



Blue-Ribbon Commission on Forensic Custody Evaluations: An Unreliable Work-Product



by Jeffrey P. Wittmann, Ph.D.

...while this report has its hopefully brief time in the sunlight, it is important to look at some of its notable problems

The governor's Blue-Ribbon Commission on Forensic Custody Evaluations issued its report this past December. It correctly and thankfully concluded that judges should be more cautious about ordering such assessments, low-income litigants should have equal access to such services, and that evaluators should be better trained, certified, and held more accountable. Unfortunately, the BRC also reported a preference by most commissioners for the elimination of such assessments or a temporary moratorium regarding their use. This was, in my view, a grave error which, when considered together with other questionable conclusions by the BRC, should make us hope this report is given minimal attention. However, while this report has its hopefully brief time in the sunlight, it is important to look at some of its notable problems.

BRC (p. 6): "A majority of Commission members support limiting the use and scope of forensic custody evaluations to those cases where they are necessary to assess a parent's mental health, as it affects their behavior as a parent."

Commentary: This language is problematic because it implies that, unless there is a diagnostic question about the presence of a disorder, no evaluation can be ordered. What if there are allegations of unhealthy, risky, or

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Issue Alert: The Use of Forensic Evaluations In New York State

by Karen Simmons, Esq.

In 2021, former Governor Andrew Cuomo convened a Blue-Ribbon Commission on Forensic Custody Evaluations. The Commission—which was comprised of former members of the judiciary, academics, family and matrimonial law attorneys, advocates, psychologists, and parents—was charged with developing recommendations regarding the use of forensic custody evaluations in the New York State Court System. That work was no small task, given the critical role that forensic evaluations often play in emotionally fraught custody litigation, the lack

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hurtful parenting practices without questions of “Does this parent have a disorder?” This means that if a parent or their legal representative has an awareness that their aberrant behavior will be more accurately detected by a forensic evaluator, they can simply derail its discovery by resisting an assessment, leaving the child vulnerable to harm. Judges should be able to order assessments over the resistance of one party if the circumstances call for it. I agree that judges should be prevented from using child custody evaluations (CCEs) as unguided fishing expeditions --- such expeditions can end up harming children and families. Judges can keep the process under more control by not writing bland, vacant appointment orders, replacing them with more specific, circumscribed orders that give us adequate direction and specific issues to address and by demanding we cleave to the limits of our discipline’s library (In a wonderful, recent example I read an order where the Judge wrote that the mental health professional (MHP) was to assess the risks and protective factors associated with each parent and that such inferences should also be tied to the research literature --- how refreshing!).

BRC (p. 7): “...the majority of members felt forensic evaluators should not be called upon to assess allegations of intimate partner violence or other forms of family abuse, or allegations that one parent is distancing a child or children from the other parent.”

Commentary: This assertion attempts to address circumstances where evaluators are insufficiently educated or sensitive to IPV issues or default to constructs like parental alienation syndrome (PAS) in a way that blames victims and distorts a family’s reality. However, banning regular assistance by MHPs who actually lay eyes on real, living, breathing families in IPV matters or cases of alleged alienation is throwing the baby out with the bathwater --- Trained evaluators (1) understand the complexities of families with IPV better than most attorneys or judges; (2) can help make sure a court learns about the type, severity, and circumstances of IPV operative in a family to ensure sensitive decisions, and (3) stay behaviorally focused about issues of an alleged attempt to damage a child’s relationship with the other parent in a way that avoids the problems with PAS approaches. Deep controversy still exists about the complexity of IPV and resist/refuse cases but to paint with a broad brush by saying that these thorny problems are just questions of fact does a disservice to the variability of child experiences in such sad circumstances. And while the recognition by the BRC

of the value of academic/didactic experts in such matters is welcomed, the potential value to courts of a full, case-specific, contextualized analysis of IPV and resist/refuse dynamics robs the judiciary of a tool for discerning best interests. It also fails to allow adequate attention to hybrid cases where both past violence and toxic, injurious alienation are realities for certain families. Child safety must always be primary, but any process that supports simplistic IPV models or that prevents the forensic discovery that a child who has cut-off a relationship with a parent is doing so in response to family pathology is asking Judges to wear massive blinders, to the detriment of those whose interests the courts are to serve. Again, detailed appointment orders about what we are, and what we are not to address in our assessments, along with both a requirement that our reports are adequately constrained by our research literature and requirements that we have sufficient training, would go a long way toward protecting families while leaving this important tool in the judicial toolbox.

BRC (p. 9): “The Commission unanimously recommends that mandatory and ongoing trainings for qualified mental health evaluators be established. Such trainings must cover topics related to the history of forensic evaluations, best practices in forensic evaluations, implicit and explicit bias, domestic violence and intimate partner violence, child abuse, child sexual abuse, substance abuse, coercive control, and trauma. In addition, the state should establish a “blind” regular peer review process, as well as a rigorous quality assurance review program to ensure that professional standards are followed as an additional safeguard against bias.”

Commentary: While, in the broadest sense, this recommendation seems wise on its face, the devil truly is in the details. The notion of a 36 hour, deep-dive training required of all court-involved evaluators is good for children, but only if the training content is balanced and untainted by advocacy-bias. Given the genesis of the BRC, the topic-list it suggested is glaring for what is missing. For example, the Supreme Court of the state of Ohio has accessed funds through the Judicial College for the development of a 40-hour training course that will be offered online and that will have to be completed by all current and new custody evaluators. The project was spearheaded by our colleagues, Arnold Sheinvold, PhD and Robin Deutsch, PhD. I was hired to be one of 12 faculty members for the resulting video training and was struck by the comprehensiveness of the training and its content, compared to what the BRC recommended. The

topics included: Roles distinctions, relevant state laws, forensic guidelines and ethical issues, confidentiality and privilege, record keeping, remote assessment, forensic interviewing of children and adults, child memory and divorce effects on children, parent-child observation, collateral interviews, high conflict and gatekeeping, parental mental health, substance misuse, diversity issues, resist/refuse dynamics, child trauma, hypothesis testing and cognitive biases, research on parenting plans, attachment issues, psychological testing, relocation, special needs, child maltreatment, report writing, and testimony. As we are all well aware, we practice in an arena where emotionally-charged, gender-political issues are around every corner and allowing the content of any mandatory state training to be coopted by one advocacy “slant” can be its own kind of tragedy.

BRC (P. 13): “...A majority of Commission members believe that as common law effectively prohibits civil action against evaluators, a cocoon of quasi-judicial immunity impedes evaluator accountability. They recommend legislation be enacted eliminating such quasi-judicial immunity so that evaluators may be subject to civil liability where their conduct gives rise to a cognizable cause of action.”

Commentary: I remain terminally ambivalent about this issue. It seems to me that a process for decertification (from the state-level lists of approved evaluators, wisely recommended by the BRC), if marked by vigilance and fairness, is a hefty tool for weeding out worrisome evaluators (and it balances the need for public protection with the public’s interest in access to the benefits forensic assessments offer). However, I have seen cases where the evaluator’s behavior was so egregious that a hefty lawsuit for damages may have been very appropriate with respect to public protection. My leaning is that a certification/decertification process with teeth, serious attention by the NYS Office of the Professions to public complaints about practitioners, along with continued immunity attends to protection of the public while avoiding making forensic work something few are willing to do because of the personal/professional risks involved. Such efforts would be aided by codifying a document such as the AFCC (2022) Guidelines for Parenting Plan Evaluations in Family Law Cases into NYS statute or regulation as a baseline requirement.

BRC (p. 14): “...Most Commission members support statutorily reclassifying forensic evaluators as Qualified Mental Health Evaluators so there is a clear understanding

by the parties, attorneys, and the court of their role. The use of the term “forensic” in connection with the term “evaluator” creates an underlying assumption that the forensic evaluator’s role is to investigate and solve the issues before him/her/them and to present the answer to the court. But it is the role of the court, not the evaluator, therefore the name used for appointed mental health experts should convey the limits of their roles.”

Commentary: In other legal areas where MHPs are involved the term “forensic” does not connote the idea the evaluator intrudes on the province of the court regarding the ultimate issue. It is understood that one is addressing a constricted psycho-legal question that is relevant to the proceedings (competency to stand trial, insanity at the time of the crime, etc), a question that is not the ultimate issue before the finder-of-fact. In CCEs this role-constriction would correspond to courts requiring that we limit our opinions to a research-grounded assessment of the psychological risks/benefits associated with different plans or with each parent (without “picking” a parent). My concern is that using a new QMHE label will return us to an emphasis on DSM diagnoses rather than parenting assessment. When we conduct a CCE we are, in fact, doing forensic work: We are applying psychology or psychiatry to a psycho-legal question. Giving us new labels not only misleads the public but also risks detaching us from the forensic guidelines that help protect it. Shifting to a term like forensic parenting evaluator, or a similar moniker, makes more sense given that it would honor the reality that such assessments are certainly forensic in nature, move us away from the term “custody” that suggests the ultimate issue is to be addressed, and align with the titles of our most recent professional guidelines.

BRC: (p. 4): “After a review of research, reflection, and discussion, the Commission agrees that changes should be made to the current environment when custody evaluations are ordered; however, the members could not reach uniform consensus on whether forensic custody evaluations should continue to exist within the court system. By an 11-9 margin, a majority of Commission members favor elimination of forensic custody evaluations entirely, arguing that these reports are biased and harmful to children and lack scientific or legal value. At worst, evaluations can be dangerous, particularly in situations of domestic violence or child abuse – there have been several cases of children in New York who were murdered by a parent who received custody following an evaluation.”

Commentary: Some of my colleagues may be surprised at my defense here of forensic assessments in custody matters: After completing many hundreds of custody evaluations at public clinics and in private practice over 30 years, I began to argue in various journals and teaching venues, together with Professor Timothy Tippins, that we had lost our way in the area of custody assessment --- That our willingness as forensic evaluators to give opinions about which parent should receive custody is a practice dense with the evaluator's subjective values about parenting, is entirely without an adequate basis in our research literature, and usurps the role of the finder-of-fact (the judge). A list of forensic scholars expressed this same position, both before and after us, and some NY judges began to specify in orders for forensic evaluations that, while they wanted assessments of parenting strengths and weaknesses and about potential risks to children, opinions about who should get custody were forbidden. I also submitted a lengthy written argument for various reforms to this BRC, including limitations in what evaluators are allowed to opine about and the critical importance of mandatory training, certification, and accountability.

I have never argued that forensic evaluations should cease to be ordered for litigating families and have in fact argued for their rich value (1) when judges do their job and constrain what they ask of evaluators and (2) evaluators do their job by adhering to the limitations of their guidelines, ethical codes, and available research. I currently see the good, the bad, and the ugly in these forensic custody reports as a trial consultant. However, while the BRC heard tragic stories of damage to families involved in custody evaluations, it missed the big picture when it concluded that forensic assessments are, as a whole, ".....biased and harmful to children and lack scientific or legal value."

The BRC never even defines the term "bias" (an interesting omission given its mission and the number of distinct biases that affect MHPs, attorneys, and judges) and presents no objective, empirical confirmation that, in general, CCE's create more harm than good for the children of this state. The individual, tragic case can be instructive, meaningful, cautionary, but potentially misleading and only marginally helpful for policy formation that affects families in NYS as a population. For those BRC members who voted to eliminate or pause forensic evaluations for families, a few questions: Is there no value in an evaluator spotting toxic coercive intimidation that had gone undetected? No value in

reporting that, after a sensitive and forensically sound interview, a child disclosed molestation by a caretaker? No value in informing the court that a 6-year-old cried as she noted her father had cut her mother's face out of all pictures in the home? No value in discovering that a 13-year-old was so disturbed by his parents' hatred that he had tried to cut his wrists while at a friend's home? No value in discovering a severe learning impairment in a parent that made them unable to follow drug-instructions for their medically fragile child? No legal value?

In several exchanges I have heard attorneys and mental health colleagues struggling with whether banishment of mental health professionals (MHPs) from Family and Supreme Courts in NYS is on the horizon. Three issues here: First, the BRC held no power to make rules or policy – after a rushed, cursory process it simply made recommendations. Second, if evaluators want to avoid such banishment, they should claim their own power to improve our field by showing appropriate constraint and caution in their forensic processes with families – despite having solid professional guidelines in place for CCE work, a percentage of evaluators still give them marginal attention and produce work products that understandably raise concern. As MHPs, we need to own this weakness.

A note of compassion for the BRC is called for here: Those of us who have participated in task forces or committees charged with crafting summary documents about controversial issues know how politically charged and torturous the process can be. And I have never signed off on a final document I thought was the best it could have been – every document had components with which I disagreed or that I thought had been handled in a less-than-optimal manner. In the end, varying degrees of horse-trading, tactics, and compromise characterize such professional groups. Also, this BRC was apparently under a ridiculous timeline for achieving a genuinely deep and accurate analysis of its topic, a timeline that should have led to a note being sent to the governor saying "Not doable." This timeline may explain why the BRC gave the public an unrealistic, last-minute window of time to submit meaningful commentary.

That having been said, those concerned about the BRC might subject it to the same kind of scrutiny used for admitting evidence in court: Does this work product – the final report by the BRC – have the indicia of sufficient reliability such that it should be given meaningful weight? It does not. A review of the membership of this

supposedly objective look at forensics is instructive: While, thankfully, a fair number of our respected AFCC-NY colleagues sat on the BRC, the full list makes clear that it was very heavily laden with professionals, academics, and parents whose dominant focus is intimate partner violence and related advocacy. The list of names and agencies does not read as a collection of balanced perspectives, rendering its “votes” easily interpretable as the product of the same kind of bias it finds endemic to forensic assessments. The list begs for the BRC to be renamed “Commission on IPV and Forensic Evaluations,” yet even with that imaginary change it would fall very short of the mark, lacking any citations to the wider universe of empirical works on family violence, children, and related forensic issues. For example, the BRC presents one study (Meier, Dickson, O’Sullivan, Rosen, & Hayes, 2019) regarding ways victims of IPV are disadvantaged within the court system (and, certainly, many of us have seen victims mistreated by the very system there to protect them). However, it fails to even mention the reality that the conclusions drawn by Meier, et. al have come under meaningful empirical scrutiny (Harmon & Lorandos, 2020). The debate continues to this day about this line of research (Meier, Dickson, O’Sullivan, Rosen, 2022). Next, inspect the topic-distribution in the reference list: The list is embarrassingly thin (including opinion pieces, newspaper articles, and a negligible bit of science) and almost entirely about IPV, a critically important issue relevant to child welfare, but only one of many issues forensic evaluators and courts have to consider and about which they have valuable insight to offer. There is not a single, scholarly text on forensics mentioned and there are no references about issues like substance abuse and parenting, psychopathology and parenting, assessing child abuse, the psychological effects of relocation, parenting practices and child outcomes, attachment psychology in a divorce context, LGBTQ parenting, etc. Also missing is any reminder to the Governor that evaluators have comprehensive professional guidelines available to them for assessing custody and IPV issues (AFCC 2007, revised in 2022; 2016). In short, despite some of its wise recommendations, as a general guide for public policy related to forensic assessments in custody matters, this BRC report should be viewed as insufficiently unreliable and be placed in a lower desk drawer somewhere. The Governor would receive more helpful guidance by forming a new, more carefully designed advisory group or by dusting off Judge Sondra Miller’s cautious and academically thorough Matrimonial Commission Report from 2006 and giving it another look.

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REFERENCES

- Association of Family and Conciliation Courts (2007). Model Standards of Practice for Child Custody Evaluation. *Family Court Review* 45(1), 70-91.
- Association of Family and Conciliation Courts (2016). Guidelines for examining intimate partner violence: A supplement to the AFCC model standards of practice for child custody evaluation.
- Association of Family and Conciliation Courts (2022). Guidelines for parenting plan evaluations in family law cases.
- Harman, J. J., & Lorandos, D. (2020, December 14). Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes. *Psychology, Public Policy, and Law*. Advance online publication. <http://dx.doi.org/10.1037/law0000301>
- Matrimonial Commission (2006). Report to the Chief Judge of the State of New York. Chairperson: Hon. Sondra Miller.
- Meier, Joan S. and Dickson, Sean and O’Sullivan, Chris and Rosen, Leora and Hayes, Jeffrey, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations* (2019). GWU Law School Public Research Paper No. 2019-56;
- Joan S. Meier, Sean Dickson, Chris S. O’Sullivan & Leora N. Rosen (2022): The Trouble with Harman and Lorandos’ Parental Alienation Allegations in Family Court Study (2020), *Journal of Family Trauma, Child Custody & Child Development*, DOI: 10.1080/26904586.2022.2036286

Issue Alert: The Use of Forensic Evaluations In New York State

of a consistent statewide approach to the use of those evaluations, and the widespread disagreement among practitioners, academics, and lay people about whether the courts should order forensic evaluations in the first place.

In December 2021, the Commission delivered its [report and recommendations](#) to Governor Kathy Hochul. The report demonstrates just how complicated and divisive the use of forensic evaluations is, as it highlights not just the Commission members agreed-upon points, but also the areas regarding which the Commission's members could not reach consensus. Ultimately, the Commission members acknowledged that the family courts, where the majority of child custody cases are litigated, are under-resourced, that flaws exist in forensic custody evaluation process, and that there is a need to improve forensic evaluators' training and accountability, as well as the ethics and equity of the forensic evaluation process. However, the Commission members disagreed on a number of challenging and important questions, such as whether forensic evaluations should be limited in scope and/or altogether prohibited, how much access litigants should have to forensic evaluation reports, which often contain highly-sensitive information, and whether forensic evaluators' quasi-judicial immunity should be eliminated.

A look at the legislation introduced by some New York State legislators during recent sessions shows that they, too, have been grappling with the same questions. For example:

- A bill was introduced in the New York State Senate and the Assembly that would prohibit the court from ordering or allowing into evidence a forensic evaluation in a child custody litigation.
- Governor Hochul has not yet signed a bill that passed in both houses of the New York State legislature, which would require that forensic evaluators be trained about domestic violence. Although most stakeholders agree that such training is important, some advocates and stakeholders have questioned the statute's permanent delegation of the responsibility for developing and providing domestic violence training to a single, non-professional, non-governmental, lay advocacy agency.
- In numerous recent sessions, including the 2021-2022 legislative session, a bill was introduced in both the Senate and the Assembly that, if passed, would permit the distribution of forensic reports to all litigants, who may keep those reports rather than review them in their counsels' office or in the courthouse. While some advocates are concerned that the current failure to distribute these reports directly to litigants violates their due process, others are concerned that permitting litigants to obtain these reports and do with them as they wish places the subjects discussed therein—especially children—at risk.

Given legislators' prior interest in this topic and the question of whether and how the Commission's recommendations will be effectuated, we anticipate that the topic of forensic evaluations in custody litigation will continue to cause debate in the 2023 New York State legislative session. AFCCNY hopes to support our members' thoughtful discussions about this complicated topic, as it undoubtedly has a significant impact on the clients with whom our members' work.

...some advocates and stakeholders have questioned the statute's permanent delegation of the responsibility for developing and providing domestic violence training

Karen Simmons, Esq.

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REPORT OF THE BLUE-RIBBON COMMISSION ON FORENSIC CUSTODY EVALUATIONS

Delivered to Governor Kathy Hochul

December 2021

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INTRODUCTION

Announced in the 2021 State of the State and convened in June 2021, the Governor's **Blue-Ribbon Commission on Forensic Custody Evaluations** ("the Commission") was charged with providing recommendations to the Governor regarding if and/or how forensic custody evaluations should be used by New York courts. New York State convened the Commission after hearing from parents, attorneys, and other court actors who reported negative experiences with forensic custody evaluators.

In the New York State courts, judges order and rely on forensic evaluations for some cases involving child custody and parenting time. Statewide, there is no consistent approach regarding if and/or when evaluations are ordered, who may act as a forensic custody evaluator, how evaluators should conduct these evaluations, or how incompetent or unethical evaluations may be subject to review. While there are longstanding certification, credentialing, training, and accountability processes in place for the courts in the boroughs of New York City and the surrounding counties composing the First and Second Appellate Divisions of the New York State Judiciary, these do not extend upstate.

The Commission is co-chaired by the Honorable Sherry Klein Heitler (Ret.), former Chief of Policy and Planning for the New York State Unified Court System and Justice of the Supreme Court of the State of New York, Commissioner Sheila Poole of the Office of Children and Family Services, and Office for the Prevention of Domestic Violence Executive Director Kelli Owens. The members of the Commission include former judges, academics, attorneys who practice family and matrimonial law, children's rights experts, domestic violence advocates, psychologists, and parents. Coming to this work from different perspectives and committing to make a good faith effort to address this important issue, the Commission members gave generously of their time, energy, and expertise in developing recommendations for the Governor.

THE COMMISSION PROCESS

Among the matters considered by the Commission:

- If forensic custody evaluations should be ordered by the courts at all, and if so, under what circumstances;

- How to standardize the evaluation process;
- How reports should be used by the courts;
- How to ensure equity regarding the availability and conduct of forensic evaluations among all parties;
- How to standardize access to reports for parties and attorneys;
- Necessary qualifications, training, and oversight of evaluators;
- Possible certification processes for evaluators; and
- How to address bias in the system.

The Commission members undertook a significant amount of work in a limited timeframe. To efficiently and productively address these issues, the Commission formed **three subcommittees** to focus on issues pertaining to: **1) the use of forensic evaluations within the court process; 2) potential training and certification requirements for forensic evaluators; and 3) bias within the system.** Each subcommittee embraced its charge to study its particular area in a comprehensive manner, given the profound and permanently life-changing impact forensic custody evaluations have on many children and parents in New York State. Members engaged in hours of thoughtful debate and reviewed numerous research articles from multiple disciplines (see appendix of references).

The full Commission met monthly through the summer and fall of 2021, and also held two virtual listening sessions that were open to the public. Deep consideration was given to the public statements provided to Commission members by parents, children, forensic evaluators, attorneys and advocacy organizations about the challenges and inequities of the current forensic evaluation process, the costs of such evaluations, and the difficulties holding forensic evaluators accountable.

SUMMARY OF THE COMMISSION’S CONCLUSIONS

The State charged the Commission with examining the well-documented flaws in forensic custody evaluations. There are systemic biases and inequities, however, in the overall justice process that go beyond this singular issue, and to address those would be outside the Commission’s mandate. Custody cases in New York are heard in the state’s supreme and family courts. Only supreme courts can hear divorces, and both courts have jurisdiction over custody, visitation, orders of protection and other matters. The majority of custody cases are heard in the family courts, which are under-resourced. As a result, family courts have extraordinarily high case dockets, long delays in cases being adjudicated, and a dearth of available court-appointed counsel for those financially unable to afford private attorneys. These fundamental issues

disproportionately impact low-income New Yorkers, especially people of color and immigrants. These larger issues are not addressed in this report but offer important context for the recommendations.

Ultimately, the Commission members agree that some New York judges order forensic evaluations too frequently and often place undue reliance upon them. Judges order forensic evaluations to provide relevant information regarding the “best interest of the child(ren),” and some go far beyond an assessment of whether either party has a mental health condition that has affected their parental behavior. In their analysis, evaluators may rely on principles and methodologies of dubious validity. In some custody cases, because of lack of evidence or the inability of parties to pay for expensive challenges of an evaluation, defective reports can thus escape meaningful scrutiny and are often accepted by the court, with potentially disastrous consequences for the parents and children. Commission members recognize that this Commission was established in the hope of preventing such tragic occurrences in the future. As it currently exists, the process is fraught with bias, inequity, and a statewide lack of standards, and allows for discrimination and violations of due process.

The Commission developed a number of robust and important recommendations that address the need to reconsider the role of evaluations and the situations in which they are ordered. All members support efforts to improve training, ethics, and accountability for evaluators, and introduce more equity into the process. Those recommendations are presented in-depth in the “Recommendations to the Governor” section. The Commission also debated the question of eliminating forensic custody evaluations, either permanently or as a temporary measure as reforms are put into place. The facets of that discussion appear in the full report which can be obtained via [this link](#).

Mental Health Professionals Provide Useful Independent Input to Judges

by Neil Cahn, PLLC

This past season, ABC TV presented The Parent Test. In its 10 episodes, 12 sets of parents took part in a series of challenges designed to test their parenting skill. The “winner,” as voted by those same parents, had demonstrated today’s “most effective” parenting “style”; the style best to raise kids who are “emotionally whole” and part of a close family unit; the style that best lays the foundation for a child to have “healthy relationships,” better able to navigate today’s world. The 12 styles included, Intensive, Natural, New Age, Routine, Child-Led, Helicopter, Free Range, Strict, Negotiation, High Achievement, Disciplined, and Traditional.

Who says that these parents, as a jury of their own peers, were any less (or more) able to decide what is in the “best interests” of their children than a judge, an attorney, or, for that matter, a forensic evaluator? The divergent opinions presented by the Blue-Ribbon Commission (“BRC”) on Forensic Custody Evaluations invite questioning the qualifications of every participant in the current method searching for the best interests of the children.

In this current method, the decision is left to the trial judge, whose decision is rarely set aside on appeal. Should judges be the ones deciding what is in a child’s best interests? However, does not every judge bring to the bench preconceived notions of what is best for children? Will not the judge’s own childhood, relationship with parents, marital and parental status and history, religion, etc., lead to “biases” that tint the lens through which parents are viewed? What is the scientifically-demonstrated competency of any individual to decide the best fate for someone else’s children?

The BRC Report challenges the value of the current forensic evaluation process. However, the question remains whether a judge should take on that task of deciding the best interests of the children without hearing from a forensic evaluator or other mental health professional?

For decades, Tim Tippins and Jeff Wittmann and many others have challenged the competency of forensic evaluators to state opinions without citation “to the limits of the published, research-supported, knowledge-base of the discipline.” As Justice Jeffrey Goodstein noted in his 2014 decision in *J.C. v. A.C.* (NYLJ 1202653656922 May

the judge has the benefit of being able to assess the credibility of the parties, whose veracity, if not character, is tested by vigorous cross-examination

5, 2014), “reliance on mental health testimony in custody matters ‘may be an evil when the dependence is too obsequious or routine or the experts too casual.’” *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976). Justice Goodstein went on:

From this writer’s perspective, support for permanent elimination of evaluations reflects a view that they are so mired in bias and incompetence and are so lacking in reliability that they are beyond redemption. . . . It further reflects the desperate sadness of parents and children who have endured heartache and tragedy as a result of courts that are dreadfully uninformed about such core scientific principles as reliability and validity and are therefore unable to differentiate between reliable work-product and outright schlock.

On the other hand, the forensic evaluator is likely a professional with training and clinical knowledge and experience, whose career has been committed to enhancing child development and family dynamics, whether in the context of a divorce or otherwise. Why would one assume that such a professional is not qualified to provide information that can help a judge?

Certainly, the judge has the benefit of being able to assess the credibility of the parties, whose veracity, if not character, is tested by vigorous cross-examination. However a trained, if not “certified” forensic evaluator may be better able to create the warm and trusting environment for the children to express their thoughts, fears and concerns. Moreover, the forensic evaluator is uniquely able to observe the children’s interaction with their parents.

Consider the role of the Family Specialist, or better still, the Child Specialist in the Collaborative Divorce model. The latter is there to provide a method for the voices

of the children to be heard, and to have their concerns addressed. Within the context of a process predicated on the parents' commitment to resolution without litigation, the Child Specialist is in direct communication with the children, he or she can raise their issues, while attempting to enhance the relationships of the children with their parents. The Child Specialist's interaction with the children through discussion and play, enables the parents to hear the children's messages, feelings, wishes, fears and needs. Direct discussion between children and parents can be facilitated (and observed). At the same time, it is clear that what is being provided by the Child or Family Specialist is not therapy; there will be no ongoing contact.

Without the forensic evaluation in litigation, who sees the children interact with their parents? In litigation, the messages of the children are not presented directly to the parents. At least, with a forensic valuation, they may be found in a report that historically may not even have been read by the parents. That is now changing.

Within the litigation framework, what is the role of the Attorneys for the Children. They do not observe the interaction of parents and children. Are they more competent than a mental health professional at providing the warm, safe environment and a skill set aimed at drawing out the children's feelings? In those cases where it is appropriate to do so, are they more competent than the mental health professional to substitute his or her judgment for that of a child or challenge the motives behind a child's expressed preferences? What is the AFC's competency to opine as to the best interests of the child? Are they better mediators (is that their role?) or advocates?

Without the forensic evaluation, who will present the messages of the children to the judge from the perspective of one with the training, knowledge and experience of a mental health professional? Will the thoughts of the family's or children's therapists be heard by the judge, whether through the hearsay restatement by the AFC (whether or not "evidence") or after a waiver of the children's privilege against disclosure?

Of course, as the BRC Report notes, there have been negative experiences with forensic evaluators. There have also been negative experiences with AFCs, attorneys, and judges. Children have negative experiences with their parents, and parents with their children.

For the extreme case, neither forensic evaluators nor judges can accurately predict when a parent acts to hurt or kill a child. Predicting unusual events such as suicide and intimate partner homicide would seem made more difficult in part because of the very unusual occurrence of such events. Nonetheless, having seminars from researchers who evaluate different models for making predictions about such unusual events would be useful for judges, forensic evaluators, and AFCs. A judge can profit from the input of a forensic evaluator who is trained to address the very specific issues that may be noted by the judge such as mental health of the parents, partner violence, parental interference and substance abuse.

The answer, then, cannot be the immediate termination of mental health evaluations, even on a temporary basis. "In custody disputes, the value of forensic evaluations has long been recognized [citations omitted]." *Matter of Wilson v. Bryant*, 143 A.D.3d 905, 906 (2nd Dept.2016). "

Perhaps, just as there is to be court-ordered mediation in divorce actions, there should be court-ordered referral to a mental health professional who could assume a role similar to that of the Family Specialist or Child Specialist in the Collaborative Divorce process. That role can be far less expensive, and better able to reach and hear from the children in an effort not to further damage family relationships. The interaction of the family can be better assessed. Such could go a long way to achieving the recommendation of the Commission that the input of a mental health professional be more equitably provided, and without regard to the income level of the litigants.

Then again, would litigating parents be better off having the "winner" decided by a jury of their peers?

Neil Cahn, PLLC.

Neil Cahn is a law review graduate of Hofstra University School of Law where he has served as Adjunct Faculty Member and Instructor. His practice is limited to family law as a litigator, mediator and Collaborative Attorney. He now serves as a Special Master for the Nassau County Supreme Court. He is a past revision author of Matthew Bender's New York Civil Practice, Matrimonial Actions and for the past 12 years has authored the blog, <https://divorceny.com/>.



Interim Editor's Message

Editor: Neil Cahn

Interim Editor: Daniel O'Leary

Dear AFCC NY Members,

This edition of the Newsletter addresses issues regarding forensic custody evaluations and the "Report of the Blue-Ribbon Commission on Forensic Custody Evaluations." Three members of AFCC-NY provided articles that were written with the purpose of promoting critical thinking about the Blue-Ribbon Report as well as about the use of forensic evaluations in general.

The Blue-Ribbon Commission Report was delivered to Governor Hochul in December 2021. It makes a core recommendation "limiting the use and scope of forensic custody evaluations to those cases where they are necessary to assess a parent's mental health, as it affects their behavior as a parent. These members recommend evaluations only be ordered when all parties agree there is a need." The Commission report was intended to address a number of issues and to prompt reforms regarding custody evaluations. Newsletter readers can make their own evaluation of the report and its suggested reforms. It is notable that the members of the commission were almost evenly split (11-9) on whether to eliminate forensic evaluations entirely. The three articles by AFCC-NY board members question a number of the Blue-Ribbon recommendations, but most notably actions to prohibit the court from ordering forensic evaluations. The reader hopefully will profit from the issues and questions raised by our three authors who have many years of experience addressing custody evaluations in the roles of a clinical psychologist, an attorney for the children, and an attorney representing a litigant.



On March 3, 2023, bill 5385 was introduced in the NY State Senate which established a moratorium on the use of forensic child custody evaluations in family court proceedings. The bill was introduced by senator Pete Harckham and co-sponsored by senator Cordell Cleare. As of March 6, 2023, the Bill has not yet passed the Senate or Assembly. President Teresa Ombres will be appointing a task force to address issues related to forensic custody evaluations. If you are interested in working on a Task Force to address this issue of child custody evaluations, and others that affect children and families as they come up, please email Teresa Ombres, our chapter president, at afccnypresident@gmail.com.

I have served on the newsletter committee for the past four years, and I served as co-editor in 2020 and 2021. In 2022, a new editor was appointed who unfortunately had to resign for family health reason. I agreed to stay on board, provided a new editor was appointed. In the fall of 2022, President Teresa Ombres appointed Neil Cahn, J.D., Nassau County Supreme Court Special Master, to become the Newsletter Editor. I will serve as his co-editor. Two other individuals serve as members of the Newsletter committee, Suffolk Court Referee, Catherine Miller, and NY attorney, Ariella Deutsch. One other individual member soon will be added to the Newsletter committee.

K. Daniel O'Leary, Ph.D.

K. Daniel O'Leary, Ph.D. is Distinguished Professor of Psychology at Stony Brook University. He was chairman of Psychology Department, Director of Clinical Training at Stony Brook University. He was President of the Association of Behavior and Cognitive Therapy and of the Association of Family and Conciliation Courts. He has conducted forensic custody evaluations for numerous judges in Supreme and Family Courts of Suffolk County, NY for thirty years, and he is a divorce/family dispute mediator with attorney, Dawn Murphy, in Smithtown, NY. His recent research focuses on the impact of alcohol abuse, anger, and personality disorders on intimate partner violence and multivariate risk models of intimate partner violence in national samples in the United States and Ukraine. He has published over 300 articles or chapters and 13 books. His awards include: Distinguished Scientist Award, Clinical Division, APA; Lifetime Achievement Award from National Family Violence Legislative Resource Center, 2009; Family Psychologist of the Year in 2011, APA; Psychologist of the Year, Suffolk County, NY, 2015; the Elizabeth Beckman Award, \$25,000, for mentoring graduate students in 2015, and Fellow of the American Association for the Advancement of Science, February, 2019.





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IN-PERSON EVENT

FRIDAY,
MARCH 31, 2023

9:00 A.M. – 3:30 P.M.

REGISTRATION BEGINS 8:15 A.M.

5 CE CREDITS

5 CLE CREDITS

Mask or No Mask:

A Critical Look at Post-Pandemic Issues Surrounding Families, Children and Those of Us Working in This Field

What Worked, What Didn't Work, How Are We Changed, and What Changes Are Here to Stay?

PANEL PRESENTATIONS

Moderated by The Honorable Jeffrey S. Sunshine

STATEWIDE COORDINATING JUDGE FOR MATRIMONIAL CASES

The Professional Community Experience:

HON. JAVIER E. VARGAS; SAMUEL J. FERRARA, ESQ.; JACQUELINE CAPUTO, ESQ.

MEDIATOR: DANIEL O'LEARY, PHD.

The panel will look at some of the more difficult Pandemic cases, highlighting the behaviors that heightened the conflict.

The Family and Children Community Experience:

GLORIA P. DINGWALL, PRINCIPAL DRYDEN STREET SCHOOL, WESTBURY, NY;

JILL C. STONE, ESQ./AFC; PAUL J. MELLER, PHD.

The panel will take an in-depth look at the difficulties suffered by children and families during the pandemic and examine alternative processes that were implemented and how they worked.

Pandemic Status and How It Changed Child Custody

Evaluations:

JOSEPH T. COOKE, MD; MICHELE REED, MD; MILFRED D. (BUD) DALE, ESQ./PHD;

STEPHEN GASSMAN, ESQ.

Is COVID over, kind of over, what about RSV and the avian flu? How did we cope? Drs. Cooke and Reed will share stats and status, as well as coping skills. Bud Dale will educate us about virtual child custody evaluations moderated by Steve Gassman.