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Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings

Janet M. Bowermaster*

Changes in child custody law are shifting the framework in which mental health professionals participate in child custody proceedings. The reintroduction of legal presumptions, combined with the ubiquitous delegation of custody decision-making authority to mental health professionals has created problems that threaten the integrity of the family courts.

Widespread involvement of psychologists, social workers, therapists, and psychiatrists in child custody determinations was ushered in by the abandonment of determinate rules of decision in the 1970's. During this period, most states moved away from the "tender years" presumption and fault-based rules towards a broad and formless "best interests of the child" standard.

Because the best interests standard is not susceptible to traditional legal analysis, judges turned to mental health professionals for expertise regarding children and child development. Over time, the judiciary came to rely heavily on mental health professionals in child custody decision-making. So long as trial judges had unfettered discretion in making custody awards, mental health professionals enjoyed similar leeway in making custody recommendations to the court.

Legal presumptions are being reintroduced into American child custody law. These new presumptions narrow the broad grant of judicial discretion under the best interests standard by providing subsidiary rules of decision for certain types of cases with recurring fact patterns. Because judges are bound by the legal constraints of these presumptions, recommendations made to judges by mental health professionals are similarly constrained.

Recognizing the symbiotic relationship between mental health recommendations and judicial decisions, appellate courts have

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1. Indeed, the trend in family law in the last thirty years has been away from broad judicial discretion and toward more certain rules of decision. This trend has been most evident in the area of child support, and has made the least progress in child custody. The AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Chief Reporter’s Preface xiii (Ira Mark Ellman) (Tentative Draft No. 3, Pt. I March 20, 1998)[hereinafter PRINCIPLES].

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begun to scrutinize the legal correctness of the mental health recommendations in child custody cases. This scrutiny raises new issues for child custody practice. This article is divided into five sections. Section I gives a brief history of the best interest of the child standard, tracing the abandonment of the old paternal, maternal, and fault-based presumptions, which previously guided the application of the best interests standard, and looking briefly at the formless, unworkable standard that remains.

Section II describes how implementing the formless best interests standard led to the pervasive involvement of mental health professionals in child custody proceedings. It catalogs the wide range of roles that mental health professionals currently play in child custody cases, especially those roles in which they make custody recommendations to the court.

Section III provides the background for understanding the modern presumptions being re-introduced into child custody proceedings to guide the application of the best interests standard. The structure and procedural function of devices ranging from simple inferences to conclusive presumptions are detailed. This section also discusses how the new presumptions constrain judicial decision-making, and thus necessarily constrain the custody recommendations made by mental health professionals.

Section IV uses paternity and move-away cases from California and domestic violence cases from North Dakota to illustrate the types of problems the new presumptions have created relating to the involvement of mental health professionals in making custody recommendations. These problems include the courts' unwillingness to assume a legal role, the ignorance of relevant presumptions, the inability to apply presumptions because of insufficient legal knowledge, and resistance to the substantive content of the presumption because of conflicting professional values. Section V questions whether psychologists, mediators, and social workers should make recommendations on the ultimate issue of custody. It inquires about the scientific basis for custody recommendations, the degree to which value judgments are involved, and the reasons mental health professionals are being asked to make legal determinations in child custody proceedings.

Finally, section VI concludes by briefly exploring alternatives for accommodating the legal and practical aspects of the role mental health professionals are currently asked to play in disputed custody cases.

I. CHILD CUSTODY LAW ABANDONS RULES OF DECISION

Until the 1970's, there were clear decisional rules for deciding child custody cases. Early American common law gave fathers the
legal right to custody and control of their legitimate children.\textsuperscript{2} This paternal entitlement was a status-based property right — children, in essence, were “owned” by their fathers.\textsuperscript{3} Some exceptions existed to this rule of paternal possession, but only in extraordinary cases.\textsuperscript{4} Judicial decision-making under this rule was straightforward. If the man in question was determined to be the father, the only issue subject to judicial discretion was whether he was so unfit that a rare deviation from paternal custody was required.\textsuperscript{5}

The paternal entitlement rule during the nineteenth century yielded to the “best interests of the child” standard as the governing substantive principle in custody adjudications.\textsuperscript{6} However, the indeterminacy of this evolved standard led courts to develop secondary criteria for determining what was in children’s best interests.\textsuperscript{7} Some courts developed a legal presumption that the interests of children, especially young children or children of “tender years,” were best served by placement in their mothers’ custody.\textsuperscript{8} This “maternal” or “tender years” presumption, like the traditional paternal custody rule, was status-based.\textsuperscript{9} However, unlike the traditional paternal preference, which embodied notions of property rights in the child, the maternal preference derived from assumptions about the nurturing quality of mother-child relationships.\textsuperscript{10}

Concurrently, other courts retained a paternal preference, but with a new rationale that focused on the protective quality of father-child relationships, rather than on incidents of ownership in the child.\textsuperscript{11} A showing that the presumed custodian was unfit could rebut both the paternal and maternal presumptions.\textsuperscript{12} By the end of the nineteenth century, the maternal preference or tender years doctrine predominated American case law.\textsuperscript{13}

Fault was another subsidiary rule of decision that coexisted with the tender years doctrine. Prior to the no-fault revolution of the 1970’s, fault principles governed the availability of divorce, with

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\textsuperscript{3} Fineman, supra note 2, at 82.
\textsuperscript{4} Id.
\textsuperscript{5} Id.
\textsuperscript{6} Id.; O’Kelly, supra note 2, at 488.
\textsuperscript{7} Fineman, supra note 2, at 82.
\textsuperscript{8} Id. at 82-83.
\textsuperscript{9} O’Kelly, supra note 2, at 487.
\textsuperscript{10} Id. at 487-88.
\textsuperscript{11} Id. at 488.
\textsuperscript{12} Id. at 489.
\textsuperscript{13} Herbert Jacob, Silent Revolution: The Transformation of Divorce Law in the United States 128 (1988).
\end{flushright}
custody typically being awarded to the innocent spouse. These fault principles also interacted with the tender years or maternal presumption. For example, under the maternal presumption, a finding of maternal unfitness could defeat custody. The most common basis for finding maternal unfitness was immorality; adultery was considered to be immoral. Thus, an adulterous mother could lose custody of her children under the tender years doctrine because she was morally unfit, and because she was not the innocent party under the fault rule.

The divorce revolution of the 1970's, with its focus on gender neutrality and changing marital roles, saw the demise of both the tender years presumption and fault-based divorce. This left most jurisdictions with the vague best interest standard stripped of the definitive subsidiary rules that had previously guided its application.

Custody determinations under the best interests standard significantly differ from the standard model of adjudication. Unlike the typical adjudicatory process, which focuses on fact-finding, past actions, and application of rules, the resolution of child custody disputes under the best interests standard calls for an assessment of the parties' personal characteristics, and predictions as to which parent will better meet the child's future needs. So long as the subsidiary presumptions made the "outcome turn in a systematic way on the showing of ascertainable facts about the past," the judicial function in custody cases resembled the fact-finding and rule application role familiar to lawyers and judges. However, the judicial role took on new and unfamiliar aspects when these subsidiary rules were abandoned.

Decision-making under the broad, undifferentiated best interest standard requires a wide-ranging comparative evaluation of two fit parents, with no substantive standard against which to judge competing values. The judge decides which of the myriad of possible factors affecting a child's "best interests" are relevant in each custody case. While many states provide statutory lists of factors for judges to consider in determining a child's best interests, these lists are ineffective as substantive guides for

15. O'Kelly, supra note 2, at 496 n.78.
17. O'Kelly, supra note 2, at 498.
19. Id. at 252.
20. O'Kelly, supra note 2, at 500.
custody decision-making.\textsuperscript{21}

First, the statutory lists are not definitive. Courts are typically directed to consider the statutorily enumerated factors "among any other factors the court finds relevant."\textsuperscript{22} Thus, significant discretion is left to the courts to determine the other aspects of a custody situation to be considered. With so little guidance, judges often rely on personal values to determine what individual qualities, parenting skills, or situational factors are important in their decisions. As a result, familiarity with local judges' personal predilections and preferences in family law cases may be as important as knowledge of the relevant law.

Second, the statutory factors do not embody the standards for decision. For example, California courts are directed to consider "the nature and amount of contact with both parents."\textsuperscript{23} However, there is no indication of how much contact is too little, too much, or the appropriate amount. There is not even a clear indication of whether contact includes only in-person contact or whether phone calls, letters, and e-mail communications are included. Therefore, the factors' substantive content can only be derived from outside the statute — again from the personal values and opinions of the decision-maker.\textsuperscript{24}

Finally, the enumerated factors are typically presented without suggestion of relative importance. Absent the legislature weighting or rank-ordering the factors, widely divergent decisions can be supported on the same facts by simply emphasizing different factors from the many available for consideration.\textsuperscript{25}

II. MENTAL HEALTH PROFESSIONALS ARE SOUGHT TO FILL THE VOID OF THE "BEST INTERESTS" STANDARD

Discomfort with the virtually formless best interests analysis has
led courts to involve mental health professionals in giving substantive content to child custody decision-making. The mental health professions seemed an appropriate source for this content because they typically confront issues such as parenting skills, psychological attachment, sibling relationships, and the developmental needs of the child. Over time, the involvement of psychologists, psychiatrists, and social workers in child custody proceedings has increased dramatically. Today, mental health professionals are heavily involved in child custody proceedings in a variety of roles.

A. Expert Witnesses

Mental health professionals sometimes serve as expert witnesses to educate the court on issues such as the effects of divorce, general psychological principles, or child development. This type of expert testimony does not depend on the interpretation of information gathered for the particular case under consideration, but rather on the expert's general knowledge of these areas.

B. Therapists

Some mental health professionals provide supportive therapy to individuals and families involved in family court proceedings. Individual therapists counsel parents or children on a one-to-one basis during the difficult period surrounding a divorce. Family therapists see the family as a group, with the goal of improving family system functioning. When therapists gather information from clients about family and friends, it is understood that client reports are a reflection of the clients' perceptions and are not necessarily true. However, because the therapy focuses on the clients' inner thoughts and feelings, in this context, perceptions are more important than objective truth.

C. Psychological Evaluators

Some mental health professionals assess individuals' cognitive, and/or emotional, functioning for the purpose of planning appropriate therapeutic interventions. For example, psychological evaluations may be performed when a child is having problems at school, when an adolescent is abusing drugs, or when an adult has been hospitalized for acute depression. Such psychological

28. Id. at 17.
29. Id. at 14.
evaluation focuses on the individual and is not an assessment of family functioning.  

D. Custody Evaluators

Mental health professionals who conduct custody evaluations are charged with assessing family dynamics, including the strengths and weaknesses of each parent, and the functioning of the children. These evaluators compile data from many different sources including observations of, and interviews with, parents and children; interviews and archival information from third-party sources; and administration of psychological tests. In contrast to the therapeutic context, this forensic context requires that the litigants' perspectives and facts be independently confirmed. Thus, evaluators may seek information from day care providers, teachers, pediatricians, coaches, social service agencies, therapists, and the like to confirm the objective truth of the subject's reported perceptions.

Some custody evaluators limit their involvement to providing the court with detailed assessments of family functioning, while others go further and make recommendations on the ultimate legal issue of which parent would be the better custodian. Conducting child custody evaluations is fast becoming an area of professional specialization for clinical and forensic psychologists.

E. Mediators

Some jurisdictions require the mandatory mediation of child custody cases so that the parties must attempt to resolve their custody disputes before a judge can hear their case. Mental health professionals serving as mediators in these custody proceedings may play a facilitative or a decision-making role.

The traditional goal of custody mediation was to facilitate the

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30. Id. at 15.
35. See, e.g., CAL. FAM. CODE § 3170(a) (West 2000) (stating that "[i]f it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation").
36. For a complete listing of other jurisdictions which impose or allow mandatory mediation, see Christy L. Hendrix, Note, The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview, 32 J. Fam. L. 491 (1993-94).
conflict resolution process so that parents could create their own custody agreements. Mediators who see couples as part of their private practice, as well as those in some court-annexed programs, still function in this traditional facilitative mode. However, in some California counties, however, mediators in court-annexed Family Court Services ("FCS") play a decision-making role in child custody proceedings. When FCS mediations in these counties do not produce voluntary custody agreements between the parents, the FCS mediator “changes hats” and uses the information learned during the mediation sessions to make a custody recommendation to the court. Because the courts so often follow these recommendations, FCS mediators in these “recommending” counties are widely viewed as being the de facto decision makers in contested custody cases.

F. Special Masters

Mental health professionals who take on the role of special master are given even more explicit decision-making power in custody cases. Special masters are most often appointed after custody evaluations have been conducted, to monitor and oversee the relationship between the parties in an ongoing fashion. In California, specially defined issues (e.g. problems surrounding transportation or exchange of children for visitation) can be referred to and decided by a special master who can be appointed


37. Cal. Fam. Code § 3183 (a) (West 2000) (providing that “[t]he mediator may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child”).

38. Investigation and analysis of court files and records in 282 disputed child-custody cases in San Diego, California revealed a 75% agreement between the FCS mediator’s recommendation and the judge’s decision. Carla C. Kunin et al., An Archival Study of Decision-Making in Child Custody Disputes, 48 J. Clinical Psychol. 564, 570-71 (1992). The data was interpreted as substantiating claims that the mediators were emerging as the true decision-makers in disputed custody cases. Id. The influence of FCS recommendations has become so well recognized in San Diego that “mediation preparation” has emerged as a new professional service. Mediators or lawyers familiar with FCS processes charge from $100 to $150 per hour to coach parents in disputed custody cases on how to best present themselves to the FCS mediators. Believing that the real custody decision is made in the FCS mediation session, parents pay for professional preparation in order to maximize their chances of getting a favorable recommendation and thus a favorable custody decision. Interviews with Lawyers and Mediators in San Diego, Cal. See also, 5 Bar Report: News and Events of the San Diego County Bar Association 6 (1999) (classified advertisement for this service by former Family Court Services mediator); 1999 National CLE Conference: Family Law, Winning the Psychological War: Preparing the Client for the Mediation and Custody Evaluation Process, in Vail, Colorado (Jan. 3, 1999).

39. Though referred to by other names such as mediator or arbitrator in other jurisdictions, their functions are largely the same despite the difference in names. Stahl, supra note 28, at 18.
without the consent of the parties. After hearing all sides of the issue, the special master makes advisory findings. Much like the FCS recommendations, the findings of special masters do not become binding unless adopted by the court. They are, however, given great weight.

The range of referable issues is much broader when the parties affirmatively consent to appointment of a special master. When parties consent, a master may make conclusive determinations on any and all issues regarding custody without further action by the court. The parties' consent prevents this broad delegation of judicial authority from being unlawful.

G. Recommendations

With the overwhelming caseloads in family courts, many judges have come to rely on the fact-finding and custody recommendations of mental health professionals in child custody proceedings. The indeterminacy of the best interests standard made this reliance possible by conferring a scope of judicial discretion in custody matters that is unprecedented in any other area of the law. So long as judges have unfettered discretion, the recommendations of custody evaluators, FCS mediators, and special masters cannot be incorrect in any substantive sense. Reliance on the recommendations simply substitutes the personal values and judgments of the mental health professional for the personal values and judgments of the family court judge.

III. THE REINTRODUCTION OF SUBSIDIARY PRESUMPTIONS

Judicial discretion to determine the best interests of the child has been narrowed in recent years through the emergence of modern legal presumptions. These presumptions are not like the

40. CAL. CIV. PROC. CODE § 639 (Deering 1998).
42. CAL. CIV. PROC. CODE § 638 (Deering 1998).
47. MELTON, supra note 31, at 488.
single-principle paternal or maternal preferences that once governed all custody cases. Rather, they apply to certain categories of cases with regularly occurring fact patterns that have been removed from the unguided discretion of the best interests standard and marked for special treatment.

Within these categories, the courts or legislatures have agreed on what constitutes the best interests of the child, and have declared clear and consistent principles to guide adjudication. The appropriate balance of certainty, through fixed rules that produce similar outcomes in similar cases, and flexibility, through discretion to tailor outcomes to the idiosyncrasies of each case, is achieved through the procedural effects embedded within the particular presumption employed.

Significant confusion exists about presumptions and their effects. Much of this confusion stems from the use of the term "presumption" to cover several distinct procedural devices. A presumption is a legal fiction that allows the trier of fact to establish the existence of a presumed fact, for which there may be no direct evidence, based upon proof of other basic facts. For example, upon showing that one parent has committed acts of domestic violence against the other, the court may presume that custody with the abusive parent is not in the best interests of the child. The various procedural devices that are typically lumped together within the rubric of presumptions may be viewed as a continuum along which the strength of procedural advantage conferred on the beneficiary of the presumption is measured. This continuum runs from simple permissible inferences at the weak end, through rebuttable presumptions, to conclusive presumptions at the strong end.

A. Permissible Inference

At the weak end of the continuum is the permissible inference. An inference is a logical conclusion that the trier of fact is permitted, but not required, to make based on proof of certain basic facts. Because fact finders may or may not draw the inference, inferences have no necessary legal effect. For example, when a party fails to call a witness whose testimony could be material to an issue in the case, the trier of fact is traditionally

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48. See supra notes 2-13 and accompanying text.
51. See, e.g., CAL. FAM. CODE § 3044 (West 2000).
52. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS, AND CASES 803 (2d ed. 1982).
53. Hjelmaas, supra note 50, at 431.
allowed to draw the inference that the testimony would have been unfavorable to that party. 54

B. Rebuttable Presumption

Rebuttable presumptions are next in strength along the continuum. Rebuttable presumptions may affect all or part of the burden of proof. 55 Those rebuttable presumptions that shift only the burden of production are stronger than permissible inferences, but weaker than rebuttable presumptions that shift the entire burden of proof. When the presumption only shifts the burden of production, a party who proves the basic fact is entitled to have the resulting presumed fact accepted as proven, unless the opposing party introduces some evidence to disprove the presumed fact. 56 Thus, the presumption shifts to the opposing party the burden of producing some substantial evidence to contradict the presumed fact. 57 Once contradictory evidence is introduced, the presumption disappears and the facts are weighed as usual. 58

Rebuttable presumptions that shift the burden of proof are stronger in their procedural effect than those that shift only the burden of production. Presumptions that shift the burden of proof are treated the same as presumptions that shift only the production burden, until the opposing party introduces evidence disputing the presumed fact. Once such evidence is introduced, presumptions affecting the burden of proof continue to affect the burden of persuasion so that "jurors will be instructed that they must find the presumed fact unless the party opposing the presumption convinces them by some appropriate standard that the presumed fact does not exist." 59

Additional procedural effect is achieved by elevating the standard

55. The burden of proof is composed of two aspects — the burden of production and the burden of persuasion. Lawrence B. Solum, Presumptions and Transcendentalism: You Prove It! Why Should I?, 17 Harv. J.L & Pub. Pol'y 691, 691 (1994). The burden of production refers to the requirement that a party raise an issue and be able to produce some evidence to support it. The burden of persuasion has two components that come into play after a particular issue has been raised — the risk of non-persuasion and the standard of proof. Id. The risk of non-persuasion is the risk that the party who bears the burden of persuasion may not be able to meet the standard of proof on an issue and thus have it decided against him or her. Id. at 692.

The standard of proof refers to the level at which the litigant's proof must convince the trier of fact. The typical standard of proof in civil cases is "by the preponderance of the evidence." "By clear and convincing evidence" represents an elevated standard in civil cases. "Beyond a reasonable doubt" is the standard employed in criminal proceedings.
56. LEMPERT & SALZBURG, supra note 52, at 804.
58. Id.
59. LEMPERT & SALZBURG, supra note 52, at 804.
of proof to rebut the presumption.60 In child custody proceedings, this elevation would typically be from “preponderance of the evidence” standard to the “clear and convincing” standard.

C. Conclusive Presumptions

At the strongest end of the procedural effect continuum are conclusive presumptions for which the legal effect of proving the basic fact is the same as proving the presumed fact.61 These presumptions are conclusive because rebuttal evidence is not allowed.62 The term “presumption” for this procedural device is a misnomer because an irrebuttable presumption has the same effect as a substantive rule of law.63 Under California law, for example, a man whose wife gives birth to a child while they are married and living together is presumed to be the child’s father. If this presumption is not rebutted within two years after the child’s birth, the husband’s paternity becomes conclusive and may no longer be legally challenged.64

IV. NARROWED JUDICIAL DISCRETION CREATES PROBLEMS FOR THE INVOLVEMENT OF MENTAL HEALTH PROFESSIONALS

The creation and employment of presumptions under the best interests standard adds a degree of certainty to child custody determinations by narrowing the judicial discretion to consider and weigh factors to determine what is in the child’s best interest. To the extent that calling upon judges to apply definable legal standards alters the judicial task in child custody proceedings, what judges need from custody recommendations also changes. If custody recommendations do not comply with controlling law, they will not assist judges with their judicial task. However, the need for mental health professionals to incorporate the effects of legal presumptions into their evaluation and recommendation process creates several problems.

A. Unwilling to Assume Legal Role

Some mental health professionals believe it inappropriate to incorporate legal considerations into their role in child custody proceedings.65 They perceive their role as recommending what they consider to be in the best interests of the child, regardless of

61. LEMPERT & SALZBURG, supra note 52, at 803.
63. Id.; LEMPERT & SALZBURG, supra note 52, at 803.
64. See CAL. FAM. CODE § 7540 (West 2000).
65. This was a common response from audience members when the author presented this idea in papers at professional conferences or conducted training on presumptions for mental health professionals.
whether their recommendations comply with the law. Application of the law, in their view, is the judge's responsibility. While this view may be correct from their professional perspective, it creates significant problems when mental health professionals make recommendations in child custody proceedings involving legal presumptions.

Custody recommendations that do not comply with the law are of diminished usefulness to the courts. Judges are sworn to apply and uphold the law. When custody recommendations contravene the law, judges cannot rely on them. Rather, the judges must re-weigh the available information in light of the controlling law to make independent custody determinations. For judges who frequently adopt the recommendations of mental health professionals, the need for such re-weighing requires a significant increase in the amount of judicial time allotted to custody decision-making.

Even judges who typically make their own custody determinations may find that the fact-finding and professional expertise of custody evaluators and mediators is compromised by their lack of legal focus. This occurs most obviously when the lack of attention to controlling law results in a failure on the part of the expert to address the necessary legal issues. When this happens, further fact-finding is required to provide the court with sufficient information to make a legally correct custody determination. The need to re-do the work of the mental health professionals largely negates the benefits of their efficiency and expertise, which are thought to derive from their involvement in custody proceedings.

In a recent California case, for example, an FCS custody recommendation failed to incorporate California's then 3-year-old move-away presumption. 66 The final recommendation did not comport with controlling law and failed to provide sufficient information on the relevant legal issues for the court to make an independent and legally correct custody determination.

The law in California is reasonably clear in this area. California's move-away presumption, recognized by the California Supreme Court in In re Marriage of Burgess, favors the ability of custodial parents to relocate without losing custody of their children. 67 The only remedy for non-custodial parents resisting the relocation of their children is a change of custody. 68 Custodial parents themselves cannot be legally restricted from relocating because of their constitutional right to travel. 69 The Burgess court emphasized

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68. Id. at 482. See also Ruisi v. Thieriot, 62 Cal. Rptr. 2d 766, 771 (Cal. App. 1997).
that lower courts cannot assume that the custodial parents will not move if it means losing custody of their children. Rather, the move must be assumed to occur, so the pertinent inquiry becomes whether the child's interests would be best served by being with the custodial parent in the new location or the non-custodial parent in the old location.

As in other change of custody cases, the non-custodial parent has the burden of establishing that a change of custody is warranted. In California move-away cases, no change in custody is warranted unless the non-custodial parent can establish that the proposed move would be so detrimental to the child that it is "essential or expedient for the welfare of the child that there be a change" of custody. Ordinary incidents of moving, including greater distance from the non-custodial parent, and changes in homes, schools and communities, do not satisfy the detriment requirement. The Burgess Court emphasized that "the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail. . . ."

In contravention of this law, the July 1999 Family Court Services report in In re Bower recommended that the mother not be granted permission to move to New Jersey with her six-year-old daughter. The primary reason for this recommendation was that no acceptable visitation schedule could be arranged with the allegedly violent father if the child was allowed to relocate with her mother.

The parties in this case had three children, two sons and a much younger daughter. The mother claimed that the father had been physically violent during the marriage. However, because the boys had also become physically violent and threatening to the mother, the parties stipulated in the original custody agreement that the father would have custody of the boys and the mother would have

70. Burgess, 913 P.2d at 481, n 7. See also Ruisi, 62 Cal. Rptr. 2d at 771; In re Marriage of Edlund, 78 Cal. Rptr. 2d 671, 684 (Cal. App. 1996).
71. Brody v. Kroll, 53 Cal. Rptr. 2d 280, 282 (1996); Edlund, 78 Cal. Rptr. 2d at 684. It should be noted that this is not a crisp dichotomy. Except in the unusual situation where divorced parents maintained residences very close to one another, a transfer of custody to the formerly non-custodial parent who remains in the "old location" still involves changing houses, neighborhoods, schools, access to playmates, etc.
73. Burgess, 913 P.2d at 482 (quoting In re Marriage of Carney, 598 P. 2d 36, 38 (Cal. 1979)).
74. Edlund, 78 Cal. Rptr.2d at 683.
75. Burgess, 913 P.2d at 483.
77. Id. at 6-7.
78. Id. at 1.
79. Id. at 2, 5.
custody of the daughter. The younger boy's behavioral problems escalated under his father's custody, and he was incarcerated for a time in a juvenile detention center.

With regard to possible visitation schedules, the mediator reasoned that the father could not safely leave this son, who was only recently released from incarceration and still behaviorally troubled, to travel to New Jersey to visit with his daughter. Further, if the father were to have extended visitation with the daughter in San Diego, the father would eventually have to go to work and leave the young daughter unsupervised with the son, whom the counselor considered to be dangerous to her. Thus, the counselor recommended that the court not grant the mother permission to move to New Jersey with her daughter.

The mediator's recommendation was legally and logically flawed, as well as insufficiently focused on the relevant legal issues to be addressed. In Burgess, the California Supreme Court made it clear that the only remedy in a move-away case is a change of custody. However, the mediator in Bower recommended refusing the mother permission to move to New Jersey, without addressing the issue of changing custody. The Burgess Court emphasized that "calling the mother's bluff" was not allowed, and that the legal analysis must assume that the requested move would take place.

Nevertheless, the mediator's recommendations for visitation in Bower were based on the impermissible assumption that the mother would remain in San Diego to avoid loss of custody. Accordingly, the trial court could not legally accept the mediator's recommendation. Moreover, the court was unable to use the information contained in the report to craft a legally correct custody decision. That is, the court could not use the mediator's determination that no acceptable visitation plan could be arranged as evidence of the detriment necessary to overcome the Burgess presumption and switch custody to the father. If the father could not manage short periods of visitation, how could he be deemed acceptable for primary custodian of the child?

The mediator failed to consider all reasonable alternatives. It is true that, if the daughter were to have extended visitation with the father in San Diego, the father would eventually have to go to work and leave her without supervision. However, this is a common

80. Id. at 2, 4, 5. Subsequent to that agreement, the older boy turned eighteen and was no longer subject to the custody order. Id. at 1.
81. FCS Report, supra note 76, at 3.
82. Id. at 6
83. Id.
84. Id.
85. See supra notes 67-71 and accompanying text.
86. FCS Report, supra note 76, at 6.
87. See supra notes 67-71 and accompanying text.
occurrence for non-custodial parents who have only one child or who have multiple children too young to be left alone without parental supervision. Parents of these children typically provide appropriate supervision in their absence, either through the use of babysitters or out-of-home day care. There is no reason why the father in this case could not hire a competent adult to supervise his daughter in his absence. If the son's presence created obstacles to that option, the father could reasonably be expected to arrange for out-of-home day care for his daughter.

Because the mediator did not concern himself with the legal issues involved in a move-away case, he failed to address whether a change of custody to the father would be an appropriate remedy. On the facts of this particular case, a court might conclude that a home situation, too dangerous for the daughter's extended visitation, would not be a viable option as a primary custodial home. Before making such an important determination, however, the court might wish to obtain more substantial information or an expert's opinion about the perceived advantages and disadvantages of each parent's home.

88. Because of the mother's allegations of physical violence during the marriage, the comparison of the relative fitness of the parents would also have implicated other legal considerations relating to the legislative reluctance to award sole or joint custody to a perpetrator of domestic violence.

Effective January 1, 1998, the California Family Code was amended to elevate the importance of domestic violence concerns in child custody determinations. The following provisions were added:

(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

.... (c) Where the policies set forth in subdivision (a) and (b) of this section are in conflict, any court's order regarding custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.


In making a determination of the best interest of the child in a proceeding described in § 3021, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child. (b) Any history of abuse by one parent or any other person seeking custody against any of the following:

(1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.

(2) The other parent.

(3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies . . . .

.... (e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure
When mental health professionals are unwilling to be guided by controlling law, their recommendations on ultimate issues of custody and visitation are often legally impermissible, and therefore of little, if any, use to the courts. Even information on subsidiary issues needed by the courts to make their own custody determinations often goes undeveloped by mental health professionals who fail to identify and consider the legally relevant issues. Clearly, mental health professionals involved in child custody proceedings cannot continue to simply ignore applicable legal presumptions.

B. Ignorance of Presumption

Even among those mental health professionals who view their role in child custody proceedings as having some legal dimension, several types of problems have emerged. The most straightforward problem occurs when mental health professionals are unaware of the existence of a legal presumption and therefore fail to apply it.\textsuperscript{89} \textit{In re Marriage of Rebecca and David R.} is an example of a case where a conclusive presumption was ignored.\textsuperscript{90}

Rebecca and David R. were married for 17 years and had two children.\textsuperscript{91} David was listed as the father on each child's birth certificate.\textsuperscript{92} A dissolution petition was filed in 1992,\textsuperscript{93} and during the dissolution proceedings, the court learned that David was not the children's biological father.\textsuperscript{94} Rebecca claimed that Mr. O had impregnated her pursuant to an agreement with her husband, who

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\textsuperscript{89} An example of a straightforward mistake that does not involve a legal presumption is \textit{Parker v. Parker}, 986 S.W.2d 557 (Tenn. 1999). In that child custody case, the Tennessee Supreme Court held that the trial court erred by permitting expert testimony to the effect that the mother's involvement in an interracial relationship could harm the child. \textit{Parker}, 986 S.W.2d at 557. Consideration of such racial factors in child custody matters has been held by the United States Supreme Court to be unconstitutional. \textit{Palmore v. Sidoti}, 466 U.S. 429 (1984).

\textsuperscript{90} \textit{In re Marriage of Rebecca and David R.}, 62 Cal. Rptr. 2d 730 (Cal. Ct. App. 1997).

\textsuperscript{91} \textit{In re Marriage of R.}, 62 Cal. Rptr. 2d at 732.

\textsuperscript{92} \textit{Id.} at 732.

\textsuperscript{93} \textit{Id.} at 733.

\textsuperscript{94} \textit{Id.} at 731.
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was unable to father children.\textsuperscript{95} David claimed that he was able to have children and that he had no knowledge of any agreement for his wife to become pregnant by another man.\textsuperscript{96} David testified that he believed the children were biologically his and had treated them as his natural children since their birth.\textsuperscript{97} He also believed that the children considered him their father.\textsuperscript{98}

Mr. O testified that, although he had never discussed the matter with David, he understood from discussions with Rebecca that he was assisting the couple by impregnating her.\textsuperscript{99} No evidence demonstrated that Mr. O ever had any interest in acting as a father to the children, or that he had any desire to do so in the future.\textsuperscript{100}

David raised the paternity issue during mediation proceedings, claiming that he was not the children's biological father and should not have to pay child support.\textsuperscript{101} The children were four and nine years old when the issue of their paternity was raised.\textsuperscript{102}

Under California law, a husband who is not impotent or sterile is presumed to be the father of any children born to his wife while they are married and living together.\textsuperscript{103} This presumption may be rebutted by blood test evidence, but only during the first two years after a child's birth.\textsuperscript{104} During that two-year period, the woman's husband may make requests for blood tests, a presumed father who is not the woman's husband, the child through a guardian \textit{ad litem}, or the mother, if her request is supported by an affidavit from the child's biological father acknowledging paternity.\textsuperscript{105} After the two-year period has expired, however, the presumption becomes conclusive and is treated as a substantive rule of law that is no longer rebuttable.\textsuperscript{106}

By the time the paternity issue was raised in \textit{In re Marriage of R.}, the statutory two-year window for challenging the presumption of David's paternity had long since passed.\textsuperscript{107} Nevertheless, the mediator, unaware of the existence or significance of the presumption, recommended that blood tests be ordered.\textsuperscript{108} Per-

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 732-33.
\item \textsuperscript{96} \textit{In re Marriage of R.}, 62 Cal. Rptr. 2d. at 733 n.3.
\item \textsuperscript{97} \textit{Id.}
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.} at 733.
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{In re Marriage of R.}, 62 Cal. Rptr. 2d. at 733.
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} CAL FAM. CODE \textsection 7540 (West 2000). \textit{See also}, Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).
\item \textsuperscript{104} CAL FAM. CODE \textsection 7541 (b) & (c) (West 2000).
\item \textsuperscript{105} \textit{See In re Marriage of R.}, 62 Cal. Rptr. 2d. at 733-34 (discussing CAL FAM. CODE \textsections 7540-41).
\item \textsuperscript{106} \textit{Id.} at 734.
\item \textsuperscript{107} As discussed above, the children were already four and nine years old at the time the dissolution petition was filed. \textit{See supra} notes 101-06 and accompanying text.
\item \textsuperscript{108} \textit{In re Marriage of R.}, 62 Cal. Rptr. 2d. at 733.
\end{itemize}
haps because mediators frequently recommend blood tests in appropriate situations, and perhaps because judges have come to rely on mediator recommendations without personally examining the record in each case, the mediator's recommendation in this case was not suspect by the judge, who subsequently signed the order for the blood tests recommended by the mediator, and the tests confirmed that David was not the children's biological father.109

The case was referred to a different judge for trial.110 David introduced the blood test evidence in the trial court to support his argument that he need not pay child support because the children were not biologically his.111 At trial, the central legal issue was whether the blood test evidence should be allowed to rebut the statutory presumption of paternity.112 The trial judge, realizing the error in ordering the blood tests, held that the blood test evidence was irrelevant under the California statute.113 Accordingly, David was found to be the children's legal father pursuant to the statutory presumption and was ordered to pay child support.114 David appealed.115

In a ruling that threatened to reshape California law, the California Court of Appeals reluctantly reversed the decision.116 While agreeing with the trial court that David was legally precluded from challenging the statutory presumption of paternity, the court noted that it was not David, but the family mediator, who requested the blood tests.117 Under these circumstances, the court found that the trial court had discretion to order blood tests.118 In a troublesome finding, the appellate court determined that once blood tests have been ordered, paternity must be resolved in accordance with the outcome of the tests.119 Thus, the purportedly "conclusive" presumption of the husband's paternity of children born to his wife during the marriage was effectively rebutted.120

While the court of appeals felt legally constrained to acknowledge the blood test results, its opinion left little doubt that a mistake had been made:

Judge J. McIntyre, when presented with the family mediator's

109. Id.
110. Id.
111. Id.
112. Id. at 739-42.
113. In re Marriage of R., 62 Cal. Rptr. 2d. at 741-42.
114. Id.
115. Id. at 730.
116. Id. at 743.
117. Id. at 736.
118. In re Marriage of R., 62 Cal. Rptr. 2d. at 736-37.
119. Id. at 741-43.
120. Id. at 737.
recommendation for blood testing, ordered blood testing under section 7551. This would have been an appropriate case for the trial court to refuse to exercise its discretion to order blood testing. . . .

When the blood test results were presented to Judge Van Frank, he attempted to disregard the results of the blood tests. However, at that time, it was too late in the process to ignore the blood test results. . . . As a result, the court is now forced by the blood test results to disrupt the social relationship between the children and David R., the only father they have ever known, to determine that Lee O., an apparent stranger to the children, is their "father."121

In an unusual move, the Court of Appeal's opinion included a proposal for legislative change that would prevent such a problem in the future.122

The legal community responded to this case with great concern that it established a flawed and dangerous precedent.123 Experts claimed the opinion would upset California's 125-year-old legal precedent and undermine important social policies.124 Attorneys asked the California Supreme Court to strike down the ruling.125 On July 30, 1997 the California Supreme Court ordered the opinion depublished so that it could not be cited as precedent in future cases.126

C. Unable to Assume Legal Role Due to Inadequate Legal Knowledge

A more complicated problem occurs when mental health professionals are asked to make custody recommendations in cases covered by presumptions that require interpretation for their

121. Id. at 741-42.
122. The court suggested the statute be amended to allow the court discretion to determine paternity when considering blood tests so such factors as the child's age, degree of bonding with the presumed father, and presence or absence of relationship with the biological father could be considered. Id. at 743.
123. Davan Maharaj, Sex, Laws and Fatherhood — And a Court to Sort it Out; L.A. TIMES, June 9, 1997, at A3; These Days with Gloria Penner: What is a Father? (KPBS radio broadcast, June 12, 1997); Hon. Dennis A. Cornell, Commentary, 1997 CALIFORNIA FAMILY LAW MONTHLY 163 (June 1997).
125. Id.
126. In re Marriage of R., 62 Cal. Rptr. 2d at 730. It would seem that the substantial publicity given to the mistaken application of the paternity presumption in this case would have been sufficient to make mental health professionals aware of its existence and application, especially because the presumption at issue was conclusive and required no interpretation for its application. Yet, when the author mentioned the conclusive presumption of paternity to a group of Family Court Services' mediators some time thereafter, it was surprising that the vast majority of the fifty-plus FCS mediators remained unaware of the presumption. Presentation to Family Court Services, Training Workshop in San Diego, Ca. (July 17, 1997).
application. Determining children's best interests in cases involving rebuttable presumptions requires application of legal knowledge that mental health professionals generally do not possess. When rebuttable presumptions apply, it is essential that the mental health professional know both the procedural effects of the presumption and how it may be rebutted. However, without significant understanding of legal concepts, such as the burdens of production, persuasion, and proof, the standard of proof, preponderance of the evidence, and clear and convincing evidence, mental health professionals cannot incorporate the effects of legal presumptions into their custody recommendations. Because recommendations that do not properly consider these effects are not in compliance with the law, they are of little use to judges who must apply that law.

Judicial discretion has recently been narrowed through various procedural devices, including rebuttable presumptions, in custody cases involving domestic violence. In 1990, the U.S. Congress unanimously adopted a resolution urging states to include in their child custody laws a presumption against custody for batterers. In 1994, the National Council of Juvenile and Family Court Judges approved a Model Code on Domestic and Family Violence that contained a rebuttable presumption against awards of sole or joint custody to abusive parents. More than forty jurisdictions currently require consideration of domestic violence in child custody determinations. Several states have adopted rebuttable presumptions against awarding sole or joint custody to perpetrators of domestic violence.

North Dakota's experience with creating and applying presumptions to prevent awarding custody to perpetrators of domestic violence is instructive for its classic step-wise progression. In 1989, the North Dakota Legislature amended the state's child custody statute to explicitly direct courts, for the first time, to consider evidence of domestic violence when making best interests determinations. In 1991, apparently in response to cases in which custody

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129. Joan Zorza, Protecting the Children in Custody Disputes When One Parent Abuses the Other, 29 CLEARINGHOUSE REV. 1113, 1119 (1996).
132. Id. at 1013 (citing S. Res. 2398, 51st Leg., 1989 N.D. Law 547, which requires courts to determine whether domestic violence had occurred and, if it had, to tailor custody and visitation arrangements to protect the child and victim parent).
continued to be awarded to perpetrators of domestic violence, the
child custody statute was again amended to create a rebuttable
presumption against awarding custody to abusive parents.133 The
North Dakota Supreme Court interpreted this statutory provision in
a 1992 case, Schestler v. Schestler, as a presumption affecting the
burden of production.134 The father in Schestler was found to have
abused his wife during the marriage by shoving and striking her,
and to have "teased" his two stepdaughters by touching or
"twisting" their breasts.135 Despite these findings, the Chief of
Psychological Services at the North Central Human Services Center
in Minot recommended that the father's biological children be
placed in his custody.136 The trial court followed the psychologist's
recommendation.137

The North Dakota Supreme Court affirmed the trial court's
decision, finding that the trial court had properly applied the
statutory presumption, which was successfully rebutted by a
combination of other statutory factors favoring the father.138 These
factors included the lack of evidence that the father had been
violent toward his biological children, his more stable home
environment, more love and affection between him and the
children, and the availability of child care assistance from his
mother and sisters.139

As previously discussed, when a presumption affects only the
burden of production, a party who proves the basic fact is entitled
to have the presumed fact taken as proved, unless the opposing
party introduces some evidence to disprove the presumed fact.140
Thus, in the context of a child custody case involving domestic
violence, a parent who proves that the other parent has committed
domestic violence is entitled to a presumption that it is in the best
interests of the child not to be placed in the custody of the violent
parent. However, this presumption lasts only until the opposing
party introduces evidence to disprove the presumed fact, i.e.,
evidence tending to show that it is in the child's best interests to
be placed in the abusive party's custody. Once this contradictory
evidence is introduced, the presumption disappears and the facts

133. Schestler v. Schestler, 486 N.W.2d 509, 511-14 (N.D. 1992) (citing a reference in
legislative history to Dizayee v. Dizayee, 414 N.W.2d 606 (N.D. Ct. App. 1987)).

Once the presumption was invoked through presentation of credible evidence of domestic
violence, the statute required the trial court to make findings showing that its custody and
visitation orders provided adequate protection for the child, the victim parent, and other
family or household members. See supra note 55 (discussing the burden of production).

134. Schestler, 486 N.W.2d at 512.
135. Id.
136. Id. at 513.
137. Id. at 512.
138. Id.
139. Schestler, 486 N.W.2d at 512.
140. See supra note 55 and accompanying text.
The North Dakota Supreme Court in Schestler explained that, while domestic violence was one factor to be considered in custody cases, other statutory factors must also be considered. Accordingly, the North Dakota Supreme Court affirmed the trial court's interpretation that the presumption against awarding custody to perpetrators of domestic violence could be rebutted by a combination of other statutory factors.142

In Schestler, the court interpreted the applicable presumption to affect only the burden of production; accordingly, the presumption disappeared when the father introduced evidence to contradict it. From that point on, the judge had complete discretion to weigh the various considerations raised by the facts. Because the judge had full discretion, the psychologist's recommendation could not run afoul of the law. However, as discussed below, because a new statutory presumption affects the entire burden of proof, professional recommendations may easily diverge from the law. In 1993, the North Dakota legislature responded to the Schestler court's interpretation of the rebuttable presumption by amending its child custody statute yet again.143 In an attempt to clarify domestic violence as the paramount factor in determining the best interest of the child, the amendment specified that the presumption affects the entire burden of proof, i.e., the burden of persuasion as well as the burden of production. The presumption was further strengthened by elevating the standard of proof for rebuttal from "preponderance of the evidence" to "clear and convincing evidence."144

Bruner v. Hager was decided in 1995, after the North Dakota legislature strengthened the statutory presumption against awarding custody to a perpetrator of domestic violence to a rebuttable presumption affecting the entire burden of proof.145 In Bruner, custody was awarded to a violent father after the trial court heard a significant quantity of evidence from several mental health professionals.146 On appeal, the North Dakota Supreme Court found that the statutory presumption against placing custody with a violent parent had not been appropriately recognized.147 The reviewing court criticized the trial court's findings of fact as improperly excusing the father's abusive behavior toward the mother as past, minimal, and not directed toward his son. The North Dakota Supreme Court noted that these findings were based, in part, on a psychologist's evaluation report that failed to raise any

141. See supra notes 55-60 and accompanying text.
142. Schestler, 486 N.W.2d at 512.
144. N.D. CENT. CODE § 14-09-06.2(1)(j) (Supp. 1997).
146. Bruner II, 547 N.W.2d at 554.
147. Bruner I, 534 N.W.2d at 826-27.
concerns about the father's parenting abilities. As a result, the case was remanded for express findings regarding the domestic violence and a redetermination of custody in compliance with the statutory presumption. After a new trial, custody was awarded to the mother and upheld on appeal.

The evaluation report in *Bruner* raised concerns about the ability of mental health professionals to recognize and evaluate domestic violence in custody settings. In particular, it raised questions about whether the psychologist understood and correctly applied North Dakota's statutory presumption against awarding custody to perpetrators of domestic violence.

The new presumption, in effect when *Bruner* was decided, shifted the entire burden of proof (both the burden of production and the burden of persuasion) to the violent parent. This means that, even if the violent parent were to introduce evidence that he was a "good parent" in spite of his domestic violence, he would still retain the burden of persuading the judge by clear and convincing evidence that the child's best interests required that he, rather than the non-violent parent, be named custodian.

Presumptions shifting the entire burden of proof constrain judicial discretion significantly more than presumptions affecting only the burden of production. With greater constraints on the judge's discretion, the inability of mental health professionals to understand and sufficiently incorporate the effects legal presumptions are much more likely to result in unlawful custody recommendations. Legally flawed recommendations are not helpful to judges, who must then independently determine and weigh material facts in light of relevant legal considerations.

The mental health professional's role in applying this more restrictive statutory presumption was directly examined in *Owan v. Owan*. Although the record in *Owan* contained significant evidence of domestic violence perpetrated against the mother by the child's father, the trial court minimized and excused the father's violent conduct. The trial court's single written finding on the issue of domestic violence was based on the testimony and opinion of a social worker. Excerpts from the trial transcript reflect the concern of the mother's lawyer that the social worker's custody recommendation did not incorporate the procedural advantage the legislature intended to accord to non-violent parents through the

148. *Id.* at 828.
149. *Id.* at 829.
150. *Bruner II*, 547 N.W.2d at 552.
151. 541 N.W.2d 719, 721 (N.D. 1996).
152. *Owan*, 541 N.W.2d at 720.
153. The social worker reported to the court that the "allegations of [father's] physical altercations appear to be minor. In most cases, [mother] has acted and [father] has reacted." *Owan*, 541 N.W.2d at 721.
statutory presumption.

Q. Did you analyze that violent behavior in light of the presumption in the Century Code that absent other factors, the non-violent party is given a nod so to speak under the categories that are analyzed? How did you weigh that, if at all?
A. I guess I did not feel that it met the same level of violent behavior that I would, I guess I —
Q. You didn't apply the presumption basically, is that fair?
A. I don't think that I held that what had happened in that case as meeting that standard that the Court is looking for as a determining factor.\textsuperscript{154}

The reviewing court in \textit{Owan} determined that to the extent that the trial court had adopted the findings of the social worker, it had improperly delegated its statutory duty to weigh the evidence and make findings on domestic violence.\textsuperscript{155}

The continued refinement of the legal issues related to the application of the statutory presumption against awarding custody to violent parents by the North Dakota courts has complicated the already problematic relationship between mental health professionals and the courts in child custody proceedings where legal presumptions apply.\textsuperscript{156}

D. Resistance to Substantive Content of Presumption

A different kind of problem arises in custody proceedings when a mental health professional's values conflict with the substantive content of governing legal presumptions. California's experience with its "move-away" presumption provides a concrete example of how this conflict can lead mental health professionals to resist application of the governing law.

As previously discussed, the discretion of trial courts with regard to move-away custody disputes in California was narrowed in \textit{In re Marriage of Burgess} by judicial recognition of a presumption favoring the custodial parent's ability to relocate.\textsuperscript{157} Prior to the

\textsuperscript{154} Id. at 721.
\textsuperscript{155} Id. at 722. It is likely that the social worker did not understand, and thus could not incorporate, the procedural effects of the statutory presumption into his recommendations. While on one hand, the social worker's assistance to the court is limited if he does not incorporate the procedural effects of the presumption into his recommendations, on the other, asking the social worker to do so may be tantamount to asking him to engage in the practice of law.

\textsuperscript{156} Issues of particular interest include whether the presumption can be triggered when both parents are violent, when only property has been damaged, when there has been only one act of physical abuse, or where there has been only emotional abuse. Jenny & Stoner, supra note 131, at 1021-25. The difficult question of what constitutes the clear and convincing evidence necessary to rebut the presumption has also received significant judicial attention. Id. at 1022-24.

\textsuperscript{157} See supra notes 67-75 and accompanying text.
California Supreme Court's 1996 ruling in *Burgess*, the decision whether to allow a custodial parent to move with the children out of the jurisdiction was a matter within the discretion of the trial court. Under pre-*Burgess* law, custody awards were often made "to mother, unless she moves, then to father."

The *Burgess* Court significantly changed the legal framework for move-away cases, declaring that a custodial parent is presumptively entitled to move with the children unless the non-custodial parent can demonstrate that the move would be so detrimental to the child that a change in custody was "essential or expedient for the welfare of the child." However, there are indications that because of their professional training, mental health professionals are predisposed to favor joint custody; therefore, they resist applying California's move-away presumption.

1. **Professional Bias in Favor of Joint Custody**

The substantive content of the *Burgess* move-away presumption preserves continuity in the child's primary caretaking relationship, rather than fostering joint custody. However, this stands in sharp contrast to the professional values of some mental health professionals who favor joint custody and shared parenting. Evidence suggests that many social workers, mediators, and psychologists have a professional bias favoring joint custody.

Professor Martha Fineman details how the therapeutic ideology of social work shapes a joint custody bias. She observes that social work theory views divorce primarily as an emotional crisis for families, rather than as a legal event. According to this view, the spouses' relationship is not terminated at divorce, but instead restructured through therapeutic processes controlled and monitored by mental health professionals into a post-divorce shared parenting model. The legal approach of choosing one parent for sole custody is antithetical to this family systems view. Rather than focusing on the best parent to assume custody, social workers seek to restructure the family with equal parental rights as the primary goal. Fineman thus concludes that social workers have a professional bias in favor of a specific substantive result: shared parenting or joint custody.

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158. *Burgess*, 913 P.2d at 482. See also *supra* notes 67-75 and accompanying text.
159. In recent California cases, appellate courts have begun to scrutinize mental health professionals' custody recommendations to determine if they comport with the *Burgess* move-away presumption.
161. *Id.* at 745.
162. *Id.* at 750.
163. Fineman, *supra* note 2, at 149.
164. *Id.* at 146.
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Analogously, Professor Trina Grillo reports that many mediators “state unabashedly that they attempt to steer their clients toward joint custody, regardless of what the clients want.”\textsuperscript{165} Indeed, she reports that some mediators caution parents that a refusal to agree to joint custody may result in custody being awarded to the other “friendlier” parent.\textsuperscript{166} Available evidence suggests that mediators are in fact influencing outcomes toward more joint custody.\textsuperscript{167} Moreover, recent professional books indicate that many psychologists conducting custody evaluations also have a predisposition towards joint custody.\textsuperscript{168}

2. Bias Creates the Risk of Resistance to Presumptions

The bias of many mental health professionals in favor of joint custody cause a resistance to applying laws aimed at protecting the primary caretaking relationship in relocation cases. Such resistance is apparent in the legislative history surrounding a 1993 California bill that would have created a move-away presumption. The bill was strenuously opposed by groups promoting joint custody, whose comments were intended to demean and pathologize custodial mothers who made post-divorce decisions that did not elevate their ex-husbands’ “frequent and continuing contact” with the children above considerations of their own well being.\textsuperscript{169} In parody of the traditional precedent promoting continuity of primary caretaking relationships, custodial mothers were referred to pejoratively as “primary controllers” instead of “primary caretakers.”\textsuperscript{170} The bill died in committee.\textsuperscript{171}

Two years later, after developing the legal issues through briefs and oral argument, the California Supreme Court in \textit{In re Marriage of Burgess} judicially recognized the move-away presumption.\textsuperscript{172} Under \textit{Burgess}, California courts are obliged to apply the rebuttable legal presumption that a custodial parent is allowed to move and retain custody of the children. Nevertheless, anecdotal reports from both northern and southern California indicate that

\textsuperscript{166} \textit{Id.} at 1594-95; see also, Joan Zorza, “Friendly Parent” Provisions in Custody Determinations, 26 CLEARINGHOUSE REV. 921, 922 (1992).
\textsuperscript{167} Marsha Kline Pruett et al., Divorcing Families with Young Children in the Court’s Family Services Unit: Profiles and Impact of Services, 38 FAM. & CONCILIATION LTS. REV. 478, 487 (2000); Douglass D. Knowlton & Tara Lea Muhlhauser, Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?, 70 N.D. L. REV. 255, 268 (1994).
\textsuperscript{168} STAHL, supra note 27, at 9; GOULD, supra note 32, at 242.
\textsuperscript{169} COMMITTEE REPORT OF 1993 CALIFORNIA SENATE BILL No. 1350, 1993-94 Regular Session, SENATE COMMITTEE ON JUDICIARY at 2. [hereinafter COMMITTEE REPORT].
\textsuperscript{170} Testimony on S.1350 (move-away bill) before the California Senate Judiciary Committee, May 3, 1994 (author testified as an expert witness at these hearings).
\textsuperscript{171} COMMITTEE REPORT, supra note 169, at 1.
\textsuperscript{172} See supra notes 67-75, 85.
FCS personnel continue to recommend move-away restrictions despite the new presumption favoring the ability of custodial parents to relocate without losing custody of their children.\textsuperscript{173}

Custody evaluators also continue to recommend relocation restrictions. For example, in a recent California case, a custody evaluator recommended that the custodial parent not be allowed to change the residence of the children, even within the county, without the written agreement of the other parent or a court order.\textsuperscript{174} The evaluator recommended a comprehensive plan of individual and conjoint therapy for all family members, and a complicated split custody arrangement intended to achieve an eventual fifty-fifty sharing of custody between the parents. Restricting of the mother's residence was recommended to facilitate the evaluator's plan for custody, which he referred to as a "work in progress."\textsuperscript{175} Thus, the psychologist disregarded (if even considered) the legally controlling Burgess presumption, favoring the custodial parent relocating with the children, in favor of his own psychological plan for the case.

3. Compliance with Presumptions Is Subject to Legal Scrutiny

Recent appellate court opinions in California have scrutinized the reports and recommendations of mental health professionals for compliance with California's move-away law. In \textit{Ruisi v. Thieriot}, the trial court refused to allow the custodial mother to move to Rhode Island with her eight-year-old son because it would disrupt the father's established patterns of visitation.\textsuperscript{176} The Court of Appeals noted that the decision was abiding by the law in effect at the time of the decision, but that the law had changed during the pendency of the appeal.\textsuperscript{177}

In explaining the requirements of the new move-away presumption, the reviewing court focused on the recommendation of the court-appointed psychologist. The appellate court suggested that the trial court's construction of the issues was shaped by the psychologist's evaluation/recommendation, which was incorrectly focused under the current law.\textsuperscript{178} The case was remanded with explicit directions about the legal issue to be addressed by the trial court, and thus by the court-appointed expert:

\textit{[W]hen the trial court is faced with a request to modify the...}

\textsuperscript{173} Interviews with Academics, Attorneys, and Custodial Parents.


\textsuperscript{175} \textit{Id.} at 91.


\textsuperscript{177} \textit{Ruisi}, 62 Cal. Rptr. 2d at 768.

\textsuperscript{178} \textit{Id.} at 769.
existing custody arrangement on account of a parent's plan to move away, ... the trial court must treat the plan as a serious one and must decide the custody issues based upon that premise. The question for the trial court is not whether the parent may be permitted to move; the question is what arrangement for custody should be made. 179

The reviewing court thus obliquely reminded the trial court of its responsibility to apply the law, even if the custody evaluator did not.

The court-appointed expert in In re Marriage of Edlund specifically declined to make a recommendation on the move-away issue, declaring that the judge should decide the legal issues involved. 180 The content of his evaluation report was, nevertheless, closely scrutinized on appeal.

The mother in Edlund left her native mid-western home to move to California with her husband. 181 The couple separated shortly after the birth of their daughter and the father moved to another city, where he began a romantic relationship with a high school student. 182 In the dissolution order, the father was awarded visitation with his daughter every other weekend with additional time on holidays. 183 He did not seek a larger share of responsibility for his daughter's care because of his work schedule at a fitness club and, over time, failed to exercise all of his visitation time. 184

The mother became engaged to a man who worked for United Airlines, and when he received a job transfer to Indianapolis, the mother sought a modification of custody to allow her daughter to also move to Indiana. 185 The trial court granted the modification to accommodate the move and the father appealed. 186

In reviewing the case, the Court of Appeals began by noting that the move-away presumption articulated in Burgess placed a burden on the non-custodial father to establish that his 2-year-old daughter would suffer such detriment as a result of the mother's move to Indiana that it would be essential or expedient for the child's welfare that custody be transferred. 187 The court looked to the report of the court-appointed expert for evidence of such detriment.

The court first considered the conclusory assertion in the expert's report that the child would be "significantly negatively

179. Id. at 771 (emphasis in original).
180. Edlund, 78 Cal. Rptr. 2d at 678.
181. Id. at 674.
182. Id.
183. Id.
184. Id. at 673.
185. Edlund, 78 Cal. Rptr. 2d at 674.
186. Id. at 679.
187. Id. at 682.
impacted” by the separation from her father.\textsuperscript{\textcircled{188}} Breaking down this assertion, the court identified two apparent sources of detriment: (1) that the child would wind up “being fathered primarily by a step-father;” and (2) that the father would not be “involved in the primary parenting or typical parent-child activities as she grows older.”\textsuperscript{\textcircled{189}}

The court rejected the first source of detriment observing that fathering by a stepfather would occur upon the mother’s remarriage, regardless of whether a move was authorized.\textsuperscript{\textcircled{190}} As to the second source, the court noted that the father had never played more than a minimal role in his daughter’s day-to-day care, and his established pattern of behavior did not suggest he would take advantage of having more time with her, even were it available.\textsuperscript{\textcircled{191}} The court commented that every child who had any meaningful relationship with the non-custodial parent would likely be “significantly negatively impacted” by a move to a distant location.\textsuperscript{\textcircled{192}} If such evidence of detriment were sufficient to deny a move-away order, no custodial parent would ever be able to relocate. The Court of Appeals thus rejected the evidence of detriment in the expert’s report as being legally insufficient under the \textit{Burgess} presumption.\textsuperscript{\textcircled{193}}

The reviewing court also criticized a statement in the expert’s report reflecting the expert’s professional bias toward joint custody in the face of California’s move-away presumption. In his report, the expert opined “the best possible scenario for Natalie would be for her parents to remain in the Bay area, sort out their lives and allow her to have the benefit of the love and attention of both parents and extended families.”\textsuperscript{\textcircled{194}} The reviewing court admonished, “to the extent Dr. Perlmutter considered this a realistic option he was supposed to evaluate for the court, Dr. Perlmutter was mistaken.”\textsuperscript{\textcircled{195}}

Problems associated with the unwillingness, inability, or resistance of mental health professionals to apply the legally controlling presumptions in child custody proceedings requires re-evaluation of the proper role of social workers, mediators, and psychologists in such proceedings.

\textsuperscript{\textcircled{188}} Id.
\textsuperscript{\textcircled{189}} Id.
\textsuperscript{\textcircled{190}} \textit{Edlund}, 78 Cal. Rptr. 2d at 683.
\textsuperscript{\textcircled{191}} Id.
\textsuperscript{\textcircled{192}} Id.
\textsuperscript{\textcircled{193}} Id.
\textsuperscript{\textcircled{194}} Id. at 683-84.
\textsuperscript{\textcircled{195}} \textit{Edlund}, 78 Cal. Rptr. 2d at 684.
V. SHOULD MENTAL HEALTH PROFESSIONALS MAKE RECOMMENDATIONS ON THE ULTIMATE ISSUE OF CHILD CUSTODY?

The trend to reintroduce principles of decision into best interests determinations through the use of legal presumptions both highlights and exacerbates the difficulties encountered with the involvement of mental health professionals in child custody proceedings. There has been significant disagreement within the mental health community about whether expert opinions should be offered on the ultimate issue of custody under the best interests standard. Even though the Federal Rules of Evidence expressly allow such testimony, some state statutes provide for it, judges often request it, and professional standards of practice leave it available as an option, the general academic consensus is that mental health professionals exceed their scientific expertise when they state an expert opinion on the ultimate legal issue of child custody.

This consensus has, until now, been based on two main contentions. First, there is inadequate scientific knowledge relevant to the legal issues posed in custody disputes to justify claims of

196. MARC. J. ACKERMAN & ANDREW W. KANE, PSYCHOLOGICAL EXPERTS IN DIVORCE ACTIONS 2-3 (3d ed. 1998); see also Melton, supra note 31, at 3; David M. Brodzinsky, On the Use and Misuse of Psychological Testing in Child Custody Evaluations, 24 PROF. PSYCHOL. RES. & PRACT. 213 (1994); Bolocofsky, supra note 26, at 198.

197. FED. R. EVID. 704 states:
(a) except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

198. California, for example, provides by statute that court-connected mediators "may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child." CAL. FAM. CODE § 3183 (a) (West 2000).

199. "Some judges insist that only they will answer the ultimate issue. Other judges expect the expert to provide the court with an answer to the ultimate issue." GOULD, supra note 32, at 28; "Some judges never read the report itself, looking only at the recommendations and the bottom line. Other judges, although they care about the recommendations, wish to understand the evaluator's assessment of the family in order to make their own rulings." STAHL, supra note 27, at 136.

200. APA Guidelines, supra note 33, at 54-58. While Guideline 4 instructs that "[t]he psychologist does not act as a judge, who makes the ultimate decision applying the law to all relevant evidence," Guideline 14 acknowledges that "the profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts" and cautions psychologists that they "are obligated to be aware of the arguments on both sides of this issue and to be able to explain the logic of their position concerning their own practice."

making “expert” custody recommendations. Second, the ultimate issues of custody and visitation involve moral and value judgments that are outside scientific expertise but are properly in the province of the trial judge. The reintroduction of legal presumptions into custody law adds a third basis for this position: mental health professionals do not possess the legal expertise needed to correctly apply the applicable child custody law.

A. Scientific Expertise

Professional literature has raised serious questions about whether mental health professionals possess sufficient scientific expertise to make custody recommendations. One concern about the scientific underpinnings of custody decision-making is the lack of directly relevant empirical research.

1. Lack of Relevant Research

While some research comparing the effects of various custody arrangements on the well being of children after divorce has been conducted, this research necessarily looks at large group differences on unrefined dimensions such as joint versus sole custody. The types of data derived from these large group comparisons provide no scientific support for the detailed custody and visitation recommendations that must be made in individual custody cases. Simply stated, the factors typically considered in choosing between parents are not empirically supported. There is no data, for example, comparing the effects of consistent discipline by one parent to the effects of interpersonal warmth in the other. There is no data on the effects of small variations in parents' personality structures, adjustment patterns, or intellectual capabilities on a child's later adjustment. Indeed, no empirical data exists to


204. Sheila Rush Okpaku, Psychology: Impediment or Aid in Child Custody Cases?, 29 Rutgers L. Rev. 1117, 1143-44 (1976). Indeed, Opaku suggests that in the absence of empirical data establishing that less than perfect consistency by a parent has negative effects on a child and that the benefits of consistency outweigh the emotional trauma of separating a child from its primary caretaking parent, an opinion suggesting an award to the more consistent non-caretaking parent would lack scientific support and would be no better than the opinion of a lay person who has strong views about the importance of “consistency.” Id.
establish how personality disorders relate to parents' ability to care for their children. The context of custody involves many confounding and uncontrolled variables that are difficult, if not impossible, to account for through statistical design or statistical methods.

2. Psychological Testing Concerns

A second area of concern about the science underlying child custody decision-making centers on the use of psychological tests in custody evaluations.

a. The Tests

One criticism is that the test instruments themselves are scientifically inadequate. Standard psychological tests such as the Minnesota Multiphasic Personality Inventory ("MMPI"), the Rorschach, and the Thematic Apperception Test ("TAT") were developed for clinical, rather than forensic use. Professor Bolocofsky cautions that the MMPI "was developed as a gross screening device for severe psychiatric disorders and its intended use was to identify significant psychopathology, not the small differences in relatively mild pathologies more often found in parties to a custody dispute." Yet, the MMPI is one of the traditional measures used most frequently by forensic psychologists in child custody evaluations. The usefulness of current standard psychological tests of intelligence, personality, or psychopathology, without scientific validation for use in child custody contexts, has been plainly questioned.

New measures such as the Bricklin Perceptual Scales (measuring children's perception of each parent) and ASPECT

205. Brodzinsky, supra note 196, at 215. Indeed, Brodzinsky reports a case where the psychologist diagnosed the mother with a histrionic personality disorder at the same time acknowledging that she had been an adequate caregiver. In spite of her past care-giving history, custody was awarded to the father. Id.

206. MELTON, supra note 31, at 484. Melton also points out that ethical barriers to the random assignment of children to comparison groups make it unlikely that such research could ever be conducted at a level specific enough to be applicable in individual custody cases. Id. See also Thomas R. Litwack et al., The Proper Role of Psychology in Child Custody Disputes, 18 J. Fam. L. 269, 277-79 (1979-80).

However, even if significant advances in scientific knowledge are achieved, it is not clear more accurate custody evaluations would result in light of findings that clinicians often do not stay current with empirical research. HOWARD N. GARB, STUDYING THE CLINICIAN: JUDGMENT RESEARCH AND PSYCHOLOGICAL ASSESSMENT 37 (1998).

207. STAHL, supra note 27, at 55.

208. Bolocofsky, supra note 26, at 207.

209. Dennis P. Saccuzzo, Still Crazy After All These Years: California's Persistent Use of the MMPI as Character Evidence in Criminal Cases, 33 U.S.F.L. Rev. 379, 380 (1999).

(Ackerman-Schoendorf Parent Evaluation for Custody Test) were developed specifically for use in custody evaluations.\textsuperscript{211} Even these measures have been criticized, however, for their lack of demonstrated reliability and validity, the unrealistic or untested assumptions they contain, and problems with the sample populations through which they were developed.\textsuperscript{212} Although in apparent agreement that independent validation studies are needed for these new measures, no professional consensus seems to exist about whether the data should be validated against judicial decisions, relitigation rates, measures of child outcomes, or other criteria.\textsuperscript{213} Without such validation, even these newly developed measures cannot be used with confidence.

\textbf{b. Overuse and Misuse of Tests}

Another criticism of psychological testing is that the tests are commonly overused or misused by custody evaluators. The overuse criticism stems from evaluators routinely administering batteries of psychological tests without clearly relating the information gathered to the substantive issues in a case.\textsuperscript{214}

In spite of challenges to the forensic relevance of psychological test results in custody cases, one study found that nearly three-quarters of the professionals surveyed routinely used these tests for custody purposes.\textsuperscript{215} David Brodzinsky has suggested several explanations for this widespread overuse of psychological tests in custody proceedings including: (1) psychologists do not understand legal issues; (2) lawyers and judges do not understand the limitations of psychological evidence and thus pressure psychologists to report test results; (3) psychologists use test administration to differentiate themselves from psychiatrists and social workers; and (4) there are financial incentives to doing more testing.\textsuperscript{216}

The misuse criticism is more straightforward, claiming that the psychological tests in child custody cases are often simply

\begin{footnotes}
\item[211] Melton, supra note 31, at 503.
\item[212] Id. at 504.
\item[213] Brodzinsky, supra note 196, at 218.
\item[214] Id. at 217.
\item[216] Brodzinsky, supra note 196, at 216-17.
\end{footnotes}
administered, scored, and interpreted erroneously.  

**3. Shortcomings of Clinical Expertise**

A third area of concern with regard to the scientific credibility of child custody recommendations involves the clinical expertise of custody investigators, evaluators, and counselors. Psychologists, even those who perform psychological testing, rely heavily on their clinical experience in performing custody evaluations. Research on clinician performance, however, indicates that clinicians are not skillful at making clinical judgments for normal populations. The degree to which judgments agree when two or more clinicians are asked to make clinical judgments based on identical information about the same client is known as "interrater reliability." While the interrater reliability of clinicians has been found to adequately describe psychiatric symptoms, it has been found to vary widely when describing normal personality traits, and to be consistently poor when describing normal defense mechanisms.

"Incremental reliability" refers to the degree to which additional information increases the validity of judgments. For example, the ability to see and hear an interview might be expected to produce more valid results than merely reading a transcript of the interview. Contrary to expectation, however, the incremental validity of case history data for normal subjects either did not change or decreased the validity of personality ratings by clinicians. Because the vast majority of parents engaged in custody disputes are within the range of normal functioning rather than pathological, these findings are of concern.

Another troubling finding is that clinicians are often quite confident of clinical judgments that are in fact inaccurate. Surprisingly, the problem of overconfident and inaccurate clinical performance does not improve with increased clinical experience.

One explanation for this lack of improvement with experience is that clinicians often do not receive feedback on their

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218. STAHL, supra note 27, at 57; MELTON, supra note 31, at 485, 501.
219. GARB, supra note 206, at 19.
220. Id. at 10.
221. Id. at 36. The reliability of outcomes across different assessment instruments, such as the MMPI, Rorschach, Wechsler-Bellevue Intelligence Scale, and vocational histories, has also been shown to be poor. Id. at 13.
222. Id. at 18.
223. Id. at 37.
224. GARB, supra note 206, at 37.
225. Id. at 200. Indeed, Melton suggests that learning to display confidence in the treatment being administered has placebo effects, which may enhance treatment success and thus the success of the clinicians' practice. "The problem . . . is that if this style of presentation is carried into the reporting of forensic evaluations, the legal factfinder may be misled as to the certainty of the conclusions." MELTON, supra note 31, at 12.
In child custody cases, for example, the evaluator often has to choose between two fit parents. It is unlikely that the evaluator will ever be wrong in any ultimate sense because the child is likely to grow up reasonably well in either parent's care. Thus, scientifically unwarranted distinctions between parents in custody actions will rarely be judged as having been wrong based on child outcomes.

Findings from research on clinical performance also raise questions about the use of mental health professionals as investigators and fact-finders. There is research evidence, for example, that clinicians tend to form conclusions prematurely and then selectively attend to evidence that supports that conclusion.

Premature conclusions can result from mental health professionals' personal or theoretical biases. Some, for example, hold personal beliefs that religious values are important in raising well-adjusted children or that financial status is important in determining which parent can better meet their children's needs. Some have doctrinal biases, unsupported by research, in favor of one particular form of custody over another. One well-known commentator acknowledges, for example, that biases against move-aways and in favor of joint custody are not uncommon among custody evaluators.

Research with clinicians also shows that social class, sexual orientation, and sex-role behavior appear to exert important influences on clinical judgments when personality traits are rated.

4. Situational Anomalies Accompanying Family Breakup Prevent Accurate Assessment

Even if all the measurement techniques employed in child custody cases were problem free, Professor David Chambers questions whether the reliable observation of parent-child relationships during divorce is even possible. He points out that:

[t]he period shortly after separation, when most struggles over custody occur, is abnormally stressful. During this period, the behavior of children and adults toward each other may bear

226. GARB, supra note 206, at 201.
229. STAHL, supra note 27, at 9.
230. ACKERMAN & KANE, supra note 196, at 20.
231. STAHL, supra note 27, at 9 (remarking that "[m]any evaluators have a bias that both parents need to maintain an active role in children's lives and that access to both parents should be relatively equal"). See also supra notes 160-95 and accompanying text.
232. GARB, supra note 206, at 33, 37.
little resemblance to the past or the future. . . . Even an expert who recognizes the problem of stress may not be able to determine how the children or adults would behave in its absence.233

B. Value Judgments

The second contention underlying the concerns about mental health professionals making custody recommendations is that determination of the best interests of the child cannot be resolved through application of scientific expertise.

First, it is impossible to predict with any scientific accuracy the comparative outcomes for a child placed in the custody of one parent as opposed to the other. Indeed, one commentator noted that the prediction of what will be in the best interest of the child involves factors "of such complexity that surely most palm readers would be reluctant to make it."234

More importantly, custody determinations invariably come down to value judgments. Robert Mnookin describes the enormity of the task encompassed in child custody decision-making:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he [or she] grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation?235

The kinds of social, moral, financial and legal concerns involved in child custody determinations are simply outside the scientific expertise of mental health professionals.236 These types of concerns are typically entrusted to the judiciary in the expectation that community values will be reflected in their decisions.

C. Legal Considerations

The reintroduction of presumptions into custody law makes the

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235. Mnookin, supra note 16, at 260. For a more recent expression of concerns about the choice of values in custody evaluations, see Gindes, supra note 34, at 43-44.
need for legal expertise yet another basis for arguing that mental health professionals should not make recommendations on the ultimate issue of custody. Custody and visitation have always been legal issues; however, their legal nature was masked under the formless best interests standard, which could encompass almost any expert recommendation. Custody cases under the new presumptions, however, require the application of more specific legal standards to facts developed in a particular case. The application of proven facts to defined legal standards is a basic lawyering skill. Because custody recommendations in cases covered by legal presumptions require this distinctly legal conduct, mental health professionals cannot make ultimate issue recommendations in these cases without some degree of legal training.

Standards of practice for mental health professionals involved in custody proceedings require familiarity with applicable laws in the relevant jurisdictions. More than a passing familiarity with the law is required, however, for the application of legal presumptions to facts in a case. While training opportunities in this area are gradually increasing, such training begs the ultimate question of whether mental health professionals should be charged with responsibility for legal decision-making in child custody cases.

Practical concerns, rather than scientific or legal considerations, appear to be the primary motivating force behind the increasing delegation of judicial responsibility to mental health professionals in custody proceedings. When a bill was introduced into the California legislature that would have prohibited FCS mediators from making custody recommendations, the argument leading to the bill's quick and quiet demise was that California's family court dockets are so overloaded that family court judges could not possibly conduct individualized, fact-finding hearings in all disputed custody or visitation cases. If FCS personnel did not conduct the


The American Bar Association instructs family mediators to insure that participants have a sufficient understanding of statutory and case law by recommending that they obtain legal representation. Standards of Practice for Family Mediators, 17 FAM. L. Q. 455, 458 (1984). These practice standards, however, do not contemplate mediators like those in California who are empowered to make recommendations to the court on the ultimate issue of child custody.

One commentator suggests that standards imposed by professional organizations and associations need to be enforced by licensing bodies if participants are to be effectively protected. He emphasizes the importance of such enforcement mechanisms in cases where the mediation is mandatory and the result is rubber-stamped by the courts. Paul Devine, Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?, 12 ST. LOUIS U. PUB. L. REV. 187, 188 (1993).

238. STAHL, supra note 27, at 153; GOULD, supra note 32, at 14.
240. Frances Harrison et al., California's Family Law Facilitator Program: A New
lengthy meetings with the parties and fact-finding required to support individualized determinations in custody cases, some other (and more expensive) alternatives, such as children's counsel or custody evaluators, would have to be employed for every case. It was simply assumed that family court judges could not hear the cases themselves, especially in light of the large percentage of cases with pro se litigants who do not have attorneys to investigate and develop the facts to present to the court. Indeed, there was a very real fear that without the involvement of psychologists, mediators, and social workers, the family courts would collapse under the load.

VI. WHAT ROLE SHOULD MENTAL HEALTH PROFESSIONALS PLAY IN CHILD CUSTODY PROCEEDINGS?

The reintroduction of legal presumptions into child custody law raises new questions about the appropriate involvement of psychologists, mediators, and social workers in child custody decision-making. Correctly applying the law and protecting parties' due process rights need to be balanced against assisting judges with overwhelming caseloads.

One possibility for accommodating the involvement of psychologists, mediators, and social workers in child custody decision-making, without running afoul of legal standards, would be to exempt cases involving legal presumptions from recommendations by mental health professionals. However, according to statistics collected in a California study by the Statewide Office of Family Court Services, as a result, the majority of custody cases seen in California Family Court Services would become exempt. For example, the statistical reports indicate that over half of all cases mediating child custody and visitation in FCS are subject to the legal presumption that it is not in the best interests of a child to be placed in the sole or joint physical or legal custody of a perpetrator of domestic violence.


241. Recent data suggests that the number of California divorces brought by self-represented litigants is nearing 75%. Harrison, supra 240, at 61.


243. Uniform Statistical Reporting System, Report 6 - Executive Summary: Statistical Profiles From Two Statewide Studies (February 1996) available at http://www.courtinfo.ca.gov/courtadmin/aoc/familycourtservices/usrs/report061/r06sum.htm. Another study looking at couples disputing child custody issues in Portland, Oregon and Minneapolis, Minnesota who were court-ordered to attend Family Court Services mediation or evaluation found even higher percentages of domestic abuse, with 80% of the women and 72% of the men reporting being abused. Lisa Newmark et al., Domestic Violence and Empowerment in Custody and Visitation Cases, 33 FAM. & CONCILIATION CTS. REV. 30, 36 (1995).
Further, the statistics from the FCS study show that a parent's desire to move was an issue in one-third of the cases mediated by FCS personnel across the state, reaching fifty-percent in some courts. These custody cases implicate the California "move-away" presumption, which provides that a custodial parent may relocate with his or her children unless the other parent can show that such a move would be detrimental to the best interests of the child.

Other California presumptions regarding the paternity of children born to married women and joint custody when both parents agree play a role in many cases.

Accordingly, precluding the participation of mental health professionals in custody cases involving legal presumptions would likely cause the return of the majority of California custody cases to judges for fact-finding and decision. Because of practical considerations this may not be a viable option.

A second possibility for avoiding legal problems that arise when mental health professionals are involved in custody proceedings is to have the professionals serve solely as fact-finders, leaving the actual custody decision-making to judges. This accords with the original, more limited rationale for using child custody investigators in California: to "produce for the judges evidence which might not otherwise be available" such as visits to a child's home. With the

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Presumption against persons perpetrating domestic violence.
(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

CAL. FAM. CODE § 3044 (West 2000).


245. Burgess, 913 P.2d at 473.

246. CAL. FAM. CODE § 7540 provides: "[e]xcept as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. FAM. CODE § 7540 (West 2000).

247. CAL. FAM. CODE § 3080 provides:
There is a presumption affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to Section 3011, where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.


Contrary to frequent but erroneous claims otherwise, CAL. FAM. CODE § 3040 explicitly states that no general presumption exists favoring joint custody in the absence of parental agreement. Section 3040 provides in part:
(b) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

CAL. FAM. CODE § 3040 (West 2000).

growing burden on family court dockets over the years, however, the role of investigators expanded to include broader fact-finding responsibilities. This expanded role encompassed gathering information available to judges through legal channels, such as sworn affidavits and live witness testimony.

Even in the absence of recommendations to the court, this expanded fact-finding role raises legal concerns. Fact-finding by mental health professionals in custody proceedings unavoidably raises due process concerns. Unlike court proceedings, which are generally conducted on the record, fact-finding by mental health professionals is usually conducted behind closed doors and off-the-record. Custody evaluations, for example, are sometimes considered so confidential that even the persons being evaluated are not allowed to see the reports.240

Although there may be legitimate psychological reasons for such secrecy, the use of “secret” evidence against a party to a legal proceeding offends traditional notions of due process.250 Due process requires “fundamental fairness,”251 including the opportunity to be heard on important issues “at a meaningful time and in a meaningful manner.”252 In custody evaluations, parties may not be afforded sufficient notice to reasonably confront allegations against them or to introduce evidence on their own behalf when allegations regarding their suitability as parents are made in confidential reports to which they do not have access.

Even where evaluation reports are made available to the parties, significant legal problems can occur in the fact-finding process. One technique common among custody evaluators, for example, is to solicit, consider, and report hearsay statements, which are not made under oath, from people referred to in the professional literature as “collateral sources.”253

*In re Marriage of Barnes* demonstrates the due process problems inherent in this technique.254 The custody evaluator in *Barnes* revealed late in his evaluation process that he was actively collecting hearsay testimony from witnesses whose names had been provided by the father.255 The evaluator disregarded objections

249. In some jurisdictions, evaluation reports are considered property of the court and are not given either to attorneys or their clients. At best, attorneys may be allowed to read the evaluation but may not have a physical copy of the evaluation to use in preparing their client's case. STAHL, supra note 27, at 137.

250. Id. at 139-40. The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amends. V; U.S. CONST. amend. XIV, § 1.


253. GouLD, supra note 32, at 19; STAHL, supra note 27, at 53-54.


255. Memorandum of Points and Authorities in Support of First Motion in Limine to
to this procedure by the mother’s attorney and rejected requests that testimony be taken by way of sworn affidavits or conference calls with the parties or counsel present.\textsuperscript{256} As a result, neither the mother nor her attorney was informed of the exact nature of the allegations of the hearsay witnesses.

The mother’s attorney advised her, as a matter of self-defense, to submit a list of witnesses whom she wanted the evaluator to contact.\textsuperscript{257} The evaluator contacted some, but not all of mother’s witnesses. One of mother’s witnesses who was contacted called the mother afterwards, upset by the nature, content, and manner of the evaluator’s questions; according to this witness, the evaluator referred to mother’s move to a different part of town as “skulking out of town,” and specifically asked if the mother had ever made “public” statements to the effect that she was angry with the father.\textsuperscript{258} This witness reported feeling that the evaluator had already drawn his conclusions about mother and was merely seeking corroborating information from the witness.\textsuperscript{259}

In his report, the evaluator portrayed the mother as an angry woman.\textsuperscript{260} In support of this portrayal, he quoted several hearsay statements allegedly made by collateral source witnesses in his report. However, none of the quoted statements regarding what the mother had reportedly said or done was directly attributed to the person who made the statements. It was later learned that some of the collateral source witnesses whose testimony was included in the evaluator’s report were not named at all.\textsuperscript{261}

The evaluator directed the attorneys to relay to their clients only the final recommendations, and not to share the contents of the report with them.\textsuperscript{262} However, the mother’s attorney, believing this would violate his ethical duty to his client,\textsuperscript{263} showed the report to the mother. When the mother reviewed the report, she did not recognize the statements that had been attributed to her and became concerned when the evaluator refused her the opportunity to tell him that she had not made them. In an attempt to set the record straight, the mother’s counsel deposed four of the father’s hearsay witnesses.\textsuperscript{264} These witnesses indicated that they had expected complete confidentiality and were described by the mother’s counsel as “outraged at being asked to account for their

\textsuperscript{255} Memorandum, \textit{supra} note 255, at 8.
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.} at 8.
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} Memorandum, \textit{supra} note 255, at 8.
\textsuperscript{261} \textit{Id.} at 10.
\textsuperscript{262} \textit{Id.} at 7.
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Id.} at 12.
statements under oath." During their depositions, the witnesses could not recall with any degree of specificity what the evaluator had asked them or what they had told him. In fact, none of their deposition statements could be matched with any specific statements quoted by the evaluator in his report. One witness even confessed, in response to questioning by the mother's attorney, that he had no personal knowledge of the events and statements he had related to the evaluator, allegations that the mother claimed were patently untrue. Despite the irregularities contained in this evaluation, the court denied the mother's motion in limine to strike the evaluation report.

Custody recommendations made by FCS personnel based on mandatory "mediation" sessions also raise due process concerns. In counties where FCS counselors make custody recommendations, the mediation sessions in which they gather information from the parties and draw their conclusions regarding custody are not confidential proceedings. They are, however, conducted behind closed doors and off-the-record. This system creates opportunities for problems when mediators and parties differ about what happened in the sessions.

For example, in one recent case, an FCS counselor submitted a report to the court recommending that custody be awarded to a father, who was alleged to have perpetrated violence against the mother during the marriage. The report cited certain statements made by the mother in the "mediation" session as part of the basis for the recommendation. Upon reading the report, the mother claimed she had not made those statements. With no record of the proceedings, the mother's challenge to the content and conduct of these proceedings was reduced to the word of an apparently disgruntled parent with a personal interest in the outcome, against a court-appointed, presumptively neutral professional.

In another case, an FCS counselor reportedly began the mediation session in a move-away case by clearly stating that he

265. Memorandum, supra note 255, at 13. The evaluator admitted that he had assured the hearsay witnesses that their statements would not be attributed to them. Id. at 23. His assurances were made a reality by his failure to keep notes of his interviews sufficient to identify the statements that a particular witness had made. This failure appeared to be particularly significant given that the inherent credibility of witnesses ranged from the daughter's piano teacher (who talked about her son's "astral travel" experience in which his spirit traveled out of his body) to the daughter's guidance counselor at school. Id. at 24, 34.

266. Id. at 13.

267. Id. at 14.

268. Id. at 15.


Most unrepresented parents would have been quite unable to discover the types of irregularities contained in this evaluation, let alone raise the issue to the court.

270. Interview with Kate Yavenditti, the mother's attorney.
favored joint custody. He is reported to have said that he believed that parents with children should not get divorced and, if they did, they should live close to one another and share the parenting responsibilities as much as possible.\textsuperscript{271} Not surprisingly, he recommended that the custodial mother not be allowed to relocate with her child.\textsuperscript{272} However, these claimed statements, along with others made by the mother in this case, are impossible to verify because the sessions were held in private and not on the record.\textsuperscript{273}

In the same case, the mother reported that issues had been raised in the mediation session that were not included in the mediator's report and recommendation to the court. These issues concerned a provision in the original custody order requiring the father to have a separate bed for his young daughter when she spent overnights in his care.\textsuperscript{274} The mother claimed that this provision was explicitly included in the original order because of concerns about inappropriate behavior between the father and daughter. According to mother, she told the mediator about this provision and expressed her dismay and anxiety that father was still sleeping in the same bed with the daughter four years later. She reported that the mediator strongly confronted the father on this issue and clearly emphasized that he was to arrange for separate sleeping accommodations for daughter immediately. However, there was no mention of this issue in the mediator's recommendation to the court.\textsuperscript{275} Although mother's claim about the provisions of the original order can be confirmed, there is no way for her to prove what happened in the closed door, off-the-record mediation session.

The mediator in this case apparently did not consider the sleeping arrangement issue important enough to include in his custody recommendation to the court. Might the judge have considered the issue to be more significant? To the extent that the mediator did not raise this issue in his report and this pro se mother was not informed enough or assertive enough to raise the issue independently, the judge had no way of knowing of the issue.

The notion that we can separate fact-finding from the decision-making functions in child custody proceedings is illusory. While those in the growing field of forensic psychology view their specialty as part psychology and part law, many mental health professionals feel that their task is a psychological one and that

\begin{itemize}
\item \textsuperscript{271} Interview with the mother.
\item \textsuperscript{272} Recommendation on file with author.
\item \textsuperscript{273} For an example of mediator misconduct that served to invalidate the agreement reached in court-ordered mediation see Vitakis-Valchine v. Valchine, No. 4D00-2013 (Fla. Dist. Ct. App. August 22, 2001).
\item \textsuperscript{274} Order on file with author.
\item \textsuperscript{275} Interview with the mother, supra note 271.
\end{itemize}
judges are responsible for application of the controlling law.276 Such a clean division of responsibilities is, of course, impossible. Courts cannot make fair and accurate determinations based on facts collected from collateral sources without proper attention to ensuring the reliability of the facts gathered. Furthermore, courts cannot make independent decisions where others take off-the-record testimony and weigh the credibility of parties and witnesses before reporting to the court. Even where judges consciously try to remain independent of mental health professionals' recommendations, they are necessarily exercising their judgment on the basis of issues selected and facts developed by those mental health professionals. Confidence in the ability of the courts to retain their independent decision-making role and to keep watch over the legal aspects of custody recommendations may be misplaced.

One approach that might assuage this concern is to retain mental health professionals' current level of involvement in child custody decision-making, but address the legal concerns directly. This would require in-depth legal training for mental health professionals who do fact-find and make custody recommendations. While it might be possible for law schools to develop special one-year programs for mental health professionals serving the court system, more than a few courses summarizing relevant laws would be needed. Advisory councils consisting of members of the judiciary and the mental health professions who are familiar with child custody practice should develop the content of such programs. Special exams would have to be developed to certify the legal knowledge of the participating mental health professionals who could then serve quasi-legal functions in the child custody proceedings. However, while this might ensure that such "hybrid professionals" had the requisite legal knowledge to conduct reliable fact-finding and correctly apply the facts and law, it leaves unresolved questions about conflicting professional ethics in situations involving such dual roles.277

Procedural safeguards also have to be consciously instituted. Fact-finding and decision-making procedures must be structured to provide accountability for due process purposes. For example, FCS sessions from which recommendations may emerge could be recorded. Additionally, custody evaluators could be required to have sworn affidavits from all collateral sources whose testimony is used in their reports. Other procedural protections would need to be put into place to address other areas of concern.

A very different option for resolving the legal concerns about the involvement of psychologists, mediators, and social workers in the

277. Melton, supra note 31, at 486.
custody decision-making process is to return to a legal standard for custody determinations. A true legal standard could be applied without employing the wide-ranging, unguided, psychological, predictive approach under the current best interests approach. A genuine legal standard, to which facts could be directly applied, would obviate the need for much of the current involvement of psychologists, mediators, and social workers. The American Law Institute (ALI) in their new “Principles of Family Dissolution” has recommended such a presumptive rule of decision for child custody cases.278

The ALI Principles assume that parental agreement on custody issues is beneficial to children and clear preference is given to such agreements.279 In cases where parents cannot agree, the main rule for allocating physical custody is to approximate the share of care-taking each parent performed for the child before the parents separated.280 This continues the overall emphasis on parental agreement pursuant to the belief that “when parents do not agree, past divisions of responsibility may be the most reliable proxy for the shares of responsibility they would agree upon if they were focused on their child.”281 With regard to legal custody, joint allocation of decision-making responsibility is presumed to be in the child’s best interest so long as each parent has been reasonably involved in parenting functions.282

This approximation approach to allocating custodial responsibility has the advantage of generating more predictable results than the current best interests approach. Greater predictability, in turn, is believed to reduce both litigation and strategic behavior by parties.283 The approximation approach also avoids having to make predictions about the future and thus reduces the expense and uncertainty associated with expert witnesses and psychological evaluations.284 The ALI Principles explicitly recommend that mediators not make recommendations to the court.285

CONCLUSION

Family courts are overwhelmed with cases and with pro se
The involvement of mental health professionals to assist the courts is creating legal problems. Either strengthening the legal aspects of mental health professionals' involvement or moving to a rule of decision that significantly reduces the need for their involvement represents a distinct change in direction for the family court system. The response to the ALI Principles will constitute an important opportunity to initiate discussion and dialogue in the legal and professional communities on this issue.

286. Harrison, supra note 240, at 61, 70.