 3610481, \*2 (Ohio Ct. App. Dec. 29, 2005) (determining that the court must conduct an in camera

bility and the denial of such instability similarly does not put mental health in issue.<sup>31</sup>

The law in Virginia presents an interesting case study as to the volatility of this issue. After some lobbying by mental health professionals, in 2003, the Virginia Legislature enacted Virginia Code § 20-124.3:1, barring mental health professionals from testifying in child custody cases without the parent's explicit consent. After a number of cases came down barring such testimony,<sup>32</sup> the family law bar lobbied for repeal of the statute,<sup>33</sup> and it was re-

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review for disclosure and only those records that are "causally or historically" related to a condition relevant for custody is disclosed).

This authors wonder whether the intermediate approach has validity in light of the following statement by the U.S. Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996):

We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 393.

<sup>31</sup> *Peisach v. Antuna*, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989) ("[T]he custodial parent's denial of allegations of mental instability does not operate as a waiver of the patient-psychotherapist privilege. To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity.").

<sup>32</sup> *E.g.*, *Rice v. Rice*, 638 S.E.2d 702, 706 (Va. Ct. App. 2006) (holding that because the testimony of the child's therapist was being offered by the child's grandparents, it was likely that the substance of the testimony would be adverse to mother's position in the case, and therefore the mother's consent to the therapist's testimony must be given under Code § 20-124.3:1); *Schwartz v. Schwartz*, 616 S.E.2d 59, 65 (Va. Ct. App. 2005) (finding that the trial court committed reversible error by admitting testimony from the therapist over the mother's objection).

<sup>33</sup> *E.g.*, Katherine C. Dewart, *A Privilege for "Mommy Dearest?" Criticizing Virginia's Mental Health Records Privilege in Custody Disputes and the Court's Application in Schwartz v. Schwartz*, 13 GEO. MASON L. REV. 1341 (2006).

pealed.<sup>34</sup> Thus, Virginia ended up taking the middle road: there is no preclusive bar to mental health records, and mental health records may be obtained for cause in cases where the mental health of a parent is at issue.<sup>35</sup>

The second issue that arises is, if a parent's mental state is not automatically in issue in a custody case, what constitutes a waiver of privilege.

First, if a parent agrees to a court ordered psychological examination, does that constitute a waiver of all psychological records, even treatment that occurred before the litigation?<sup>36</sup> Assuming that the mental states of the parties are not clearly in issue, then merely agreeing to a court ordered mental health

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<sup>34</sup> 2008 Va. Acts, ch. 809.

<sup>35</sup> *Child Custody, Pleading and Practice, and Trial Considerations*, VIRGINIA PRAC. FAMILY LAW § 15:14 (2020 ed.).

<sup>36</sup> Compare the situation in *Stancuna v. Stancuna*, 41 A.3d 1156 (Conn. App. Ct. 2011). In that case, the court ordered the following:

Before the court will consider unsupervised visitation with the minor children, the [defendant] must engage the services of an experienced psychotherapist and psycho-pharmacologist approved by the [guardian ad litem], each of whom has had training in managing and treating individuals with delusional disorders, and comply with their recommendations for a period of at least [six] consecutive months. The [defendant] also must submit to a neuropsychological evaluation to assess any consequences of past head trauma and to rule out complications of other diseases if such evaluation is recommended by the psychotherapist. Attorney for the [plaintiff] and the [guardian ad litem] shall have access to these professionals, their treatment recommendations and [the defendant's] compliance with these recommendations, including making and keeping appointments and filling and taking prescriptions prescribed by the aforesaid professionals. The [defendant] shall execute appropriate authorizations to [the plaintiff's] attorney and the [guardian ad litem] to obtain such information.

41 A.3d at 1161. The court held this did not violate the defendant's privilege, because the court's order was concerned solely with the procedure that would occur if and after the issue of his unsupervised visitation with either of the children is presented to the court. Had the trial court treatment allowed for "unrestricted access" to the "treaters" and "unlimited disclosure" by them of his mental health records, as the husband erroneously claimed, the court would have ruled differently. *Id.*

evaluation does not constitute waiver of privilege for other mental health records.<sup>37</sup>

Second, merely assenting to the factual investigation by a guardian ad litem does not act as a waiver,<sup>38</sup> and testifying about one's own mental state does not constitute waiver.<sup>39</sup> On the other hand, having one's own mental health professional testify

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<sup>37</sup> *Meteer*, 2003 WL 1084650, \*3 (holding that the wife did not waive the psychotherapist-patient privilege and the physician-patient privilege by filing a marital dissolution petition and requesting child custody and agreeing to a private psychological custody evaluation); *M.M. v. L.M.*, 55 A.3d 1167, 1176 (Pa. Super. Ct. 2012); *Gates v. Gates*, 967 A.2d 1024, 1030 (Pa. Super. Ct. 2009). *See also Cabrera*, 580 A.2d at 1234 (deciding that specific releases did not operate as a blanket waiver of privilege); *Peisach*, 539 So.2d at 546 (holding that the custodial parent's agreement to submit to a psychological examination rendered the testimony of parent's psychiatrist, who treated the custodial parent seven years before, unnecessary); *Care and Protection of M.C.*, 94 N.E.3d 379, 392 (Mass. 2018) (holding that the mother's introduction of psychiatric evidence at the care and protection trial did not serve as a waiver of her right to assert the patient-psychotherapist privilege at a subsequent criminal trial); *Clark*, 371 N.W.2d at 753 (determining that the fact that a litigant seeks custody of a child in a dissolution of marriage proceeding does not result in making relevant information contained in the file cabinet of every psychiatrist who has ever treated the litigant). *But see* *Feurman v. Feurman*, 447 N.Y.S.2d 838, 841 (N.Y. Sup. Ct. 1982) (ruling that by agreeing to a stipulation to referral for psychological study and evaluation, parties to custody proceedings may waive any objection to unlimited access to certain portions of confidential reports and supporting data).

<sup>38</sup> *In re Marriage of Trepeck*, No. D048190, 2007 Cal. App. Unpub. LEXIS 2187 at \*19 (Mar. 20, 2007) (the father sought to subpoena the mother's psychotherapist based on a waiver of privilege after the mother permitted the court-appointed evaluator to contact her psychotherapist and obtain privileged information for the purposes of the evaluation; the trial court found that this authorization did not result in a broad waiver of her privilege); *In re Marriage of True*, 16 P.3d 646 (Wash. Ct. App. 2000) (holding that the statutory privilege between counselor and patient prohibited discovery of the former husband's ten-year-old mental health records, in post-divorce proceedings to resolve child custody dispute, though the parties had authorized release of certain information in the order appointing a guardian ad litem, where the authorization allowed release of the parties' mental health information only to the guardian ad litem, guardians were ordered to maintain confidentiality of the records, and the former wife demonstrated no relevance to her perceived need to have the records).

<sup>39</sup> *Culbertson*, 455 S.W.3d at 139-40.

as to mental state waives privilege and opens the door to cross-examination.<sup>40</sup>

Finally, acts that may or may not constitute a waiver of privilege must be examined on a case by case basis, with due regard to whether the parent's privacy interests<sup>41</sup> should give way to the custody determination.

## Conclusion

As it now stands, fifty states, plus the District of Columbia, plus four U.S. territories, plus federal law, means there are fifty-six definitions of a guardian ad litem and its duties. Because family law is an area of law uniquely entrusted to the states,<sup>42</sup> there is no reason to believe this will change without adoption by every state of a uniform law.<sup>43</sup>

What can and should happen, however, is that a guardian ad litem should make his or her function absolutely clear to all those involved in the custody case. There should be no "blanket waivers" handed to parents when the guardian ad litem begins his or her investigation. Rather, a complete and knowing waiver for

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<sup>40</sup> *Roper*, 336 So.2d at 657 (ruling that if the wife had offered the testimony of her treating psychiatrist to prove her mental condition, the patient-psychiatrist privilege would have been waived and the husband on cross-examination could then have inquired as to any relevant communications between his wife and her psychiatrist); *Gil v. Gil*, 2003-Ohio-180, 2003 WL 132447 (Ohio App. Jan. 26, 2003) (holding that the wife waived privilege by filing a counterclaim seeking child custody and by introducing into evidence letters from her treating physicians); *Com. ex rel. Romanowicz v. Romanowicz*, 248 A.2d 238 (Pa. Super. Ct. 1968) (deciding that where the wife in custody proceeding not only consented to, but actually sought introduction of, the testimony of her psychiatrist relating to her own examination and such testimony would have been subject to cross-examination, the court erred in refusing to allow the wife to introduce testimony of the psychiatrist relating to such examination).

<sup>41</sup> *Jaffee*, 518 U.S. at 15 (stating that a psychotherapist-patient privilege will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth).

<sup>42</sup> "The regulation of domestic relations is traditionally the domain of state law." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013), citing *In re Burrus*, 136 U.S. 586, 593-94 (1890).

<sup>43</sup> *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 1 (2008) (defining roles and duties of a "child's attorney" and a "best interests" attorney). To date, no jurisdiction has adopted this Act.

each and every physical and mental health professional should be provided and explained to a parent, upon a court determination, after hearing and fact findings, that such a waiver is necessary for the particular case.

Finally, and most importantly, if mental health is at issue, the first resort of the court should be a court-ordered examination, where it is clear that there is no privilege.<sup>44</sup> If mental health is in issue, the first resort should be a court-ordered exam, which is not privileged. As noted by a Florida court,

We recognize that in a child custody case the mental health of a parent may be a relevant issue. Where this issue is raised the trial court must maintain a proper balance, determining on the one hand the mental health of the parents as this relates to the best interest of the child, and on the other maintaining confidentiality between a treating psychiatrist and his patient. The court in this case has an alternate tool which may accomplish both purposes. Upon proper motion the court may order a compulsory psychiatric examination.<sup>45</sup>

Selected factors that might compel such an exam would be a past history of mental health issues that resulted in private or court-ordered evaluations or therapy; a history of domestic violence; a history of parental alienation. Only if the court-ordered

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<sup>44</sup> *E.g.*, *M.M.*, 55 A.3d at 1175 (holding that the “preferred method” is through an evaluation and that the privilege is waived only to specific records); *Kinsella*, 696 A.2d at 583 (ruling that courts must look first for information from a court-appointed evaluator or one hired by the partys); *Kinsella*, 696 A.2d at 584 (requiring the court to examine “whether all other sources of information available to the court are adequate to justify adjudication of the custody and visitation issues without resort to the plaintiff’s therapy records); *Cabrera*, 580 A.2d at 1233 (the “most appropriate” source of information regarding a parent’s mental health is to hire an expert for litigation rather than obtaining the parties’ mental health records from a treating therapist); *Husgen v. Stussie*, 617 S.W.2d 414, 416-17 (Mo. Ct. App. 1981) (holding that the proper source of psychological information regarding a parent in a child custody proceeding is a mental examination rather than by piercing the psychologist-patient privilege); *Simek*, 172 Cal. Rptr. at 568-69 (preferring a court-ordered mental examination over piercing the psychotherapist-patient privilege in a child custody proceeding); *Perry v. Fiumano*, 403 N.Y.S.2d 382, 386-87 (N.Y. App. Div. 1978) (requiring a showing that the information gleaned from an evaluation is inadequate to resolve a child custody issue); *Barker*, 440 P.2d at 139 (declining to hold that the psychological-patient privilege was waived automatically in child custody litigation, indicating that a court-ordered psychological examination was the proper avenue to obtain this data).

<sup>45</sup> *Roper*, 336 So. 2d at 656-57.

exam is inadequate should the guardian ad litem be allowed to pierce the privilege, and only upon a showing that the records or testimony sought is essential to the presentation of the child's best interests. In this way, the expectations of confidentiality recognized by the Supreme Court and relied upon by individuals in therapy can be meaningful.



## Evolution of the Birth Certificate: A Tale of Gender, ART, and Society

by  
Bruce L. Wilder\*

### I. Introduction

Two legal cases have highlighted the need for a close examination of what a birth certificate is, what it is not, and what its utility and function are in fact. One is a recent decision in the U.K. Court of Appeals, and the other is a case from Germany that is now before the European Court of Human Rights. Advances in medical science, including in the field of assisted reproduction, have influenced the way the law has evolved in many areas. Changes in social norms having to do with the role of gender in marriage, and in the way the law views gender, marriage, and legal parentage, require an examination about long-held views of the birth certificate.

In the course of such a discussion it is useful, if not necessary, to recognize a distinction between birth registration and the birth certificate itself. In a study of the literature (including many of the sources cited in this article) with regard to these two entities, it is not always clear which one the writers are talking about. Birth registration is considered proof of a person's existence and is done primarily in the interest of the state. It is considered a right,<sup>1</sup> and it is primarily a process.<sup>2</sup> The birth certificate derives from the registration and is a person's proof of identity and generally one's legal parentage. It is a document used for the benefit of the individual, but it is not clear that there

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<sup>1</sup> Convention on the Rights of the Child art. 7, *adopted and opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); International Covenant on Civil and Political Rights art. 24(2), *adopted and opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>2</sup> Although, of course, memorializing documents are produced in the course of that process.

is a right to have a birth certificate.<sup>3</sup> This article is an attempt to elucidate the nature of both, to describe the differences between them, and to propose a scheme for a more universal process of birth registration and issuance of the birth certificate.

## II. The Cases

In 2018, Freddy McConnell gave birth to a child in England. Freddy, a single man and U.K. citizen, conceived the child with insemination by donor sperm. He had transitioned from female to male and had been certified in 2017 as a man under the United Kingdom's Gender Recognition Act of 2004 (GRA).<sup>4</sup> His request to be identified as "father" on the child's birth certificate was denied,<sup>5</sup> and the denial has been upheld on appeal.<sup>6</sup> In its 2020 opinion in the case, the Court of Appeal held:

The legislative scheme of the GRA required Mr[.] McConnell to be registered as the mother of YY, rather than the father, parent or gestational parent. That requirement did not violate his or YY's Article 8 rights. There is no incompatibility between the GRA and the Convention. In the result we dismiss these appeals.<sup>7</sup>

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<sup>3</sup> Paula Gerber, Andy Gargett & Melissa Castan, *Does the Right to Birth Registration Include a Right to a Birth Certificate?*, 29 NETHERLANDS Q. HUM. RTS. 429, 430 (2011), [https://www.researchgate.net/publication/255725410\\_Does\\_the\\_Right\\_to\\_Birth\\_Registration\\_Include\\_a\\_Right\\_to\\_a\\_Birth\\_Certificate](https://www.researchgate.net/publication/255725410_Does_the_Right_to_Birth_Registration_Include_a_Right_to_a_Birth_Certificate).

<sup>4</sup> Gender Recognition Act, 2004, ch. 7, <https://www.legislation.gov.uk/ukpga/2004/7/contents>.

<sup>5</sup> In the matter of TT and YY, [2019] EWHC 2384 (Fam), <https://www.familylawweek.co.uk/site.aspx?i=ED203219#:~:text=AN%20extensive%20case%20regarding%20the,confirming%20his%20gender%20as%20male>

<sup>6</sup> R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales, [2020] EWCA Civ 559, <https://www.judiciary.uk/judgments/r-alfred-mcconnell-v-the-registrar-general-for-england-and-wales-and-others/>. For further details, see Robert Booth, *Transgender Man Loses Appeal Court Battle to Be Registered as Father*, GUARDIAN, Apr. 29, 2020, <https://www.theguardian.com/society/2020/apr/29/transgender-man-loses-appeal-court-battle-registered-father-freddy-mcconnell>. There was a somewhat similar case in Germany from 2017, with a similar result. See Dan Avery, *German Court Rules Transgender Man Can't Be His Biological Child's Father*, NEWNOWNEXT (Sept. 27, 2017), <http://www.newnownext.com/transgender-man-birth-certificate-father/09/2017/>.

<sup>7</sup> *McConnell*, EWCA Civ 559, para. 89. Note that Article 8(1) of the Convention on the Rights of the Child provides that: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations* as recognized by law without unlawful interfer-

Permission to appeal further has been denied, but the case could possibly reach the European Court of Human Rights.<sup>8</sup> Another case, in Germany, with similar facts is now before that court.<sup>9</sup> These cases do not represent the first time that a female to male trans person had given birth, and they will not be the last.<sup>10</sup>

In its ruling, the U.K. Court of Appeals looked to the Gender Recognition Act of 2004,<sup>11</sup> a statute enacted more than a decade earlier and almost certainly not in contemplation of such a fact situation.<sup>12</sup> The lower court (the High Court of Justice's Family Division and Administrative Court) apparently interpreted section 12 of the GRA (which says "The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.")<sup>13</sup> as meaning that the official recognition of a trans per-

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ence." Convention on the Rights of the Child, *supra* note 1, art. 8(1) (emphasis added). Whether McConnell would be the child's father "as recognized by law" is of course what was at issue in the case, and it had to be determined through application of common law and interpretation of the GRA.

<sup>8</sup> The order denying permission to appeal is available at <https://www.judiciary.uk/wp-content/uploads/2020/04/McConnell-Final-Approved-Order-1.pdf>. An application to the European Court of Human Rights is planned. See Robert Booth, *Trans Man Loses UK Legal Battle to Register as His Child's Father*, GUARDIAN, Nov. 16, 2020, <https://www.theguardian.com/society/2020/nov/16/trans-man-loses-uk-legal-battle-to-register-as-his-childs-father>.

<sup>9</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 6, 2017, XII ZB 660/14. Germany's Federal Constitutional Court declined to hear an appeal. Bundesverfassungsgericht [BVerfG], May 15, 2018, 1 BvR 2831/17, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=79598&pos=0&anz=1>.

<sup>10</sup> Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?*, 34 INT'L J. L., POL'Y & FAM. 225-246 (2020), <https://academic.oup.com/lawfam/article/34/3/225/6040670>; see also Erica Tempesta, 'We're Still Humans and I Want People to Respect Us,' MAIL ONLINE (U.K.), Jan. 4, 2019, <https://www.dailymail.co.uk/femail/article-6558255/Pregnant-trans-gender-man-shares-fears-giving-birth-Texas.html>.

<sup>11</sup> Gender Recognition Act, 2004, ch. 7.

<sup>12</sup> *McConnell*, EWCA Civ 559. Paragraph 46 of the opinion acknowledges that prior to the enactment there had been other cases of transgender men giving birth but provides no indication that such a scenario was considered when the GRA was enacted. *Id.* para. 46.

<sup>13</sup> Gender Recognition Act § 12. The fact situation in *McConnell*, where a trans man gave birth, was almost certainly not what U.K. legislators had in mind at the time of the enactment of the provision. A conclusion that this stat-

son's gender does not affect the acquisition of legal parentage *even after* gender recognition has occurred. In other words, the court felt that section 12's disavowal of effect on parentage is "both retrospective and prospective," applying "even where the relevant birth has taken place after the issuance of a [gender recognition certificate]." <sup>14</sup> That conclusion relied on section 9 of the Act:

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes *for all purposes* the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the [gender] certificate is issued; but *it does operate* for the interpretation of enactments passed, and instruments and other documents made, before the [gender recognition] certificate is issued (as well as those passed or *made afterwards*).

(3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation. <sup>15</sup>

Note the distinction between "things done, or events occurring" and "interpretation of enactments passed, and instruments and other documents made." <sup>16</sup> Sections 9 and 12 do not make explicit mention of "things done" or "events occurring" *after* the gender certificate is issued.

At worst – as far as Mr. McConnell is concerned – section 9 could be viewed as inapplicable, and at best it could (and probably should) be read as entitling McConnell to be listed as a male parent (*i.e.*, as "father") on the birth certificate. In other words, his official recognition as a male operates for the interpretation of "enactments passed, and instruments and other documents made" either before or after the issuance of the gender recognition certificate. This wording therefore should authorize *ab ovo* issuance of a birth certificate listing a trans man who gave birth as the "father" in a case where legal gender recognition occurred

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ute is dispositive of whether Mr. McConnell is his child's mother or his father presupposes itself.

<sup>14</sup> *McConnell*, EWCA Civ 559, para. 14(iv).

<sup>15</sup> Gender Recognition Act § 9 (emphasis added). The reference to "instruments and other documents" made before issuance of the gender recognition certificate, in section 9(2) of the GRA, presumably would include a birth certificate.

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

before the child's birth. And it should authorize amending the child's birth certificate, to reflect the official recognition of the trans parent's gender, if the gender recognition came into effect after the birth of the child.

So the British courts got this wrong, but what's the fuss? Why can't Mr. McConnell just accept that he will be designated as the child's mother and just forget about it? Well, it is a matter of identity, not only with regard to himself and his son, but as a part of society. The structured information required in the birth certificate form notwithstanding, does it really matter if anyone, including the state, sees Freddie McConnell, who identifies as a man and who is socially and legally considered a man, to be the father and not the mother of a child? Should the answer to that question be decided by the constraints of a statutory form when no other valid reason exists to deny his request? What is important, as far as a birth certificate is concerned, is that he is the legal parent of his child. The child's "right to know [his] origins"<sup>17</sup> is fully preserved and protected in the relevant medical information contained in the record of birth registration, to which he would have access.<sup>18</sup>

In addition to the fact that being listed as his child's mother is an affront to his identity, a more practical problem for Mr. McConnell is that, despite identifying as a man, and being legally and socially recognized as a man, every time he is required to produce his son's birth certificate<sup>19</sup> in person he will likely be met with quizzical looks and asked for some explanation. This may happen over and over again, in dealings with people for whom the details really don't matter, and might make him an unwilling object of curiosity.<sup>20</sup> Moreover, the ripple effects of

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<sup>17</sup> *McConnell*, EWCA Civ 559, para. 75. On this point, the court referenced the German case, *see supra* note 9, noting that the German decision "laid emphasis on the right of a child of a trans person to know its origins." *Id.*

<sup>18</sup> The common practice of using anonymous gamete or embryo donors can be problematic in that it may deny the child the "right to know its origins" by preventing the child from knowing the identity of a biological parent. That in itself is a larger issue and is beyond the scope of this article.

<sup>19</sup> *But see infra* notes 23-26 and accompanying text, where there is a discussion of the U.K. long form and short form birth certificates.

<sup>20</sup> In the case pending before the European Court of Human Rights, organizations advocating for the interests of trans parents and their children have emphasized the potential harm resulting from forced disclosure of information

such a scenario may lead unnecessarily to adverse discriminatory consequences for both parent and child.<sup>21</sup> Birth certificates have a wide range of uses and “[t]he interplay between public and private information is politically sensitive.”<sup>22</sup> It might also be argued of course, that if the trans parent were listed as the child’s father, he could be questioned about why no mother is listed, but that is not unlike the more common situation where no father is listed.

Part of the problem in the *McConnell* case lies in the British system of birth registration,<sup>23</sup> which is in effect the “long form” birth certificate.<sup>24</sup> The “short form” certificate records “only the name, sex, date and place of birth, without disclosing any parental details.”<sup>25</sup> However, it is said that while the short form has been useful in the past for enabling persons to keep the circumstances of their family private (and indeed was probably created for just that reason), the long form is being “increasingly requested for identification purposes.”<sup>26</sup> So, in effect, what was originally conceived as a tightly restricted source of information, including a lot of medical information that should be private, has become a semi-public document in the way that only the short form certificate was meant to be.

Mr. McConnell participated in the making of a documentary film, entitled “Seahorse,” about his experience as a trans man

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when presenting a child’s birth certificate, including stigmatization, discrimination, and bullying. See Third Party Intervention at 3, 9-11, *O.H. & G.H. v. Germany*, Application No. 53568/18 and 54741/18 (Eur. Ct. H.R. June 25, 2019) (submitted by ILGA-Europe and TGEU), [https://ilga-europe.org/sites/default/files/AH%20v.%20Germany%20draft%20TPI%20\\_FINAL.pdf](https://ilga-europe.org/sites/default/files/AH%20v.%20Germany%20draft%20TPI%20_FINAL.pdf).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> Julie McCandless, *Reforming Birth Registration Law in England and Wales?*, REPROD. BIOMEDICINE & SOC’Y ONLINE, June 2017, at 52, 53, <https://reader.elsevier.com/reader/sd/pii/S2405661817300187>.

<sup>23</sup> HM Passport Office, *Birth Certificates and the Full Birth Certificate Policy*, GOV.UK (updated Oct. 30, 2019), <https://www.gov.uk/government/publications/birth-certificates-and-the-full-birth-certificate-policy/birth-certificates-and-the-full-birth-certificate-policy>.

<sup>24</sup> The certificate is apparently the only record of birth registration.

<sup>25</sup> McCandless, *supra* note 22, at 55.

<sup>26</sup> *Id.* Proof of legal parentage may often be the main reason why the birth certificate is required for individuals to avail themselves of rights and privileges of citizenship, or to prove citizenship itself.

who gave birth.<sup>27</sup> That decision should not amount to a waiver of privacy rights in all such future encounters on his part, and of course should not affect the privacy rights of others in a similar situation.

The British Court of Appeal's decision in the *McConnell* case refers to the common law<sup>28</sup> being used to define "mother," but it is common law that was developed centuries before the *McConnell* fact situation was ever contemplated, and of course before assisted reproduction technology could bring about situations where neither the person giving birth nor the egg provider was ever intended to be the child's legal mother. And that common law was used to support the contention that one's status as father or mother is not affected by the acquisition of gender under the GRA, even when the relevant birth took place after the issue of a gender recognition certificate (*i.e.*, where no parent-child relationship existed at the time the gender recognition certificate was issued). Such a conclusion requires the common law to presuppose itself.<sup>29</sup> The judgment of the Court of Appeal eschewed the idea of "judicial legislation,"<sup>30</sup> in effect suggesting that in fact the statute did not apply in any event.

Paragraph 14 of the Court's opinion looks to the common law for the legal definition of "mother,"<sup>31</sup> but apparently does not consider the idea that it may be time for centuries-old com-

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<sup>27</sup> SEAHORSE (BBC 2019).

<sup>28</sup> R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales, [2020] EWCA Civ 559, para. 28. Note that in the German case, the designation of "mother" was based upon statute. *Id.* para. 73 (quoting the German Civil Code's statement that "[t]he mother of a child is the woman who gave birth to it"). Likewise, a U.K. statute indicates that the "woman who is carrying or has carried a child . . . and no other woman, is to be treated as the mother of the child," unless modified by adoption. Human Fertilisation and Embryology Act, 2008, ch. 22, <https://www.legislation.gov.uk/ukpga/2008/22/section/33>. Once again the statute was almost certainly enacted without considering the situation of a legally recognized male giving birth.

<sup>29</sup> Such a conclusion also seems to contradict section 9(1) of the GRA, which provides that the acquired gender will be effective "for all purposes," and section 9(2), which provides that the acquired gender will apply to the "interpretation of enactments passed, and instruments and other documents made," either before or after the gender recognition certificate is issued. Gender Recognition Act, 2004, ch. 7, § 9(1), (2).

<sup>30</sup> *McConnell*, EWCA Civ 559, para. 35.

<sup>31</sup> *Id.* para. 14(i).

mon law to change. The common law is not static, as Lord Hodge of the U.K. Supreme Court has so well stated elsewhere: “Judge-made law is an independent source of law in common law systems.”<sup>32</sup> Accordingly, the dynamic nature of the common law seems well-suited to a situation where advances in medical science and evolution in social customs and norms clash with labored interpretations of statutory law such as the GRA. We should not be trying to shoehorn a novel fact situation into a statute and thereby produce an anomaly such as officially designating a male parent as being his child’s mother. There is a place for judge-made law under certain circumstances, such as when statutory law was not created in contemplation of the facts of the case at bar and does not lend itself to easy application. In such instances a court ruling that fairly settles the issue in dispute may provide a stimulus for the legislature to codify the ruling, either by affirmation or by correction. As Lord Hodge also noted, “Parliament has also used statute to codify rules which judges have made in order to make them more accessible.”<sup>33</sup>

Section 12 of the GRA, providing that a person’s acquired gender does not affect the person’s status as a parent, does not support a different result. McConnell had been legally recognized as being a male before his child’s insemination and birth occurred. Section 9(1) states that the acquired gender applies *for all purposes*. Section 9(2) adds that this includes the interpretation of “enactments passed and instruments and other documents made” either before or after the gender certificate is issued. So at the very least, McConnell should be recognized as being a “male parent,” and the issue then, I suppose, is whether a “male parent” can be a “mother,” which flies in the face of the common meaning of the term “mother.” A “male parent” is the common meaning of the term “father.” As to the need to know one’s biological origins,<sup>34</sup> I shall try to show that the birth certifi-

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<sup>32</sup> Lord Patrick Hodge, *The Scope of Judicial Law-Making in the Common Law Tradition*, Lecture at the Max Planck Institute of Comparative and International Private Law 1 (Oct. 28, 2019), <https://www.supremecourt.uk/docs/speech-191028.pdf>. For an example of resorting to “judge-made” law when the statutory law does not explicitly address or does not properly fit a given fact situation, see the *Buzzanca* case discussed below. *See infra* note 44.

<sup>33</sup> Hodge, *supra* note 32 at 1.

<sup>34</sup> *McConnell*, EWCA Civ 559, para. 75. Paragraph 75 of the opinion seems to rely on the German Court’s language, saying “The [German] Court

cate, at least in the vast majority of states in the United States, is primarily a document to prove legal parentage, can be unreliable as a source of one's biological origins,<sup>35</sup> and has been unreliable for centuries. Moreover, its unreliability is potentially magnitudes greater when viewed today against the backdrop of assisted reproduction and modern concepts of legal gender.<sup>36</sup> Of course, a rule that treats the person giving birth as the legal mother, at least temporarily, is a bright line, but one that can produce much confusion and misunderstanding and can, in turn, lead to unnecessary litigation. U.S. courts have figured this out to varying degrees, in permitting pre-birth orders<sup>37</sup> for designation of legal parents on the birth certificate.

Interestingly, in a 2017 Pennsylvania case, a transgender man (female at birth) was listed on the birth certificate as the father of a child born to his female spouse during the marriage, a fact uncontroversially acknowledged by the court.<sup>38</sup> An Arizona case included facts reflecting that a transgender man had given birth to three children in Oregon between 2003 and 2005, and was named as the father, and his female spouse was named as the mother, on the birth certificate in each instance.<sup>39</sup> Similar fact situations resulted in verdicts (and subsequent legislation) in

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laid emphasis on the right of a child of a trans person to know its origins (*Abstammungsrecht*)." *Id.*

<sup>35</sup> Most commonly, a birth certificate may not accurately identify the male parent.

<sup>36</sup> Marilyn A. Crawshaw, Eric D. Blyth, & Julia Feast, *Can the UK's Birth Registration System Better Serve the Interests of Those Born Following Collaborative Assisted Reproduction?*, REPROD. BIOMEDICINE & SOC'Y ONLINE, June 2017, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5952822/>.

<sup>37</sup> For instance, in the case of surrogacy, see *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited Dec. 29, 2020).

<sup>38</sup> *In re A.M.*, 223 A.3d 691 (Pa. Super. Ct. 2019). The legal spouse of the birth mother referred to himself as a male, as did the Pennsylvania Superior Court in its opinion. The case itself was about the marital presumption of paternity and did not directly have anything to do with the issue of designating a transgender man as the father on the birth certificate. Curiously, however, both the female spouse and the court referred to the marriage as "same-sex." *Id.* at 693-94, 697.

<sup>39</sup> *Beatie v. Beatie*, 333 P.3d 754 (Ariz. Ct. App. 2014). The dispute in the case was not about how the parents were listed on the birth certificate.

Sweden based on rationales that drew on international law, with courts finding that “the official recognition of gender identity should apply for all legal purposes, as well as [the] ‘best interests of the child’ principle derived from the Convention on the Rights of the Child.”<sup>40</sup> Courts in Italy and Israel have reached similar conclusions.<sup>41</sup> In California, parents are, by statute, permitted to self-designate as “mother,” “father,” or “parent,” regardless of gender.”<sup>42</sup>

The *McConnell* case is not just about how a person is designated as a legal parent. It highlights the disconnect between how the birth certificate has been traditionally viewed and its actual significance and function in today’s world. It also suggests a need to distinguish between birth registration and the birth certificate.

There are three major factors that influence how the birth certificate has evolved or arguably should evolve. The first is advances in the technology of assisted reproduction. The multitude of techniques used in assisted reproduction<sup>43</sup> has greatly increased the number of scenarios where individuals secure parental rights through actions, other than sexual intercourse, that lead to the birth of the child. In other words, the dispositive factor or factors may be certain acts that may have nothing to do with a biological connection.<sup>44</sup> The second factor is the trend toward

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<sup>40</sup> *Third Party Intervention*, *supra* note 20, para. 9.

<sup>41</sup> *Id.* para 10.

<sup>42</sup> CAL. HEALTH & SAFETY CODE § 102425.1. California law refers to a “confidential portion” and a “public portion” of the certificate of live birth, with the confidential portion labeled “Confidential Information for Public Health Use Only.” *Id.* § 102425.

<sup>43</sup> The term “assisted reproduction” is not to be confused with “assisted reproductive technology” (ART), which is best described as a sub-category of assisted reproduction. ART includes all fertility treatments in which both eggs and embryos are handled outside the body. ART does not include non-coital insemination or the use of drugs only to stimulate ovulation, even though those measures would be considered assisted reproduction. *See* Ctrs. for Disease Control & Prevention, *What Is Assisted Reproductive Technology?* (reviewed Oct. 8, 2019), <https://www.cdc.gov/art/whatis.html>.

<sup>44</sup> This concept was established in the United States in the case of *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 1410 (Cal. Ct. App. 1998) (also sometimes cited as *Buzzanca v. Buzzanca*), where a child was born from an embryo created by a sperm donor and an egg donor, implanted into a gestational surrogate, and so none of the individuals biologically-related to the child intended to be a legal parent. The couple who, intending to be the child’s parents, set in

gender neutrality and the increasing number of jurisdictions (world-wide) that recognize legal same-sex marriage. And the third factor is the increasing acceptance (both social and legal) of the idea that gender identity and the legal recognition of gender are not necessarily concordant with the chromosomal make-up of the individual or gender designated at birth. Gender identity is a complex phenomenon that is not entirely either/or, in other words, is not dichotomous (especially when genitalia are ambiguous) as to indicating one gender or another. There is increasing societal and legal recognition of this idea of non-binary gender or non-cisgender.<sup>45</sup> These issues primarily concern the individual, and are (or at least should be) of rapidly decreasing interest of the state, almost to the point of having zero state interest in some jurisdictions.

I have chosen to discuss the *McConnell* case in some detail because it raises fundamental questions about an already brewing question of what a birth certificate actually is and what it is not, with the overriding goal being to protect the rights of individuals that may be affected by its use. What if Mr. McConnell had been a gestational surrogate or gestational (non-genetic) parent of a child derived from a donor embryo, donor sperm or a donor egg? If he were listed as the child's "mother,"<sup>46</sup> *i.e.*, the person who had given birth, would it not trivialize or mask the

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motion the events that led to the child's birth, had divorced by the time the child was born, and were found in a trial court to not be the child's parents. In other words, the trial court said, the child had no legal parents. On appeal, the court said that both of the formerly-married couple were the child's legal parents. *See also supra* note 32.

<sup>45</sup> *See, e.g.*, Marissa Mallon, Comment, *Ambiguous Genitals & Societal Disdain: A Case for a Prohibition of Medically Unnecessary, Cosmetic Genital Normalization Surgeries on Infants and Children*, 33 J. AM. ACAD. MATRIM. LAW. 465, 478 (2020) ("Society has evolved beyond clear definitions of male and female, and society recognizes non-binary individuals."). The term "cisgender" refers to the common situation where a person's gender identity aligns with the gender assigned to them at birth, however that may have been determined. A "non-cisgender" person simply refers to a person whose gender identity does not conform to one's gender at birth. The term "non-binary" means that the person does not acknowledge having either a "male" or "female" gender. *See* Hum. Rts. Campaign, Glossary of Terms, <https://www.hrc.org/resources/glossary-of-terms> (last visited Dec. 29, 2020).

<sup>46</sup> And he would be, as of the time of birth. *See supra* note 28.

child's right to know the identity of anonymous donors?<sup>47</sup> If he had gestated an embryo derived from donor sperm and an egg from a female intended parent (whether or not, hypothetically here, she were his spouse), how would she be characterized on the birth certificate?

In reaching its decision, the U.K. Court of Appeal drew support for its opinion from a ruling in the Federal High Court of Germany, noting the German court's "emphasis on the right of a child of a trans person to know its origins (*Abstammungsrecht*),"<sup>48</sup> and "the child's right to personal knowledge of his/her parentage, which is also protected by Article 8(1) of the [European] Convention [on Human Rights]."<sup>49</sup> That information can and should be entered in the process of birth registration, which can be accessed by the child, without unnecessary access by others. I suggest that such a right of a child to know their<sup>50</sup> biological origins would not be in any way infringed by designating Mr. McConnell as the child's father on the birth certificate, any more than such a right would be infringed if the child were born as a result of an anonymous sperm, egg, or embryo donor,<sup>51</sup> especially if one considers the only real issue from a legal standpoint and purposes of producing a birth certificate is whether he is the

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<sup>47</sup> As to sperm or egg donation, the answer is "yes," at least if the donors are registered with the Human Fertilisation & Embryology Authority, as is required of clinics in the United Kingdom. See *Sperm Donor Anonymity Ends*, BBC News (Mar. 31, 2005), <http://news.bbc.co.uk/2/hi/health/4397249.stm>. Under the Human Fertilisation and Embryology Act, see *supra* note 28, once a child reaches the age of 18 they will have a right to know the identity of egg or sperm donors, *i.e.*, their genetic parents. See also *Legal Rights for Egg and Sperm Donors*, Gov.UK, <https://www.gov.uk/legal-rights-for-egg-and-sperm-donors> (last visited Dec. 29, 2020).

<sup>48</sup> *R (Alfred McConnell) v. Registrar Gen. for Eng. & Wales*, [2020] EWCA Civ 559, para. 75.

<sup>49</sup> *Id.* para. 76.

<sup>50</sup> Throughout this article, and recognizing that the choice is controversial, I have chosen to use the word "their" rather than the phrase "his or her" (likewise "they/them" rather than "he/she" or "him/her"), slightly sacrificing formality, so as to preserve gender neutrality in the least awkward way. This is in keeping with common usage of the word "they" as a gender-neutral singular pronoun for more than six hundred years. See Merriam-Webster's Words of the Year 2019, <https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they> (last visited Dec. 29, 2020).

<sup>51</sup> There is an increasing tendency to recognize a right of a child to learn the identity of such donors, say, when they reach the age of eighteen.

legal parent of his child.<sup>52</sup> The emergence of this unusual fact situation should give cause to consider the idea that the birth certificate is in fact a legal document and as such one of its primary functions is to identify legal parentage: the designation of “mother” or “father” really amounts to no more than a cognomen of little or no legal significance, and one that simply facilitates or confirms one’s position in society so as not to disrupt long-established social norms. The designation of Mr. Connell, or of one similarly situated, as “father” would seem to be included (if not required) in “[f]ull legal recognition in all areas of life.”<sup>53</sup> Not surprisingly, the existing statutory forms do not contemplate the situation where the gestational parent is legally a male.<sup>54</sup>

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<sup>52</sup> The fact that the child may grow up not knowing the birth-gender of their parent seems no more difficult to manage than the eventual disclosure that one’s legal and social parent(s) is not their genetic parent. Although, of course, law in some jurisdictions may treat the child differently based upon the birth-gender of their parent(s), such law would likely be viewed as anomalous and rare.

<sup>53</sup> COUNCIL OF EUROPE, PROTECTING HUMAN RIGHTS OF TRANSGENDERED PERSONS: A SHORT GUIDE TO LEGAL GENDER RECOGNITION 21-22 (2015), <https://rm.coe.int/1680492119>. That document states:

Member states should ensure that the change of name and gender on official documents effectively guarantees full legal recognition in all areas of life. CM/Rec(2010)5 [Council of Ministers Recommendations] states that the content and scope of procedures relating to the legal recognition of a person’s gender identity need to be sufficient for “making possible the change of name and gender in official documents” and “*corresponding recognition and changes by non-state actors with respect to key documents*”. Thus, member states need also to ensure that documents provided by non-state actors, such as educational and employment certificates can also be changed to match a person’s legally recognised gender. *Legal gender recognition procedures should also ensure protection of a transgender person’s private life by making sure that third parties cannot obtain information on gender reassignment.*

*Id.* at 21 (emphasis added).

<sup>54</sup> It appears that only one of a same-sex couple can be listed as “mother” or “father,” and the other is to be listed simply as “parent.” Individuals simply declare their parental status by declaration under oath and it is implicit that the “mother” will be female. *Register a Birth*, Gov.UK, <https://www.gov.uk/register-birth> (last visited Dec. 29, 2020).

The dilemma faced by Mr. McConnell justifies some in-depth consideration of just exactly what a birth certificate is (and is not) in today's world, what it is used for, and what kind of information it should contain, given that it will be seen by various clerks and functionaries – often presented by a parent – on many occasions over the person's lifetime, and thus in effect is a quasi-public document.<sup>55</sup> It also raises the question of what kind of information is more appropriately relegated exclusively to the birth registration, to which access is more easily and appropriately restricted.

### III. History of Birth Registration and the Birth Certificate

The history of birth registration is a tale of many origins and *raisonns d'être* that goes back centuries.<sup>56</sup> Initially its primary purposes were taxation and estimates of military manpower.<sup>57</sup> In the American colonies, it was used to ensure individual rights, primarily rights to property.<sup>58</sup> Birth registration in England and Wales has been compulsory since 1837.<sup>59</sup> In response to the horrors of “baby farming” in England in the late nineteenth century, the Infant Life Protection Act of 1872 required the registration of all births and deaths and placed a legal duty on certain individuals to notify the authorities of births and deaths.<sup>60</sup>

Generally, the reasons for both birth registration and the issuance of birth certificates are legal, and not medical. The rationales for including medical information about the parents relate

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<sup>55</sup> See *supra* notes 23-26 and accompanying text.

<sup>56</sup> See, e.g., Peter Turvey, *The History Behind Your Birth Certificate*, <https://www.angliaresearch.co.uk/articles/the-history-behind-your-birth-certificate/> (last visited Dec. 29, 2020).

<sup>57</sup> Heather L. Brumberg, et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407, 407 (2012), <https://www.nature.com/articles/jp20123>.

<sup>58</sup> *Id.*

<sup>59</sup> McCandless, *supra* note 22, at 54-55.

<sup>60</sup> Dorothy L. Haller, *Bastardy and Baby Farming in Victorian England* (2009), <http://people.loyno.edu/~history/journal/1989-0/haller.htm>. Baby farming was a practice that preyed upon unwed mothers, by which their children were “farmed out” to so-called baby farmers who, for a fee, would take over the care of the children, but notoriously neglected them, often to the point of negligent infanticide or worse.

to establishing the legal rights of the individual, some of which has relevance in determining legal parentage, as well as providing demographic data for purposes of administering public health and the development of public policy, but also to provide a repository of medical and genetic information regarding the biological parent(s) that may be of interest to the child. The birth registration is primarily in the interest of the state,<sup>61</sup> and the birth certificate is primarily to protect the interest of the individual and to enable and facilitate the exercise of their rights.

Various U.S. states began to require registration of births and birth certificates in the nineteenth century. The Bureau of the Census, which was later established as a permanent agency in 1902 by an Act of Congress, developed the first standard certificate for the registration of live births in the United States in 1900.<sup>62</sup> In 1946, responsibility for the collection of vital statistics was transferred to the U.S. Public Health Service's National Office of Vital Statistics, "later reorganized in 1963 as the Division of Vital Statistics of the National Center for Health Statistics."<sup>63</sup> The U.S. Standard Certificate of Live Birth was last updated in 2003.<sup>64</sup> States are encouraged to use this form, but are not required to do so.<sup>65</sup> Notably this form simply requests information on the "father" and the "mother" (presumably the legal parents), apparently assuming that they are the sperm provider and the birth mother/egg provider, respectively.<sup>66</sup> There are questions about whether assisted reproduction was employed, but they seem to go no further.<sup>67</sup> Presumably this will be updated periodically and require more and more data, but already it requires lots of information regarding the obstetric and maternal history, as well as medical information about the (presumably biological) fa-

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<sup>61</sup> Although much of the information recorded is medical and should receive the confidentiality protections available under law, that same information is presumably derived from a medical record, often through a medical professional, as the original source.

<sup>62</sup> Brumberg, *supra* note 57, at 408.

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

<sup>64</sup> Ctrs. for Disease Control & Prevention, *U.S. Standard Certificate of Live Birth* (revised Nov. 2003), <https://www.cdc.gov/NCHS/data/dvs/birth11-03final-ACC.pdf>.

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 2.

ther, tobacco use, “race,” marital status, and even source of payment for delivery, all ostensibly for public health surveillance and development of health policy.<sup>68</sup>

The rapid evolution of the electronic health record in the United States and in other developed countries and the likelihood of its becoming near-universal in the next few years, coupled with its likely eventual seamless integration with public health databases, including governmental archives of vital statistics,<sup>69</sup> enables the relegation of medical information identifying the child’s biological progenitors<sup>70</sup> and its gestational mother to a medical record, part of which may be duplicated in the birth registration, subject to the legal protections of privacy and confidentiality, and of course available to the courts in the event of challenges to the child’s legal parentage.

It is probably axiomatic that the longer the checklist of questions and the more data that is requested, the greater the potential for inaccuracy in reporting.<sup>71</sup> And a significant problem with recording and storing inaccurate data in electronic form is that it so easily propagates among multiple databases. That is a problem that is not unique to birth registration, and the advent of the electronic health record has only exacerbated it because the appetite for data requested or required has increased in proportion to the increase in the availability and use of electronic methods for acquisition and storage, as well as the increasing capacity of such systems to acquire and store such information without enough thought given to the necessity and purposes of requiring such data. The solution to this problem probably lies in user-designed artificial intelligence systems that aid in the design of such systems and that detect and prevent errors and inconsistencies in reporting.

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<sup>68</sup> *Id.* at 1-2.

<sup>69</sup> With, of course, appropriate limitations on the kind of information that is linked.

<sup>70</sup> Here, “biological progenitor” refers to an individual who has contributed genetic material to the creation of the child and would include providers of DNA, both nuclear and cytoplasmic (nDNA and cDNA, respectively), or egg cytoplasm. See Bruce Lord Wilder, *Assisted Reproduction*, in *PENNSYLVANIA FAMILY LAW PRACTICE AND PROCEDURE WITH FORMS* 481, 486 (2019) (volume 17 of the *West’s Pennsylvania Practice* series).

<sup>71</sup> See Brumberg, *supra* note 57, at 409-11 (noting concerns about the accuracy of data on birth certificates).

The common thread is that the purpose of the birth certificate seems to have been primarily to be a document that derives from birth registration and memorializes a person's identity and legal status in a given jurisdiction.<sup>72</sup> It functions as a prerequisite for accessing the range of rights and privileges for the individual,<sup>73</sup> such as establishing citizenship, obtaining a passport, identification for issuance of a driver license, enrollment in Social Security, and enrollment in school. A declaration of legal parentage in the form of a birth certificate is critical to that goal. Initially, the collection of information surrounding the child's biological parents was the major determinant of legal parentage. It was almost inevitable that other information about the parents would also be collected incident to the child's birth.

A birth certificate is a document issued by a government that records the birth of a child for vital statistics, tax, military, and census purposes. . . . In the United States, birth certificates serve as proof of an individual's age, citizenship status, and identity. They are necessary to obtain a social security number, apply for a passport, enroll in schools, get a driver's license, gain employment, or apply for other benefits. Humanitarian Desmond Tutu described the birth certificate as "a small paper, but it actually establishes who you are and gives access to the rights and privileges, and the obligations of citizenship."<sup>74</sup>

Other important uses for the birth certificate are identification to establish inheritance rights, registration to vote, and obtaining a marriage license.

In the days before assisted reproduction, identifying the child's mother (synonymously birth mother, genetic mother, and legal mother) was almost always simple, except for the occasional inadvertent or even intentional switching of babies in a hospital nursery. When there was a need for absolute certainty (as in the birth of royalty) special measures were undertaken.<sup>75</sup> If the wo-

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<sup>72</sup> *Id.*; Christine Ro, *A Birth Certificate Is a Person's First Possession*, ATLANTIC MONTHLY, Dec. 10, 2017, <https://www.theatlantic.com/technology/archive/2017/12/a-birth-certificate-is-a-persons-first-possession/547970/>.

<sup>73</sup> Gerber, Gargett & Castan, *supra* note 3, at 436.

<sup>74</sup> Am. Bar Ass'n, *Birth Certificates* (Nov. 20, 2018), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/birth-certificates/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/).

<sup>75</sup> Sarah Bradford, *Royal Births: From Protracted, Painful and Public to 21st-Century Labor*, GUARDIAN, July 23, 2013, <https://www.theguardian.com/uk-news/2013/jul/23/royal-births-protracted-painful-public>.

man were married, her husband was deemed in the law to be the child's legal father. However, a child could not always be absolutely certain of that fact, nor could the "father." The child's mother might or might not know. The legal presumption of paternity provided a kind of certainty as far as the law was concerned, but injected the possibility of uncertainty with regard to what a child knows about their biological origin if the birth certificate is seen as the official testament of genetic paternity.

Until the availability of genetic markers, such as ABO blood groups, human leukocyte antigen, and more recently (and more accurately) DNA testing, it was often impossible to establish with certainty who the biological father was. So the presumption of paternity served multiple purposes: to preserve the integrity and respectability of the family, to remove the stigma of bastardy, and to provide a bright line for the establishment of legal paternity, and as much as possible settling (albeit sometimes inaccurately) any lingering doubts on the part of others about a child's biological origin.

With the advent of technology to identify genetic markers, the presumption can now be more easily challenged. For the most part, though, legal parentage of the child still implies their biological heritage, but in fact the birth certificate may not always reliably tell the child anything about their paternal "biological origins."

When assisted reproduction, initially artificial insemination by donor, came along, the law dealing with the issue of who was to be listed as the father on the birth certificate became complicated. In some states it was handled like the situation where a child was born out of wedlock. Particularly in the case of an anonymous donor, this denied the child some possibly important information about their "biological origins" or even misled the child into assuming their legal father was their biological father. That did not change things very much, because by that time childbirth out of wedlock had lost much of its stigma. If the artificial insemination was done with the husband's consent, there was no problem. It was not as easy in the case of an unmarried wo-

man or of a woman married to a man who did not consent, especially if the donor were known.<sup>76</sup>

When surrogacy, including gestational surrogacy,<sup>77</sup> came along, things got more complicated, not least because there were, and still are, wide variations in how legal parentage is determined in such situations. The determination of maternity might involve a dispute between the intended mother/egg provider and the gestational surrogate. If the egg provider were a donor, the intended mother would have no biological connection (not genetic and not gestational) to the child but still could be listed as the mother on the birth certificate, again, depending upon the jurisdiction. Case law developed in many jurisdictions was not, and still is not, congruous. The trend in the United States, though not without a lot of bumps along the way, has been to regard the intended parents as the legal parents and to list them as parents on the birth certificate, assuming certain conditions have been met.<sup>78</sup>

The Uniform Parentage Act, and other legislation or case law in some states, provides some certainty and uniformity by establishing contract-based parentage and provides that the intended father and mother be named on the birth certificate, even though neither might have any biological relationship to the child. But to date the Uniform Act has been adopted in less than half of the states, and not always in its most recent version.<sup>79</sup>

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<sup>76</sup> See, e.g., *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007). In a 3-2 decision, the Pennsylvania Supreme Court reversed a lower court ruling that a donor had support obligations. In that case, a known donor per an oral contract with a married woman would not have parental obligations where there was no spousal consent, and the mother participated in a fraudulent misrepresentation of spousal consent by an imposter.

<sup>77</sup> Gestational surrogacy occurs where the surrogate mother bears a child from an embryo genetically foreign to her, created by IVF from gametes from donors, one or both of which could be anonymous.

<sup>78</sup> See UNIF. PARENTAGE ACT § 815(b)(3) (2017).

<sup>79</sup> The Uniform Parentage Act completed in 2017 has been adopted in its entirety by only four states. See Unif. Law Comm'n, *Parentage Act*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Dec. 29, 2020). Earlier versions have been adopted by some other states. Unif. Law Comm'n, *Parentage Act (2002)*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315> (last visited Dec. 29, 2020); Unif. Law Comm'n, *Parentage Act (1973)*, <https://www.uniformlaws.org/committees/>

The concept of “intended parent” is not straightforward, either. For instance, an individual may “intend” to be the child’s parent at the time of conception, but may have a change of heart before the child is born. A California court’s decision in *In re Marriage of Buzzanca*<sup>80</sup> gave rise to the idea that intent and corroborating behavior at the time of embryo transfer would be the benchmarks of legally enforceable intent (assuming, of course, that there was consent – not always easy to prove). To have a more unified approach to the matter of “intent,” it might be simpler to view what a presumptive parent actually did (regardless of non-written evidence of intent) to bring about the birth of the child,<sup>81</sup> including entering into a contract that includes an explicit statement of intent to be legally bound as the parent(s) of the child.

Another factor, that can be thought of as a by-product of assisted reproduction and the wide variability of legal frameworks in various countries, is what has come to be known as cross-border reproduction, sometimes referred to as “reproductive tourism.”<sup>82</sup> That phenomenon has emerged because people who wish to build their families with assisted reproduction are often stymied by the laws of their own country or state, and resort to travelling to achieve what they might not be able to legally do in their own state or country. However, that solution in turn can lead to other unanticipated legal problems involving birth registration and issuance of a birth certificate.

What does today’s birth certificate look like? What we know as our birth certificate is generally a one- or two-page document that lists the date, time, and place of birth; gender; “race or color”; birth weight; person certifying the birth; and similar information about the father and mother.<sup>83</sup>

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community-home?CommunityKey=10720858-ebe1-4e85-a275-40210e3f3f87 (last visited Dec. 29, 2020). As noted, statutory and case law varies considerably among the states.

<sup>80</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 1410 (Cal. Ct. App. 1998); see *supra* note 44.

<sup>81</sup> Sexual intercourse is of course the most common and time-honored example. Parentage by estoppel may not require explicit intent.

<sup>82</sup> Deborah Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531 (2005).

<sup>83</sup> For a list of key changes to the data captured by the national standard birth certificate, see Brumberg, *supra* note 57, at 408.

The function of the birth certificate in practice is that of a legal document that identifies the child's place, date, and time of birth, their gender, and the individual or individuals deemed to be the child's legal parents at the time of birth. Law in various jurisdictions varies, but virtually all jurisdictions provide for amendment and reissuance of the birth certificate at a later time for valid reasons, almost always legal, even after attaining majority.<sup>84</sup> If the birth certificate is amended, say, in the case of adoption, or where a judicial determination of sexual assault has subsequently been made, an amended birth certificate may be issued to conform to the child's legal status vis-à-vis their legal parents and the original placed under seal, depending of course on the particular jurisdiction. Access by even the child may be restricted, depending upon state law.

We can and should consider, therefore, that the collection of medical information incident to a child's birth is important for many reasons other than those having to do with the child's legal parentage, but could be done in a way that protects one's privacy to the same extent that personal health information (including electronically stored personal health information) is protected. The collection and recording of such medical information on the birth certificate may have at one time been important as it relates to the legal status of a child, but with today's technology, the focus should shift to where it belongs, in other words, accurately recording the child's legal parentage at the time of birth (in addition, of course, to the time and place of birth) or under certain circumstances when the legal relationship changes or if a correction or amendment is needed.

Of course a child, and possibly others with a legitimate need to know, should have access to medical information that relates to their biological provenance, as well as other information about how they came to exist, but what is recorded on the birth certificate as the source of that information can be misleading, and possibly harmful if treated as medically accurate and relied upon as medical fact. Moreover, while it may be said that laws restricting access to one's birth certificate provide privacy protection, the fact remains that individuals or their parents have to produce the

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<sup>84</sup> See, e.g., *Amending a Birth Certificate After Adoption*, JUSTIA (updated Aug. 2018), <https://www.justia.com/family/adoptions/adoption-procedures/amending-birth-certificate/>.

birth certificate to various clerks or other officials (both governmental and non-governmental) as an identifier for any number of reasons throughout the child's life, and are thus effectively forced to disclose information about themselves that is not relevant and may lead to adverse consequences. For instance, the inclusion of the Social Security numbers and birth dates may facilitate identity theft.<sup>85</sup>

The history of the law shows how technological advances or changes in society can bring about disputes involving rarely or never imagined factual situations that must be resolved with law that never contemplated such scenarios. A rigid adherence to such law may be a recipe for rulings that are manifestly cruel or just bizarre when measured with the yardstick of fairness and common sense. Perhaps not enough attention is given to judge-made law in these situations.<sup>86</sup> There are times when judge-made law is appropriate and can avert tragic consequences, such as when strict application of existing case law or statutory law might result in declaring a child (potentially) stateless<sup>87</sup> or parentless.<sup>88</sup>

Regarding legal parent-child relationships designated on the birth certificate, we can make a number of observations, of

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<sup>85</sup> See Third Party Intervention, *supra* note 20; see also notes 20-21 and accompanying text.

<sup>86</sup> Hodge, *supra* note 32; see also notes 32-33 and accompanying text.

<sup>87</sup> For example, U.S. State Department policy initially denied citizenship to twins born to a U.S. citizen in Israel, where she could not prove citizenship of an egg donor, but this was reversed to permit citizenship based upon the fact that she was the gestational mother. Michele Chabin, *Policy Shift Eases Citizenship for Foreign-Born Kids of American Moms*, USA TODAY, Feb. 27, 2014, <https://www.usatoday.com/story/news/world/2014/02/27/american-moms-giving-birth-in-israel/5819205/>. The reversal of policy was based on "reinterpretation" of the Immigration and Nationality Act, 8 U.S.C. §§ 301, 309. An appeal by the State Department of a federal district court decision, *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020), to grant citizenship to a child born outside the United States, based upon the U.S. citizenship of a non-biologically related spouse in a same-sex marriage, has been abandoned by the State Department. Michael K. Lavers, *State Department No Longer Challenging Gay Couples' Children's U.S. Citizenship*, WASH. BLADE, Oct. 27, 2020, <https://www.washingtonblade.com/2020/10/27/state-department-no-longer-challenging-gay-couples-childrens-u-s-citizenship/>.

<sup>88</sup> Judy Peres, *Surrogacy Case Breeds New Legal Dilemma*, CHI. TRIB., Sept. 11, 1987, at 1; see also *supra* note 44.

course bearing in mind that the validity of such observations is highly jurisdiction-dependent. First, the person who carried the pregnancy to term (commonly referred to as the birth mother), may or may not (as in the case of surrogacy) be a legal parent. Whether, and under what circumstances, that person may be designated as a “father” is, of course, the crux of the *McConnell* case. Second, the person who provides the female gamete (commonly termed the genetic mother) may or may not be a legal parent, and might (if not a donor) be listed on the birth certificate as either “mother,” “father,” or “parent,” depending on the jurisdiction. Third, the person who provides the male gamete (commonly termed the genetic father) may or may not be designated as “mother,” “father,” or “parent” on the birth certificate.

Thus, it is not at all far-fetched or disruptive to regard the terms “mother” and “father” as mere *cognomina* descriptive of an important legal status – that of legal parent, with certain restrictions (such as requiring the designation to have some rational underpinning).<sup>89</sup> And just as the long-accepted presumption of paternity may be misleading as to one’s biological origins, the idea that a legally and socially recognized male (who may or may not have provided the female gamete) cannot be designated as the child’s father, because the child has a right to know their biological origins, doesn’t hold water, at least so long as no other person claims that status exclusively.<sup>90</sup> Stated in a different way: The person designated as the legal mother on the birth certificate may be neither the gestational carrier<sup>91</sup> nor

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<sup>89</sup> For example, in the *McConnell* case, the father relied on a previous statutory designation of gender. Such a provision would, arguably, permit a legal parent with a later-acquired legal gender change to request a modified birth certificate, but the answer to such a question is not clear, as it might depend on the question of who owns the birth certificate.

<sup>90</sup> Although it has been relatively rare for a same-sex couple to be legally-recognized as being two fathers or two mothers, it is common nowadays for the children of same-sex couples – even where both may not be legal parents – to view themselves and portray themselves to others as having “two moms,” or “two dads.”

<sup>91</sup> The gestational carrier is sometimes referred to as the “gestator,” which is in fact a term from the Latin, meaning “carrier,” and more recently a commonly-used neologism derived from the words “gestation” or “gestate.”

the source of the female gamete.<sup>92</sup> And, of course as noted above, and has been true for centuries, the person designated as the “father” may have no biological relationship to the child whatsoever.

Now that we have, I hope, established that the birth certificate is *de facto* a legal document that may not necessarily accurately indicate biological origins, we should recognize the tremendous variability in how jurisdictions decide who is to be listed on the certificate as a legal parent. Generally the choice of who is listed as a parent is determined by the law in the place of birth, but problems may arise if there is conflict<sup>93</sup> with the law of the jurisdiction of one or both parents’ citizenship. Some uniformity among states and among nations is desirable, but is it achievable? The Hague Conference has made a start in the area of surrogacy,<sup>94</sup> and perhaps could build on that idea with regard to the birth certificate.

Accordingly, I offer the following guides toward that end. Birth registration is a universal human right and requires, as a minimum, that data is gathered and recorded regarding a child’s birth that establishes their identity, as required by law in the place of birth, including biological origins; date, time, and place of birth; legal parentage; gender;<sup>95</sup> and other pertinent information about the child’s biological provenance and identities of the individuals legally responsible for their existence. The information should be available only to those who have a legitimate need to know, including the state or states of the nationality of the

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<sup>92</sup> Leaving aside, for a moment, the unusual fact situation in *McConnell* that was undoubtedly not contemplated in the drafting of such statutes, that determination depends upon the state.

<sup>93</sup> Maria Hook, *Common Law Recognition of Foreign Declarations of Parentage*, CONFLICT OF LAWS.NET (Feb. 10, 2020), <https://conflictoflaws.net/2020/common-law-recognition-of-foreign-declarations-of-parentage/>.

<sup>94</sup> Hague Conference on Private Int’l Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Agreements* (Mar. 2014), <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>. This project demonstrates a recognition of the changing landscape of the law on parentage, but for reasons that are perhaps obvious, it has not considered the role that gender-implicit designations, such as “father” and “mother,” have vis-à-vis the gender-neutral term “parentage.”

<sup>95</sup> Bearing in mind, of course, that the child’s gender may be indeterminate, and designated as such. For example, see Mallon, *supra* note 45.

child and their putative legal parents, and the information should be subject to modification to comply with law in that state or states.

The certificate of birth is also arguably a right of every individual. Issued by the child's state or states of citizenship, it should contain the child's name; date, time, and place of birth; gender; and legal parentage of the child, and as determined by law in the jurisdiction in which it is used, establishes a panoply of legal rights, among them citizenship, enrollment in school, entitlement to government-issued benefits, and of course identification for any other number of rights and privileges. It should be subject to amendment when necessary to preserve the rights and privileges due the child under the law.

Given that a child's legal parents are more and more often (but still relatively rarely) likely to be discordant with their biological progenitors, and are not uncommonly of the same gender, the designation of "mother" or "father" is of decreasing significance, to the point where such designations amount to mere *cognomina*<sup>96</sup> attached to the status of legal parentage, and serve more a purpose of social recognition, rather than legal recognition.

#### **IV. Conclusion**

The registration of live births and the issuance of birth certificates are best viewed as distinct entities, the former being a process created in the interest of the state, and the latter being a document that provides the individual with proof of a unique identity that is required to access a panoply of rights and privileges. The utility and primary function of the birth certificate, as an official document that declares a child's legal status, including their parentage, ought to be preserved. As such it ought to memorialize the date, time, and place of birth, and the individuals recognized as the child's legal parents at the time of birth. The

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<sup>96</sup> The designation of "mother" or "father" may be subject to certain requirements, such as that a legally male parent is a "father" and a legally female parent is a "mother." In that way, a child may have two legal fathers or two legal mothers. In the latter instance it makes no sense to require that only one be designated the legal mother and the other simply as "parent," especially in the case of a female same-gender couple where one provided the egg and the other was the birth mother.

birth certificate has long been imperfect, but nonetheless has often been viewed as an official record of a child's biological origins because it provided easy (although sometimes inaccurate) assumptions based upon the limited possibilities available for biological parentage in the past.

The acquisition of data about the individual and their biological provenance in the process of birth registration was historically done to help verify or confirm a child's legal status and to satisfy the state's need to maintain vital statistics. For centuries, identification of the child's birth mother virtually always confirmed both biological and legal relationship to the child, thus providing some certainty for the birth certificate's function as a document to verify the child's legal parent, and vice versa. The concordance of legal and biological parentage in the "father" has been less ascertainable, and the law concentrated on providing certainty as to legal parentage, as opposed to the determination of biological paternity, something that up until recently has always been difficult to achieve with equal certainty.

With the relatively recent advent of assisted reproduction techniques, the role of the birth certificate as a testament of both legal and biological parentage has become untenable, even though in only a minority of cases, and has forced us to decide whether it is to be one or the other. Given the overwhelming degree to which, as a matter of practice, it is used almost entirely to establish a child's legal status and access to rights and privileges that are due, we should view the birth certificate as a legal instrument. And given its decreasing reliability as a marker of biological parentage, insofar as some jurisdictions have redefined the determination of legal parentage, it is less and less a reliable document of biological origins.

A designation of the child's gender may also be of importance, depending upon the law in the jurisdiction of the child's birth, or later on, citizenship. Inasmuch as it may differ from certain biological markers, details need not be included on the birth certificate, but may have a legitimate place in the record of birth registration.

What information is recorded on the birth certificate ought to evolve in concert with changes in societal norms, scientific advances in the means by which procreation occurs, and the evolution of gender-neutrality in the law. Above all, its utility and

primary function as an official document for legal purposes ought to be preserved.

The details of biological (or non-biological) relationships between the child and others who contributed to their birth are a legitimate interest of the state, and may have significance for medical, research, and public health interests, as well as to the child, but ought to be available to only those who have a legitimate need, and tailored to fit that legitimate need. Those details are best preserved through the process of birth registration and need not, and for the most part should not, be available to people who may require the birth certificate to validate citizenship, issue other official documents, enroll the child in school, and so forth.

Conflicts that arise because of (sometimes unconscious) differing views as to whether the birth certificate is supposed to be a medical document as well as a legal document, or when it might be disruptive to social norms, can often have adverse consequences for the child or their parents. With the globalization of assisted reproduction, conflicts can arise between determination of parentage and citizenship in the place of birth and in the country or countries of the child's parents. There is a pressing need for agreements, such as Uniform Laws in the United States, and international instruments, such as a Hague Convention,<sup>97</sup> that will provide some uniformity in how legal parents are identified and designated at the time of birth, what information about the biological and legal parents is collected and protected in the registration process, and what is contained in the birth certificate, which is at least a semi-public document.<sup>98</sup> Where uniformity cannot be achieved, such agreements should set out processes to resolve disputes about parentage and citizenship when interjurisdictional conflicts exist. With these steps, progress can be made toward a better understanding of the proper role of birth registration and birth certificates, for the many new issues that have arisen in recent years and surely will continue to arise in the future as reproductive technology develops and social norms evolve.

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<sup>97</sup> See *supra* note 94.

<sup>98</sup> I have designated the birth certificate as a semi-public document because individuals can be required to produce it on multiple occasions during their lives to various entities to show proof of identity

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## **Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post *Monasky***

by  
Andrew A. Zashin\*

The 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) is the leading treaty used to return wrongfully removed or retained children to their habitual residence. The Convention’s focus is on establishing a cooperative system between contracting states to ensure the swift return of these children. In most cases, if a petitioning parent can establish that a child under age sixteen is removed or retained from their habitual residence, and that removal or retention violates the petitioning parent’s rights of custody under the laws of the habitual residence, the child “shall” be promptly returned to the habitual residence if the petition was brought within a year of the removal or retention.<sup>1</sup> A central tenet posits that a child’s “habitual residence” is the best location to make substantive custody determinations.

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<sup>1</sup> See generally Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (hereinafter “1980 Convention”).

However, the Convention contains several narrow exceptions to the presumptive immediate return of a child to the child's habitual residence which allow the country in which the child is located to reject a return petition under various circumstances. One of these exceptions is Article 13(b), the "grave risk of harm" exception. Under Article 13(b), the requested state can deny a return request if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."<sup>2</sup>

Parents frequently try, without success, to use Article 13(b) to avoid a return in cases of abuse, domestic violence, or regional turmoil. Those U.S. cases in which a return was denied on this basis tend to evidence relatively dire circumstances. Despite the historic lack of success, parents continue to try—and attempt to do so creatively. This year, the U.S. Supreme Court considered the case of an abused mother, together with its first foray into defining "habitual residence." While announcing a case-by-case habitual residence standard based upon the specific facts and circumstances, and despite noting the impact of abuse in habitual residence determinations, the Court declined to clarify the confusion about exactly when harm is grave enough to merit the 13(b) exception to return.<sup>3</sup> In doing so, the Court likely sparked a much wider conversation and debate about the Convention and, specifically, Article 13(b), particularly regarding how trial courts should distinguish between meritorious situations of abuse and those cases attempting to raise every possible defense, no matter how tenuous.

On one side, it is the judiciary's job to protect children from abusive or otherwise dangerous situations. On the other, the extreme measure of removing or retaining a child from one parent is not something that can be taken lightly. The manner in which facts are presented is becoming even more important to ensure that justice is achieved and the interests and safety of children are protected. The inherent nature of these competing positions creates a zero-sum game.

One thing seems clear: attempts to use and expand the 13(b) exception will not abate and this issue requires serious attention.

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<sup>2</sup> *See id.* art. 13(b).

<sup>3</sup> *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

*Monasky v. Taglieri*, while remembered most as the landmark decision defining habitual residence in Hague cases in the United States, is yet another case that presents the Article 13(b) grave risk of harm exception to return.<sup>4</sup> In fact, the 13(b)

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<sup>4</sup> *Monasky* is one of the most important family law cases in American jurisprudence, and certainly the most important international family law case. *Monasky* is only one of four Convention cases the U.S. Supreme Court has ever heard. The others are, *Lozano v. Alvarez*, 572 U.S. 1 (2014), *Abbott v. Abbott*, 560 U.S. 1 (2010), and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). It is the most important, since it deals with the Convention's entry point and fundamental issue, the definition of "habitual residence." The Convention is explicit in Article 4 that the terminal point, the end date of its application to children, is sixteen years old. Habitual residence is mentioned throughout the Convention, however, nowhere in the Convention is the term "habitual residence" defined. If the Convention's drafters wanted to define habitual residence, they would have done so. They did not.

Taglieri argued that every child must have a habitual residence; *Monasky* argued that in some circumstances children, specifically infants and children with cognitive disabilities, may not have a habitual residence at all if they have not formed sufficient connection with the signatory nation. The plain language of the Convention does not address this issue. The Convention is explicit about when the date the Convention's application terminates for children, sixteen years old, but the Convention is intentionally silent about defining habitual residence, suggesting that in some cases, like A.M.T.'s, an eight-week-old infant has not habituated to anything but the child's primary caretaker(s). *Monasky* argued that, in some cases, there is no habitual residence and the Convention simply does not apply. She asserted that this outcome is not a catastrophe by any means—when this happens, the law of the country where the child is, which must be a Hague Treaty co-signer in the first place, applies.

In *Monasky*, the U.S. Supreme Court announced a new "totality of the circumstances" standard to determine the habitual residence of all children. Prior to *Monasky*, different circuits had used different definitions of habitual residence. Some circuits, such as the Ninth Circuit, utilized a "shared parental intent" standard, focused on where the parents intended the child to be raised. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). Others, such as the Sixth Circuit, adopted an "acclimatization" standard focused on where the child was acclimatized and where the child viewed as "home." *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007). Some circuits, such as the Third and Eighth Circuits, used a hybrid approach that considered both shared parental intent and acclimatization in different ways. *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010). Although *Monasky* created a uniform legal standard among American circuit courts, scholars have commented that "[d]espite the court [sic] finally defining habitual residence, it remains unseen whether the new totality-of-the-circumstances definition will cause 1980 Convention litigation to become more or less costly, complicated and time-consuming." Melissa A. Kucinski, *The Future of Litigating an Interna-*

issues were not just dealt with as “stand alone” arguments. Counsel for *Monasky* wrapped those arguments into the habitual residence “intent” arguments.<sup>5</sup> As a matter of determining habitual residence, it stands to reason and the *Monasky* Court found,<sup>6</sup> that domestic violence is a necessary factor in determining whether someone intends to be habitually resident in a place with a spouse who is violent towards them or their children. *Monasky* was not only a 13(b) case, but given the fact pattern, it provided the Court with an opportunity to address the specific grave risk of harm to minors who may or may not have been in harm’s way, although one of the parents was absolutely a victim of domestic violence. Questions like these are fairly common, but few victims actually get their day in court because of the time and expense of litigation.<sup>7</sup>

Although the Article 13(b) question was not certified before the Supreme Court, *Monasky* is a high-profile example of the same arguments presented in so many other cases in so many other courts. Moreover, Article 13(b) defenses float in orbit around the discussions of habitual residence cases. One cannot separate undisputed violence from the habitual residence considerations. If parental intent, or any sort of intent, were to be used at all for the basis of determining habitual residence, then one must consider the issue of violence. When considering violence, one must naturally consider, either directly or indirectly, the essential elements of a 13(b) analysis. Necessarily, it is only logical that one’s intent must consider the violence that a parent experiences in a place where that parent habituates. Given the facts at hand, the *Monasky* case provided the Court with an opportunity to speak to the issue – which the Court once again denied.

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*tional Child Abduction Case in the United States*, 33 J. AM. ACAD. MATRIM. LAW. 31, 38 (2020).

<sup>5</sup> See generally Brief for Petitioner, *Monasky v. Taglieri*, 140 S. Ct. 719 (No. 18-935).

<sup>6</sup> “In accord with decisions of the courts of other countries party to the Convention, we hold that a child’s habitual residence depends on the totality of the circumstances specific to the case.” *Monasky*, 140 S. Ct. at 723.

<sup>7</sup> See generally Andrew A. Zashin, Christa G. Heckman & Amy M. Keating, *United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention*, 28 J. AM. ACAD. MATRIM. LAW. 249 (2015).

This article offers a new approach for analyzing the 13(b) grave risk of harm defense, specifically as it relates to victims of domestic violence and their children, that is both practical and clear, and rooted in principles that are grounded in American jurisprudence that will result in more consistent rulings. Part I of this article provides background to the text of the Hague Convention, including the purposes of the text, the systematic return of a child to his or her habitual residence, the Article 13(b) grave risk of harm exception, and the role of undertakings. In Part II, the facts of the *Monasky* case are introduced, as well as its procedural history relative to Article 13(b). Then, Part III discusses previous 13(b) cases and considers when victims of domestic violence are victims by proxy, applying a tort law principle for guidance. Finally, this article concludes with the author's proposed framework in the interest of judicial economy and expediency in future 13(b) cases, so as to not waste the resources of the courts or litigants, but rather to benefit the court, the parties, and the child(ren) involved. This proposal serves the interests of justice and the policy set forth in the articles of the Convention itself for a swift resolution.

## I. The Hague Convention

The Hague Convention convened in response to the growing concern over international child abductions, and specifically, to reduce the risk of harm to minor children wrongfully retained or removed as well as the distress to parents wrongfully deprived of their children. The Convention only applies if three standards are met: first, the minor child is aged sixteen or younger; second, the minor child was habitually residing in a contracting state prior to the time of removal; and third, the petitioning parent was exercising his or her custody rights at the time of the child's removal or retention. Primarily, the Convention aimed to construct a cohesive system of cooperation between signatory countries to ensure the swift return of children abducted by a parent.

The underlying purpose of the articles of the Convention were to maintain the overall status quo, while still protecting affected children from the harmful effects of wrongful removal or retention. Thus, the articles have created a system that does not seek to make substantive determinations of custody rights, but rather to establish a collaborative mechanism for securing the

prompt return of a wrongfully removed or retained child to the country of his or her habitual residence – the forum that is presumed capable of making the best determination of the child’s interests. The articles establish an overriding preference to return a removed or retained child to his or her state of habitual residence. Moreover, an equal preference exists that the institutions of the child’s habitual residence should make the custody determination, so long as the petition and proceedings for the child’s return have begun within one year of the date of wrongful removal or retention. Together, these provisions further the objective to promote cooperation between signatory countries. When followed, the Convention assists in deterring parents from attempting to forum shop principally to obtain the most favorable legal determination on custody issues.

Within the articles of the Convention exist several explicit exceptions to the rule that one must immediately return an abducted child to the country from which the child was abducted, and thereby allow judicial and administrative authorities to reject a custodial parent’s petition for return. This article will focus on the exception written in Article 13(b), known widely as the “grave risk of harm” exception. This exception allows a country to which a child is taken the power to deny a request to return an abducted child “if the person, institution, or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>8</sup> Respondent parents must prove by clear and convincing evidence that a grave risk of harm will fall upon a child if the child is returned to the home country.<sup>9</sup>

The articles of the Convention, however, do provide for the return of a child even if there is a potential grave risk of harm, in the event that “sufficient protection was afforded.”<sup>10</sup> Undertak-

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<sup>8</sup> 1980 Convention, *supra* note 2, at art. 13; See also Andrew A. Zashin, *Bus Bombings and a Baby’s Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes*, 21 J. AM. ACAD. MATRIM. LAW. 121, 126 (2008).

<sup>9</sup> Olivia Claire Dobard, Comment, *The Supreme Court Addresses International Child Abduction Under The Hague Convention*, 32 J. AM. ACAD. MATRIM. LAW. 435, 444 (2020).

<sup>10</sup> *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (citing *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000)).

ings are “enforceable conditions of return designed to mitigate the risk of harm occasioned by the child’s repatriation.”<sup>11</sup> Do undertakings completely eliminate the need for the grave risk of harm defense? Undertakings do not eliminate the need for the defense, since they work in parallel to its evaluation. Even though undertakings can exist in conjunction with the defense, courts still have no controlling guidance as to when undertakings may apply.

The concept of undertakings is a judicial creation and is not included or defined in the text of the Convention itself.<sup>12</sup> Some

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<sup>11</sup> *Simcox*, 511 F.3d at 605 (2007) (citing *Feder v. Evans-Feder*, 63 F.3d at 226 (3d Cir. 1995) and holding “[I]n order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon ‘undertakings’ from the petitioning parent.”); *Baran v. Beaty*, 479 F. Supp. 2d 1257, 1272 (S.D. Ala. 2007). *See also Simcox*, 511 F.3d at 606 (“Clearly, then, undertakings are not appropriate in all cases, and a court ‘must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child.’”).

<sup>12</sup> *See Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008) (“There is a long-standing tradition in English speaking countries of protecting children from harm through court orders which require parents or guardians to take steps to ensure children’s safety.”); *id.* at 1349 (“The concept of court-ordered conditions on the return of children has been imported to Hague Convention cases by courts in the United Kingdom, Canada, Australia, and the United States.”). *See also id.* 1, 22-23 (1st Cir. 2002) (“The concept of ‘undertakings’ is based neither in the Convention nor in the implementation of legislation of any nation. Rather, it is a judicial construct, developed in the context of British family law.”); *Danipour*, 286 F.3d at 22 (“The Department of State’s view of undertakings, to which we accord great weight, is that they should be limited in scope. The Department’s view of undertakings is expressed in a letter to the British government, written in response to British concerns about American courts’ failure to enforce consistently British undertakings: Undertakings should be limited in scope and further the Convention’s goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.”); *Simcox*, 511 F.3d at 605 (“Even when confronted with a grave risk of harm, some courts have exercised the discretion given by the Hague Convention on the Civil Aspects of International Child Abduction . . . to nevertheless return the child to the country of habitual residence, provided sufficient protection was afforded.”). *See generally Walsh*, 221 F.3d 204. RAY BEAUMONT & PETE E. McELEVY, *THE HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION* 157-58 (1999) (discussing legal origins of undertakings).

argue that undertakings subvert the convention itself, and that the doctrine is unfair and inequitable in its application in several ways. Most problematic is the fact that undertakings assume that there is a credible danger in the habitual residence of the child. Nonetheless, the court in which the taking parent has brought the child and where the Hague proceedings have occurred have decided to return that child to his or her place of habitual residence, with certain safeguards. This “half-measure” is a problem, “Many scholars see undertakings as a compromise, but in fact, they open the door for the abuser to continue to manipulate and control the abductor.”<sup>13</sup> Also, “the aims of the Convention are to protect the child, and sending the child back to the country where the abuse occurred blatantly contradicts that aim. Yet, that is precisely what undertakings accomplish.”<sup>14</sup> Moreover, undertakings issued by a U.S. court may or may not be enforceable in the other country after the child is returned, rendering them worthless . . . While the United States may have means of recognizing and enforcing foreign court orders under the Uniform Custody Jurisdiction and Enforcement Act, foreign countries do not necessarily have the same streamlined processes.<sup>15</sup>

In *Saada v. Golan*,<sup>16</sup> the mother was the taking parent who would not return her child to Italy, arguing that such a return presented a grave risk not just to the mother, but also the child.<sup>17</sup> The trial court agreed with the mother that violence did occur

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<sup>13</sup> Kyle Simpson, Comment, *What Constitutes a “Grave Risk of Harm?”: Lowering the Hague Child Abduction Convention’s Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 *GEO. MASON L. REV.* 841, 861 (2017).

<sup>14</sup> *Id.* at 862; See also Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abductions*, 33 *COLUM. HUM. RTS. L. REV.* 275, 341 (2002) (“The Second Circuit. . . emphasized that undertakings might allow the children to be returned notwithstanding the risk of harm.”). As Respondent Narkis Golan argued in her petition for a writ of certiorari in the Supreme Court of the United States, “The ameliorative measures framework adopted by certain circuit courts have affectively gutted the grave risk exception.” Brief for Respondent, Narkis Aliza Golan, Petitioner v. Isacco Jacky Saada, 930 F.3d 533 (2d Cir. 2019), *cert. pending*, No. 20-1544 (U.S. Jan. 29, 2021).

<sup>15</sup> See Kucinski, *supra* note 5, at 49.

<sup>16</sup> 930 F.3d. 533 (2d Cir. 2019).

<sup>17</sup> See Kucinski, *supra* note 5, at 49-50.

and that there was risk, but that the risk could be ameliorated with undertakings that amounted to tens of thousands of dollars, legal fees, housing, and that the father would stay away from the mother and only visit with the child with mother's consent. The Second Circuit noted on appeal that "once a child is returned to his or her habitual residence, the U.S. court would lack jurisdiction to redress a parent's non-compliance with the 'carefully crafted conditions' of the child's return."<sup>18</sup>

It is important to note two things about *Saada*. First, both litigants were able to find or afford private counsel in the United States to take their cases, a luxury that so many litigants simply cannot manage.<sup>19</sup> Second, the undertakings ordered by the district court were tremendously expensive. What if the left behind parent, here the father, was not able to afford those undertakings? Would he then be "denied the justice" of having his child returned to his habitual residence? So the question must be asked, do undertakings only work for the lucky? And for the rich?<sup>20</sup>

This article proposes a comprehensive framework for when undertakings may be applicable and for when a 13(b) grave risk of harm defense applies.

## II. The *Monasky*<sup>21</sup> Case: The First of Its Kind, but Same as It Ever Was<sup>22</sup> — How Did We Get Here? — *Monasky* Goes to the Supreme Court

Michelle Monasky, an American citizen, met Domenico Taglieri, an Italian citizen, while they were conducting medical research at a university in Illinois. The two married in September 2011. After Taglieri was unable to find further employment in the

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<sup>18</sup> *Id.* at 50.

<sup>19</sup> See Zashin et al., *supra* note 7, at 262-63.

<sup>20</sup> See generally Zashin et. al., *supra* note 7.

<sup>21</sup> See generally *Monasky*, 140 S. Ct. 719.

<sup>22</sup> ONCE IN A LIFETIME, TALKING HEADS (Sire Records 1981). Talking Head's Lead Singer, David Byrne, explained the lyric, "same as it ever was" meant that "we operate half-awake or on autopilot and end up . . . and haven't really stopped to ask ourselves, how did I get here?" NATIONAL PUBLIC RADIO (Mar. 27, 2000).

United States as a researcher, he returned to Italy in January 2013, and his wife joined him the summer of the same year.

Soon after the couple moved to Italy, their marriage began to deteriorate. By March of 2014, Taglieri had begun to physically abuse his wife, striking her on the face in an episode that he later described dismissively as “a not welcome touch.”<sup>23</sup> His slapping continued and “got harder”<sup>24</sup> over time. Taglieri told Monasky’s parents that he would “smack [her] in the face” because of her acne and that he was “not ashamed of it” because he “[id] it for her own good.”<sup>25,26</sup>

As time passed, the abuse escalated from physical and emotional abuse to include sexual abuse, as well. He “‘forced himself upon [Monasky] multiple times’” and “‘forced [her] to have sex that he knew [she] didn’t want to have.’”<sup>27</sup> During one assault, he climbed on top of his wife and told her: “‘spread your legs, or I will spread them for you.’”<sup>28</sup> As a result of the continued sexual assaults and despite her express unwillingness to have a child with him, Monasky became pregnant in May of 2014.

The following month, Taglieri decided to move, alone, to Lugo, a town more than 165 miles away from the couple’s apartment in Milan. The distance further strained the parties’ marriage. Two months later, Monasky began to “contact[ ] American divorce lawyers,” “inquire[ ] about American health care and child care options,” and “appl[y] for jobs in the United States.”<sup>29</sup> However, after a near-miscarriage during the first tri-

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<sup>23</sup> Joint Appendix at 106, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Pet. App. 75a.

<sup>24</sup> Joint Appendix at 130, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Pet. App. 75a.

<sup>25</sup> Joint Appendix at 97, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Joint Appendix 124–25, *Monasky v. Taglieri* 420 S. Ct. 719\_.

<sup>26</sup> *See* Tr. 364:10-372:5, Stipulations, Ex. EE, DDD, EEE, Tr. 364:13-366:8, 447 – 457:1-3, 565:23-25, 566-567:1-3, Jt. Ex. 2, Ex. 10, Tr. 364:18, 372:2-3.

<sup>27</sup> Pet. App. 104a n.3 (quoting Joint Appendix at 152, *Monasky v. Taglieri* 420 S. Ct. 719).

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

<sup>29</sup> Joint Appendix at 28-29, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Joint Appendix 189-90, *Monasky v. Taglieri*, 420 S. Ct. 719 (Aug. 6, 2014 e-mail from Monasky to her mother stating “I’d like to look into getting a U.S. divorce. . . . I want to go home.”).

mester, she was barred by physicians from traveling for the remainder of her pregnancy due to the risk of premature labor.

As the pregnancy progressed, Taglieri began “slapping [Monasky] more frequently”<sup>30</sup> during his visits to Milan, and “control[ling] every dollar [Monasky] spen[t].”<sup>31</sup> In response, she repeatedly raised the prospect of divorce with her husband and told him that she intended to return to the United States with the baby after she was born.

When Monasky was nine months pregnant, her husband “smacked the hell out of”<sup>32</sup> her head and days later, when Monasky declined a physician’s recommendation to induce labor during a routine check-up, her husband grew angry. Taglieri refused to take his wife back to the hospital when she started having contractions later that day. Monasky was compelled to take a taxi, alone, in the middle of the night to the hospital and A.M.T. was ultimately born by cesarean section.<sup>33</sup> Alas, Taglieri’s attitude toward his newborn daughter proved to be no different from his attitude toward his wife. He screamed at his crying newborn daughter to “shut up” and threatened to “shove [formula] up her ass”<sup>34</sup> and continuously argued with his wife.<sup>35</sup>

During the weeks following A.M.T.’s birth, Monasky repeatedly communicated to her husband her desire for a divorce and began planning her return to the United States with A.M.T.

Out of necessity, Monasky traveled to Taglieri’s home in Lugo so that she could have help in caring for A.M.T. and complete a passport application process the two had jointly initiated after the child’s birth. Throughout her temporary stay in Lugo, she continued to reiterate to Taglieri that she was divorcing him and returning to the United States with A.M.T. The couple also

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<sup>30</sup> Joint Appendix at 130, *Monasky v. Taglieri*, 420 S. Ct. 719.

<sup>31</sup> *Id.* at 189.

<sup>32</sup> *Id.* at 195.

<sup>33</sup> See Ex. DDD, EE, Pg. 12:6-8, in which Taglieri stated he “refused” to go with his wife to the hospital several times, due to his extreme anger, and Tr. 362:17-19, 450:14-20, 453-25, 454:1-16, in which he stated that he told his wife to take a taxi.

<sup>34</sup> Joint Appendix at 95, 139–40, *Monasky v. Taglieri*, 420 S. Ct. 719; *See also id.* 231.

<sup>35</sup> See Ex. TT, Tr. 245:13-14, 248:15-20, 548:13-16, in which Taglieri argued with his wife, telling her that she was the “son of the devil” after leaving the hospital and that she deserved to suffer.

discussed their impending divorce—and her return to the United States—with their families.

A few months later, during the middle of yet another fight involving the well-being of the child, Taglieri raised his hand as if to strike Monasky. He paused and headed into the kitchen, where Monasky heard what sounded like Taglieri “picking up [a] knife and putting it . . . back.”<sup>36</sup> After Taglieri left for work, Monasky took A.M.T. to the police, who placed them in a social-services safe house for domestic-violence victims. For the next two weeks, they remained in protective care in three different locations, until they left for the United States. On the date of their departure, A.M.T. was only eight weeks old.

Taglieri filed a Hague Convention petition in the U.S. District Court for the Northern District of Ohio seeking an order returning A.M.T. to Italy, to which Monasky raised the Article 13(b) grave risk of harm defense. In response, the district court credited Monasky’s “deeply troubl[ing]” allegations of her exposure to Taglieri’s physical abuse. But the district court found “no evidence” that Taglieri ever abused A.M.T. or otherwise disregarded her well-being.<sup>37</sup> After a bench trial, the district court granted Taglieri’s petition.

At the time of trial, the Sixth Circuit had not addressed the standard for determining the habitual residence of infants under the Hague Convention. Expressly noting the absence of binding precedent, the district court created its own legal standard and presumed that an “infant will normally be a habitual resident of the country where the [parents’] matrimonial home exists.”<sup>38</sup> The district court concluded that Monasky “lacked definitive plans as to *how* and *when*” to leave Italy and thus had not “disestablish[ed]” A.M.T.’s presumptive habitual residence in Italy.<sup>39</sup> The court therefore issued an order directing A.M.T.’s return to Italy.

As it relates to the grave risk of harm defense, the Northern District of Ohio found Monasky’s testimony [and the evidence presented] with respect to the domestic abuse to be credible. Nevertheless, the court conclude[d] that Monasky ha[d] failed to

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<sup>36</sup> Joint Appendix at 147–49, *Monasky v. Taglieri* 420 S. Ct. 719. *See also* Pet. App. 81a.

<sup>37</sup> *Monasky v. Taglieri*, 420 S. Ct. at 729.

<sup>38</sup> Pet. App. 90a.

<sup>39</sup> Pet. App. 93a, 97a (emphases added).

demonstrate, by clear and convincing evidence, that returning [the minor child to its habitual residence] would “expose her to a grave risk of physical or psychological harm or otherwise place [the minor child] in an intolerable situation.”<sup>40</sup> While the court discussed the troubling nature of the alleged abuse, it did not conclude that Monasky met the threshold so as to qualify the risk of harm as “grave.”<sup>41</sup>

Upon review at the U.S. Supreme Court, the Court did not address the issue of the Article 13(b) grave risk of harm exception further than the district court, because Monasky<sup>42</sup> did not challenge those dispositions.<sup>43</sup>

### **III. Spouse and Child: A Consideration of When Victims Are Victims by Proxy**

To clarify how and when courts should allow a respondent parent to use the 13(b) defense to prevent a child’s return to his or her place of habitual residence, it is essential to first determine who exactly is in harm’s way – the parent or the child. Thereafter, the court must determine the gravity of the harm. Courts have unsuccessfully wrestled with whether child return orders

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<sup>40</sup> Taglieri v. Monasky, No. 1:15-CV-00947, 2016 U.S. Dist. LEXIS127474 (S.D. Ohio Sept. 14, 2016).

<sup>41</sup> *Id.* at 28. *Simcox*, 511 F.3d at 604 (“While the court is deeply troubled by, and in no way discounts the seriousness of the physical abuse Monasky suffered—regardless of the frequency, severity, or duration—the Sixth Circuit has instructed that the grave risk exception is “to be interpreted narrowly.”) The court echoed the words of a sister district court that noted: “Much has been written regarding the difficulty victims of domestic abuse face in litigating ICARA cases. Compounding this is the inherent difficulty of attempting [to] prov[e] rape and domestic abuse allegations in court. Unfortunately, this leaves the Court in the uncomfortable position of both understanding why there is little proof of these allegations, and still requiring more under the law. *Pliego v. Hayes*, 86 F. Supp. 3d 678, 703 (W.D. Ky. 2015) (internal citations omitted) (finding no grave risk exception where the respondent, who the court deemed credible, testified in detail regarding several occasions of physical and sexual abuse by the petitioner). Constrained by the requirements of the law, the court concludes that Monasky has failed to demonstrate by clear and convincing evidence that issuing an order of return would place A.M.T. at a grave risk of harm.”

<sup>42</sup> In a strategic move by her counsel.

<sup>43</sup> *Monasky*, 420 S. Ct. at 729.

present reasonable risks of harm, genuine risks of harm, or grave risks of harm.

In tort law, a principle exists to assist litigants and courts in determining the moment in which the distress of a person is actionable. This is called the “zone of danger” rule.<sup>44</sup> The zone of danger can extend to include others, so it is “a geographical area near an accident or incident causing injury, within which a person would be in danger of the same injury.”<sup>45</sup> This rule is used in negligent infliction of emotional distress cases to determine whether bystanders to tortious events will have claims through the witness effect.<sup>46</sup> Similar to its function in tort law, this principle can provide greater guidance and clarity when making the essential determination of when a risk of harm meets the threshold of “grave” in international child abduction cases under the Hague Convention, which is to say that it is so severe that the risk of harm rises to the level of legally preventing a child’s repatriation. When does the grave risk become “grave” in a domestic violence setting? When is the threat of harm to the child enough? The court must inquire as follows: 1) are the children in such proximity to danger they themselves are in danger of sustaining the same injuries as the abused spouse, 2) were the children actually harmed and, if so, how badly, 3) if the children were returned to their habitual residence, would the violence happen again, and 4) is the legal system of habitual residence unable to protect the children even with undertakings.

In *Dobos v. Dobos*,<sup>47</sup> a petitioning parent, the father, claimed the respondent parent, the mother wrongfully removed the parties’ minor children from Hungary to the United States. The mother raised the grave risk of harm defense, testifying that it was necessary due to a pattern of abuse and the domestic violence against her, and therefore by extension, towards her children. While the question of an altercation was substantiated, the court concluded that because any abuse was only directed towards the mother, she had not proven by clear and convincing

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<sup>44</sup> *Zone of Danger Rule*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012).

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

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

<sup>47</sup> *Dobos v. Dobos*, No. 1:08cv307, 2009 U.S. Dist. LEXIS 127474 (S.D. Ohio Jul. 9, 2009).

evidence that a grave risk of harm would fall upon the minor children if they were ordered to return to their country of habitual residence.<sup>48</sup> Instead, the Court employed a series of undertakings to ensure safe return for the minor children.

*Monasky* can be seen as yet another example of the same pattern of violence displayed in the *Dobos* case; the most extraordinary difference is that *Monasky* worked its way up to the U.S. Supreme Court. In *Monasky*, as in *Dobos* before it, violence to a spouse generally speaking was not enough to establish a grave risk of harm to a child without concrete, substantial harm or a threat thereof to the minor child in particular. Both cases exhibit a fact pattern in which a parent is clearly a victim of domestic violence and the minor child is not him or herself a victim, but may or may not be in harm's way.

Numerous courts have attempted to bring order to the confusion and set standards for distinguishing between the differences between "risk of harm" and "grave risk of harm." Sadly, these cases endlessly go back and forth. While some courts have aligned in their analysis of more severe fact patterns (e.g., agreeing that sexual abuse to a child is sufficient to create the grave risk of harm),<sup>49</sup> the courts have continuously met cases of domestic violence with confusion and dissonance.<sup>50</sup>

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<sup>48</sup> Which was stipulated to be Hungary.

<sup>49</sup> "The United States Department of State's legal analysis of Article 13(b) provides the following example of an intolerable situation: A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm." See *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001).

<sup>50</sup> See also *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299, 2005 WL 67094, at \*7 (E.D.N.Y. Jan. 13, 2005), in which the court held that there was a grave risk of harm upon the child's return to Mexico based upon psychological trauma, and *McManus v. McManus*, 354 F. Supp. 2d 62, 70 (D. Mass. 2005), where the court concluded that the psychological harm to the child would not meet the grave risk of harm threshold because the abuse was sporadic. In *Krishna v. Krishna*, No. C97-0021 SC, 1997 WL 195439 (N.D. Cal. Apr. 11,

Two cases that illustrate the inconsistent approaches courts have taken when tackling similar fact patterns are *Lopez v. Alcala*<sup>51</sup> and *Wigley v. Hares*.<sup>52</sup> In *Lopez*, the court determined that while some physical abuse to the minor children did exist, the level of harm evidenced did not rise to the threshold so as to create a grave risk of harm if the minor children were to be returned to their habitual residence of Mexico.<sup>53</sup> In *Wigley*, however, the court determined that even though no abuse existed between either spouse or the children, the psychological harm of return to the children would be so grave as to meet the grave risk of harm threshold.

In *Simcox v. Simcox*,<sup>54</sup> the court outlined three categories into which Hague cases fell relative to situations of abuse. The first category contained “cases in which abuse is relatively minor” where “it is unlikely that the risk of harm caused by return of the child will rise to the level of a ‘grave risk’ or otherwise place the child in an ‘intolerable situation’ under Article 13(b).”<sup>55</sup> In these cases, the court suggested that regardless of undertakings, there was no discretion to refuse return of the minor child.

The second category detailed by the court contained cases in which the “risk of harm is clearly grave” and stated that these cases make undertakings “likely . . . insufficient to ameliorate

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1997), the court determined that the psychological stress from the relationship between the minor child’s parents was so severe as to meet the grave risk of harm threshold. But in *Tabacchi v. Harrison*, No. 99 C 4130, 2000 U.S. Dist. LEXIS 1518 (N.D. Ill. Feb. 10, 2000), the court determined that the grave risk of harm defense failed due to violence being directed to the spouse, rather than the minor child. *See generally* Kilpatrick Stockton LLP & National Center for Missing and Exploited Children, Inc., *Litigating International Child Abduction Cases Under the Hague Convention 50-57* (2007).

<sup>51</sup> 547 F. Supp. 2d 1255 (M.D. Fla. 2008).

<sup>52</sup> 82 So. 3d 932 (Fla. Dist. Ct. App. 2011).

<sup>53</sup> “Even if this Court took all of the children’s testimony as true, it does not rise to the level of an intolerable situation. [The minor child] indicated that his father hit him twice, and that he never saw his father hit [minor child]. . . . This evidence only indicates that Lopez has used corporal punishment to discipline the children in the past. . . . Ultimately the alleged abuse in this case is not so severe that it rises to the level of intolerable situation. . .” *Lopez*, 547 F. Supp. 2d at 1261-62.

<sup>54</sup> 511 F.3d 594 (6th Cir. 2007).

<sup>55</sup> *Id.*

the risk of harm”<sup>56</sup> as a result of the lack of deterrence and difficulty in enforcement.<sup>57</sup>

The third category contained cases that fall somewhere in the middle of these two extremes, where “abuse is substantially more than minor, but is less obviously intolerable.”<sup>58</sup> These are the cases in which the court states undertakings may be helpful.

As they exist now, grave risk cases can create a spectrum of harm,<sup>59</sup> based on the fact patterns, and where cases fall on the spectrum can illuminate the zone of danger. On one end of the spectrum are cases similar to *Walsh v. Walsh*,<sup>60</sup> evidencing a grave risk of harm due to the psychological and physical abuse endured by a minor child, and on the other are cases where no abuse to the minor child or spouse exist, but where a respondent parent argues that factors relative to the environment of the habitual residence create a grave risk of harm.<sup>61</sup> While courts have

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<sup>56</sup> *Id.*

<sup>57</sup> The extremes of physical and psychological abuse against a child were illustrated in *Walsh v. Walsh*. In this case, the court found that the violence exhibited by the petitioning parent was so severe and that the minor child was so affected that the court determined that it rose to the level of grave, accepting the defense to the return of the minor child (refusing return of child after the minor child witnessed abuse to the minor child’s parent, experienced severe abuse and violence herself, as well as anxiety and other physical side effects of enduring the severe abuse). *Walsh*, 221 F.3d 204.

<sup>58</sup> *Simcox*, 511 F.3d 594.

<sup>59</sup> See generally *Blondin*, 238 F.3d at 162. (“In other words, at one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child’s preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.”)

<sup>60</sup> 221 F.3d 204.

<sup>61</sup> See *In re Ariel Adan*, 437 F.3d at 397, in which the court found that the return of a child where money is short or where educational or other opportunities are limited did not meet the threshold of grave risk of harm. See also *Mendez Lynch v. Mendez-Lynch*, 220 F. Supp. 2d 1347 (M.D. Fla. 2002), in which the court found that economic or civil disorder in the minor children’s home country did not meet the threshold to pose a grave risk of harm to minor children. And see *In re D.D.*, 440 F. Supp. 2d 1283 (M.D. Fla. 2006), where the court found that to meet the grave risk of harm threshold, a fact pattern requires more than taking a minor child from their primary caregiver

looked to *Simcox*<sup>62</sup> for guidance, it is time to reconsider *Simcox* and expand upon one of its greatest ideas – the possibility of creating a hierarchy of risk – from which judge and lawyers can create a model to measure how to evaluate and execute remedies consistent with the 1980 Hague Convention’s Article 13(b) grave risk of harm defense to return.

With *Monasky*, the Supreme Court had a chance to address this most important issue. Unfortunately, it did not.

#### **IV. Conclusion – “A Modest Proposal” To Help Children in Grave Risk of Harm<sup>63</sup>**

To save children from unnecessary litigation and further the purposes of Article 13(b), numerous courts have attempted to address what exactly “grave risk of harm” means. *Simcox* offered the idea of a hierarchy of risk. This idea has merit. If wedded<sup>64</sup> to the well-established tort law zone of danger concept, the resultant framework represents a comprehensive guide to resolving 13(b) claims under the 1980 Hague Convention.

If minor children in cases such as those described above fall within the concept of a “zone of danger,” these matters should be addressed in a similar fashion to litigants in tort law situations.<sup>65</sup> Melding the *Simcox* matrix to the well accepted common law zone of danger concept, a court considering a respondent’s 13(b) petition should follow this proposed inquiry: 1) are the children in question in such proximity to the danger; 2) that they themselves are in danger of the same injuries as the parent who is the

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<sup>62</sup> *Simcox*, 511 F.3d 594.

<sup>63</sup> JONATHAN SWIFT, *A MODEST PROPOSAL* (1729).

<sup>64</sup> Author’s note: pardon the domestic relations pun.

<sup>65</sup> Those familiar with the evolution of tort law jurisprudence might note that “foreseeability” has replaced or merged with the concept of the zone of danger over time. This fact, however, is irrelevant in the context we are discussing. The zone of danger is a formulation familiar to lawyers and jurists that could bring order to the chaos of protecting children from the collateral danger of domestic violence in 13(b) situations. *See also* REST. 3D OF THE LAW, TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 48, Comment (“Many courts refer to the requirements of this Section – contemporaneous perception of the accident and a close family relationship – as indications that the emotional distress is both genuine and foreseeable. Some courts state that the actual test is foreseeability and that a person can recover even if the formal requirements are not satisfied.”).

direct victim of violence; 3) and if returned to their habitual residence the children would be put in grave risk of harm or an otherwise intolerable situation; 4) for which the legal system of the habitual residence cannot protect the children even if appropriate undertakings are employed.

It is important to note that this framework considers potential psychological risk but also recognizes the potential of that risk being mitigated by undertakings. Moreover, this model eliminates from the outset the ability of a respondent from “gaming the system” by claiming that grave risk of harm is inchoate or is somehow “on the horizon.” These claims are too often used in the United States to financially burden the left behind parent and win the case for the respondent from the outset.<sup>66</sup>

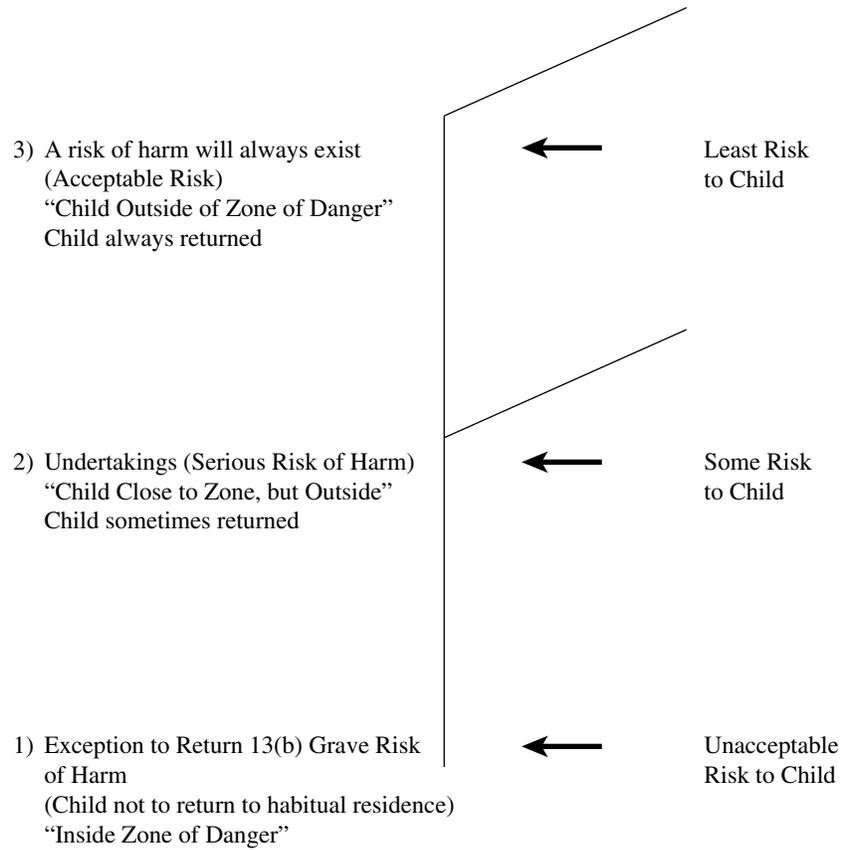
The ultimate question under this framework, if the issue had been a certified question, is should the United States have accepted a 13(b) petition to prevent Monasky’s daughter from returning to Italy? To answer that question, it is essential to keep in mind that the real-life circumstances presented in the *Monasky* case were horrible. The child at issue was an infant. Moreover, Monasky’s daughter was not harmed nor was she even capable of cognizing harm. For these reasons, the fact pattern in *Monasky* makes it an excellent test case.

If one were to graph out the *Simcox* hierarchy and overlay this new *Monasky* grave risk of harm matrix on top of it, the concept would look something like the following illustration titled “Grave Risk of Harm Exception to Return a Child to His or Her Place of Habitual Residence.”

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<sup>66</sup> See generally Zashin et al., *supra* note 7.

## Grave Risk of Harm Exception to Return a Child to His or Her Place of Habitual Residence



The third prong of the illustration demonstrates a situation similar to the *Silverman v. Silverman*<sup>67</sup> case. The opinion reads that, while there was general unrest throughout the country of Israel, there were not specific indications that a grave risk of harm would befall children should they be ordered to return.<sup>68</sup>

<sup>67</sup> 338 F.3d 886 (8th Cir. 2003).

<sup>68</sup> *See id.* ("The district court found that the current situation in Israel constitutes a 'zone of war,' warranting application of the 'grave risk' exception. In *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996), the district court found that Israel in 1996 was not a 'zone of war' under Article 13(b). In so finding, the court determined that the fighting was fifteen to ninety minutes from the children's home, no schools were closed, businesses were open, and

Essentially, the day to day lives of the public at large continued on as normal. Thus, there is risk, but it is the risk of everyday life in a co-signing state. It is a reasonable risk, where no undertakings are necessary. The risk the taking parent complained of in *Silverman*, which falls into the third prong of the illustration, might be argued by one who left a large city in the United States and settled in a rural co-signing country. Logically, the argument must fail.

Considering the second prong, it resembles a case like *Dobos*, one where concerns for the children's safety can be remediated with the implementation of undertakings. Presuming, of course, that the American court is satisfied with both the sufficiency of the undertakings and just as important, the willingness and ability of the co-signing country's legal system to implement and enforce them.

Finally, the first prong of the illustration is the most troublesome. When should a court not return a child to his or her habitual residence? That question turns on the issue of "domestic violence by proxy." *Monasky* is a good test case to define this term and a perfect test case for this framework, even though the child was not harmed. One might argue that the infant, A.M.T., was not harmed by proxy or otherwise, however, that assertion is weak in light of the objective facts. A.M.T. had only lived with her mother. She was only eight weeks old when she was removed. Her mother did not speak Italian. Her parents had separated before the child's birth. Her parents had clearly discussed divorce, had lived in the United States previously, and had discussed returning there. Thus, there was no clarity on the issue of parental intent. Her only caregiver, her mother, was alone in Italy. Her mother was an abused woman. The issue of domestic violence was substantiated and her mother even won compensation and damages for that abuse in the United States. The dis-

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the mother was able to travel to and from the country. *Id.* No subsequent case has found that Israel is a 'zone of war' under the Convention. In fact, there does not appear to be another case that finds any country a "zone of war" under the Convention. Nor does the district court cite any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999. Rather, the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel.").

strict court that ordered the child's return was aware of this. It is reasonable to argue that no undertakings could reasonably protect a child of this age from her father who felt that it was his right to use violence inside his family. In light of the foregoing, it is illogical to argue that A.M.T. was not a subject of domestic violence "by proxy." Sadly, upon returning to Italy, this little girl was placed in similar danger to the actual harm, both physical and psychological,<sup>69</sup> that her mother faced.<sup>70</sup>

From the start, if lawyers were to assemble their cases and present their arguments to courts in accordance with the proposed framework detailed above, and the courts were similarly receptive to this proposal, outcomes would change radically. In *Monasky*, where the violence against the mother was not in dispute, and the imbalance of marital and financial power was so great, returning the infant to Italy was unconscionable. Thus, in this case, the 13(b) grave risk of harm defense would have been employed successfully.

Although *Monasky v. Taglieri* did not turn on 13(b), the Supreme Court could have still addressed this important issue. Too many courts have gotten this wrong. To further the spirit and purpose of the convention, lawyers and jurists in the United States must do better to protect the most vulnerable among us, children, who cannot protect themselves, and whose parents may have only their self-interests at heart.

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<sup>69</sup> As referenced in the text of the Hague Convention itself.

<sup>70</sup> See Simpson, *supra* note 13, at 841-864, 857.

Comment,  
**THE USE OF NON-DISPARAGEMENT  
CLAUSES IN FAMILY LAW CASES**

The enforcement of non-disparagement clauses in divorce and custody cases is a challenge that all parties involved share. A seemingly simple clause that asks divorcing parties to act like adults is surprisingly the center of great controversy. Judges and lawyers alike must use all of their legal knowledge to draft enforceable non-disparagement clauses, because they must consider the parties' First Amendment right to freedom of speech.<sup>1</sup>

This comment will address the challenges that judges and lawyers face when drafting non-disparagement clauses. It is limited to a discussion of non-disparagement clauses, and does not address similar clauses such as non-disclosure agreements in business contracts.<sup>2</sup> Part I will provide a description of non-disparagement clauses to offer a basic understanding of the clause. Part II will discuss court imposed non-disparagement clauses and First Amendment issues. Part II will be further separated into two sections, the first addressing speech related to communication with the children, and the second with third-party communications. Part III will explore non-disparagement clauses that parties have agreed to, and will similarly be divided into speech relating to communication with the children and speech directed to third parties.

## **I. What Is a Non-Disparagement Clause**

To understand the complexity of non-disparagement clauses, one must first understand what they are. A non-disparagement clause in a parenting plan is a clause that requires each parent in a dissolution or custody case to refrain from disparaging the

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<sup>1</sup> U.S. CONST. Amend. I.

<sup>2</sup> Jonathan Lurie, *Party Unity: Understanding Non-Disclosure and Non-Disparagement Clauses*, LEGAL MATCH: EMPLOYMENT LAW (July 26, 2016), <https://legalmatch.typepad.com/employmentlaw/2016/07/party-unity-understanding-non-disclosure-and-non-disparagement-clauses.html>.

other.<sup>3</sup> Non-disparagement clauses are helpful in custody situations because they try to prevent a parent from making disparaging comments about the other parent in front of the children and third parties.<sup>4</sup> Non-disparagement clauses are not boilerplate clauses; they must be unique in order to work. A crafty ex-spouse would be able to evade the intended restrictions, and lawyers and judges must be careful to draft air-tight clauses. What is unique about non-disparagement clauses is the way they are enforced. To enforce the non-disparagement clause a party generally has three options.<sup>5</sup> A party can ask the court to modify the parenting plan, and reference to the court the change of circumstances that occurred since the last hearing.<sup>6</sup> Alternatively, a motion to modify can be filed, asking the court to change certain terms in the non-disparagement clause.<sup>7</sup> Finally, one has the option of filing a motion for contempt in which the injured party asks the court to punish the other party for not abiding by the non-disparagement clause and to compel future good behavior.<sup>8</sup>

## **II. Court Imposed Non-Disparagement Clauses and First Amendment Issues**

Courts throughout the country adopt various approaches when including non-disparagement clauses in their orders. Generally, a distinction can be seen between those clauses that address speech related to children, and those directed to third-party communications.

### *A. Speech Relating to Communication with the Children*

Non-disparagement clauses are sometimes written to protect the bond between a parent and child. The court in writing such clauses must be mindful of all the interests involved. These interests are the child's best interest standard, the state's duty to pro-

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<sup>3</sup> Kelly Kanavy, *The State and the "Psycho Ex-Wife": Parents' Rights, Children's Interests, and the First Amendment*, 161 U. PENN. L. REV. 1081, 1087 (2013).

<sup>4</sup> *Id.* at 1091.

<sup>5</sup> *Id.* at 1089, 1090.

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

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

<sup>8</sup> *Id.*

protect the child also known as “*parens patriae*,”<sup>9</sup> and both parents’ separate constitutional interests.<sup>10</sup> The balancing of these interests can be seen in the following cases.

An early case exploring this issue is *Schutz v. Schutz*.<sup>11</sup> This thirty year-old Florida Supreme Court decision is a landmark decision that many courts have cited when addressing non-disparagement clauses.<sup>12</sup> The case involved a six-year marriage, and at the time of the divorce the mother was given sole custody of the children.<sup>13</sup> Several years later the father alleged, and the trial court agreed, that the children had come to hate their father. The court found that the mother was “the cause of the blind, brain-washed, bigoted belligerence of the children toward the father which grew from the soil nurtured, watered and tilled by the mother.”<sup>14</sup> The trial court found that the, “mother breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their father,”<sup>15</sup> and with these findings the court drafted a non-disparagement clause in the visitation, custody, and support order.<sup>16</sup> These findings then created a potential First Amendment challenge. The Florida Supreme Court held that the mother’s First Amendment challenge was “merely incidental,”<sup>17</sup> and in doing so, upheld the order.

The court reasoned that the non-disparagement clause “furthered an important or substantial governmental interest,” and it weighed the mother’s First Amendment interest as inferior to the government’s *parens patriae* interest.<sup>18</sup> In reaching its conclusion, the court also considered the children’s and father’s inter-

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<sup>9</sup> *Id.*, at 1092.

<sup>10</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

<sup>11</sup> *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991).

<sup>12</sup> Kanavy, *supra* note 3, at 1098.

<sup>13</sup> *Schutz*, 581 So. 2d at 1291.

<sup>14</sup> *Id.* at 1292.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The non-disparagement clause stated that the mother will have “to do everything in her power to create in the minds of the children a loving, caring feeling towards the father, and to convince the children that it is the mother’s desire that they see their father and love their father.”

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1293.

ests.<sup>19</sup> The *parens patriae* interest was identified as the importance of the state's influence in assisting the creation of a father-child relationship, and the father had a constitutional right to that relationship.<sup>20</sup> The court found that the actions of the mother created an environment that would never allow such a relationship to occur. The court further explained how in promoting the state's interest, it would also be promoting the best interest of the children by having a father in their lives.<sup>21</sup> The Florida Supreme Court ruled that the burden placed on restricting the mother's right to free expression was essential and necessary to promote the father's and the state's interests.<sup>22</sup> What makes this case interesting is the court's seeming disregard for the mother's First Amendment right to freedom of expression. Throughout the decision the court only briefly mentioned the mother's right, and instead focused heavily on the competing rights. This approach has led other courts to distinguish the *Schutz* case.

In Missouri, the court decided in *Kessinger v. Kessinger* that the *Schutz* court's rationale was not applicable in Missouri.<sup>23</sup> In a fact situation similar to that in the *Schutz* case, the court ordered the mother in *Kessinger* to tell her children that all of the problems that they were facing were her fault and not their father's.<sup>24</sup> As in *Schutz* the court faced the delicate task of balancing every party's interest.<sup>25</sup> However, even after balancing the interests of all the parties, the court found that there was no authority in Missouri by which to make such an order enforceable.<sup>26</sup> The reasoning is that these specific statements in the non-disparagement clause go beyond what the state legislature intended when it drafted the statute, and it was beyond the scope of the court's power to enforce such a clause.<sup>27</sup>

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

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

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

<sup>22</sup> *Id.*

<sup>23</sup> *Kessinger v. Kessinger*, 829 S.W.2d 658, 663 (Mo. Ct. App. 1992).

<sup>24</sup> *Id.* The court ordered that the mother was to tell the children that the financial deprivation they suffered resulted from the mother's actions, that the father was not responsible for the mortgage payments on their house, and that the father did not harass, intimidate or coerce the mother.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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

In Massachusetts, the court in *Shak v. Shak* decided that a non-disparagement clause was an unconstitutional prior restraint under the First Amendment.<sup>28</sup> This case differs from *Schutz* and *Kessinger* in that it uses a more in-depth First Amendment analysis. The Shaks were married a little over a year and had one young child together.<sup>29</sup> During one of the hearings the mother asked the court to order a non-disparagement clause.<sup>30</sup> At a different hearing the mother filed a civil complaint against her ex-husband, because he violated the first non-disparagement clause.<sup>31</sup> The trial court denied the mother's motion after finding that the non-disparagement clause was a prior restraint on the father's speech. However, the judge concluded that the clause would be constitutional if it was narrowly construed and supported by a compelling state interest and therefore crafted a new clause.<sup>32</sup>

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<sup>28</sup> *Shak v. Shak*, 144 N.E.3d 274 (Mass. 2020).

<sup>29</sup> *Id.* at 276. This little background is important later in the court's final decision.

<sup>30</sup> *Id.* The non-disparagement clause read:

1. Neither party shall disparage the other— nor permit any third party to do so — especially when within hearing range of the child.
2. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 277. The new non-disparagement clause read:

1. Until the parties have no common children under the age of fourteen years old, neither party shall post on any social media or other internet medium any disparagement of the other party when such disparagement consists of comments about the party's morality, parenting of or ability to parent any minor children. Such disparagement specifically includes but is not limited to the following expressions: 'cunt', 'bitch', 'whore', 'motherfucker', and other pejoratives involving any gender. the court acknowledges the impossibility of listing herein all the opprobrious vitriol and their permutations within the human lexicon.
2. While the parties have any children in common between the ages of three and fourteen years old, neither party shall communicate, by verbal speech, written speech, or gestures any disparagement to the other party if said children are within one hundred feet of the communicating party or within any other farther distance where the children may be in a position to hear, read or see the disparagement.

The appellate court in its review addressed the constitutionality of the court-created second non-disparagement clause. The appellate court approached this issue beginning with a thorough First Amendment review. It first looked at what the First Amendment protects and concluded that the First Amendment prevents the government from limiting one's speech unless a narrow exception applies.<sup>33</sup> The court then reviewed the prior restraint standard. The court defined prior restraint as a court order that forbids certain speech in the future before that speech has even occurred.<sup>34</sup> The court viewed prior restraint as the "most serious and the least tolerable infringement on First Amendment rights."<sup>35</sup> The court did, however, mention exceptions where prior restraints might be permissible, but concluded that the standard for finding an exception is extremely high. The court concluded that it would allow such orders if the damage from the speech was "truly exceptional," or if the damage from the speech was certain and there were no less restrictive alternatives available.<sup>36</sup> The court would also allow prior restraint in a non-disparagement clause if it could be shown that there was a compelling state interest, and the prior restraint was protecting against a serious danger.<sup>37</sup> The appellate court acknowledged that the trial court was able to find that the state indeed had a compelling interest to protect the children, but went on to explain that the compelling state interest was not strong enough to overcome the high burden against courts allowing the enforcement of a prior restraint.<sup>38</sup> The court found that there was no imminent harm to the child, because the child was only a toddler, and therefore the child was unable to understand what was being mentioned in his presence or on social media.<sup>39</sup> The court therefore held that the non-disparagement clause was a prior restraint on the father's speech and unconstitutional.<sup>40</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 278.

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

<sup>37</sup> *Id.* at 279.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 280.

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

It is interesting to consider whether the court would have ruled the same way if the child were older? The manner in which the court decided this case involved a significant reliance on the fact that the child was too young to understand what was happening. It seems not to be a general holding on the constitutionality of non-disparagement clauses, but one that remains fact specific. As such, it illustrates the complexities of a First Amendment analysis, and the possible ways that similar non-disparagement clauses could be enforced.

In a different approach to the First Amendment analysis, the Supreme Court of New Hampshire engaged in a simple legal discussion in *In re Ramadan*.<sup>41</sup> The trial court ordered that the father “shall not speak about the petitioner as a Muslim/Muslim woman to the children or within hearing of the children.”<sup>42</sup> The Supreme Court in one line said that the court order was an “impermissible prior restraint on his freedom of speech.”<sup>43</sup> Unlike in *Shak*, the court here did not bother to go through a sophisticated legal analysis of the constitutionality of the non-disparagement clause. Instead, the court summarily concluded that the clause constituted an infringement of the father’s First Amendment rights.

In *In re Marriage of Hartman*, the court used the best interest of the child standard to limit the mother’s speech.<sup>44</sup> Unlike the *Shak* court’s opinion, the court here did not bother with an in depth First Amendment analysis. Instead the court simply said, “In family law cases, courts have the power to restrict speech to promote the welfare of the children. Thus courts routinely order the parties not to make disparaging comments about the other parent to their children or in their children’s presence.”<sup>45</sup> This case demonstrates again that every court’s jurisdiction may have a different way of approaching non-disparagement clauses.

The trial court in *In re Marriage of Black* was overturned by the Washington Supreme Court, because it wrongfully tried to use the best interest of the child standard simply because the

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<sup>41</sup> *In re Ramadan*, 153 N.H. 226 (N.H. 2006).

<sup>42</sup> *Id.* at 233.

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

<sup>44</sup> *In re Marriage of Hartman*, 185 Cal. App. 4th 1247 (2010).

<sup>45</sup> *Id.* at 1251.

mother was a homosexual.<sup>46</sup> This case involved a conservative religious Christian household that believed that homosexuality was a sin.<sup>47</sup> During the parties' long marriage, the wife revealed her sexual orientation as a lesbian, which led the parties to divorce three years later.<sup>48</sup> The guardian ad litem for the children recommended to the court that the mother should be refrained from talking about anything relating to homosexuality with the children,<sup>49</sup> and the trial court adopted the guardian ad litem's suggestion in its court orders.<sup>50</sup> The trial court also further restricted the mother's conduct with her children by restricting her from talking about alternative lifestyles with them.<sup>51</sup> The Washington Supreme Court determined that the trial court based its order solely on the mother's sexual orientation, and used the guise of protecting the children as a rationale for making the order enforceable.<sup>52</sup> The court found that the order was also based on an unwarranted belief that the children would be bullied and harmed because of their mother's sexuality,<sup>53</sup> and strongly rejected such a rationale.<sup>54</sup> The Supreme Court found that the guardian ad litem's recommendations, ratified by the trial court, created an unconstitutional restriction on the mother's speech, and that the court failed to stay neutral to the parties regarding their sexual orientation.<sup>55</sup> What makes this case interesting is that the court here came to the same conclusion as *Shak*, but used a drastically different approach. Here the court found that

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<sup>46</sup> *In re Marriage of Black*, 188 Wash. 2d 114 (Wash. 2017).

<sup>47</sup> *Id.* at 118.

<sup>48</sup> *Id.* at 119.

<sup>49</sup> *Id.* at 124.

<sup>50</sup> *Id.* at 125.

<sup>51</sup> *Id.* at 132. The court order read:

[Rachelle] is ordered to refrain from having further conversations with the children regarding religion, homosexuality, or other alternatives lifestyle concepts and further that she be prohibited from exposing the children to literature or electronic media; taking them to movies or events; providing them with symbolic clothing or jewelry; or otherwise engaging in conduct that could reasonable be interpreted as being related to those topics unless the discussion, conduct or activity is specifically authorized and proved by Ms. Knight.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 133.

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

<sup>55</sup> *Id.* at 137.

the best interests of the children were not being accomplished by maintaining such an order. When it comes to religion, courts must balance every parties' interest, but at the same time the court cannot uphold an order that is clearly designed to discriminate against a parent because of who they are.<sup>56</sup>

#### B. *Third-Party Communication*

There are situations in which the courts will order parents to not disparage each other to third parties. This is different than writing a non-disparagement clause to protect the children from the parents' hateful comments. The courts here are trying to prevent parents from disparaging each other to friends, family, co-workers and others, and must do so without unnecessarily infringing upon the parties' First Amendment rights.

In *In re Marriage of Candiotti*, the trial court restrained the mother from talking to third parties about the background of her ex-husband's wife.<sup>57</sup> The trial court justified the order by explaining that it was trying to protect the children from hearing rumors about their step-mother, and from being bullied because of it.<sup>58</sup> The trial court felt that it had written the order narrowly enough to prevent any First Amendment challenge.<sup>59</sup> However, this was not the case. The appellate court explained that because family court judges often are tasked with dealing with hostile parents, they must balance all the parties' interests and any harm that might occur.<sup>60</sup> With that in mind, the appellate court indicated that while it may be proper to issue orders limiting parents' interactions with their children, here the the trial court went beyond the scope of that power by limiting the mother's right to speak to others.<sup>61</sup> The appellate court found that the order an undue prior restraint on mother's speech, because it would limit how the mother could talk to all third parties about the children's step-

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<sup>56</sup> Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interest of the Child*, 53 VLL.L. REV. 173 (2008).

<sup>57</sup> *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 719 (1995).

The order stated: "Directing Debra not to disseminate information regarding Donna's past driving record and other defined personal history to anyone besides certain specified individuals."

<sup>58</sup> *Id.* at 721.

<sup>59</sup> *Id.* at 722.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 725.

mother.<sup>62</sup> The court agreed that it was in the best interest of the children for the mother to not speak ill about their step-mother, but here the court felt that the non-disparagement clause was too far-reaching to be constitutional.<sup>63</sup>

This case demonstrates that the best interest of the child standard has less weight in issues involving disparaging comments to third parties. While the California court in *In re Hartman* allowed the “best interest standard” to be used to enforce a non-disparagement clause when directed at inter-parental communication, here that standard was not enough to justify the infringement on the mother’s First Amendment right. However, in the next case the court in Kentucky demonstrated what requirements are needed in order to allow a non-disparagement clause to be upheld.

In *Wedding v. Harmon*, the appellate court in Kentucky upheld an order preventing a father from forwarding emails to third parties.<sup>64</sup> The father on multiple occasions sent emails to hundreds of individuals complaining about his divorce.<sup>65</sup> The mother filed a motion with the court to stop the father’s actions, and that motion was granted by the family court.<sup>66</sup> The father appealed, arguing that the order was an infringement on his First Amendment rights, but the appellate court after a thoughtful analysis denied the father’s claim.<sup>67</sup> The court first examined what is protected under the First Amendment and in doing so explained that the First Amendment is designed to promote “the free flow of ideas and opinions on matters of public interest and concern,” and that “very few restrictions upon the content of speech are permitted.”<sup>68</sup> However, the father’s emails were not designed to promote these lofty ideals; instead the emails were only designed to denigrate the mother to the parties’ acquaintances. The court explained that freedom of speech is not unlimited, and that others can be affected by actions.<sup>69</sup> This, the court, explained al-

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<sup>62</sup> *Id.*

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

<sup>64</sup> *Wedding v. Harmon* 492 S.W.3d 150 (Ky. Ct. App. 2016).

<sup>65</sup> *Id.* at 152.

<sup>66</sup> *Id.* at 153.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 154.

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

lows one's freedom of speech to be limited in order to protect others.<sup>70</sup> The father also argued that preventing his emails constituted a prior restraint on speech.<sup>71</sup> The court rejected the father's argument, finding that the ruling was not an abuse of discretion.<sup>72</sup> The court found that the father's actions were inimical to the children's interest, and the state has a compelling interest to protect the children.<sup>73</sup> In this case the father's First Amendment right was outweighed by the children's interests.<sup>74</sup> This case illustrates that the First Amendment will not protect purely disparaging remarks, particularly when they affect a central family figure in a child's life.

In contrast to the *Wedding* case, the Supreme Court of Washington in *In re Marriage of Suggs* held that an anti-harassment order (similar to a non-disparagement clause) was an unconstitutional prior restraint on the wife's speech.<sup>75</sup> The trial court noted eleven instances in which the wife sent harassing communications about her ex-husband to different third parties.<sup>76</sup> The court granted the husband's order of protection restraining his former wife from making allegations to third parties.<sup>77</sup> The Washington Supreme Court found that the order constituted a prior restraint.<sup>78</sup> The court explained that "the line between protected and unprotected speech is very fine,"<sup>79</sup> and such court orders must be "tailored as precisely as possible to the

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 155. The reasons for upholding the court order were: the injunction was narrowly tailored relating only to unprotected speech; there was a final hearing prior to the injunction; evidence supported the order; the harassing emails were not subject to heightened scrutiny; and the mother had a right to be free from harassment.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *In re Marriage of Suggs*, 152 Wash. 2d 74 (Wash. 2004).

<sup>76</sup> *Id.* at 78.

<sup>77</sup> *Id.* at 79. The protective order read: "Knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose."

<sup>78</sup> *Id.* at 81. The court here used a similar prior restraint analysis found in previous cases that explored the topic.

<sup>79</sup> *Id.* at 83.

exact need of the case.”<sup>80</sup> The court then dissected the order into three parts to come to its conclusion.<sup>81</sup> It found that the order created confusion regarding what it was trying to prevent, and in doing so it

lacks the specificity demanded by the United States Supreme Court for prior restraint on unprotected speech. Indefinite wording is impermissible when the court has repeatedly stated that the line between protected and unprotected speech is very fine. Such wording leaves us unable to ascertain what speech the order actually prohibits.<sup>82</sup>

The court felt that upholding such an order was impermissible, because it would leave a “chilling effect” on any type of speech that would normally be protected.<sup>83</sup> The problem with chilling one’s First Amendment rights is that it could result in a person living in fear of being found in contempt of the court order for doing something that they have every right to do.

What makes this case interesting is that the Washington Supreme Court used an in-depth First Amendment analysis to find that the trial court order was unconstitutional. The distinguishing factor here is that the wife’s First Amendment right was never compared to the best interest of the child standard. By not including such a comparison, it is easier for courts to find prior restraint in such orders. A common theme with non-disparagement is that the clauses include many different competing constitutional interests that the courts must carefully balance to protect everyone involved. In looking at the caselaw, it is difficult to find a bright-line rule regarding whose constitutional rights reign supreme. However, a common theme is that the court will use the best interest of the child standard to tip the balance in favor of one party.

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

<sup>81</sup> *Id.* The first part of the order was designed to “restrain libelous speech”; the second part was designed to deal with “harassing speech”; the third part was designed to combine “harassing and libelous speech.”

<sup>82</sup> *Id.* at 84.

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

### III. Non-Disparagement Clauses That Parties Have Agreed to and Their First Amendment Considerations

Another aspect of non-disparagement clauses is the complications that will arise when parties agreed to the terms. In this situation, parties were able to settle their divorce and had their attorneys draft the non-disparagement clause. A quick Google search for non-disparagement clauses will find news articles relating to famous ex-couples who have broken their divorce settlements regarding their non-disparagement clause.<sup>84</sup> What makes these types of clauses different than judicially imposed ones is that the parties agreed to the terms. In the area of agreed clauses, courts will use different metrics to determine whether the non-disparagement clauses are enforceable.

#### A. Speech Relating to Communication with the Children

These types of non-disparagement clauses are the newsworthy ones, as is seen in NBA player Steve Nash's divorce.<sup>85</sup> Steve Nash was married to his wife for five years before they divorced.<sup>86</sup> During the divorce, the parties created a joint custody agreement, which included a non-disparagement clause that

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<sup>84</sup> See, e.g., Kwame Anthony Appiah, *My Ex-Wife Bad-Mouths Me to Our Boys. Can I Tell Them the Truth About Her?*, N.Y. TIMES MAG. (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/magazine/my-ex-wife-bad-mouths-me-to-our-boys-can-i-tell-them-the-truth-about-her.html>; Louisa Chu, *42 Grams Chef Battered His Ex-Wife. Now He Has Filed a \$250,000 Defamation Lawsuit Against Her*, CHI. TRIB. (Nov. 18, 2019), <https://www.chicagotribune.com/dining/ct-42-grams-jake-bickelhaupt-alexa-welsh-lawsuit-stone-flower-20191108-wg6faiijvvd6blapkv5cfsv73e-story.html>; Shaune Flowers, *Dwyane Wade's Ex-Wife Siohvaughn Funches Wants a New Divorce Settlement*, INQUISITR (July 11, 2016), <https://www.inquisitr.com/3295964/dwyane-wades-ex-wife-siohvaughn-funches-wants-a-new-divorce-settlement/>; David L. Hudson Jr., *NBA Star's Divorce Becomes an Unexpected First Amendment Contest*, ABA J. (Dec. 1, 2013), [https://www.abajournal.com/magazine/article/nba\\_stars\\_divorce\\_becomes\\_an\\_unexpected\\_first\\_amendment\\_contest/](https://www.abajournal.com/magazine/article/nba_stars_divorce_becomes_an_unexpected_first_amendment_contest/).

<sup>85</sup> Greg Price, *Lakers News: Steve Nash Child Support Payments to Increase; Kobe Bryant's Auction a Boon for Mom*, INT'L BUS. TIMES (July 25, 2013), <https://www.ibtimes.com/lakers-news-steve-nash-child-support-payments-increase-kobe-bryants-auction-boon-mom-1359855>.

<sup>86</sup> Nash v. Nash 232 Ariz. 473, 475 (Ariz. Ct. App. 2013).

was approved by the family court.<sup>87</sup> The very day after the case was settled, the mother went on Twitter and disparaged Steve Nash.<sup>88</sup> The family court reprimanded the mother because the comments on social media were in violation of her agreed settlement. She then appealed the court's interpretation, arguing that the clause violated her First Amendment rights.<sup>89</sup> The Arizona appellate court used an in-depth First Amendment analysis similar to that used in the previously discussed cases.<sup>90</sup> The court held that the mother's argument that the non-disparagement clause was unconstitutional failed because she had agreed to put restrictions on her own First Amendment rights by signing the joint custody agreement.<sup>91</sup> The court then took judicial notice of the facts of the case.<sup>92</sup> The court explained that because the father was a famous athlete the mother's tweets would be highly visible, and the children could most likely see the mother's disparaging comments.<sup>93</sup>

This is an interesting interpretation of the the non-disparagement clause that the parties signed, because technically the comments were never made in the presence of the children. However, in today's modern age, social media comments can be treated as being made in-person. Even though this case involved a famous athlete, one can assume that a similar result would occur to the plebeians in this country as was seen in *Shak* regarding the use of social media.<sup>94</sup> What is also important to understand is that people are able to limit their constitutional rights. Just as an individual can waive his or her Fourth, Fifth, and Sixth Amend-

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<sup>87</sup> *Id.* at 481. The non-disparagement clause read:

All communications between the parties shall be respectful. The parents agree that neither parent shall disparage the other party to the children, and that each parent shall model respect for the other parent in their interactions with the children. Neither parent shall do or say anything to the children that would negatively impact the child's opinion or respect for the other parent.

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

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 482. The appellate court here used similar federal case law that was seen throughout this comment, to figure out what constitutes a prior restraint of speech.

<sup>91</sup> *Id.*

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

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

<sup>94</sup> *Shak*, 144 N.E.3d at 277.

ment rights in criminal cases<sup>95</sup> and accept the consequences, so too can one waive his or her First Amendment rights in a divorce settlement.<sup>96</sup>

### B. *Third-Party Communication*

A further issue to consider is whether the clause actually protects the speech intended. This is an important consideration when parties settle their divorce and agree to the terms. An example of the concern is seen in the Utah Court of Appeals case of *Robertson v. Stevens*.<sup>97</sup> The case involves the parties' agreed upon non-disparagement clause that Mr. Stevens felt needed to be amended to deal with a change of circumstances that occurred.<sup>98</sup> Ms. Robertson (the ex-wife) wrote a chapter in her book, as well as blog posts, that included private details about the parties' marriage, and she made potentially disparaging comments about her ex-husband.<sup>99</sup> What makes this case interesting is that Mr. Stevens did not argue that his ex-wife disparaged him, but instead argued that a change of circumstances occurred, and therefore the non-disparagement clause should be expanded. The appellate court had to answer the question of whether a family court has continuing jurisdiction to modify an agreed upon non-disparagement clause that did not involve children.<sup>100</sup> A court has limited jurisdiction to modify an order once a judgment has been entered, and this is designed to prevent angry parties from filing endless motions.<sup>101</sup> The court explained that when it lacks jurisdiction over an issue, the only available option is to dismiss

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<sup>95</sup> Scott Grabel, *Criminal Amendments in the Bill of Rights*, GRABEL & ASSOCIATES MICH. CRIM. LAW., <https://www.grabellaw.com/criminal-amendments-in-the-bill-of-rights.html#:~:text=these%20amendments%20include%20the%20fourth,suspected%20or%20arrested%20for%20crimes.&text=the%20Fourth%20Amendment%20protects%20people,and%20seizures%20without%20a%20warrant> (last visited Sept. 25, 2020).

<sup>96</sup> *Nash*, 32 Ariz. at 482.

<sup>97</sup> *Robertson v. Stevens*, 461 P.3d 323 (Utah Ct. App. 2020). The non-disparagement clause read: "Ms. Robertson shall not tell third parties that Mr. Stevens kicked her out of the house, or has stolen marital assets."

<sup>98</sup> *Id.* at 324.

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

<sup>100</sup> *Id.* at 325.

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

the case.<sup>102</sup> In Utah, a family court under limited circumstances can maintain jurisdiction if the statutes allow it.<sup>103</sup> However, in this case no statutes were available to allow the family court to exercise continuing jurisdiction over the non-disparagement clause.

Perhaps Mr. Stevens was arguing the wrong point to enforce his non-disparagement clause. He may have been more successful if he had argued that his wife violated the agreement. Ms. Robertson then would have to argue that her First Amendment rights were being infringed by the clause. In that situation, as in the *Nash* case, the court might have held that she had waived her First amendment right by agreeing to the non-disparagement clause.<sup>104</sup>

## Conclusion

Non-disparagement clause are often hidden away in divorce documents. These few sentences, however, raise complex constitutional debates throughout the country. Attorneys and judges must be cognizant of the issues involving non-disparagement clauses, and should never assume that the drafted clause will be enforceable. When these clauses are subject to review, courts will treat similar clauses differently suggesting that there is never a perfect non-disparagement clause, and in looking back to the caselaw mentioned throughout a bright-line rule is hard to discern. In drafting non-disparagement clauses it would be paramount to look at what one's own state's highest court has decided on the matter.

Jacob Eisenman

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

<sup>103</sup> *Id.* The statutes allow courts to maintain jurisdiction in cases involving child custody, child support, alimony, property distributions, and debts.

<sup>104</sup> *Nash*, 232 Ariz. 482 (2013).

Comment,  
POST-SEPARATION PARENT-CHILD  
CONTACT PROBLEMS: UNDERSTANDING  
A CHILD'S REJECTION OF A PARENT AND  
INTERVENTIONS BEYOND CUSTODY  
REVERSAL

The relationships within a divorced family are “pitted with emotional intra-family land mines.”<sup>1</sup> Post-parental separation may lead children to resist contact or show a strong preference for one parent. Traditionally, a rejected parent may accuse the favored parent of causing this resistance by alienating the child against them. This allegation could lead to contentious and drawn-out litigation that undercuts parenting plans and reverses custody to the rejected or non-favored parent.<sup>2</sup> This concept of alienation has significantly evolved since its introduction in the 1980s to become a multi-factor theoretical model used to analyze the effects of post-separation stressors on the physical, psychological, and cognitive strengths and vulnerabilities of the child.<sup>3</sup> Courts are called on to consider the unique risks and protective factors for the child and parents on a case-by-case basis. This Comment will describe what parental alienation is and ways courts can address parental alienation to improve the child’s relationship with both parents. Part I of this Comment will define post-separation parent-child contact problems (PCCPs)<sup>4</sup> and their many forms. Part II will explain this concept’s origin and

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<sup>1</sup> See *J.F. v. D.F.*, 61 Misc. 3d 1226(A) (N.Y. Sup. Ct. Dec. 6, 2018).

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

<sup>3</sup> See generally Marjorie Gans Walters & Steven Friedlander, *When a Child Rejects a Parent: Working with the Intractable Resist/Refuse Dynamic*, 54 FAM. CT. REV. 424, 425 (2016); Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 FAM. CT. REV. 270, 279-80 (2020); Kimberley J. Joyce, *Under the Microscope: The Admissibility of Parental Alienation Syndrome*, 32 J. AM. ACAD. MATRIM. LAW. 53, 63 (2019); Shely Polak, Tom Altobelli & Linda Popielarczyk, *Responding to Severe Parent-Child Rejection Cases Without a Parentectomy: A Blended Sequential Intervention Model and the Role of the Courts*, 58 FAM. CT. REV. 507, 509 (2020).

<sup>4</sup> Barbara Jo Fidler & Nicholas Bala, *Concepts, Controversies and Conundrums of “Alienation:” Lessons Learned in a Decade and Reflections on*

the critique of the single factor model of parental alienation as applied in the courtroom. Part III of this Comment will explain how cases involving parent-child contact problems are handled in family law litigation today and the most prominent concerns raised. Part IV will provide potential changes to the way courts handle PCCPs that accommodate the new use of the multi-factor theoretical model of post-separation parent-child contact problems. These potential changes include systemic changes to the case management process as well as therapeutic recommendations that show promise in alleviating post-separation parent-child contact problems.

## **I. Defining Post-Separation Parent-Child Contact Problems**

### *A. Types of Post-Separation Parent-Child Contact Problems*

Post-separation parent-child contact problems result when a child refuses or rejects one of the parents, usually in preference for the other parent; however, identifying PCCPs requires going beyond the simple frustration of a parent's access to his or her child.<sup>5</sup> Contact problems can range on a scale from an affinity for one parent, to alignment with one parent, to realistic estrangement from a parent, to alienation from one parent, or to a hybrid of two or more of these forms of PCCPs.<sup>6</sup> These contact problem categories can vary in intensity from mild or moderate to severe.<sup>7</sup>

An affinity with a preferred parent is quite common in children and can occur for a variety of reasons such as age, gender, religion, common interests, or a prolonged absence from the other parent.<sup>8</sup> Generally, an affinity for one parent does not

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*Challenges Ahead*, 58 FAM. CT. REV. 576, 577 (2020) (hereinafter "Fidler & Bala, *Lessons Learned*").

<sup>5</sup> *J.F.*, 61 Misc. 3d 1226(A).

<sup>6</sup> Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 15 (2010) (hereinafter "Fidler & Bala, *Children Resisting*"); Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

<sup>7</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>8</sup> *Id.* at 509; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

amount to the level of parent-child contact problems necessary for court involvement.

Concern starts to mount with parent-child alignments. Alignment can occur before, during, or after separation of the child's parents.<sup>9</sup> Alignment usually arises from a child witnessing a divide growing between the parents and the perceived view that neutrality is not a sustainable option.<sup>10</sup> It is used by the child as a coping mechanism to adjust to the divide between parents, even if those parents are still in a relationship with each other.<sup>11</sup> Alignment can form between a child and one parent for reasons such as "the nonpreferred parent's minimal involvement in parenting, inexperience, or poor parenting, even if those shortcomings do *not* reach the level of abuse or neglect."<sup>12</sup> If alignment occurs during or after separation, it may be due to a parent inviting the child to take his or her side in the separation.<sup>13</sup> A child may align with a parent for separation-specific reasons, such as financial issues, a parent's wish to relocate, or other specific parental-conflicts.<sup>14</sup> Divorce-specific reasons such as a child's resentment of a parent they perceive to have left or hurt the other parent may also inspire a child to align with a parent.<sup>15</sup> Alignment does not include a complete rejection of the non-favored parent; however, alignment may evolve over time into stronger contact problems such as realistic estrangement or alienation.<sup>16</sup>

Parent-child contact problems may also take the form of realistic estrangement. This is a justified rejection of a parent based upon the child's actual negative experiences with that par-

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<sup>9</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15.

<sup>10</sup> Barbara Jo Fidler & Nicholas Bala, *Guest Editors' Introduction to the 2020 Special Issue on Parent-Child Contact Problems: Concepts, Controversies, & Conundrums*, 58 FAM. CT. REV. 265, 265 (2020) (hereinafter "Fidler & Bala, *Introduction to the 2020 Special Issue*"); Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

<sup>11</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

<sup>12</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15 (emphasis in original).

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; Gans Walters & Friedlander, *supra* note 3, at 425.

<sup>16</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

ent.<sup>17</sup> For example, the child would be justified for refusing to have contact with a parent if that parent had physically, emotionally, or sexually abused them or neglected to properly care for them.<sup>18</sup> This rejection can also arise from exposure to the parents' intimate partner violence at the hands of the rejected parent.<sup>19</sup> There also may be less objectionable reasons for the child's rejection such as parenting skill deficiencies or conflict with the rejected parent that did not rise to the level of abuse or neglect.<sup>20</sup> The realistic estrangement may intensify in reaction to the child's rejection. Some rejected parents react in a negative manner and counter-reject the child, worsening the estrangement.<sup>21</sup>

Finally, contact problems can manifest as unjustified rejection, which is more commonly known as alienation.<sup>22</sup> Alienation is a child's negative position against a parent that is disproportionate to their own experience with that parent and inconsistent with the previous relationship of the child with that parent.<sup>23</sup> This can result in a rejection, either full or partial, of one parent; superficial or inflated complaints about the rejected parent; and contradictory behaviors or statements regarding the rejected parent.<sup>24</sup> Traditionally, alienation was thought of as a single factor model in which the child's alienation of the rejected parent was the direct and sole result of the favored parent's "campaign of indoctrination of denigration, mistrust, and hate" to accomplish the favored parent's goal of terminating the child's relationship with the other parent.<sup>25</sup> However, it is now understood that denigration may be only one form of parental alienating behavior

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<sup>17</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579.

<sup>18</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 591.

<sup>19</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15, 16; Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265.

<sup>20</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 15, 16; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579, 591.

<sup>21</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 18, 23.

<sup>22</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>23</sup> William Bernet, *Parental Alienation and Misinformation Proliferation*, 58 *FAM. CT. REV.* 293, 294 (2020); Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265; Johnston & Sullivan, *supra* note 3, at 279.

<sup>24</sup> *J.F.*, 61 *Misc. 3d* 1226(A), n.18.

<sup>25</sup> Johnston & Sullivan, *supra* note 3, at 272.

(PAB) and only one factor in consideration of whether alienation is present.<sup>26</sup>

Today, alienation and other PCCPs are understood to be a result of the child's complex, nuanced, and dynamic experiences with each parent.<sup>27</sup> Not all rejection is alienation.<sup>28</sup> While a favored parent's PABs may be involved, the favored parent's actions that inspire the child's rejection are not the sole factor in finding or treating parent-child contact problems.<sup>29</sup> Therefore, it is likely that contact problems manifest as a hybrid PCCP involving two or more contact problems of affinity, alignment, justified rejection, or unjustified rejection.<sup>30</sup> For instance, a child could have an affinity with a favored parent based on a shared interest while also justifiably rejecting the non-favored parent due to the non-favored parent's poor parenting skills. Another child may justifiably reject a non-favored parent after seeing that parent commit intimate partner violence against the favored parent, while also unjustifiably rejecting the non-favored parent due to the PABs of the favored parent. This complexity is part of what makes these cases so difficult to identify and resolve.

#### B. Causes of Parent-Child Contact Problems

Parent-child contact problems usually manifest in high-conflict separation or divorce.<sup>31</sup> In many of these situations, both parents are partially responsible for the child's rejection, whatever type that may be.<sup>32</sup> Although it may be common for

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<sup>26</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 582.

<sup>27</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265; Johnston & Sullivan, *supra* note 3, at 271; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>28</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 578.

<sup>29</sup> See Robin Deutsch, Leslie Drozd, & Chioma Ajoku, *Trauma-Informed Interventions in Parent-Child Contact Problems*, 58 FAM. CT. REV. 470, 471 (2020); Fidler & Bala, *Children Resisting*, *supra* note 6, at 16; Fidler & Bala, *Lessons Learned*, *supra* note 4, at Highlight.

<sup>30</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 578, 579; Johnston & Sullivan, *supra* note 3, at 280; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>31</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265.

<sup>32</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at Highlight. See generally Rebecca Bailey, Deborah Dana, Elizabeth Bailey, & Frank Davis, *The Application of the Polyvagal Theory to High Conflict Co-Parenting Cases*, 58 FAM.

both parents to behave in a way that causes the child's justified or unjustified rejection, not all children exposed to that behavior will respond by rejecting a parent.<sup>33</sup>

Parental alienating behaviors are defined as:

an ongoing pattern of observable negative attitudes, beliefs and behaviors of one parent (or agent) that denigrate, demean, vilify, malign, ridicule, or dismiss the child's other parent. It includes conveying false beliefs or stories to, and withholding positive information from, the child about the other parent together with the relative absence of observable positive attitudes and behaviors (affirming the other parent's love/concern for the child, and the potential to develop and maintain the child's safe, supportive and affectionate relationship with the other parent).<sup>34</sup>

This definition encompasses both verbal and nonverbal actions of the parent, as well as intentional and non-intentional actions and inactions.<sup>35</sup> Examples of PABs include failing to correct the child when they are defiant or disrespectful to or regarding the other parent, allowing the child to control the family's established practices such as parenting schedules, sharing legal or inappropriate information with the child, using the child to deliver messages or spy on the other parent, and withholding affection from the child as punishment for their favorable treatment of the other parent or for not sharing the same opinion as the alienating parent.<sup>36</sup>

A child's reaction to parental alienating behaviors will depend on the child's unique risk, vulnerability, and protective factors.<sup>37</sup> These include age, cognitive capacity, temperament, vulnerability, special needs, and resiliency.<sup>38</sup> Other factors relevant to how a child will be affected by PABs include each parent's parenting style, parenting capacity or skill, beliefs and behaviors, mental health, and personality such as their willing-

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CT. REV. 525, 527 (2020); Michael Saini, *Strengthening Coparenting Relationships to Improve Strained Parent-Child Relationships: A Follow-Up Study of Parents' Experiences of Attending the Overcoming Barriers Program*, 57 FAM. CT. REV. 217, 217 (2019).

<sup>33</sup> Saini, *supra* note 32, at 217.

<sup>34</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 581; Johnston & Sullivan, *supra* note 3, at 283.

<sup>35</sup> Johnston & Sullivan, *supra* note 3, at 283.

<sup>36</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 581-82.

<sup>37</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 513.

<sup>38</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

ness and adaptiveness to change, as well as whether the rejected parent counter-rejects the child.<sup>39</sup> Other factors can include the nature of the parent conflict before and after separation (for example, the presence of intimate partner violence), the ability of the parents to co-parent, poor or conflicting parental communication to the child, the nature of the litigation process, and the exposure and effect of third parties such as extended family and involved professionals.<sup>40</sup>

There are three types of alienating parents. Naïve alienators are passive and sometimes unintentional in their exercise of PABs.<sup>41</sup> They do not act to reinforce the child's relationship with the other parent and occasionally say or do something to promote or reinforce alienation.<sup>42</sup> Active alienators are vulnerable to emotional triggers that result in their PABs.<sup>43</sup> They usually surrender to their feelings of hurt and anger, which result in impulsive alienating behaviors directed at the child that promote or reinforce alienation.<sup>44</sup> The emotional dysregulation active alienators experience prevents them from maintaining a clear focus on the child's needs.<sup>45</sup> Obsessed alienators seek to harm or terminate the child's relationship with the other parent.<sup>46</sup> This is sometimes accompanied by the obsessed alienator's delusion that

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<sup>39</sup> See generally Fidler & Bala, *Children Resisting*, *supra* note 6, at 14; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>40</sup> See generally Fidler & Bala, *Children Resisting*, *supra* note 6, at 14; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 579; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 509.

<sup>41</sup> Douglas Darnall, *Parental Alienation: Not in the Best Interest of the Children*, 75 N.D. L. REV. 323, 327 (1999); Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19.

<sup>42</sup> Darnall, *supra* note 41, at 327; Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19.

<sup>43</sup> Darnall, *supra* note 41, at 327; Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19.

<sup>44</sup> See generally Darnall, *supra* note 41, at 327; Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19; Gans Walters & Friedlander, *supra* note 3, at 426.

<sup>45</sup> Gans Walters & Friedlander, *supra* note 3, at 426.

<sup>46</sup> Darnall, *supra* note 41, at 327; Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19.

the other parent is abusive to the child, when that is not true.<sup>47</sup> An obsessed alienator rarely has the emotional insight or perspective to recognize the harmful effect of PABs on the child.<sup>48</sup> For this reason, obsessed alienators present the most difficult cases for attorneys and judges.<sup>49</sup>

### C. *Significance of Parent-Child Contact Problems*

With the complexity and nuance that parent-child contact problems have, there are several challenges to identifying the type of PCCP that is present. The child and parents must be screened for these considerations prior to significant intervention becoming successful. Absent abuse, neglect, or other danger to the child, it is generally acknowledged that a child benefits from having a relationship with both parents.<sup>50</sup> Therefore, it may still be in the child's best interest to pursue a means to repair the parent-child relationships, even if the relationships start from a place of justified or unjustified rejection.<sup>51</sup> In the case of a parent demonstrating parental alienating behaviors or parenting deficiencies, these can be addressed to repair the child's relationship with the favored and non-favored parent.<sup>52</sup> PCCPs with one child can easily spread to siblings and become more intractable as the problem persists.<sup>53</sup> Therefore, prevention and early intervention are important.

Not addressing parent-child contact problems can have devastating, long-term effects on the emotional well-being of the child. When the parents are engaged in lengthy, high-conflict separations, the child experiences chronic stress and perceived danger that can move the child's emotional responses into a survival state.<sup>54</sup> With parents consumed by their own conflict, it

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<sup>47</sup> Darnall, *supra* note 41, at 327; Gans Walters & Friedlander, *supra* note 3, at 426.

<sup>48</sup> Darnall, *supra* note 41, at 327; Fidler & Bala, *Children Resisting*, *supra* note 6, at 18-19.

<sup>49</sup> Darnall, *supra* note 41, at 317.

<sup>50</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 591; Aaron Robb, *Methodological Challenges in Social Science: Making Sense of Polarized and Competing Research Claims*, 58 *FAM. CT. REV.* 308, 317 (2020).

<sup>51</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 591.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 583.

<sup>54</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 526.

may appear to the children that no one is caring for them.<sup>55</sup> The children may also internalize their own stress and fear while avoiding their own grief over the separation.<sup>56</sup> Some children may seek to avoid conflict by rejecting one parent while siding with the other. While this tactic may be beneficial to the child in the short term as a coping mechanism, it prevents the child from building adaptive, complex thinking, and problem-solving skills with those they disagree with.<sup>57</sup> The longer this avoidance tactic is used, the more intractable the parties become.<sup>58</sup> These behaviors can impede the child's age-appropriate skill development and result in the child having gaps in emotional maturity when compared to a child of similar age.<sup>59</sup>

Often, parents experiencing contact problems seek resolution through the legal system. This is usually in the form of a request to change custody to the non-favored parent in an initial separation, or a motion to modify a parenting schedule, modify custody, enforce a previously established parenting plan, or find the other parent in contempt. A satisfactory conclusion must go beyond the confines of a legal solution to resolve the underlying conflict problem. To do that, therapeutic orders must be made to address the root cause of the conflict and the parents' contributing behaviors.<sup>60</sup> Even if one parent is entirely responsible for the conflict problem, each parent should be part of the solution to reach a healthy parent-child relationship between both parents and the child as well as a healthy co-parenting relationship.<sup>61</sup>

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<sup>55</sup> *Id.* at 526.

<sup>56</sup> Gans Walters & Friedlander, *supra* note 3, at 425.

<sup>57</sup> *Id.* at 426.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 266.

<sup>61</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 580.

## **II. Parent-Child Conflict Problem's Theory Origin and the Origin's Implementation in the Courtroom**

### *A. Origin of Parental Alienation and Other Parent-Child Contact Problems*

Parent-child conflict problems, and in particular alienation, is understood to be much more nuanced than what was believed at its inception. The concept of parental alienation was first introduced into the psychological vernacular in the 1980s by psychiatrist, Richard Gardner.<sup>62</sup> He coined the term “parental alienation syndrome” (PAS) to describe the phenomenon he perceived of children involved in custody litigation.<sup>63</sup> In his book, *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse*, he described the pattern of the favored parent alleging in custody litigation that the non-favored parent, usually the father, was sexually abusing the child.<sup>64</sup> According to Gardner, the favored parent would “poison the child’s mind” to convince the child that the non-favored parent had sexually abused them while creating an idolized version of the favored parent in the child’s mind.<sup>65</sup> This brainwashing was done through both intentional and unintentional means until such point that the child believed the sexual abuse had happened.<sup>66</sup> This was a single factor model focused solely on the alienating behaviors of the favored parent and their direct effect on the child that resulted in total rejection of the non-favored parent.<sup>67</sup>

Gardner identified eight characteristics an alienated child will show as part of parental alienation syndrome. These characteristics are:

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<sup>62</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265.

<sup>63</sup> Joyce, *supra* note 3, at 63.

<sup>64</sup> See *J.F.*, 61 Misc. 3d 1226(A), 6; Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265; Joyce, *supra* note 3, at 63.

<sup>65</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265; Joyce, *supra* note 3, at 63.

<sup>66</sup> Joyce, *supra* note 3, at 64.

<sup>67</sup> Johnston & Sullivan, *supra* note 3, at 277.

(1) the child's campaign of denigration against the alienated parent; (2) frivolous rationalizations for the child's criticism of the alienated parent; (3) lack of ambivalence; (4) the independent-thinker phenomenon; (5) reflexive support of the preferred parent against the alienated parent; (6) absence of guilt over exploitation and mistreatment of the alienated parent; (7) borrowed scenarios; and (8) spread of the child's animosity toward the alienated parent's extended family.<sup>68</sup>

### B. Critique of Parental Alienation Syndrome and Its Use in Custody Litigation

Initially, Gardner's theory of parental alienation syndrome was critiqued for a lack of evidence. His book introducing parental alienation syndrome lacked citation to any research studies on the topic.<sup>69</sup> The majority of his evidence for the theory was his personal observations as a child psychiatrist, and his most cited source was himself.<sup>70</sup> Other psychiatrists later built upon Gardner's parental alienation syndrome theory, and today it encompasses much more than Gardner's theory initially did.

Still, parental alienation and other parent-child contact problems lack empirically reliable assessment and research.<sup>71</sup> Despite the past decade of significant advances in understanding the nuances of PCCPs, much more research is needed in regard to diagnosis and intervention.<sup>72</sup> One difficulty in researching PCCPs is that psychologists lack evidence to know the prevalence of these contact problems.<sup>73</sup> Additionally, it is difficult to evaluate a family's contact problems under traditionally reliable assessment tools due to the nature and constant evolution of family relationships.<sup>74</sup> Since each child will react differently to the circumstances they encounter and their own personal risk and protective factors, it is difficult to extrapolate conclusions regarding PCCPs as a whole from the research of a select few chil-

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<sup>68</sup> Bernet, *supra* note 23, at 293-94 (numeric indicators added).

<sup>69</sup> Joyce, *supra* note 3, at 64-65.

<sup>70</sup> Joyce, *supra* note 3, at 64-65.

<sup>71</sup> Saini, *supra* note 32, at 218.

<sup>72</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 578; Saini, *supra* note 32, at 218.

<sup>73</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 11; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 511.

<sup>74</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 511.

dren.<sup>75</sup> This is especially true when studying children of different ages and cultural backgrounds.<sup>76</sup>

The lack of reliable research has led many organizations to reject parental alienation syndrome as a legitimate psychological diagnosis.<sup>77</sup> In 2013, the American Psychiatric Association rejected the inclusion of PAS as a mental disorder and refused to include it in the *Diagnosis and Statistical Manual, Fifth Edition* (DSM-5). However, the DSM-5 does recognize a diagnosis of Parent-Child Relational Problems, Child Affected by Parental Relationship Distress, and Unwarranted Feelings of Estrangement.<sup>78</sup>

For mental health professionals, there is still difficulty in diagnosing and treating parent-child contact problems due to the lack of reliable research available and the nuance involved. A therapist may work with a family regarding a contact problem, but it is difficult to make a diagnosis with objective certainty as to the type and intensity of a PCCP.<sup>79</sup> In the single factor model Gardner initially proposed, it is difficult for a mental health professional to conclude with any amount of certainty that a primary causal relationship exists between a parent's alienating behavior and the subsequent alienated child's rejection of the non-favored parent.<sup>80</sup> To identify such a primary causal relationship, a mental health professional would have to conclude that all other potential factors that could have contributed to the child's rejection of the non-favored parent have been considered, and that those factors were either ruled out or exceeded by the alienating behavior; that the parental alienating behavior began before the child's rejection of the non-favored parent; and that the alienating behavior is directly and empirically the cause of the child's subsequent rejecting behaviors.<sup>81</sup> Essentially, they would have to

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Motion for Leave to Appeal to the New York State Court of Appeals at 31, *E.V. vs. R.V. and G.V.*, No. 2016-02286 & 2016-02287 (N.Y. Mar. 4, 2019).

<sup>78</sup> Stephanie Domitrovich, *The Parental Alienation Controversy, Two Opposing Views*, 54 *JUDGES' J.* 21, Feature (2015); Polak, Altobelli, & Popielarczyk, *supra* note 3, at 511.

<sup>79</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 511.

<sup>80</sup> Johnston & Sullivan, *supra* note 3, at 277.

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

prove a negative; i.e. that abuse, parenting deficits, and all other factors that could cause a child to reject a parent do not exist or do not affect the child in such a way that would cause rejection.<sup>82</sup>

Gardner's initial research on parental alienation informed how the phenomena of parent-child contact problems has evolved.<sup>83</sup> Today, PCCPs are understood to extend beyond one parent's allegation of sexual abuse and include more than the unjustified rejection of one parent.<sup>84</sup> Gardner's PAS theory has become common knowledge in modern family law litigation, despite the concept of PAS being rejected by all major psychological and psychiatric organizations. Now, the phrase has been shortened to parental alienation to distance itself from the rejected diagnosis of parental alienation syndrome.

### III. Implementation in the Courtroom and Present Concerns

Allegations of parental alienation have become a catch-all claim in custody litigation to include all parent-child contact problems.<sup>85</sup> The term is used imprecisely and beyond its definition of unjustified rejection to encompass all motivations behind a child's rejection of a parent. An allegation of alienation must be considered by the court in its assessment of the best interest of the child and in many states, it has been incorporated by statute as a required consideration for a court's custody determination.<sup>86</sup> For example, most states have codified or have otherwise ex-

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<sup>82</sup> Allison M. Nichols, Note, *Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes*, 112 MICH. L. REV. 663, 277-78 (2014).

<sup>83</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 266.

<sup>84</sup> *J.F.*, 61 Misc. 3d 1226(A) at 6; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 578; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 507.

<sup>85</sup> Motion for Leave to Appeal to the New York State Court of Appeals at 32, *E.V. v. R.V. and G.V.*, No. 2016-02286 & 2016-02287 (N.Y. Mar. 4, 2019).

<sup>86</sup> *J.F.*, 61 Misc. 3d 1226(A) at 6; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 515 (For example, Missouri codified this as a factor to consider in child custody considerations as which parent is more likely to foster the child's "frequent, continuing, and meaningful contact with the other parent." MO. REV. STAT. § 452.375.2(4) (2020). Kansas's iteration of this concept is "the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship be-

pressly promoted a public policy that the state should facilitate a child's relationship with both parents, absent an exigent circumstance that presents a danger to the child.<sup>87</sup> Alienating behaviors are considered a psychological and emotional danger to the child because they attack the central principle that a child benefits from a relationship with both parents; and therefore, a finding of alienation or attempted alienation may result in the reversal of custody to the non-favored parent and termination of contact with the favored parent.<sup>88</sup>

#### A. *Allegations of Parental Alienation*

Generally, a custody case involving an allegation of parental alienation is treated similarly to any other contested family law matter. However, parental alienation allegations can cause excessive amounts of litigation and require significant court, expert, and therapeutic resources.<sup>89</sup> These are resources most families and family courts lack.<sup>90</sup> In recent years, courts have responded to these allegations by ordering the child and rejected parent to attend "reintegration" or "reunification" therapy at the family's expense.<sup>91</sup> As a result, the issue of parental alienation is reserved for the families that can afford the gaggle of lawyers, therapists, and expert witnesses necessary to litigate it.<sup>92</sup>

#### B. *Reversal of Custody*

When these matters are litigated, the primary resolution requested, other than a generic order for reunification therapy with the child and non-favored parent, is for custody to be awarded to the non-favored parent accompanied with limited or no contact with the favored parent. While there is recognition that reversal

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tween the child and the other parent." KAN. STAT. ANN. § 23-3203(a)(8) (2021)).

<sup>87</sup> Bruce L. Beverly, *A Remedy to Fit the Crime: A Call for the Recognition of the Unreasonable Rejection of a Parent by a Child as Tortious Conduct*, 15 J. L. FAM. STUD. 153, 159 (2013).

<sup>88</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 29; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 508.

<sup>89</sup> *J.F.*, 61 Misc. 3d 1226(A) at 7.

<sup>90</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 508.

<sup>91</sup> *Id.*; Joyce, *supra* note 3, at 54.

<sup>92</sup> Joyce, *supra* note 3, at 54; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 508.

of custody may be the best solution in the most extreme cases of unjustified rejection, the issue is hotly debated.<sup>93</sup> The debate stems from the following questions:

Is it in the child's best interests to be left with a possibly pathologically alienating parent (i.e. thus avoiding the short term risks of separating the child from that parent) at the risk of losing the relationship with the psychologically healthier rejected parent? Or, is it better to foster and protect the relationship with the psychologically healthier rejected parent by transferring custody, thus risking a potentially adverse reaction from the child to the reversal of care?<sup>94</sup>

Advocates for custody reversal contend that leaving the child with the favored parent will cause more harm to the child than the shock of a change of custody. When the favored parent is actively undermining the child's relationship with the other parent, that parent is actively harming the child psychologically and interfering with the child's healthy development.<sup>95</sup> Some psychologists argue that this alienating behavior amounts to emotional abuse of the child, particularly when done maliciously to spite the other parent at the expense of the child's best interest.<sup>96</sup> Although available research is limited, preliminary findings suggests that some children, after an initial adjustment period, feel liberated after custody reversal.<sup>97</sup> When custody reversal is coupled with the child having limited or no contact with the alienating parent, several children reported they did not feel the pressure to resist an attached relationship with the previously rejected parent and could resume a normal relationship without fear of upsetting the previously favored parent.<sup>98</sup> Proponents of custody reversal also reported children easily reverted back to resisting the rejected parent when preparing for or returning from parenting time with the favored parent.<sup>99</sup>

Advocates against custody reversal believe such a remedy is dangerous, unethical, and traumatic for the child.<sup>100</sup> Opponents

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<sup>93</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 29; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 508.

<sup>94</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 516.

<sup>95</sup> Gans Walters & Friedlander, *supra* note 3, at 428.

<sup>96</sup> *Id.*

<sup>97</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 31.

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

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

<sup>100</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 508.

argue it should be reserved for the most severe cases of true and pervasive unjustified rejection and only for as much time as is necessary to reestablish the child's relationship with the rejected parent.<sup>101</sup> Additionally, opponents contend that the reversal will only serve to further entrench the child's hatred against the rejected parent, add to the child's stress already being experienced due to the separation and litigation, and increase the likelihood the child will engage in dangerous or self-destructive behaviors such as running away or using illegal drug.<sup>102</sup> Also, opponents argue such a custody reversal amounts to a termination of the parent-child relationship with the favored parent, thereby causing the same result and being no better than if the favored parent alienated the child to such an extent as to convince the child to completely reject the other parent.<sup>103</sup> There is also very little available research on the effects of a custody reversal in the long-term.<sup>104</sup> When courts do establish a means for the favored parent to regain contact with the child, such benchmarks are usually vague; i.e. the favored parent may resume parenting time when the rejected parent and child have successfully reunified the parent-child relationship.<sup>105</sup> Such a benchmark can be easily manipulated by the rejected parent in order to prolong the limited or no contact of the favored parent.<sup>106</sup>

### C. *Constitutional Concerns*

Parents have a liberty interest under the Fourteenth Amendment to direct their child's upbringing, which can be affected by the litigation and outcome of parent-child contact problem cases.<sup>107</sup> However, that constitutional right is limited. The law presumes that the parent will act in the child's best interest.<sup>108</sup>

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<sup>101</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 29.

<sup>102</sup> Beverly, *supra* note 87, at 169; Fidler & Bala, *Children Resisting*, *supra* note 6, at 30.

<sup>103</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 30; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 515.

<sup>104</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 31; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 516.

<sup>105</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 516.

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

<sup>107</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); Beverly, *supra* note 87, at 157.

<sup>108</sup> *Parham v. J.R.*, 442 U.S. 584, 602 (1979); Beverly, *supra* note 87, at 157.

The state may intervene, acting in *parens patriae*, to protect the child's interests when there are legitimate concerns that challenge that parental presumption.<sup>109</sup> Due process gives people a means to protect their rights, such as the right to direct their child's upbringing. Due process requires that a state provide meaningful standards to apply its laws.<sup>110</sup> The purpose of due process is to ensure ordinary people can understand what the law prohibits and to prevent the law from being applied discriminatorily or arbitrarily.<sup>111</sup>

One of the difficulties that arises in parental alienation cases is the lack of a meaningful definition of what parental alienation is. Mental health professionals continue to wrestle with the concept within their profession and have difficulty in conducting reliable studies on the matter. Even the diagnosis of parent-child conflict problem types eludes professionals trained to identify the signs. In the courtroom, the term "parental alienation" is used imprecisely to refer to a variety of conflict problems. Once raised, the term is so vague that the protesting party may have no meaningful definition or content from which to prove their claim.<sup>112</sup> Conversely, the alleged alienating parent has no meaningful definition to try and disprove the claim.<sup>113</sup> Some argue this may be in direct contravention of due process protections and parental rights when a finding of parental alienation is a legal basis for changing custody.<sup>114</sup>

#### D. Gender-Specific Criticisms of the Use of Parental Alienation Claims in Litigation

While the concept of parental alienation was inspired by allegations of sexual abuse by mothers against fathers, it is well established today that both mothers and fathers may become vic-

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<sup>109</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Prince v. Mass.*, 321 U.S. 158 (1944); *Parham*, 442 U.S. 584; *Beverly*, *supra* note 87, at 157.

<sup>110</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991) (O'Connor, J., dissenting).

<sup>111</sup> *Kolender v. Lawson*, 461 U.S. 352, 257 (1983).

<sup>112</sup> Motion for Leave to Appeal to the New York State Court of Appeals at 32, *E.V. v. R.V. and G.V.*, No. 2016-02286 & 2016-02287 (N.Y. Mar. 4, 2019).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

tims of alienation.<sup>115</sup> Feminist and men's rights activists argue that alienation claims present biases and propagate lies helping or harming their prospective groups. Feminists dismiss most, if not all, allegations of parental alienation by fathers as fabrications by perpetrators of intimate partner violence or abusive fathers as a means of using the legal system to further exert control over the family and abuse the child, who justifiably resists contact due to the abuse.<sup>116</sup> Therefore, they argue that findings of alienation against mothers further victimizes them and endangers children.<sup>117</sup> Conversely, men's rights activists assert that family courts are gender-biased against fathers.<sup>118</sup> Therefore, they contend that men's alienation claims are not considered seriously by the court, even though mothers may be alienating children against fathers as a means to incite revenge for the separation.<sup>119</sup>

#### **IV. Potential Improvements to Litigation of Cases with Parent-Child Contact Problems**

When courts are presented with parental alienation allegations, the litigation quickly devolves into the search for fault.<sup>120</sup> In making an alienation allegation, a disgruntled parent directs the blame and generally avoids accountability for any of their own actions that could have caused the child to reject them.<sup>121</sup> The court is then tasked with finding a causal connection between the parents' behaviors and the child's rejection.<sup>122</sup> While such cause is an important one to address, it is difficult for a judge to assess when the interested parties are the ones responsi-

<sup>115</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 265.

<sup>116</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 10; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 591; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 511.

<sup>117</sup> Fidler & Bala, *Introduction to the 2020 Special Issue*, *supra* note 10, at 266; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 591.

<sup>118</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 510-11.

<sup>119</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 10.

<sup>120</sup> Lyn R. Greenberg & Robert A. Schneider, *We're Still Taking X-Rays but the Patient Is Dying: What Keeps Us from Intervening More Quickly in Resist-Refuse Cases?*, 58 FAM. CT. REV. 488, 490 (2020).

<sup>121</sup> Joyce, *supra* note 3, at 54-55.

<sup>122</sup> *Id.*

ble for presenting the judge with evidence.<sup>123</sup> The critical focus must be shifted from pinpointing fault to identifying solutions that will be in the best interest of the child.<sup>124</sup> Below are several suggestions of how the courts, litigation process, and therapeutic services can better assist families with parent-child contact problems.

#### A. Recognition and Early Intervention

Parent-child contact problems can become intractable if not swiftly addressed.<sup>125</sup> Mental health professionals lament that delays in therapeutic intervention allow the family dynamics to become entrenched.<sup>126</sup> The child and parents can become so committed to their dysfunction that when interventions are imposed, it is difficult or impossible to meaningfully ameliorate the contact problem, which causes long term impact on the family and the child's ability to develop emotionally.<sup>127</sup> Early intervention with these families with contact problems is key to resolving the dysfunction.

People need to be able to recognize the signs of a child's resistance or refusal to a parent and direct them to appropriate interventions.<sup>128</sup> This includes all professionals that come into regular contact with parents and children, as well as the public at large.<sup>129</sup> For the public, more education must be done in defining what parental alienation is, as well as its harmful long-term effects on children.<sup>130</sup> This can be in the form of public education campaigns and relationship education in schools.<sup>131</sup> Education

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<sup>123</sup> *Id.*

<sup>124</sup> Greenberg & Schnider, *supra* note 120, at 490.

<sup>125</sup> Gans Walters & Friedlander, *supra* note 3, at 424.

<sup>126</sup> Greenberg & Schnider, *supra* note 120, at Highlight; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 512.

<sup>127</sup> Greenberg & Schnider, *supra* note 120, at Highlight; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 512.

<sup>128</sup> Philip Marcus, *Innovative Systemic Response: Innovative Programs in Israel for Prevention & Responding to Parental Alienation: Education, Early Identification and Timely, Effective Intervention*, 58 FAM. CT. REV. 544, 547 (2020).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 545-46.

<sup>131</sup> *Id.* at 546-47.

can be a powerful tool in preventing alienating behaviors from arising, thereby curbing instances of entrenched PCCPs.<sup>132</sup>

Mental health professionals, lawyers, and judges need initial and continuing professional education on parent-child contact problems.<sup>133</sup> In particular, this education should be cross-disciplinary to incorporate both mental health and legal aspects of the rejection dynamics so that professionals from both industries can be aware of the considerations of the other.<sup>134</sup> Due to the preliminary nature of available research, both professions need to further develop best practice guidelines with regard to contact problem families.<sup>135</sup> With this education, lawyers would be more equipped to counsel their clients regarding the dangers of continued conflict.<sup>136</sup> Judges would be more capable of identifying these dynamics within cases, even if alienation or other contact problems are not specifically alleged.<sup>137</sup> With more education, judges would also be able to tailor better court orders to intervene in contact problem dynamics.<sup>138</sup> These orders can include sending families to well-established and customized therapies designed specifically for families with PCCPs. These therapy models are discussed more thoroughly later in this Comment.

## B. *Modified Case Management*

### 1. *The Judge*

Parent-child contact problem cases are complex; thus, they benefit from a single judge that continues to address them throughout the pendency of the litigation.<sup>139</sup> By having a constant figure, intricate details will not easily be lost from hearing to hearing. One judge will be better able to serve the family as an authoritative figure to educate parents on the seriousness of

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<sup>132</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 35; Marcus, *supra* note 128, at 545.

<sup>133</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 35.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 590; Marcus, *supra* note 128, at 547.

<sup>137</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 589.

<sup>138</sup> *Id.*

<sup>139</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 28; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 589.

alienating behaviors and outline clear expectations and consequences if they choose to violate court orders.<sup>140</sup>

Once judges are educated on the dynamics involved in these families, they can notice the indicators of contact problems before specific allegations of parental alienation arise.<sup>141</sup> Once alienation claims arise, judges that understand the nuance of parent-child contact problems may know to ask the parties specific questions during hearings.<sup>142</sup> For example, if a parent accuses the other of alienating the child, a judge can ask that parent, “how have you tried to resolve the conflict between you and your child?” to assess the motivation behind the accusation and that parent’s willingness to engage in certain services.<sup>143</sup>

Judges can also impose guidelines specifically for case management of families with parent-child contact problems. If a parent raises an accusation of alienation, a judge can impose rules in the courtroom that prioritize scheduling deadlines and hearings within a short period of days to address the claim.<sup>144</sup> By doing so, the judge can address the contact problem before the dynamics become entrenched by drastically shortening the time between the first allegation and any court order.<sup>145</sup> Judges can impose a zero-tolerance policy once alienation claims arise regarding any requests for delays on filing due dates and hearings out of the knowledge that delaying proceedings for these families is not in the best interest of the child.<sup>146</sup>

## 2. *The Courts’ Orders*

### a. *Content of Court Orders for Families with Parent-Child Contact Problems*

Due to the complex, nuanced circumstances of each family with parent-child contact problems, court orders need to be carefully tailored to address the unique dynamics of each case.<sup>147</sup> To

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<sup>140</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 28.

<sup>141</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 589; Greenberg & Schnider, *supra* note 120, at 492.

<sup>142</sup> Greenberg & Schnider, *supra* note 120, at 492.

<sup>143</sup> *Id.*

<sup>144</sup> Marcus, *supra* note 128, at 551.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 550.

address the contact problem, court orders should direct families to participate in therapeutic interventions, as well as address the standard topics such as parenting time schedules and parental communication.<sup>148</sup> These orders must be detailed and unambiguous.<sup>149</sup> This will avoid manipulative or conflict-eager parents using confusing or vague court orders to further entrench conflict or avoid the court's desired intent.<sup>150</sup>

Vital details of a comprehensive parenting plan such as a parenting time schedule, child exchange times and locations, transportation, parental communication, parental decision-making, and information sharing should be included in any temporary or interim court order.<sup>151</sup> By including thorough details from the beginning, the court can effectively disengage the parties from further conflict and order the parents to conduct parallel co-parenting during the pendency of the litigation.<sup>152</sup>

Families with parent-child contact problems should be directed to therapeutic intervention by court order.<sup>153</sup> Court orders directing families to these interventions should include details such as the name, address, and contact information for the provider(s) they should see.<sup>154</sup> Thorough orders will also include the court's expectation of which family members will participate and the mechanism or schedule for reporting progress back to the court.<sup>155</sup> Orders should also state how the services will be paid for, by whom, and by when, as well as consequences if a party fails to pay pursuant to the court order.<sup>156</sup> Less tangible factors that should be addressed in the court order are the goals of the intervention (for instance, improve the child's relationship with both parents or recognize and stop alienating behaviors by a

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<sup>148</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37.

<sup>149</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 589.

<sup>150</sup> *Id.*

<sup>151</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37.

<sup>152</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 589.

<sup>153</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37; Gans Walters & Friedlander, *supra* note 3, at 433.

<sup>154</sup> Gans Walters & Friedlander, *supra* note 3, at 433. *See generally* Darnall, *supra* note 41, at 359.

<sup>155</sup> Darnall, *supra* note 41, at 359.

<sup>156</sup> Darnall, *supra* note 41, at 359; Greenberg & Schnider, *supra* note 120, at 500.

parent), and the court's role in monitoring and enforcing the family's meaningful participation in the ordered services.<sup>157</sup>

Through its orders, the court can specifically establish its expectations for the parties' behaviors. For example, it is common for orders to include an anti-alienation provision due to the frequency of unspecific claims of alienation in litigation.<sup>158</sup> These provisions prohibit both parties from disparaging the other parent or discussing the litigation with the child.<sup>159</sup> Having these provisions in place is a good first step in establishing expectations for parental behavior; however, these provisions are largely insufficient to prevent or address the issue and are difficult to enforce.<sup>160</sup> This language could be improved by adding an affirmative duty to the parents to prevent the child from observing conflict between the parents, or being exposed to other people who will disparage the other parent to the child.<sup>161</sup> Other mechanisms, such as the use of OurFamilyWizard or AppClose (messaging tools designed for separated parents to communicate and share information) can be ordered to monitor and enforce this affirmative duty by reducing the need for the parents to communicate in front of the child.<sup>162</sup>

Another requirement the court can set by court order specifically to avoid or aid parent-child contact problems is an order directing the child and both parents to meaningfully participate in therapeutic services. As will be discussed later in this Comment, it is vital that the child and both parents participate in therapeutic services.<sup>163</sup> In some cases, the child or parents may withhold or refuse to meaningfully take part in therapy sessions. The court's authority serves to counteract potential resistance that is found in many family members experiencing PCCPs.<sup>164</sup>

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<sup>157</sup> Gans Walters & Friedlander, *supra* note 3, at 433.

<sup>158</sup> Beverly, *supra* note 87, at 166-67; Greenberg & Schnider, *supra* note 120, at 501.

<sup>159</sup> Beverly, *supra* note 87, at 166-67; Greenberg & Schnider, *supra* note 120, at 501.

<sup>160</sup> Beverly, *supra* note 87, at 166-67; Greenberg & Schnider, *supra* note 120, at 501.

<sup>161</sup> Greenberg & Schnider, *supra* note 120, at 501.

<sup>162</sup> *Id.*

<sup>163</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533; Fidler & Bala, *Children Resisting*, *supra* note 6, at 25, 26-27.

<sup>164</sup> Gans Walters & Friedlander, *supra* note 3, at 433.

The court may further try to avoid resistance by placing an affirmative duty on the parents to take the child to every appointment and promote the child's cooperation with therapeutic services or parenting schedule transitions.<sup>165</sup> This should also be accompanied with specific sanctions or other consequences if the parents do not satisfy those obligations.<sup>166</sup>

Not all alienating behaviors can be prohibited through a court order. For example, a parent may exhibit tears or tell the child they will miss them before exchanging the child to the other parent. These behaviors may garner a strong emotional response from the child, leading to the child resenting the other parent and wishing they were with the emotional parent. While these behaviors by the parent may be alienating, it would be problematic for the court to prohibit them.<sup>167</sup> This makes the judge's authority as an educational source for parents all that more important. A judge can serve as an authority figure to explain to parents the dangers of parent-child contact problems. Through this education, some parents can be conscious of the subtle behaviors that the court cannot regulate by court order and hopefully prevent these behaviors themselves.<sup>168</sup>

One critical issue that must be addressed in effective court orders for families with parent-child contact problems is the information-sharing between the court and therapeutic services. The judge must have access to necessary information that only the therapist can convey.<sup>169</sup> This communication can also include information-sharing between the attorneys and therapist, with established parameters in the court order regarding limitations on one-on-one communication between the therapist and one party's lawyer, just as there are limitations on communication between one party's lawyer and the court.<sup>170</sup> The form and frequency of the communication between the therapist, judge, and attorneys can be outlined in the court order. For example, the

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<sup>165</sup> Greenberg & Schnider, *supra* note 120, at 501.

<sup>166</sup> Gans Walters & Friedlander, *supra* note 3, at 433-34; Greenberg & Schnider, *supra* note 120, at 501.

<sup>167</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37; Greenberg & Schnider, *supra* note 120, at 501.

<sup>168</sup> Greenberg & Schnider, *supra* note 120, at 501.

<sup>169</sup> *Id.* at 500.

<sup>170</sup> Gans Walters & Friedlander, *supra* note 3, at 435.

therapist may appear to testify in hearings or case management conferences held every sixty days or may have joint telephone conferences with the attorneys monthly.<sup>171</sup>

Court orders should specify the type of information being sought from the therapist. The information conveyed between the therapist and the court must be broad enough to enable the court to address the needs of the parties while being tailored enough to avoid inappropriate disclosures.<sup>172</sup> The information described in the court order should include whether the family members are attending appointments on time, cooperating with the therapist, and meaningfully engaging in the treatment program.<sup>173</sup> Other disclosures may include a provision addressing the situation where the therapist is obligated by ethical and professional standards to terminate treating an individual for any reason. This can happen based upon the dynamics the therapist notices during treatment. For example, a therapist may decide to terminate joint therapy between a parent and child if it is later disclosed that the parent is abusing the child and such joint therapy is harmful to the child's emotional wellbeing.<sup>174</sup> Another reason a therapist may terminate treatment is that the contact problem dynamics are so entrenched that it is reasonably clear to the therapist in his or her professional assessment that therapy will not accomplish its goals.<sup>175</sup> The nature of these disclosures still protects the privacy of the therapy because little to no specific or substantive detail is needed by the court.<sup>176</sup> The court needs this general information in order to monitor the cooperation of the parties, which ultimately affects the court's analysis of the best interest of the child.<sup>177</sup>

Court orders should also reflect accountability of the parties and the court's power to enforce the order.<sup>178</sup> The court should schedule review hearings at particular intervals from the outset

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<sup>171</sup> *Id.* at 435; Greenberg & Schnider, *supra* note 120, at 501.

<sup>172</sup> Gans Walters & Friedlander, *supra* note 3, at 435.

<sup>173</sup> *Id.* at 434, 437.

<sup>174</sup> Richard A. Warshak, *Professional Role: Risks and Realities of Working with Alienated Children*, 58 FAM. CT. REV. 432, 440 (2020).

<sup>175</sup> *Id.*

<sup>176</sup> Gans Walters & Friedlander, *supra* note 3, at 434, 437.

<sup>177</sup> *Id.* at 434.

<sup>178</sup> *Id.*

of any order for therapeutic services.<sup>179</sup> The court can request written or oral communication with the therapist before or during the hearing.<sup>180</sup> PCCP families have a tendency to need frequent court hearings.<sup>181</sup> The pre-scheduled review hearings allow the court to provide timely resolution if the therapist reports any concerns that require the court's interjection or if the parties have any concerns they would like to raise to the court.<sup>182</sup> If no new issues have arisen, the hearing date can be canceled.<sup>183</sup>

Court orders must be sufficiently detailed to address the complex dynamics present in PCCP families. Court orders, especially those on an interim or temporary basis, must include comprehensive parenting plans to limit conflict and direct coparenting during litigation. They must also include directions to seek out therapeutic services, and outline the people, goals, and expectations for participation in therapy. Court orders must also define the expectations the court has for parental behavior. That includes creating an affirmative duty for parents to cooperate with the court order and identifying consequences for any failure to comply. Court orders must also describe the information that will be shared with the court from the family's therapist. The information described must be sufficient for the court to monitor each party's compliance so that it may analyze the best interests of the child. To enforce the court's order, court orders should include pre-scheduled review hearings to monitor and address any new or continuing issues.

b. *Timing of Court Orders for Families with Parent-Child Contact Problems*

Meaningful, long-term change to contact problem dynamics require the court's ongoing monitoring and oversight.<sup>184</sup> During the pendency of litigation, it is tempting for the court to follow its usual procedure, collect all the evidence, and make a thoroughly

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 435.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 429.

considered decision.<sup>185</sup> However, with PCCP families, collecting all the evidence takes months that only cause more intractability and entrenchment between the family members.<sup>186</sup> Instead, when parent-child contact problems are suspected or alleged, the family should immediately be ordered to take part in a risk assessment or other form of screening for PCCPs.<sup>187</sup> If that assessment indicates contact problem issues, the family should immediately be ordered, while the case is still pending, to participate in therapeutic services.<sup>188</sup> It is recommended that the court defer making final orders until therapeutic services have been attempted and the results have been analyzed.<sup>189</sup>

While no child-centered orders are truly “final,” children benefit from finalized litigation.<sup>190</sup> Judicial orders should aim to promote enforcement and minimize potential for modifications.<sup>191</sup> Therefore, if judicial orders will require contingent actions to modify custody or visitation, the court should make this order as part of an interim order rather than part of its final orders. For example, if the court orders that the favored parent can resume parenting time with the child upon completion of a psychoeducation or therapy program, the court should make this part of an interim order so that it can provide better oversight, rather than a final order where the court is not monitoring the progress.<sup>192</sup>

With some intractable cases of PCCP, noncompliance with the court order is a significant issue that continues from interim to final order.<sup>193</sup> When noncompliance is a recurring issue, the court should stop waiting for the family member to satisfy the contingency described in the interim order.<sup>194</sup> The best interest of the child is not served by continual delay by a parent that demonstrates an unwillingness to act in their child’s best inter-

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<sup>185</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 28; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 584.

<sup>186</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 584.

<sup>187</sup> *Id.* at 589.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 517.

<sup>191</sup> Greenberg & Schnider, *supra* note 120, at 500.

<sup>192</sup> *Id.*

<sup>193</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 37.

<sup>194</sup> *See generally* Polak, Altobelli, & Popielarczyk, *supra* note 3, at 517.

est.<sup>195</sup> It is in these situations that a court should order a reversal of custody as a final order, with potential for modification if there is a change of circumstances in the future.

C. *Lawyers Involved in Representing a Party with Parent-Child Contact Problems*

Lawyers that engage in family law-based representation need to educate themselves on parent-child contact problems.<sup>196</sup> This includes understanding children's developmental needs and recognizing the signs of PCCPs in parents and children.<sup>197</sup> This will better enable lawyers to make strategic and tactical decisions in litigation and provide better advice for their clients, such as the recommendation of a therapist known to be effective with PCCP families.<sup>198</sup>

Lawyers with a thorough understanding of PCCPs will be able to recognize the possibility that their client may be a perpetrator or victim of alienating behaviors.<sup>199</sup> With this comes the responsibility to educate clients on the alienating behaviors and how they are harmful to the child.<sup>200</sup> If the client is suspected of committing alienating behaviors, it is imperative that the lawyer warns the parent of the potential harm to the child and the potential legal consequences for such behavior including the risk of losing custody and contact with the child.<sup>201</sup> When parents understand the legal consequences they face, they are more likely to respond to education and other interventions.<sup>202</sup> Convincing a client that his or her conduct may be harming their child can be a difficult task, especially if the client is an obsessed alienator who is committed to the idea that the other parent is more harmful to the child.<sup>203</sup> Despite this difficulty, lawyers must give their client this education pursuant to their ethical duties and with the hope

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<sup>195</sup> *Id.*

<sup>196</sup> Greenberg & Schnider, *supra* note 120, at 493.

<sup>197</sup> *Id.*; Marcus, *supra* note 128, at 551.

<sup>198</sup> Greenberg & Schnider, *supra* note 120, at 493.

<sup>199</sup> Marcus, *supra* note 128, at 550.

<sup>200</sup> Darnall, *supra* note 41, at 324; Gans Walters & Friedlander, *supra* note 3, at 438.

<sup>201</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 588-89; Gans Walters & Friedlander, *supra* note 3, at 438; Marcus, *supra* note 128, at 551.

<sup>202</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 588-89.

<sup>203</sup> Gans Walters & Friedlander, *supra* note 3, at 438.

that the more self-aware clients will change their behavior to promote the best interests of the child and work together with the other parent.<sup>204</sup>

Lawyers also need to understand the complexities of PCCPs so they can be better advocates in the courtroom. Lawyers must place relevant research material and case information before the court.<sup>205</sup> It is critical that lawyers convey to the court that an allegation of unjust rejection is more than a parent trying to establish fault with the other parent.<sup>206</sup> It is a theory of cause and effect between parental conduct or a child's other experiences and the child's rejection of a parent that negatively impacts the child for years and gives rise to concerns of parental unfitness and child abuse.<sup>207</sup>

Judges rule on issues with the information that is brought before them; therefore, it is a lawyer's duty to present the court with relevant information about PCCPs, childhood development, and a holistic view of the child's life.<sup>208</sup> To truly understand the purpose of a child's resistance against one parent, the court must have an understanding of all of the child's experiences with both parents, as well as the child's daily life and activities.<sup>209</sup> Absent a risk assessment or therapeutic screening, it is the court's responsibility to determine if the child's rejection of a parent is unjust due to parental alienating behaviors, which could be intentional or unintentional, or a justified rejection due to the child's experiences with a parent. Not presenting this "mundane" information to the court may prevent critical information related to the parent-child contact problem from ever being considered by the court.<sup>210</sup>

Lawyers must also be aware of their ethical duty to faithfully represent their client's interests.<sup>211</sup> Some lawyers interpret their duty to solely advocate for the parent and in doing so, exacerbate

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<sup>204</sup> Darnall, *supra* note 41, at 324; Gans Walters & Friedlander, *supra* note 3, at 438.

<sup>205</sup> Marcus, *supra* note 128, at 551. *See generally* Greenberg & Schnider, *supra* note 120, at 498.

<sup>206</sup> Joyce, *supra* note 3, at 63, 67.

<sup>207</sup> *Id.* at 67.

<sup>208</sup> Greenberg & Schnider, *supra* note 120, at 497, 498.

<sup>209</sup> *Id.* at 498-499.

<sup>210</sup> *Id.* at 497.

<sup>211</sup> *Id.* at 492-93.

the PCCP tensions by ignoring the potential harm their clients could be doing.<sup>212</sup> Conversely, some lawyers interpret their ethical duty to also pursue the best interest of their client's child; however, it is possible in PCCP cases that the client and child's interests may conflict.<sup>213</sup> A parent-client may insist that his or her attorney refuse to cooperate or compromise with the other parent or continue to engage in alienating behaviors despite the lawyer's warnings.<sup>214</sup> A lawyer in this position may request interim orders from the court to protect the child such as injunctive relief, therapeutic intervention, instructional intervention, psychoeducation, or the appointment of a guardian ad litem to protect the child's interests.<sup>215</sup> In some limited circumstances, the lawyer could move to withdraw from representation; however, this is not always available and does nothing to protect the best interests of the child.<sup>216</sup>

#### D. *Therapeutic Interventions for Families with Parent-Child Contact Problems*

No single type of therapeutic intervention has emerged as the most effective in resolving parent-child contact problems.<sup>217</sup> From the available research, it appears PCCP families benefit most when both parents and the child participate in therapy.<sup>218</sup> This therapy treats the family as a "system" of interworking members and recognizes that "actions by any individual family member will influence all the others in the family, and their reactions will have a reciprocal effect on the individual."<sup>219</sup> Family system-based therapy is conducted in various combinations so each person participates in individual therapy, in dyads (i.e. parent-parent; parent-child), and in whole-group therapy with both parents and the child.<sup>220</sup> Therapy may also necessitate the inclu-

<sup>212</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 590.

<sup>213</sup> Gans Walters & Friedlander, *supra* note 3, at 438; Marcus, *supra* note 128, at 551.

<sup>214</sup> Greenberg & Schnider, *supra* note 120, at 493; Marcus, *supra* note 128, at 551.

<sup>215</sup> Darnall, *supra* note 41, at 328; Marcus, *supra* note 128, at 551.

<sup>216</sup> Marcus, *supra* note 128, at 551.

<sup>217</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 529.

<sup>218</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 586.

<sup>219</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533.

<sup>220</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 25.

sion of other people such as step-parents, siblings, or grandparents in order to address root issues involved in PCCPs.<sup>221</sup>

In these therapy sessions, various approaches may be used to address the issues and help the child adjust to a world-view without rejection.<sup>222</sup> Therapy approaches that have been successfully used with PCCPs include “psychoeducation, cognitive-behavioral, systematic desensitization, solution-focused, narrative, motivational interviewing, skills-based education, experiential, recreational, and animal/equine-assisted.”<sup>223</sup> There are intensive family therapy programs designed specifically to address parent-child contact problems. These programs, like Overcoming Barriers and Family Bridges, involve a multi-day workshop structured with recreational and therapeutic activities.<sup>224</sup> For example, Overcoming Barriers is a summer camp-like program that combines traditional recreational camp experiences like hiking, crafts, and campfires, with periods of psychoeducation and clinical therapy sessions.<sup>225</sup> After the intensive, multi-day workshop, participants follow an after care plan that includes routine clinical therapy sessions as a maintenance tool to the benefits of the workshop.<sup>226</sup>

Therapists must learn to overcome resistance from families with PCCPs. Therapists treating these families can overcome resistance through specialized understanding and experience with treating families with high levels of conflict.<sup>227</sup> From the available research, it appears interventions with PCCP families are most likely to be effective when they involve mental health treatment along with legal authority to reduce resistance.<sup>228</sup> Another key way to avoid resistance by some participants is the use of a treatment team, rather than a single therapist to treat all individ-

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<sup>221</sup> *Id.*

<sup>222</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 585.

<sup>223</sup> *Id.*

<sup>224</sup> Saini, *supra* note 32; Warshak, *supra* note 174.

<sup>225</sup> Saini, *supra* note 32, at 219, 220.

<sup>226</sup> *Id.* at 227.

<sup>227</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533.

<sup>228</sup> Steven Demby, *Interparental Hatred: Commentary on Entrenched Post-separation Parenting Disputes: The Role of Interparental Hatred*, 55 FAM. CT. REV. 417, 422 (2017).

uals.<sup>229</sup> The use of a separate therapist for each person avoids any feeling by a patient that the therapist is biased against them or favors another patient, which is a common accusation hurled against therapists that have multiple patients within one family.<sup>230</sup>

The goal of therapy with families suffering with parent-child contact problems is not to find blame or fault anyone for why the child has rejected a parent.<sup>231</sup> The goal is also not to simply “re-unify” the child with the rejected parent.<sup>232</sup> Rather, the goal of the family-system approach is to facilitate globally “healthy child adjustment and coping mechanisms. This includes correcting the child’s distorted and polarized views and replacing them with more realistic views of each parent, improving the child’s healthy relationships with *both* parents, addressing divorce-related stress, boundaries and age-appropriate autonomy and restoring adequate parenting, co-parenting and parent—child roles,” irrespective of the cause of the contact problem.<sup>233</sup> With this goal, therapy assists the family to recover healthy family function, as well as repair the individual relationships between the child with both parents and also create a healthy co-parenting relationship.<sup>234</sup>

One of the biggest hurdles for families is the cost of these services. PCCP families are usually involved in extensive litigation that consumes family resources.<sup>235</sup> The cost of therapeutic services in most jurisdictions are assessed against the parties.<sup>236</sup> While some families would benefit from a multi-day workshop, multi-member therapy team, and therapy for all family members,

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<sup>229</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533; Fidler & Bala, *Children Resisting*, *supra* note 6, at 25; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 585-86.

<sup>230</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 529; Darnall, *supra* note 41, at 328; Fidler & Bala, *Children Resisting*, *supra* note 6, at 25-26.

<sup>231</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 580.

<sup>232</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 26-27.

<sup>233</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 26-27; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 580 (emphasis in original).

<sup>234</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533.

<sup>235</sup> Darnall, *supra* note 41, at 358.

<sup>236</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 586.

these services are too costly for many PCCP families who need them.<sup>237</sup>

Little empirical data is available about the application and success of various therapeutic models for PCCP families for several reasons. The factors that can contribute to parent-child contact problems are so numerous, and the conflicts themselves can be so dynamic, that it is difficult for meticulous and comprehensive data to be collected.<sup>238</sup> Each major study conducted as of now has used different research designs and models, and defined a therapeutic model's success differently.<sup>239</sup> For example, one study may measure its successful outcome as a reduction in alienating behaviors, an improved co-parenting relationship, or the child's self-reported experience in closeness to the previously rejected parent.<sup>240</sup> This lack of consistency in the measure of success across different studies makes these results difficult to compare.<sup>241</sup> With the differences in methodology along with the understanding that each PCCP dynamic is case-specific, it is difficult to extrapolate one theory or therapeutic intervention that will be helpful in treating other PCCP cases.<sup>242</sup> Ultimately, further and better research is needed to evaluate the application and success of therapeutic models with families with parent-child contact problems.<sup>243</sup>

#### E. *Custody Reversal as an Outcome for Families with Parent-Child Contact Problems*

In the most severe cases of parent-child contact problems, the above described legal and therapeutic interventions are unlikely to be effective.<sup>244</sup> These usually involve unjustified rejection of a parent where the favored parent has continued pervasive parental alienating behaviors.<sup>245</sup> All available data in-

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<sup>237</sup> Fidler & Bala, *Children Resisting*, *supra* note 6, at 38; Johnston & Sullivan, *supra* note 3, at 282.

<sup>238</sup> Johnston & Sullivan, *supra* note 3, at 282.

<sup>239</sup> Saini, *supra* note 32, at 218-19.

<sup>240</sup> *Id.*

<sup>241</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 593; Saini, *supra* note 32, at 219.

<sup>242</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 593.

<sup>243</sup> Bailey, Dana, Bailey, & Davis, *supra* note 32, at 537.

<sup>244</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 586.

<sup>245</sup> *Id.*

dicade that therapeutic interventions will not be successful at restoring healthy global relationships within the family if the child remains in the custody or in contact with a pervasively alienating parent.<sup>246</sup> Meaningful contact with the rejected parent is essential to any healthy resolution of the parent-child relationship.<sup>247</sup> Custody reversal is a blunt instrument, but the court must use such a remedy at times where the child is continually exposed to emotional abuse, especially when the rejected parent is able to care for and shield the child from the ongoing abuse.<sup>248</sup>

These severe cases of pervasive parental alienating behaviors are often characterized as emotionally abusive situations for the child; therefore, it is recommended that the rejected parent be awarded sole custody of the child and for the favored parent's contact with the child to be suspended, at least on a temporary basis.<sup>249</sup> This custody order is usually combined with additional orders for therapeutic interventions in which the child and rejected parent participate in joint sessions while the favored parent participates in individual therapy aimed at preventing future alienating behavior.<sup>250</sup> Unfortunately, it is unlikely the favored parent will meaningfully participate in therapeutic services once custody has been reversed because that parent is so deeply committed to the conflict that they have continued the alienating behaviors despite all other previous interventions.<sup>251</sup> It has been recommended that this custody reversal and contact suspension be reviewable after ninety days.<sup>252</sup>

## V Conclusion

Post-separation parent-child contact problems are complex, nuanced, and dynamic. There are several types of PCCPs caused by a variety of reasons that are difficult to identify. If not addressed early, contact problems can cause long-term harm to a child's emotional development and parent-child relationships.

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<sup>246</sup> Warshak, *supra* note 174, at 438.

<sup>247</sup> *Id.*

<sup>248</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 514.

<sup>249</sup> Fidler & Bala, *Lessons Learned*, *supra* note 4, at 586; Polak, Altobelli, & Popielarczyk, *supra* note 3, at 515.

<sup>250</sup> Polak, Altobelli, & Popielarczyk, *supra* note 3, at 515.

<sup>251</sup> *Id.* at 514.

<sup>252</sup> *Id.* at 515.

Although the concept first arose with a narrow focus on a favored parent's alienating behavior, PCCPs are understood today to be a multi-factor analysis and highly specific to the circumstances of each case. Even though the concept of parent-child contact problems has evolved over time, their use in the courtroom is still controversial. Since the understanding of contact problems have advanced so dramatically in the past decade, there is new information about how courts can improve their handling of these cases. It is imperative that PCCP dynamics are recognized early and intervention is taken as soon as possible to avoid intractability. Case management procedures can be modified to ensure a family is kept with a single judge during the pendency of litigation and that court orders are timely and specific. Lawyers must serve as an educational source for their clients and advise them against exhibiting parental alienating behaviors. Despite needing much more research about ideal therapeutic interventions for PCCP families, available research indicates parent-child contact problem families are best served by multi-therapist teams and a family-systems approach.<sup>253</sup> Finally, custody reversal should be a last resort remedy for the most severe cases of intractable parent-child contact problems where all other interventions have failed to stop pervasive parental alienation. By adopting these recommendations, lawyers, judges, and mental health professionals will be better equipped to serve the child's best interest in having a healthy bond, free from alienation, with both parents.

Marissa Mallon

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<sup>253</sup> See generally Bailey, Dana, Bailey, & Davis, *supra* note 32, at 533; Fidler & Bala, *Children Resisting*, *supra* note 6, at 25; Fidler & Bala, *Lessons Learned*, *supra* note 4, at 585-586.



Comment,  
THE DISPOSITION OF FROZEN EMBRYOS  
AT DIVORCE

**I. Introduction**

The advancement of Assisted Reproductive Technology (ART) processes in which eggs or embryos are handled<sup>1</sup> has posed new legal and ethical issues, as is the case with any other modern advancement. In vitro fertilization (IVF), which “involves combining eggs and sperm outside the body in a laboratory,”<sup>2</sup> accounts for 99% of ART procedures.<sup>3</sup> Since the first IVF birth took place in the United Kingdom in 1978, more than eight million babies worldwide have been born through IVF.<sup>4</sup> IVF has been an invaluable advancement in medicine and technology for many individuals and couples who are unable to conceive naturally. However, problems arise when the relationship terminates and the progenitors<sup>5</sup> disagree about what should be done with their remaining embryos.

The issues of custody, parental rights, and procreational autonomy that surface in disputes over the disposition of embryos are often issues of first impression for courts in many states.<sup>6</sup> Most states lack an established approach for determining the dis-

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<sup>1</sup> *What Is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/whatis.html> (last updated Oct. 8, 2019).

<sup>2</sup> *Infertility and In Vitro Fertilization*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization#1> (last visited Dec. 30, 2020).

<sup>3</sup> Christina L. Preville, *Collaborative Law in Pennsylvania and the Frozen Embryo Debate*, 8 J. ENV'T'L. & PUB. HEALTH L. 80, 91 (2013).

<sup>4</sup> Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN HEALTH (July 3, 2018, 6:04 AM), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

<sup>5</sup> Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 261 (1990) (Progenitors “refers to the ‘gamete providers,’ those individuals who provide the egg or sperm cells from which the preembryo is created”).

<sup>6</sup> See generally Mary Joy Dingler, *Family Law’s Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U. L. REV. 293, 294 (Oct. 2019).

position of frozen embryos in the face of disputes.<sup>7</sup> Courts in the few states that have addressed the issue of the disposition of frozen embryos find difficulty maintaining uniformity in their decisions.<sup>8</sup> In addition, courts are usually left without clear statutory guidance for settling the issue. Couples are often left with inconsistent, and at times, inequitable outcomes as a consequence of this unfamiliar and uncommon area of family law.

Part II of this Comment explains the IVF process by giving a general overview of the creation of embryos, the cryopreservation of embryos, and the development of a disposition agreement. Part III delves into the question of whether embryos are persons or property of the progenitors – an issue that remains largely unanswered. Part IV sets out the three main approaches courts have employed to determine the disposition of frozen embryos in the event of a divorce and disagreement between the parties. Finally, Part V discusses the laws in three states, Arizona, California, and Florida, that have adopted statutory schemes to address the disposition of frozen embryos.

## **II. The Creation of Frozen Embryos: The IVF Process**

In vitro fertilization, the most common and most effective form of ART,<sup>9</sup> results in an estimated 40,000 to 60,000 births each year in the United States.<sup>10</sup> The advancement of IVF has made conception possible for many people, including individuals who are infertile or suffer from genetic issues, women over the age of forty, individuals who may be undergoing treatment for a terminal illness, single-by-choice parents, and individuals in

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<sup>7</sup> Sarah B. Kirschbaum, *Who Gets the Frozen Embryos During a Divorce? A Case for the Contemporaneous Consent Approach*, 21 N.C. J.L. & TECH. 113, 117 (Dec. 2019).

<sup>8</sup> *Id.* at 116.

<sup>9</sup> Kelly Burch, *12 IVF Truths No One Tells You About*, CCRM FERTILITY, <https://www.ccrmivf.com/news-events/ivf-truths/> (last visited Dec. 14, 2020); *In Vitro Fertilization (IVF)*, MAYO CLINIC, (June 22, 2019), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

<sup>10</sup> *IVF by the Numbers*, PENN MEDICINE, (Mar. 14, 2018), <https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers#:~:text=61%2C740%3A%20The%20latest%20SART%20report,births%20annually%20are%20via%20IVF.>

LGBTQ+<sup>11</sup> partnerships.<sup>12</sup> In treating infertility, less-invasive forms of treatment, including the use of fertility drugs or intrauterine insemination,<sup>13</sup> are usually undertaken before undergoing IVF.<sup>14</sup> The IVF procedure is achieved either by using the eggs and sperm of each individual in a partnership or by using eggs, sperm, or embryos from a donor.<sup>15</sup>

The IVF process involves removing eggs from the woman and sperm from the man in a laboratory.<sup>16</sup> Using insemination techniques, the separated sperm and eggs are combined in the laboratory for the fertilization process.<sup>17</sup> A fertilized egg then forms a pre-embryo<sup>18</sup> or embryo,<sup>19</sup> which is subsequently transferred back into the uterus with the hope of a resulting pregnancy.<sup>20</sup> Although it sounds simple, the IVF process is costly, lengthy, and invasive for the woman individually and the couple

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<sup>11</sup> *What Does LGBTQ+ Mean*, OK2BME, <https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/> (last visited Aug. 14, 2020). LGBTQ+ refers to all communities and identities sharing a common experience, including Lesbian, Gay, Bisexual, Transgender, Transsexual, 2/Two-Spirit, Queer, Questioning, Intersex, Asexual, Ally, +Pansexual, +Agender, +Gender Queer, +Bigender, +Gender Variant, +Pangender. This list is not exhaustive and is not meant to exclude LGBTQ+ identities that do not appear.

<sup>12</sup> *In Vitro Fertilization*, *supra* note 9.

<sup>13</sup> *Id.* (“A procedure in which sperm are placed directly in [a woman’s] uterus near the time of ovulation”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *IVF Treatment*, CCRM FERTILITY, <https://www.ccrmivf.com/services/ivf-fertilization/> (last visited Dec. 14, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> Derek Mergele-Rust, *Splitting the Baby: The Implications of Classifying Pre-Embryos as Community Property in Divorce Proceedings and Its Impacts on Gestational Surrogacy Agreements*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 505, 508 (2016) (“A pre-embryo is the organism existing before fourteen days of development, prior to the attachment to the uterine wall and the development of the primitive streak”); Elissa Strauss, *The Leftover Embryo Crisis*, ELLE, (Sept. 29, 2017), <https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/> (The term pre-embryo is used by some medical experts in categorizing embryos that have not yet been implanted into the uterus).

<sup>19</sup> Jon Johnson, *Embryo Freezing: What You Need to Know*, MEDICAL NEWS TODAY, (Mar. 13, 2019), <https://www.medicalnewstoday.com/articles/314662>.

<sup>20</sup> *IVF Treatment*, *supra* note 16.

as a whole, with no guarantee of success.<sup>21</sup> The full IVF cycle involves several stages including ovarian stimulation, egg retrieval, sperm retrieval, fertilization, embryo transfer, and cryopreservation.<sup>22</sup>

The first stage of the IVF cycle, ovulation induction, involves the treatment of a woman who chooses or is able to use her own eggs.<sup>23</sup> During treatment, the woman takes synthetic hormones along with other fertility medications to stimulate her ovaries to produce more than one egg.<sup>24</sup> This two-week process involves multiple vaginal ultrasounds and blood tests to determine whether the woman's eggs are ready for retrieval.<sup>25</sup> Egg retrieval, the second stage of the IVF process, involves the collection of a woman's mature eggs through transvaginal ultrasound aspiration.<sup>26</sup> During this procedure, the woman is sedated and an ultrasound guide containing a needle is inserted through the woman's vagina to retrieve her eggs.<sup>27</sup> Following retrieval, the mature eggs are incubated in a nutritive liquid.<sup>28</sup>

Sperm retrieval is a relatively uncomplicated and straightforward stage of the IVF process. During sperm retrieval, a semen sample is provided by a donor or the male partner who chooses and is able to use his own sperm.<sup>29</sup> After the sperm have been retrieved and are separated from the semen fluid, the fourth stage of fertilization can begin.<sup>30</sup> The fertilization process often employs one of two methods: insemination or intracytoplasmic sperm injection (ICSI).<sup>31</sup> The conventional insemination method involves the mixing and incubation of the mature eggs and

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<sup>21</sup> *See id.* (The average cost of IVF is between \$12,000 and \$17,000 for one full cycle); *See also In Vitro Fertilization, supra* note 9 ("IVF can be time-consuming, expensive and invasive." A full IVF cycle can take approximately three weeks. More than one cycle can be required in some cases).

<sup>22</sup> *In Vitro Fertilization, supra* note 9.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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

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

<sup>29</sup> *Id.*

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

<sup>31</sup> *In Vitro Fertilization*, MEDLINEPLUS, <https://medlineplus.gov/ency/article/007279.htm> (last updated Jan. 5, 2021).

healthy sperm.<sup>32</sup> Through ICSI, a method that may be used if chances of fertilization are particularly low, a single sperm is directly injected into each egg.<sup>33</sup>

Embryo transfer is the final stage of the IVF process. Two to five days following egg retrieval, the woman will undergo a procedure during which she is mildly sedated.<sup>34</sup> A catheter containing one or multiple embryos is inserted into the woman's uterus, with the hope of at least one of the embryos implanting into the woman's uterine lining.<sup>35</sup> The full IVF process often produces several embryos to increase the chances of success.<sup>36</sup> In an effort to preserve the remaining embryos for future use, the embryos are frozen and stored through a process called cryopreservation.<sup>37</sup> During cryopreservation, the cell's water is replaced with cryoprotectant, the embryo is frozen through slow freezing or vitrification, and the embryo is stored in liquid nitrogen.<sup>38</sup>

Cryopreservation is often utilized because of its ability to make future IVF cycles less expensive and less invasive.<sup>39</sup> As of 2018, it was estimated that there were more than one million frozen embryos currently being stored in fertility clinics around the United States.<sup>40</sup> Frozen embryos can viably remain in storage for an indefinite period of time.<sup>41</sup> However, maintaining storage of frozen embryos can be costly, averaging between \$300 and \$1,200 a year, as long as the progenitors choose to keep them at the fertility clinics and facilities.<sup>42</sup> Cryopreservation can be a good

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<sup>32</sup> *In Vitro Fertilization*, *supra* note 9.

<sup>33</sup> *Id.*; Medline Plus, *supra* note 31.

<sup>34</sup> *In Vitro Fertilization*, *supra* note 9.

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

<sup>36</sup> Johnson, *supra* note 19; *See also In Vitro Fertilization*, *supra* note 9.

<sup>37</sup> Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 495 (1999).

<sup>38</sup> Johnson, *supra* note 19 (Slow freezing involves "placing the embryos in sealed tubes, then slowly lowering their temperature." The vitrification method "freezes the cryoprotected embryos so quickly that the water molecules do not have time to form ice crystals. This helps protect the embryos and increase their rate of survival during thawing.).

<sup>39</sup> *In Vitro Fertilization*, *supra* note 9.

<sup>40</sup> *Infertility and In Vitro Fertilization*, *supra* note 2.

<sup>41</sup> Johnson, *supra* note 19; Tamar Lewin, *Industry's Growth Leads to Left-over Embryos, and Painful Choices*, N.Y. TIMES, (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html>.

<sup>42</sup> Lewin, *supra* note 41.

option for individuals and couples who are certain that they will use their embryos in the future or for those who are undecided on the future use of their embryos. However, complex legal and moral disputes arise when progenitors do not agree on the use and custody of their frozen embryos.

Before undertaking the IVF process, both patients are encouraged to<sup>43</sup> complete and sign an IVF contract or disposition agreement detailing the disposition of their frozen embryos.<sup>44</sup> The agreement provides the clinic with guidance on the use or non-use of the couple's frozen embryos in the event of their separation, divorce, death, or cessation of treatment.<sup>45</sup> The IVF contract or disposition agreement is usually provided by the IVF clinic or drafted by an attorney.<sup>46</sup> The primary options given to a couple for the disposition of their frozen embryos in the event of a divorce include donating the embryos to research or to another couple, keeping the frozen embryos in storage indefinitely, awarding the embryos to one biological parent, or discarding the embryos.<sup>47</sup>

Despite having signed a disposition agreement prior to beginning IVF, it is likely that one or both progenitors will change their mind about their wishes for the disposition of their embryos.<sup>48</sup> Studies estimate that 71% of couples have different preferences for the disposition of their frozen embryos after they complete IVF treatment compared to their dispositional preferences prior to beginning treatment.<sup>49</sup> Further complicating matters, most couples do not contemplate their possible divorce or separation at the time of signing the disposition agreement.<sup>50</sup> In

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<sup>43</sup> *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998) (The court reasoned that parties "should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing.").

<sup>44</sup> Kirschbaum, *supra* note 7, at 116.

<sup>45</sup> Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 66 (Jan. 2018); Mergele-Rust, *supra* note 18, at 509.

<sup>46</sup> Kirschbaum, *supra* note 7, at 116.

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

<sup>48</sup> *Id.* at 134.

<sup>49</sup> Susan C. Klock et al., *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69, 69–70 (2001).

<sup>50</sup> Kirschbaum, *supra* note 7, at 133.

the wake of divorce and disagreement, progenitors are left to speculate about the possible characterization and disposition of their frozen embryos whether or not they signed a disposition agreement. An extensive body of family law has been established regarding the division of jointly owned property in the event of a divorce; unfortunately, the law determining the division of jointly owned frozen embryos is unclear.<sup>51</sup> The issue of determining the division of frozen embryos is complicated by the confusion surrounding characterization of frozen embryos.

### **III. Characterization of Frozen Embryos: Persons or Property?**

The issue concerning the proper disposition of frozen embryos in the event of a divorce is further complicated by the unresolved and indeterminate nature of embryos. Understandably, courts struggle with settling the question of whether to define an embryo as a person or property. The medical community “uses the term embryo from the moment that cells divide after fertilization until the eighth week of pregnancy.”<sup>52</sup> The IVF embryo or pre-embryo is a complex structure, with the potential for developing into human life.<sup>53</sup> The American Society of Reproductive Medicine (ASRM) supports affording embryos an “interim status.”<sup>54</sup> ASRM states that embryos should be given “profound respect” but not the exact same rights as humans.<sup>55</sup>

The U.S. Supreme Court has not yet addressed the characterization of embryos or other reproductive tissue.<sup>56</sup> The majority of courts that have addressed the characterization of frozen embryos found that they are property of a special or unique character.<sup>57</sup> Because of their potential for human life, courts often

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<sup>51</sup> Debele & Crockin, *supra* note 45, at 75.

<sup>52</sup> Johnson, *supra* note 19.

<sup>53</sup> *See generally* Debele & Crockin, *supra* note 45, at 63.

<sup>54</sup> *Id.* at 68-69.

<sup>55</sup> *Id.* at 69.

<sup>56</sup> *Id.* at 73; *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe v. Wade*, the U.S. Supreme Court declined to characterize fetuses as judicial persons.

<sup>57</sup> *See* Debele & Crockin, *supra* note 45, at 68; *In re Marriage of Rooks*, 429 P.3d 579, 583 (Colo. 2018) (The Supreme Court of Colorado held that an embryo is marital property of a special character); *Gadberry*, 507 S.W.3d 127 (Balancing the competing interests of the parties, the Court of Appeals of Mis-

hold that embryos occupy an intermediate category between persons and property.<sup>58</sup> In dissolution of marriage cases, courts have characterized embryos as a “unique form of joint marital property that could not simply be valued and divided.”<sup>59</sup>

Louisiana is one of the few states that has adopted legislation defining the characterization of embryos. Louisiana’s statute explicitly defines human embryos as “biological human being[s] which [are] not the property of the physician who acts as an agent of fertilization, or the facility clinic which employs him or the donors of the sperm or ovum.”<sup>60</sup> Louisiana legislation goes further to define an IVF “human ovum” as a “juridical person which cannot be owned by the in vitro fertilization parent.”<sup>61</sup> The human embryo cannot be created or destroyed for exclusive purpose research.<sup>62</sup> Louisiana’s statute further instructs the proper judicial standard of disposition of the embryo is the best interest of the embryo.<sup>63</sup>

The characterization of frozen embryos remains unclear. Whether the court determines that a frozen embryo is a person or property or of an intermediate status has a great impact on the disposition outcomes. The characterization of frozen embryos in disputes over their custody and use also plays a large role in the court’s determination of which approach to utilize in resolving the dispute.

#### **IV. Judicial Approaches to Resolving Disputes**

Courts presented with disputes regarding the disposition of a couple’s frozen embryos at their divorce are often faced with issues of first impression. With a lack of legislative guidance or precedent, courts grapple with complicated contractual, property,

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souri, Eastern District concluded that embryos are marital property of a special character); *Davis*, 842 S.W.2d at 597 (The Supreme Court of Tennessee concluded that embryos are “not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

<sup>58</sup> Dinger, *supra* note 6, at 315.

<sup>59</sup> Debele & Crockin, *supra* note 45, at 68.

<sup>60</sup> LA. REV. STAT. ANN. § 9:126 (2020).

<sup>61</sup> LA. REV. STAT. ANN. § 9.130 (2020).

<sup>62</sup> Debele & Crockin, *supra* note 45, at 71.

<sup>63</sup> LA. REV. STAT. ANN. § 9:131 (2020).

and constitutional matters.<sup>64</sup> This part of the Comment details the principal approaches courts have applied when determining the disposition of frozen embryos at divorce: the contractual approach, the balancing approach, and the contemporaneous mutual consent approach. In general, the goal of each approach is to “(1) secure both parties’ consent where possible, and (2) avoid results that compel one party to become a genetic parent against his/her will.”<sup>65</sup>

Courts that have addressed embryo-disposition cases are generally in agreement that the contractual approach should apply first in cases where the progenitors have an existing agreement stating their dispositional choices.<sup>66</sup> In absence of an agreement, the courts then employ a balancing approach to resolve such disputes.<sup>67</sup> The contemporaneous mutual consent approach is less commonly applied by courts.<sup>68</sup> Although the three judicial approaches have given courts a starting point for resolving embryo-disposition disputes, the inconsistencies in the approaches often lead to inequitable and contradictory outcomes.<sup>69</sup>

#### A. *The Contractual Approach*

The contractual approach is most commonly utilized by courts in determining disputes surrounding the custody of frozen embryos.<sup>70</sup> The majority of states whose courts have addressed

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<sup>64</sup> See generally Mergele-Rust, *supra* note 18, at 507.

<sup>65</sup> Rooks, 429 P.3d at 585.

<sup>66</sup> Dingler, *supra* note 6, at 296.

<sup>67</sup> See generally Rooks, 429 P.3d at 581; Kirschbaum, *supra* note 7, at 125.

<sup>68</sup> *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

<sup>69</sup> Dingler, *supra* note 6, at 295.

<sup>70</sup> Kirschbaum, *supra* note 7, at 123; *Dahl v. Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008) (The parties executed an agreement with the fertility clinic providing that the disposition of the frozen embryos would be directed by the parties’ joint written authorization. In absence of authorization, the wife would decide the disposition of the frozen embryos. At their divorce, the wife wanted the embryos destroyed while the husband wanted them donated to another couple. The Oregon Court of Appeals determined that the agreement was clear as to the parties’ intent. The court further stated that courts “should give effect to agreements showing the parties’ intent for the disposition of frozen embryos.”); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) (The parties signed an embryo agreement with the fertility clinic prior to starting IVF, stating that

the issue of embryo disposition have used this approach as the first step for resolving such disputes.<sup>71</sup> Courts generally apply the contractual approach when the parties have an existing IVF contract or disposition agreement stating their intent regarding the disposition of their frozen embryos.<sup>72</sup> Under the rationale that competent adults should be free to contract, the disposition agreement is presumed by the court to be valid and enforceable.<sup>73</sup> Absent a violation of the state's public policy, the court will typically determine that the agreement is binding and award disposition of the frozen embryos in accordance with the agreement.<sup>74</sup> The New York Court of Appeals was the first court to apply the contractual approach in 1988 in *Kass v. Kass*.<sup>75</sup>

Prior to undergoing IVF treatment, Maureen and Steven Kass signed an agreement with the clinic providing that any remaining embryos would be used for research.<sup>76</sup> At the time of their divorce, Maureen changed her preferences regarding embryo disposition and sought custody of the embryos for future implantation.<sup>77</sup> Steven objected, arguing the embryos should be donated for research as was agreed to prior to treatment.<sup>78</sup> In accordance with state contract law, the New York Court of Appeals held that the existing agreement between the parties was

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their frozen embryos would be discarded in the event of divorce. The Texas Court of Appeals, First District, applying the contractual approach, upheld the validity and enforceability of the agreement and held that the agreement governed the disposition of the parties' embryos.); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (The Supreme Court of Washington applied basic principles of contract law in disposing the parties' frozen embryos in a manner that comported with the parties' written cryopreservation agreement.).

<sup>71</sup> *Terrell v. Torres*, 246 Ariz. 312, 320 (Ariz. Ct. App. 2019); *Rooks*, 429 P.3d at 592; *Bilbao v. Goodwin*, 217 A.3d 977, 985 (Conn. 2019) (citing courts in eight states which have employed the contractual approach.); *Szafranski v. Duston*, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013); *Kass*, 91 N.Y.2d at 564-66, *Dahl*, 194 P.3d at 840; *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *Roman*, 193 S.W.3d at 50 (Tex. App. 2006)).

<sup>72</sup> See generally *Dinger*, *supra* note 6, at 296.

<sup>73</sup> *Bilbao*, 333 Conn. at 608; *Kirschbaum*, *supra* note 7 at 123.

<sup>74</sup> See generally *Kirschbaum*, *supra* note 7, at 132; See also *Bilbao*, 333 Conn. at 614.

<sup>75</sup> *Mary Ziegler, Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 525 (2018).

<sup>76</sup> *Kass*, 91 N.Y.2d at 558.

<sup>77</sup> *Id.* at 560.

<sup>78</sup> *Id.* at 556.

enforceable and controlling.<sup>79</sup> The court found that the parties “clearly manifested their intention” for disposition of their frozen embryos in their written contract.<sup>80</sup> The court determined the embryos would be donated to research as the parties had agreed in writing.

1. *Recent Application of the Contractual Approach*

In 2019, the Supreme Court of Connecticut in *Bilbao v. Goodwin* also adopted the contractual approach, reasoning that it was the appropriate first step for determining the disposition of embryos in the event of divorce.<sup>81</sup> Following IVF treatment, Jessica Bilbao and Timothy Goodwin stored their remaining embryos for possible future implantation.<sup>82</sup> The parties signed a standardized contract with the fertility clinic in which they initialed and checked a box providing that their embryos would be discarded in the event of their divorce.<sup>83</sup> Bilbao filed for dissolution of the marriage and asked for the embryos to be discarded in accordance with their existing agreement.<sup>84</sup> Goodwin had a change of heart and wanted to have the embryos preserved or donated.<sup>85</sup> Goodwin argued the existing agreement was unenforceable and therefore should not control the disposition of the embryos. Goodwin also argued that because their embryos are human life, they must be awarded to him as the party seeking to preserve them.<sup>86</sup>

The trial court found the agreement unenforceable because “it ‘was little more than a ‘check the box questionnaire,’ which had ‘neither consideration nor a promise.’”<sup>87</sup> In determining the disposition of the embryos, the trial court proceeded as if the embryos were property subject to distribution.<sup>88</sup> Because it

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<sup>79</sup> *Id.* at 561.

<sup>80</sup> *Id.* at 568.

<sup>81</sup> *Bilbao*, 217 A.3d at 986.

<sup>82</sup> *Id.* at 980-81.

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 982.

<sup>87</sup> *Id.* at 984.

<sup>88</sup> *Id.* at 982. The issue of whether an embryo is human life or property of its progenitors was not reviewed or determined by the Supreme Court of Connecticut.

found the agreement unenforceable, the trial court adopted a balancing approach in which it weighed the parties' interests in the embryos.<sup>89</sup> The trial court awarded the embryos to Bilbao finding her interest in the embryos outweighed Goodwin's interest.<sup>90</sup>

Applying the contractual approach, the Supreme Court of Connecticut reversed the trial court's conclusion that the agreement was unenforceable.<sup>91</sup> Addressing the trial court's concern for check-box agreements, the state supreme court held that agreements in which the progenitors "indicated a disposition choice in some manner other than by writing it out in full" are sufficient and enforceable.<sup>92</sup> The court reasoned that disposition agreements "encourage the private resolution of family issues."<sup>93</sup> Additionally, the court found that application of the contractual approach was consistent with Connecticut's public policy of "enforcing intimate partner agreements."<sup>94</sup>

In the most recent state supreme court case determining the disposition of frozen embryos, *Terrell v. Torres*, the Supreme Court of Arizona also adopted the contractual approach. Before undergoing cancer treatment, Ruby Torres was told by her doctor that the treatment could lead to infertility.<sup>95</sup> In hopes of having children in the future, Torres sought out IVF treatment and asked her then boyfriend, John Terrell, to donate his sperm.<sup>96</sup> Before beginning IVF treatment, Terrell and Torres signed an embryo disposition form required by the fertility clinic, in which they agreed to donate the embryos to another couple in the event of divorce, separation, death, or incapacitation.<sup>97</sup> The couple married shortly after and underwent the IVF process,

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<sup>89</sup> *Id.* at 984.

<sup>90</sup> *Id.* at 982.

<sup>91</sup> *Id.* at 984.

<sup>92</sup> *Id.* at 990.

<sup>93</sup> *Id.* at 987.

<sup>94</sup> *Id.*

<sup>95</sup> *Terrell v. Torres*, 456 P.3d 13, 16 (Ariz. 2020).

<sup>96</sup> *Id.* at 14.

<sup>97</sup> *Id.* at 16. Similar to the parties in *Bilbao v. Goodwin*, Terrell and Torres indicated their disposition decision by checking and initialing the corresponding box.

producing several embryos that were preserved and stored.<sup>98</sup> But before they could produce any children, Terrell filed for divorce.

Terrell, wishing to prevent having any children with Torres in the future, argued the remaining frozen embryos should be donated to another couple in accordance with their disposition agreement.<sup>99</sup> However, Torres changed her previous decision and wanted to keep the embryos for future implantation.<sup>100</sup> The family court applied a balancing approach and held that Terrell's right to not be a parent outweighed Torres's right to procreate.<sup>101</sup> The court of appeals interpreted the disposition agreement as providing the court discretion to award the embryos.<sup>102</sup> The court of appeals also employed a balancing approach, but came to the opposite conclusion. In balancing the parties' interests, the court found Torres's interest exceeded Terrell's and awarded the embryos to Torres.<sup>103</sup>

The Supreme Court of Arizona affirmed the family court's decision to award the frozen embryos to Terrell but found the family court and the court of appeals both erred in applying a balancing approach, rather than enforcing the parties' agreement.<sup>104</sup> The court held that the dispositional choice was not left to the court's discretion.<sup>105</sup> In determining the disposition of embryos at divorce, the court noted that it must first look to any existing contracts.<sup>106</sup> Citing the reasoning of *Kass*, the court stated that disposition agreements "should generally be presumed valid and binding, and enforced in any dispute between them."<sup>107</sup> The state supreme court also noted that contracts between divorcing couples directing the disposition of their property are traditionally enforced.<sup>108</sup> In applying the contractual approach, the court should seek to "discover and effectuate the

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<sup>98</sup> *Id.* at 14.

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

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

<sup>101</sup> *Id.* at 15.

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

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 14.

<sup>105</sup> *Id.* at 16.

<sup>106</sup> *Id.* at 15.

<sup>107</sup> *Terrell v. Torres*, 456 P.3d 13, 15 (Ariz. 2020) (citing *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998)).

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

parties' expressed intent."<sup>109</sup> The Supreme Court of Arizona held the parties' agreement regarding the disposition of their cryopreserved embryos in the event of their divorce directed the disposition of those embryos.<sup>110</sup>

## 2. *Support and Criticism of the Contractual Approach*

Although the contractual approach to determining the disposition of frozen embryos at divorce is relatively established and employed in disputes in which couples have an existing disposition agreement, there are supporters and critics of this approach. The largest argument in support of the contractual approach is that it maintains and maximizes the procreative autonomy of progenitors, by allowing the couple to make their own decisions rather than the allowing the court to control such a personal choice.<sup>111</sup> Proponents of this approach also contend that this approach helps couples avoid highly emotional and costly litigation.<sup>112</sup> Finally, supporters assert that the contractual approach encourages thoughtful discussion between the parties before divorce, which can minimize future uncertainty.<sup>113</sup>

On the other hand, critics of this approach argue that it is too harsh in circumstances where one party has a change in heart.<sup>114</sup> Opponents contend that because of the approach's strict adherence to the parties' previously agreed to positions, it does not give the courts any room to adapt to changed circumstances to hold otherwise.<sup>115</sup> The contractual approach is criticized for ignoring the possibility that progenitors will change their mind regarding the disposition of their embryos once they divorce,

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 14.

<sup>111</sup> *Bilbao*, 217 A.3d at 984 (citing *Kass v. Kass*, 91 N.Y.2d 554, 565-66 (N.Y. 1998)). The contractual approach "[m]aximize[s] procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."; *Id.* (citing *Kass v. Kass*, 91 N.Y.2d 554, 565-66 (N.Y. 1998) "Proponents of the contractual approach primarily argue that this approach allows 'the progenitors—not the [s]tate and not the courts . . . [to] make this deeply personal life choice'"; *Dinger*, *supra* note 6, at 301.

<sup>112</sup> *Bilbao*, 333 Conn. at 609.

<sup>113</sup> *Id.* at 613.

<sup>114</sup> *See Mergele-Rust*, *supra* note 18, at 523.

<sup>115</sup> *Id.*

something they may have not fully contemplated before signing an agreement.<sup>116</sup>

### B. *The Balancing Approach*

In resolving disputes regarding the disposition of frozen embryos where the divorcing couple does not have an existing disposition agreement or the agreement is unenforceable, courts are forced to apply the balancing approach. Under this approach, courts balance each progenitor's interest in the frozen embryos.<sup>117</sup> This balancing-of-interests test often involves weighing one party's interest in procreating against the other party's interest in not procreating.<sup>118</sup> Factors that are commonly taken into consideration under this test are: "intended use of the pre-embryos, ability of each respective spouse to reproduce through other means, reasons for pursuing in-vitro, emotional consequences, [and] bad faith."<sup>119</sup> Courts often find that the party seeking to avoid procreation prevails.<sup>120</sup> However, that is not always the case, leading to contradictory and uncertain outcomes.<sup>121</sup>

In 1992, the Supreme Court of Tennessee had its first encounter with a dispute involving the disposition of frozen em-

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<sup>116</sup> See generally *Bilbao*, 217 A.3d at 984.

<sup>117</sup> *Id.* at 985.

<sup>118</sup> *Dingler*, *supra* note 6, at 318.

<sup>119</sup> *Bilbao*, 333 Conn. at 610.

<sup>120</sup> *Davis*, 842 S.W.2d at 604; See generally *Ziegler*, *supra* note 75, at 558.

<sup>121</sup> *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015) (The Illinois Appellate Court, First District balanced the parties' competing interests and found that the wife's interest in using the embryos after becoming infertile was paramount to the husband's interest in avoiding parenthood.); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (At divorce, the parties disagreed on the disposition of their frozen embryos despite having a signed agreement with the fertility clinic stating that in the event of divorce, the embryos would revert back to the clinic. At divorce, the wife, although infertile, wanted the frozen embryos discarded while the husband wanted to keep the embryos to have children. Using the balancing approach, the Supreme Court of New Jersey weighed the parties' interests and held that the wife's interest in avoiding parenthood outweighed the husband's interest in using the frozen embryos.); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012) (The Superior Court of Pennsylvania employed the balancing test and found that the wife's interest in using the embryos, where that was her only opportunity to have biological children, outweighed the husband's interest in avoiding procreation.).

bryos at divorce in *Davis v. Davis*. During their marriage, Mary Sue and Junior Davis decided to undergo IVF treatment in the hope of procreating. However, prior to beginning IVF, the couple did not enter into an agreement directing the disposition of their cryogenically-preserved embryos in the event of divorce, separation, or death.<sup>122</sup> Upon dissolution of their marriage, Mary Sue wished to have control over the frozen embryos for donation to another couple.<sup>123</sup> Junior objected, preferring to leave the embryos frozen.<sup>124</sup>

The trial court determined that the frozen embryos were “‘human beings’ from the moment of fertilization,” and awarded custody of the embryos to Mary Sue.<sup>125</sup> The court of appeals disagreed with the trial court’s finding that embryos are “persons,” but did not specify whether they were in fact “property.”<sup>126</sup> The court of appeals found the Davises had a joint interest in the frozen embryos and awarded joint custody.<sup>127</sup> The Supreme Court of Tennessee agreed with the court of appeals that embryos are not persons.<sup>128</sup> The court further concluded that embryos are neither persons nor property but “occupy an interim category that entitles them to special respect.”<sup>129</sup>

The Supreme Court of Tennessee acknowledged that the contractual approach would be appropriate in determining embryo disposition when the parties have an agreement, and that the agreement should be presumed valid and binding.<sup>130</sup> In the absence of an existing disposition agreement between the Davises, the state supreme court was forced to apply the balancing approach. Balancing the parties’ interests, the court considered “the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”<sup>131</sup> The court found that Junior’s interest in avoiding procreation and parenthood outweighed Mary Sue’s in-

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<sup>122</sup> *Davis*, 842 S.W.2d at 590.

<sup>123</sup> *Id.* at 589-90.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 594

<sup>127</sup> *Id.* at 595.

<sup>128</sup> *Id.* at 594.

<sup>129</sup> *Id.* at 597.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 603.

terest in donating the embryos to another couple.<sup>132</sup> The state supreme court further held that the party seeking to avoid procreation wins, “assuming that the other party has a reasonable possibility of achieving parenthood.”<sup>133</sup>

### 1. *Recent Application of the Balancing Approach*

Mandy and Drake Rooks married in 2002 and were able to successfully conceive three children using IVF.<sup>134</sup> The parties signed an agreement with the fertility clinic prior to starting IVF treatment, but the agreement did not address the disposition of their remaining embryos in the event of their divorce.<sup>135</sup> When they divorced, Mandy wanted to keep the cryopreserved embryos for future implantation. At trial, Mandy testified that she believed she was no longer able to have children “naturally.”<sup>136</sup> Drake, opposed to having more children with Mandy, argued to have the frozen embryos discarded.<sup>137</sup>

The trial court awarded the frozen embryos to Drake for disposal, concluding that Drake’s right to avoid parenthood outweighed Mandy’s interest in having more children.<sup>138</sup> The trial court reasoned that the balancing approach should be applied “if the parties’ agreement did not specifically address the disposition of the pre-embryos, or was ‘so ambiguous as to be unenforceable.’”<sup>139</sup> The court of appeals affirmed, agreeing that the balancing approach was appropriately applied in the absence of a valid agreement directing the disposition of embryos at divorce.<sup>140</sup>

Although the Supreme Court of Colorado recognized the inherent adequacies of the balancing approach, it agreed that the balancing test should be employed where, as here, the existing

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<sup>132</sup> *Id.* at 604.

<sup>133</sup> *Id.* at 604.

<sup>134</sup> *Rooks*, 429 P.3d at 581.

<sup>135</sup> *Id.* at 582-83. The disposition plan between Mandy and Drake Rooks with the clinic stated in the event of divorce or dissolution of marriage “disposition of [their] embryos will be part of the divorce/dissolution decree paperwork.” *Id.*

<sup>136</sup> *Id.* at 583.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 584.

disposition agreement failed to specify the disposition of the couple's frozen embryos at divorce.<sup>141</sup> However, the court reversed and remanded, finding that the trial court and court of appeals considered inappropriate factors in applying the balancing approach.<sup>142</sup> The state supreme court listed six factors that should be considered under the balancing approach:

The intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking IVF in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation.<sup>143</sup>

The court went further and specified three factors that should not be considered by the court:

Whether the spouse seeking to use the pre-embryos to become a genetic parent can afford a child . . . the sheer number of a party's existing children, standing alone . . . whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.<sup>144</sup>

In applying the balancing approach, the court noted that "courts should strive to award pre-embryos in a manner that allows both parties to exercise their rights to procreational autonomy."<sup>145</sup> Delineating specific factors to be considered under the approach, the state supreme court reasoned held that the balancing approach was the correct approach for the dispute. The dissent argued that the contemporaneous mutual consent approach was the appropriate method because the constitutional rights of the progenitors will not be overruled by the court.<sup>146</sup>

## 2. *Support and Criticism of the Balancing Approach*

The balancing approach, like each of the other two approaches, has its strengths and weaknesses. However, this ap-

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<sup>141</sup> *Id.* at 586; *See also* Dingler, *supra* note 6, at 302.

<sup>142</sup> *Id.* at 586.

<sup>143</sup> *Id.* at 595.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 585.

<sup>146</sup> *Id.* at 595.

proach receives the most criticism of all the approaches.<sup>147</sup> Opponents of the balancing approach point to several issues of inconsistency, unpredictability, and inequity.<sup>148</sup> Because it is highly fact-dependent, the approach yields a range of outcomes depending on the jurisdiction.<sup>149</sup> This leaves progenitors vulnerable and unsure about the future of their frozen embryos. The balancing approach puts the disposition decisions in the hands of the court.<sup>150</sup> Progenitors may also be left feeling frustrated as their autonomy to make decisions regarding the disposition of their frozen embryos is taken away. The court has overwhelming discretion in applying the balancing approach, which can lead to prejudices or biases affecting the decisions. Even more detrimental, the balancing approach “can send a powerful message about the relative weakness of the constitutional rights at stake in assisted reproduction.”<sup>151</sup>

### C. *The Contemporaneous Mutual Consent Approach*

Similar to the contractual approach, the contemporaneous mutual consent approach hinges on the notion that “decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed.”<sup>152</sup> In an attempt to utilize principles from both the contractual approach and the balancing approach, the contemporaneous mutual consent approach requires both parties to agree to the disposition at the time of disposition.<sup>153</sup> Under this approach, if one party changes their

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<sup>147</sup> *Bilbao*, 217 A.3d. at 985 (“[T]he balancing approach ultimately puts the disposition of a preembryo in the hands of a court and not in the hands of the progenitors.”); Ziegler, *supra* note 75, at 558-59 (Criticizing the balancing approach, stating that the effect of judges’ prejudices and biases in weighing the parties’ interests can lead to unpredictable and unfair outcomes).

<sup>148</sup> *Witten*, 672 N.W.2d at 779 (“The obvious problem with the balancing test model is its internal inconsistency”).

<sup>149</sup> See generally Kirschbaum, *supra* note 7, at 126; see also Ziegler, *supra* note 75, at 557.

<sup>150</sup> *Bilbao*, 217 A.3d. at 985.

<sup>151</sup> Ziegler, *supra* note 75, at 567.

<sup>152</sup> *Witten*, 672 N.W.2d at 777 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999)).

<sup>153</sup> *Bilbao*, 217 A.3d. at 985.

dispositional decision at the time of enforcement, the contract will no longer be binding.<sup>154</sup> The parties must come to an agreement regarding the disposition of their embryos, regardless of any existing written agreement between them.<sup>155</sup> Frozen embryos must remain in storage until the parties can come to a mutual agreement.<sup>156</sup> If the progenitors come to a contemporaneous agreement regarding the disposition of their frozen embryos, their mutual decision will be enforced by the court.<sup>157</sup> However, if the progenitors are not able to come reach a mutual, contemporaneous agreement, their frozen embryos will remain in storage.

Few states have adopted the contemporaneous mutual consent approach.<sup>158</sup> The Iowa Supreme Court was the first to apply the approach in 2003 in *Witten v. Witten*.<sup>159</sup> During their marriage, Arthur and Tamera Witten decided to undergo IVF treatment due to infertility issues. Prior to commencing the IVF process, Arthur and Tamera signed an informed consent document with the clinic providing that the embryos would be transferred or released for disposition only with the written consent of

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<sup>154</sup> See Coleman, *supra* note 94, at 89.

<sup>155</sup> Mergele-Rust, *supra* note 18, at 522.

<sup>156</sup> Coleman, *supra* note 94, at 110 (“No embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo”).

<sup>157</sup> *Id.*; Kirschbaum, *supra* note 7, at 118.

<sup>158</sup> Dingler, *supra* note 6, at 296; *Rooks*, 429 P.3d at 592. (The Supreme Court of Colorado specifically rejected the contemporaneous mutual consent approach); *Witten*, 672 N.W.2d 768 (The Iowa Supreme Court applied the contemporaneous mutual consent approach); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (Prior to beginning IVF, the parties signed a consent form stating that, in the event of divorce, the embryos would be awarded to the wife based on her infertility. When the parties divorced, the husband changed his preferences and decided that he did not want to become a parent. The Massachusetts Supreme Judicial Court held that they would not enforce a contract, even if it was valid, that would compel one party to become a parent against their wishes.); *McQueen*, 507 S.W.3d 127 (Mo. Ct. App. 2016) (The Missouri Court of Appeals, Eastern District affirmed the trial court’s decision awarding the frozen embryos to both parties jointly and ordering that “no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization” of both parties.” The court found that ordering contemporaneous mutual consent between the parties left such an intimate decision in their hands without unwarranted governmental intrusion.).

<sup>159</sup> 672 N.W.2d 768 (Iowa 2003).

both parties.<sup>160</sup> At the dissolution of their marriage, Tamera had a change of heart and sought custody of the frozen embryos for future implantation.<sup>161</sup> Arthur opposed Tamera's desire to use the embryos but did not want them destroyed.<sup>162</sup> The trial court held that the existing agreement governed the dispute and enjoined both Tamera and Arthur from using or disposing of the frozen embryos without the consent of the other.<sup>163</sup> The Iowa Supreme Court affirmed.<sup>164</sup>

In applying the contemporaneous mutual consent approach, the Iowa Supreme Court held that disposition agreements at the time of IVF are enforceable and binding, but in the event of "a later objection to any dispositional provision," the agreement no longer controls.<sup>165</sup> The court found that requiring contemporaneous mutual consent when one party has a change of heart was in line with the public policy of the state.<sup>166</sup> In recognizing the general emotionality of familial relationships and their susceptibility to change, the court noted its reluctance to involve itself in "intimate questions inherent in personal relationships."<sup>167</sup> The state supreme court held that the parties were required to keep their embryos in storage indefinitely until the parties came to an agreement on their disposition.<sup>168</sup> Because this approach has not been adopted by many courts, there is little known about its lasting effects.

### 1. *Support and Criticism of the Contemporaneous Mutual Consent Approach*

The contemporaneous mutual consent approach has been adopted by few courts and has similarly received little criticism or support. The greatest strength of this approach is its respect for the progenitors' right to contract between themselves and make decisions regarding their frozen embryos.<sup>169</sup> The approach

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<sup>160</sup> *Id.* at 772.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 773.

<sup>163</sup> *Id.* at 772-73.

<sup>164</sup> *Id.* at 772.

<sup>165</sup> *Id.* at 782.

<sup>166</sup> *Id.* at 783.

<sup>167</sup> *Id.* at 781.

<sup>168</sup> *Id.* at 783.

<sup>169</sup> Kirschbaum, *supra* note 7, at 130.

provides parties with more certainty and consistency because of its “additional safeguard of mutual assent.”<sup>170</sup> The main weakness of the contemporaneous mutual consent approach is the potential for frozen embryos to stay in storage indefinitely if progenitors never reach a contemporaneous agreement.<sup>171</sup>

## V. Statutory Approaches to Determining the Disposition of Frozen Embryos

Without a proper statutory response, courts first facing the issue of embryonic disposition at divorce are forced to look to inconsistent rulings and a slim body of case law as a guide. Few states have enacted legislation regulating the IVF process or the disposition of frozen embryos.<sup>172</sup> Proponents of legislative reform in the area of embryonic-disposition disputes argue that enacting on-point legislation will lead to more equitable and certain results for divorcing couples.<sup>173</sup> However, critics warn that overly broad or narrow statutes could have grave consequences. This part of the Comment explores statutes in three states that address the disposition of frozen embryos.

Following the ruling in *Terrell v. Torres*, the state of Arizona adopted legislation regarding the disposition of frozen embryos at divorce. In resolving disputes over the disposition of embryos, the Arizona statute directs courts to award the embryo “to the spouse who intends to allow the in vitro human embryos to develop to birth.”<sup>174</sup> Arizona’s statute directs the disposition of embryos at divorce regardless of an existing contract between the parties.<sup>175</sup> A prior agreement between the parties will automatically be deemed unenforceable by the court and will not control the disposition of the parties’ frozen embryos.<sup>176</sup>

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<sup>170</sup> *Id.* at 134.

<sup>171</sup> *Id.* at 139.

<sup>172</sup> Dingler, *supra* note 6, at 304.

<sup>173</sup> *Id.* at 305.

<sup>174</sup> ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2020).

<sup>175</sup> ARIZ. REV. STAT. ANN. § 25-318.03(B) (2020).

<sup>176</sup> *Arizona Married Couples Lose Control of Their Embryos*, ACADEMY OF ADOPTION & ASSISTED REPRODUCTIVE ATTORNEYS, (Feb. 7, 2019), <https://adoptionart.org/2019/02/07/married-couples-lose-control-of-embryos/> [hereinafter *Arizona Married Couples*].

In situations in which only one spouse wants to keep the embryos for future use, the spouse who provided gametes and does not wish to keep them automatically has no parental responsibilities, rights, or obligations with respect to the resulting child.<sup>177</sup> However, that spouse can choose to be the legal parent of the resulting child if both spouses agree to it in writing.<sup>178</sup> However, if both spouses want to keep the embryos, the spouse who did not provide gametes (sperm or egg) during the IVF process will be divested of custody.<sup>179</sup> This provision will ultimately have a larger effect on LGBTQ+ couples, in which only one spouse is able to provide gametes for the embryo, than their heterosexual counterparts.

Critics of Arizona's new law argue that it could lead to unwarranted government intrusion into the decisions of individuals and couples.<sup>180</sup> Critics of Arizona's statute also have concerns that it will lead to the creation of a new, inadequate balancing-of-interests approach.<sup>181</sup> The law favors the right to procreate over the right to not procreate. The result of a balancing approach would certainly direct the award of the frozen embryos to the progenitor who wants to keep them for future implantation or donation to another couple.

Florida's statute requires couples to sign a written disposition agreement providing for the disposition of their embryos in the event of divorce or death prior to commencing IVF treatment.<sup>182</sup> However, the statute further states that in absence of a written agreement, the couple will have joint decision-making authority regarding the disposition of the embryos.<sup>183</sup> Proponents of Florida's statute contend that, because of its requirement of written agreements between couples, it places decisional power in the couple's hands rather than giving deference to the courts.<sup>184</sup>

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<sup>177</sup> ARIZ. REV. STAT. ANN. § 25-318.03(C) (2020).

<sup>178</sup> *Id.*

<sup>179</sup> *Arizona Married Couples*, *supra* note 176.

<sup>180</sup> *Id.*

<sup>181</sup> Dinger, *supra* note 6, at 309.

<sup>182</sup> FLA. STAT. § 742.17 (2020).

<sup>183</sup> FLA. STAT. § 742.17(2) (2020).

<sup>184</sup> *Id.* at 310.

Similar to Florida, California's law requires fertility clinics to provide patients with a form listing the six options for disposition of their embryos in the event of death or divorce.<sup>185</sup> Although the statute does not require or enforce the resulting agreement, it still provides the parties with guidance for documenting their preferences before undergoing IVF treatment.<sup>186</sup> The statute also provides the possibility that the dispositional decision will remain with the parties rather than the California courts. However, critics of California's statute still have concerns that this could result in unending litigation and uncertainty over the disposition of the frozen embryos.<sup>187</sup> Courts have recognized the need for legislation regarding the disposition of frozen embryos in the event of a couple's divorce, undoubtedly many more will now take this initiative.<sup>188</sup>

## VI. Conclusion

Assisted reproductive technology is an innovative technological advancement that has aided numerous individuals and couples who are unable to conceive naturally. The most common method of ART, in vitro fertilization, has resulted in millions of births worldwide since its inception.<sup>189</sup> Courts faced with determining the disposition of frozen embryos in the event of a couple's divorce are often presented with a host of legal and moral issues of first impression involving contract interpretation and enforcement, property rights, custodial rights, parental rights, and procreational autonomy. The current state of this emerging area of family law is still in its developing stages. The established judicial and statutory approaches have provided

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<sup>185</sup> CAL. HEALTH & SAFETY CODE § 125315(b)(1) (2020) (dispositional options include: "Made available to the living partner, donation for research purposes, thawed with no further action taken, donation to another couple or individual, other disposition that is clearly stated").

<sup>186</sup> See generally Dingler, *supra* note 6, at 307.

<sup>187</sup> *Id.* at 307-08.

<sup>188</sup> *Id.* at 305.

<sup>189</sup> Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN HEALTH (July 3, 2018, 6:04 AM), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

some guidance, but still leave much to be desired by courts and progenitors hoping to settle such personal disputes.

Morgan Parker



## The Use of Experts in Family Law Cases: An Annotated Bibliography

by  
Allen Rostron\*

This bibliography covers significant issues relating to the use of experts in family law cases. For some topics, like the use of experts in child custody cases, it focuses on literature that is specific to the family law field. For topics that relate broadly to experts in all kinds of legal matters, it includes articles that shed valuable light on issues and concerns about the use of experts in general as well as articles that specifically relate to the use of experts in the family law realm.

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### **Attorney’s Fees Experts**

Scott Brister, *Gatekeeping Attorney’s Fees: How Judges Admit or Exclude Expert Testimony on Attorney’s Fees*, *ADVOC.* (Texas), Winter 2017, at 27 (reviewing rules that govern the use of expert testimony to prove the amount and reasonableness of attorney’s fees).

Melvyn B. Frumkes & Jack A. Rounick, *An Expert as to Attorney’s Fees*, *FAM. ADVOC.*, Spring 2007, at 12 (discussing situations in divorce litigation where an attorney should be hired to testify as an expert on legal work and attorney’s fees in order to render opinions about the number of hours billed, the complexity of the issues, and the reasonableness of the fee amounts).

### **Child Custody, Protection, and Support**

Jon Amundson & Glenda Lux, *Tippins and Wittmann Revisited: Law, Social Science, and the Role of the Child Custody Expert 14 Years Later*, 57 *FAM. CT. REV.* 88 (2019) (building on an influential 2005 article by Timothy Tippins and Jeffrey Wittman, which described four levels of inferences made in opinions offered by child custody evaluators, and arguing that evaluators continue to make speculative inferences that go beyond what should be the proper role for mental health professionals in child custody cases).

Stephen J. Anderer, *Working with Your Expert Witness*, *FAM. ADVOC.*, Summer 2000, at 21 (providing a basic primer on the use of experts in child custody cases, from selecting an expert to establishing the admissibility of the expert’s testimony, along with a list of “Do’s and Don’ts” for experts).

Nicholas Bala, *Tippins and Wittmann Asked the Wrong Question: Evaluators May Not Be “Experts,” but They Can Express Best Interests Opinions*, 43 *FAM. CT. REV.* 554 (2005) (arguing that evaluators in child custody cases should be permitted to express

opinions about what would promote the best interest of children, because family courts should not treat evaluators as experts subject to *Daubert* evidentiary standards and should instead apply more flexible standards that reflect the issues, standards, and goals of the family law context).

Susan J. Becker, *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 *DENV. U. L. REV.* 75 (1996) (arguing that heightened evidentiary standards should apply for expert witnesses when a gay or lesbian parent is accused of child sexual abuse and proposing safeguards for preventing the presentation of irrelevant or unreliable expert testimony in such cases).

Richard A. Crain, *Choosing the Best Custody Expert Witness*, *FAM. ADVOC.*, Spring 2008, at 12 (recommending steps that attorneys should take in selecting and working with expert witnesses for child custody cases, including evaluating credentials, considering testimony in previous cases, and providing the expert with supporting facts).

Milfred D. Dale & Jonathan W. Gould, *Science, Mental Health Consultants, and Attorney-Expert Relationships in Child Custody*, 48 *FAM. L.Q.* 1 (2014) (describing how social science has an increasingly significant impact on child custody dispute resolution and therefore it is important for attorneys to consider the best ways to use mental health experts as evaluators, instructional experts, non-testifying consultants, or reviewers of other experts' work product).

Edward F. Dragan, *How an Education Expert Can Assist with Child Custody Solutions*, 27 *CHILD L. PRAC.* 76 (2008) (describing the role of an education expert in a typical case and explaining how attorneys can use education experts to help parents and courts make informed decisions about child custody).

Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 *FAM. L.Q.* 451 (1989) (looking at the proper role for a practicing psychologist in cases involving alleged child sexual abuse and questioning

whether progress can be made in overcoming the divergences between the conceptual frameworks of the legal and psychological fields).

Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 *FAM. L.Q.* 63 (1995) (discussing how to evaluate whether a mental health professional has the necessary expertise to be an evaluator in a child custody case and how to determine whether psychological testing was used properly in an evaluation).

Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 *J. CENTER FOR CHILD. & CTS.* 139 (1999) (discussing the increased importance of mental health experts serving as evaluators in child custody cases, proposing the use of peer review and other reforms to raise standards for evaluators, and describing common pitfalls in custody evaluations such as wearing “two hats” by serving simultaneously in therapeutic and evaluative roles, acting as a “hired gun” who gives one-sided evaluations, and misusing data and literature).

Jaime B. Margolis, *Two Divorced Parents, One Transgender Child, Many Voices*, 15 *WHITTIER J. CHILD & FAM. ADVOC.* 125 (2016) (discussing important considerations in selecting a medical or mental health professional who can serve as an expert witness on the best interests of a transgender child).

Mary Johanna McCurley, Kathryn J. Murphy & Jonathan W. Gould, *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 *J. AM. ACAD. MATRIM. LAW.* 277 (2005) (describing criticisms and concerns about evaluators in child custody cases, including failure to adhere to professional standards and ethical guidelines, failure to follow proper scientific methodologies, and failure to satisfy legal evidentiary standards for expert opinions).

Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-by-License?*, 28 *J. AM. ACAD. MATRIM. LAW.* 521 (2016) (arguing that family courts have been too willing to allow forensic experts, such as social workers and psychologists, to testify in child custody cases and introduce social science research

without adequately testing its reliability, validity, and relevance, with an examination of Parental Alienation Syndrome as an example of this problem).

Dana E. Prescott & Diane A. Tennes, *The Lawyer as Guardian Ad Litem: Should “Status” Make Expert Opinions “All-In” and Trump “Gatekeeping” Functions by Family Courts?*, 30 J. AM. ACAD. MATRIM. LAW. 379 (2018) (discussing how attorneys acting as guardians ad litem for children frequently write reports that provide expert opinions and that are admitted into evidence at trials without being subjected to the usual standards of qualifications and foundation for providing expert opinions in litigation).

Margaret “Pegi” Price, *The Use of Experts in Custody Cases*, 42 FAM. ADVOC., Winter 2020, at 23 (explaining how experts can be used effectively in custody litigation concerning children with special needs, particularly as a means of educating judges about a child’s medical condition and how that condition justifies departures from the customary approaches to custody and visitation).

Arnold H. Rutkin & Sarah S. Oldham, *Examining the Mental Health Expert*, FAM. ADVOC., Spring 2008, at 36 (discussing strategies for direct and cross examinations of mental health experts in contested child custody cases and providing lists of key questions to consider).

Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135 (2002) (observing how the general trend toward having more rigorous legal requirements for admission of expert testimony has not had a significant impact on child custody cases, where reliance on mental health experts has increased dramatically, and arguing that legislatures should enact measures setting higher standards for the work of experts in custody litigation).

Robert A. Simon & Daniel H. Willick, *Therapeutic Privilege and Custody Evaluations: Discovery of Treatment Records*, 54 FAM. CT. REV. 51 (2016) (explaining important considerations for mental health professionals with involvement in family law litigation).

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Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005) (critiquing the role of psychological evaluators in child custody cases, arguing that evaluators should not be opining about the ultimate issue of what specific plan for child custody and access should be implemented by the court, and urging that evaluators should seek to develop better empirical bases for the opinions they render).

Joanne Ross Wilder, *Religion and Bests Interests in Custody Cases*, 18 J. AM. ACAD. MATRIM. LAW. 211 (2002) (discussing the use of experts in cases where a parent's religious beliefs or practices are a factor affecting the parent's custodial rights).

### **Computer or Digital Forensics Experts**

Scott Carlson, *New Challenges for Digital Forensics Experts and the Attorneys Who Work with Them*, ASPATORE, Aug. 2013, at 1 (discussing the basics of working with digital or computer forensic experts and how lawyers can successfully manage investigations conducted by these experts).

Joan E. Feldman, *The Expert's Role in Computer-Based Discovery*, PRAC. LITIGATOR, Jan. 2003, at 37 (explaining how attorneys increasingly rely on computer forensic experts for assistance with technical issues in discovery).

Gaetano Ferro, Marcus Lawson & Sarah Murray, *Electronically Stored Information: What Matrimonial Lawyers and Computer Forensics Need to Know*, 23 J. AM. ACAD. MATRIM. LAW. 1 (2010) (providing a comprehensive overview of issues raised by electronic information in family law cases, including what attorneys need to know about selecting and working with computer forensic experts).

Daniel B. Garrie, *Digital Forensic Evidence in the Courtroom: Understanding Content and Quality*, 12 NW. J. TECH. & INTELL. PROP. 121 (2014) (discussing how the *Daubert* standard for admissibility of expert testimony and reports applies to experts presenting digital forensic evidence).

Daniel B. Garrie & William R. Spernow, *A Guide for the Bench and the Bar on How to Evaluate a Digital Forensics Report*, 67 CONSUMER FIN. L.Q. REP. 449 (2013) (explaining what digital forensic experts do and providing a framework for evaluating a digital forensic report).

Sean L. Harrington, *Collaborating with a Digital Forensics Expert: Ultimate Tag-Team or Disastrous Duo?*, 38 WM. MITCHELL L. REV. 353 (2011) (discussing ethical rules and obligations governing attorneys using experts in digital forensics investigations, including possible ethical pitfalls relating to the work product doctrine, attorney-client privilege, and information security).

Jason Krause, *In Search of E-Expertise*, A.B.A. J., Nov. 2006, at 60 (noting the importance of finding the right expert on digital forensic issues).

Paul G. Lewis, *Data Forensics: The Smoking Gun May Be a Click Away*, N.J. LAW., Aug. 2004, at 41 (explaining the kinds of information that can be uncovered by a data forensics expert).

Sharon D. Nelson & John W. Simek, *Ghostbusters: "Who You Gonna Call?"* FAM. ADVOC., Winter 2006, at 40 (reporting that one-third of business for smaller computer forensics companies now comes from family law attorneys and providing advice for lawyers considering the use of computer forensics experts in divorce cases).

Sharon D. Nelson & John W. Simek, *How to Select Your Digital Forensics Expert: Finding Wyatt Earp*, OR. ST. B. BULL., June 2018, at 36 (explaining key factors to consider in choosing a computer forensics expert).

Jack Seward & Daniel A. Austin, *E-Sleuthing and the Art of Electronic Data Retrieval*, AM. BANKR. INST. J., Feb. 2014, at 14 (first of a three-part series of articles on how digital forensics experts can use sophisticated e-data retrieval technology to locate hidden or transferred assets in bankruptcy proceedings).

Jack Seward & Daniel A. Austin, *E-Sleuthing and the Art of Electronic Data Retrieval*, AM. BANKR. INST. J., Mar. 2004, at 14 (second part of the series).

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### **Concurrent Presentation (or “Hot Tubbing”) of Experts**

Adam Elliott Butt, *Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for “Hot Tubbing”?* 40 HOUS. J. INT’L L. 1 (2017) (analyzing the potential adoption of Australia’s “hot tubbing” or “concurrent evidence” model, which means having each side’s expert testimony presented simultaneously during a joint session during the trial rather than having each expert separately subjected to direct examination and cross examination, and drawing on interviews conducted with senior U.S. and Australian judges, lawyers, experts, and academics to assess whether this reform would be preferable to the traditional adversarial methods for presentation of expert testimony in American courts).

Edie Greene & Natalie Gordon, *Can the “Hot Tub” Enhance Jurors’ Understanding and Use of Expert Testimony?* 16 WYO. L. REV. 359 (2016) (applying a social psychology framework to consider how well jurors can understand and assess expert testimony and discussing the potential risks and benefits of a “hot tubbing” or “concurrent evidence” approach).

David Michaels & Neil Vidmar, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROBS. 159 (2009) (exploring the models of science that underlie Australia's concurrent evidence approach and concluding that this approach has a modest potential to improve communication and comprehension in the courtroom but its potential benefits have been exaggerated).

Dana E. Prescott & Tim Fadgen, *Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub?*, 32 J. AM. ACAD. MATRIM. LAW. 117 (2019) (proposing that family courts can improve decision making in child protection and custody cases by adopting a "hot tubbing" or "concurrent evidence" approach for forensic evaluators).

Elizabeth Reifert, Comment, *Getting into the Hot Tub: How the United States Could Benefit from Australia's Concept of "Hot Tubbing" Expert Witnesses*, 89 U. DET. MERCY L. REV. 103 (2011) (recommending Australia's "hot tub" approach, where expert witnesses testify together at trial and can question one another, as a solution to the problem of adversarial bias of paid experts).

Megan A. Yarnall, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary?*, 88 OR. L. REV. 311 (2009) (evaluating the strengths and weaknesses of Australia's "hot tub" model for use of experts, identifying features of the American legal system that might affect the applicability of that model in the United States, and suggesting ways to modify the hot tub method for American courts).

### **Consultants (Non-Testifying Experts)**

Gemma B. Allen, *The Changing Role of Consultants in Family Law*, FAM. ADVOC., Winter 2014, at 10 (discussing the types of assistance that non-testifying expert consultants can provide in divorce cases, with a particular focus on how using them can be consistent with the emerging view that the goal of divorce practice is to help the parties minimize their losses and harm rather than to "win" the case and defeat the other side).

Kathleen Michaela Brennan, Note, *Must the Show Go on? Defining When One Party May Call or Compel an Opposing Party's Consultative Expert to Testify*, 78 MINN. L. REV. 1191 (1994) (analyzing the risk that a consulting expert could voluntarily agree to testify for the opposing party or be compelled to do so).

David S. Caudill, "Dirty" Experts: *Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts*, 8 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 338 (2018) (exploring potential ethical issues raised by the use of consulting experts who are not disclosed or subject to discovery, and comparing the U.S. approach to that of Australia).

Eric Y. Drogin, *Just the Two of Us: Privity with Your Consulting Mental Health Expert*, CRIM. JUST., Summer 2018, at 36 (examining how a criminal prosecutor might benefit from using a forensic psychologist as a consultant in order to get advice and information without presenting the psychologist as an expert witness in the case).

Maria E. Rodriguez, *Political Cover and Consulting Experts*, LITIG., Winter 2015, at 8 (explaining how a consulting expert can be a safe, non-discoverable way to get expertise and advice without the need for the expert to be identified and deposed).

## **Cost of Experts**

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John H. Minan & William H. Lawrence, *The Personal Liability of an Attorney for Expert Witness Fees in California: Understanding Contract Principles and Agency Theory*, 34 SAN DIEGO L. REV. 541 (1997) (discussing the trend toward courts holding attorneys personally liable for fees owed to experts, and explaining how an attorney can avoid personal liability for unpaid expert fees by contractually disclaiming responsibility for the fees at the time the expert is retained).

Dana E. Prescott, *Interim Attorneys' Fees and Expert 'Costs' in Divorce: Ask and Your Client May Receive*, ME. B.J., Winter 2003, at 40 (discussing the provisions of Maine law under which a party in a divorce case can seek interim court orders allocating funds to cover attorney's fees and costs of expert witnesses).

### **Court-Appointed Experts**

Anthony Champagne, *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?*, 84 JUDICATURE 178 (2001) (reporting results of a focus group study of the use of court-appointed experts in Texas family law cases, which found that judges and experts generally have a favorable impression of the effectiveness of court-appointed experts, while attorneys expressed concerns about court-appointed experts not being as neutral as they should be, costs not being reduced because parties retain private experts even when the court appoints an expert, and court-appointed experts reducing attorneys' ability to control the presentation of facts in their cases).

Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998) (asserting that court-appointed expert witnesses blur the line between courts and advocates and suggesting measures to reduce the risk of bias and improper deference to court-appointed experts).

Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS J. 371 (2010) (reporting the results of a survey of state trial judges, including family court judges, about their use of court-appointed experts, with results suggesting that many judges believe increased use of court-appointed experts would be beneficial but that many also have concerns about the cost of such appointments, potential bias of court-appointed experts, and litigants' perceptions about the procedural fairness of using court-appointed experts).

Geoffrey M. Howard & Elizabeth A. Ybarra, *Court-Appointed Experts*, PRAC. LITIGATOR, Jan. 2001, at 55 (exploring why court-

appointed experts are seldom used but may become more common in the future).

Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 *YALE L. & POL'Y REV.* 480 (1988) (proposing ways to enhance the legitimacy of court-appointed experts by adopting procedures that would minimize the aura of enhanced credibility that judicial appointment may bestow on the expert witness).

Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 *IND. L. REV.* 225 (1998) (recommending the use of court-appointed expert panels in pretrial admissibility hearings, in order to guard against the use of bad science while maintaining true adversarial presentation of the issues at trials).

Donna Tumminio, Student Note, *Breaking Down Business Valuation: The Use of Court-Appointed Business Appraisers in Divorce Actions*, 44 *FAM. CT. REV.* 623 (2006) (recommending that family courts expand their use of neutral business appraisers and addressing important practical issues that arise from the use of such experts, including how the neutral expert is chosen and who pays for the cost of the expert's work).

Joanne Ross Wilder, *Evaluating the Evaluator*, *FAM. ADVOC.*, Summer 2000, at 25 (discussing the use of mental health experts in child custody cases, including the need to hire an expert to neutralize or discredit a damaging report by a court-appointed expert).

## **Dementia**

Sharon B. Gardner, Catharine Coble Armstrong & Denise Rashti, *Dementia and Legal Capacity: What Lawyers Should Know When Dealing with Expert Witnesses*, 6 *NAELA J.* 131 (2010) (providing a basic explanation of dementia from a medical perspective and advising attorneys about the use of medical experts on dementia in probate, guardianship, and estate matters).

M. Frank Greiffenstein, *Selecting a Neuropsychologist as an Expert Witness*, *MICH. B.J.*, Sept. 2002, at 45 (proposing a method

for grading the qualifications of prospective neuropsychology experts).

Adam F. Streisand, *A Lawyer's Guide to Diminishing Capacity and Effective Use of Medical Experts in Contemporaneous and Retrospective Evaluations*, 33 ACTEC J. 180 (2007) (discussing the use of experts on dementia in cases about matters such as conservatorships, wills, trusts, and contracts).

### **Employee Benefits and Pension Experts**

David Clayton Carrad, *An Expert Witness on QDROs*, FAM. ADVOC., Spring 2007, at 34 (providing advice about the use of actuaries or qualified pension attorneys on the pension and other employee benefits issues that can arise in divorce cases).

James T. Friedman, *Questions to Trap the Expert*, FAM. ADVOC., Fall 1985, at 24 (listing questions for direct and cross-examination of actuarial experts opining about the valuation of defined benefit pensions).

Sandor Goldstein, *Put Your Actuary to Work: Valuing the Pension*, FAM. ADVOC., Fall 2001, at 26 (providing advice, from an expert who assists attorneys with pension valuations in divorce cases, about how to select an actuarial expert, what information the expert will need, and special issues to watch for).

### **Foreign Law Experts**

Alejandro J. García, Note, *Lex Incognita No Longer: Making Foreign Law Less Foreign to Federal Courts*, 108 GEO. L.J. 1027 (2020) (arguing that the use of expert testimony to define the content of foreign law should be discouraged, except in rare situations where foreign law is unusually complex or not addressed in published sources, and in most instances parties should simply integrate experts' advice into their ordinary pleadings and filings).

Frederick Gaston Hall, Note, *Not Everything Is as Easy as a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 GEO. J. INT'L L. 1457 (2012) (criticizing Judge Richard Posner's view that

courts generally should be reluctant to rely on affidavits or testimony from paid experts opining about foreign law).

Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMP. L. 213 (2014) (discussing the complicated and varying rules or standards that apply to proving foreign law in American federal and state court proceedings, explaining that obtaining opinions from experts designated by the parties is still the most common way of proving foreign law, and assessing attempts in some states to pass legislation that would limit or prohibit reliance on foreign law).

Marcus S. Quinanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31 (2011) (predicting that the use of expert testimony about foreign law will remain a common and important practice, notwithstanding criticism of the practice from Judge Richard Posner and some others).

Louise Ellen Teitz, *Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation*, 45 N.Y.U. J. INT'L L. & POL. 1081 (2013) (discussing the controversy over reliance on experts in determining foreign law and proposing that free trade agreements could address the problem by including provisions for certification of questions to foreign courts, direct communication between judges of different countries, or some other form of cross-border cooperation between American and foreign courts).

Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887 (2011) (discussing how the use of experts remains the primary method for establishing foreign law, but over-reliance on paid experts can be biased, so alternative approaches should be considered such as relying more on court-appointed masters or creating methods for certification of legal questions to foreign courts).

Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*,

45 N.Y.U. J. INT'L L. & POL. 1111 (2013) (observing that the use of party-hired foreign law expert witnesses can be adversarial, expensive, time-consuming, and unreliable, but courts can reduce these problems through creative approaches such as using court-appointed neutral experts).

### **Forensic Accounting Experts**

David H. Glusman, *Why Use a Forensic Accountant?*, FAM. ADVOC., Spring 2007, at 20 (explaining how a forensic accounting expert can assist an attorney with financial issues such as finding hidden assets or income or detecting manipulation of expenses).

Bruce L. Richman, *Valuing the Cash Business*, FAM. ADVOC., Winter 2003, at 17 (explaining how a skilled business evaluator with expertise in forensic accounting can find the hidden income of small, closely held companies).

Robert S. Steinberg, *Controlling Forensic Accounting Costs*, FAM. ADVOC., Spring 2007, at 38 (recommending ways that attorneys can limit costs of forensic accounting experts by communicating more effectively with the expert and providing specific instructions about the expert's work).

### **General Considerations for Use of Experts in Family Law Cases**

Stephen G. Dennis, *Selecting and Using a Capable, Ethical Financial Expert in Dissolution Practice*, 45 FAM. L.Q. 5 (explaining the major ethical issues that family lawyers need to address with their financial experts in divorce cases, such as conflicts of interest, objectivity, and confidentiality).

Melvyn B. Frumkes & Jack A. Rounick, *Hiring an Expert*, FAM. ADVOC., Spring 2007, at 8 (providing a basic introduction to the use of experts in family law matters).

Carl W. Gilmore, *Those Priceless Experts: Factoring Their Fees and Costs into the Case*, FAM. ADVOC., Fall 1999, at 26 (offering practical advice about how to determine when to hire experts in family law matters and suggesting ways to be cost effective in cases where experts are used).

Suzanne Harris, *The Art of the Expert*, FAM. ADVOC., Fall 1998, at 30 (providing advice on how to select, prepare, and depose an expert, as well as how to lay waste to the opposing expert's opinion).

James J. Jimmerson & Jennifer Leonescu, *Cross-Examining the Opposing Expert*, FAM. ADVOC., Fall 1998, at 34 (recommending ways to succeed in cross-examination of experts in family law cases, including outlining the examination, mining the expert's prior depositions or testimony from other cases, and controlling the witness during the examination).

Joan F. Kessler & Allan R. Koritzinsky, *Guide Your Expert Through the Thicket*, FAM. ADVOC., Summer 1996, at 29 (explaining the basic principles for effective preparation and presentation of expert witnesses in family law cases, with checklists of items to remember in engaging the expert, taking depositions, and examining the witness at trial).

### **Impact, Reliability, and Bias of Experts**

Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131 (1993) (contending that the fundamental underlying question in debates about the role of experts in the civil justice system is whether judges and juries should defer to experts or instead treat them as a source that can provide education but should not supplant the judges' or juries' decisional role).

David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451 (2008) (discussing how the risk of adversarial bias is the primary rationale for tightening standards for admission of expert witness testimony, but those tighter standards do not change the general adversarial structure of litigation that creates the underlying problems with reliability of experts selected and paid by the litigants).

Itiel E. Dror, Bridget M. McCormack & Jules Epstein, *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, JUDGES' J., Fall 2015, at 8 (discussing steps to ensure that expert evidence is as objective and impartial as possible).

Richard A. Epstein, *Judicial Control over Expert Testimony: Of Deference and Education*, 87 NW. U. L. REV. 1156 (1993) (suggesting reforms that might help to strike a balance between giving too much or too little room for use of expert testimony).

Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253 (2001) (proposing ways to deter expert witnesses from giving partisan, biased, and dishonest testimony and to make them more accountable for the social costs of their conduct).

Bernalyn D. Mcgaughey, *The Role and Responsibility of an Expert Witness*, 3 DRAKE J. AGRIC. L. 227 (1998) (offering advice for experts, from the perspective of an expert witness, on billing practices, marketing, and maintaining integrity).

Oren Perez, *Judicial Strategies for Reviewing Conflicting Expert Evidence: Biases, Heuristics, and Higher-Order Evidence*, 64 AM. J. COMP. L. 75 (2016) (reporting results of an empirical study of strategies that judges use to deal with conflicting expert evidence and arguing that the civil law model of court-appointed experts has significant advantages over the adversarial model of multiple experts selected by the parties).

## **Impeaching Experts**

Alan R. Carlson, *Discovery of Expert Witness Income Tax Forms and Other Information*, 2 J. LEGAL ECON. 67 (1992) (discussing when an expert witness can be impeached with evidence about the amount of fees earned by the expert in prior cases).

Susan B. Dussault, *Cross-Examining and Impeaching Expert Psychiatric Witnesses*, COLO. LAW., Nov. 1997, at 75 (analyzing whether an expert psychiatric witness can be cross-examined about whether the expert knows about certain prior conduct of the individual about whom the expert is offering an opinion).

Edward J. Imwinkelried, *Rationalization and Limitation: The Use of Learned Treatises to Impeach Opposing Expert Witnesses*, 36 VT. L. REV. 63 (2011) (reviewing the extent to which an attorney can impeach an expert witness using a text or article written by someone other than the witness).

Richard T. Jones, *The Defense: Impeaching Your Opponent's Expert*, BRIEF, Summer 1985, at 42 (reviewing basic strategies for impeachment of expert witnesses).

Michelle Morgan Ketchum, Comment, *Experts: Witnesses for the Persecution? Establishing an Expert Witness's Bias Through the Discovery and Admission of Financial Records*, 63 UMKC L. REV. 133 (1994) (describing the permissible scope of discovery regarding an expert witness's financial records and various methods by which information from an expert witness's financial records can be obtained).

James M. Varga, *A Short Guide to Cross-Examination to Impeach Experts*, 100 ILL. B.J. 492 (2012) (explains some dos and don'ts for impeaching expert witnesses).

## **Indigent Clients**

Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004) (discussing types of civil matters, including child neglect and permanent custody proceedings, where the constitutional right to expert assistance could apply).

Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317 (2007) (contending that judges have authority under evidentiary rules in some circumstances to exclude a wealthier litigant's expert testimony when a poorer litigant cannot afford to pay for an expert to rebut that testimony).

David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990) (arguing that indigent civil litigants have a constitutional right to the means to retain an expert in situations where the indigent litigant cannot be heard effectively without the benefit of an expert).

Jill Seaman Plancher, *Evidence Without Expensive Experts: Custody*, FAM. ADVOC., Fall 2013, at 31 (explaining the key methods used by legal aid lawyers to prepare and litigate child custody cases without the financial means to retain experts, such as rely-

ing on court-provided experts, lay witnesses, self-authenticating documentary evidence, and the client's testimony).

### **Instructional Use of Experts**

Steven N. Peskind, *Using Experts as Educators*, FAM. ADVOC., Winter 2014, at 14 (explaining how family law attorneys typically use experts to evaluate the particular facts of the case before the court, but they should also consider using experts to educate courts about important information relevant to a case, such as the contents of professional literature or empirical studies)

### **Legal Experts**

Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325 (1992) (criticizing the trend toward courts permitting law professors to testify as legal expert witnesses).

Kathryn E. Barnett, *Limiting the Testimony of Legal Experts*, TRIAL, Jan. 2001, at 55 (providing advice to attorneys filing motions to exclude the testimony of experts on law).

David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136 (2012) (discussing the general reluctance to permit expert testimony on legal issues and the exceptions to that general principle, such as for cases involving law that is particularly complex or unsettled).

Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645 (1990) (arguing that expert witnesses should be prohibited from giving opinions on substantive law).

Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984) (arguing against a blanket prohibition of expert legal testimony and explaining how such testimony can benefit both the determiner of law and the trier of fact).

Christopher A. Tiso, *The Lucid Legal Specialist*, FAM. ADVOC., Spring 2007, at 10 (discussing unusual situations in which it may

be appropriate to use expert testimony on law, such as in cases involving foreign legal procedures or particularly complex areas of domestic law).

### **Malpractice Claims Against Expert Witnesses**

Michael Flynn, *Expert Witness Malpractice*, 42 AM. J. TRIAL ADVOC. 15 (Fall 2018) (describing how the doctrine of witness immunity has traditionally shielded expert witnesses from claims that they acted negligently, but a few courts have moved toward eliminating or reducing that immunity, and also discussing the extent to which a trial lawyer could be liable for using an expert witness found to be negligent).

Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 WAKE FOREST L. REV. 497 (1996) (presenting arguments for and against immunity from liability for expert witnesses).

Carol Henderson Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C. L. REV. 39 (1992) (arguing that expert witnesses owe a duty of care and should be subject to liability for negligence).

Eric G. Jensen, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185 (1993) (analyzing recent court decisions holding that experts can be liable for professional negligence occurring in their work as expert witnesses).

Leslie R. Masterson, Note, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?*, 17 REV. LITIG. 393 (1998) (discussing whether the doctrine of witness immunity should extend to a consulting expert who does not testify in court or assist in a settlement or arbitration proceeding).

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