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COMMENTARY

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Have Custody Evaluators Lost Their Significance?

Any family law practitioner knows the new custody statute requires the court to consider 16 factors in determining custody. But what does this mean? Should testimony be strictly limited to the 16 factors? Should there be any input by an evaluator on the 16 factors? What is the role of any other relevant factor? Nearly two years since the statute's introduction, these questions still remain unanswered. Nearly two years later, the role of the evaluator has become less significant.

Prior to the new statute, attorneys put on testimony that they believed showed which parent acted in the best interest of the child. Sometimes the testimony was very detailed and gave examples of numerous incidents involving the parents in high-conflict situations. Sometimes the testimony was less detailed and focused on convincing the court of which parent was the primary caretaker of the child before the litigation began. This theory supported the position that if a parent was the primary caretaker, he or she could easily identify all of the child's needs and would be the better parent going forward. Finally, other cases involved no testimony and merely involved a custody evaluator who was selected by the parties or the court to determine custody. Surprisingly, many family law attorneys settled their cases based on this evidence alone.

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Change was certainly needed. There was too much uncertainty in determining custody. Decisions were often based on which judge was assigned to a case or how an attorney presented the case in court. There seemed to be no logic as to how custody cases were being decided. Attorneys and the courts were looking for guidance to resolve the custody disputes. Credibility alone was not enough to decide the best interest of the child. Parties to a custody action were often faced with many days of litigation that didn't support a favorable result.

On January 22, 2011, 23 Pa.C.S. §5328 was made effective and states in part:

"In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following [16 factors]."

Family law practitioners were ecstatic now that they had some guidance on the definition of "best interest of the child." Now attorneys knew they had to present testimony that addressed each factor. The factors address issues such as which parent is more likely to encourage a relationship with the other parent; the parental duties performed by each party; the well-reasoned preference of the child; and which party was more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child. But there was still one generic factor that didn't completely define the best interest of the child. The 16th factor's role was undefined and merely states "any other relevant factor." The 16th factor was still open to discussion and conflict.

Under the new law, courts are now required to write an opinion that addresses each and every factor in their decisions. Logically, family law attorneys would have their clients and any other witnesses testify as to the 16 factors. In preparing clients for trial, a good approach would be to actually ask each of the factors to clients in order for them to respond to each factor through their testimony. Each factor can then be broken down into smaller components for clients to provide examples in support of their testimony, including recent incidents or events, text messages, emails or other specific examples. Not only does this type of presentation provide a great framework for

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the court, but it is easy to follow and helps the attorney develop his or her theory of the case.

The practitioner may at times consider deviating from the 16 factors to develop other areas that may not fit within the 16 factors. Is this type of testimony objectionable? Is the attorney only permitted to address the 16 factors and if there is any deviation should this testimony be objected to and sustained by the judge? I think most family law attorneys would agree there may be instances in which testimony is important and could fall within the final factor of "any other relevant factor." But how much should this final factor play in the role of the deciding what is in the child's best interest?

More importantly, what is the role of the evaluator as it relates to the 16 factors? If you examine the 16 factors, none states the psychological component of the child shall be considered. Arguably, the 15th factor mentions "the mental and physical condition of a party or a member of a party's household." Maybe the role of the evaluator is only to determine the mental condition of a party as outlined in factor number 16. If the mental condition of a parent is not at issue, it would seem there would be no need for the evaluator to weigh in on the case. Would an evaluation fall under any other relevant factor? Interestingly, this argument would greatly expand the scope of "any other relevant factor."

If the parties decide to hire an evaluator, the role of the evaluator should be limited. The custody statute clearly says "the court shall determine the best interest of the child by considering all relevant factors." Since the court is the fact finder, it is arguable whether the evaluator should even address the 16 factors. The argument is supported under the statute because the evaluator is not the fact finder—the court is the final decision maker. Some proponents of evaluations may argue the psychologist may address the 16 factors with the caveat that the evaluation only relates to the psychological component of the child's need.

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Family law practitioners should know the American Psychological Association has developed guidelines for conducting evaluations in family law proceedings. Although the guidelines are to be aspired to and are not mandatory, they are still intended to encourage and develop a high level of practice for the psychologists completing evaluations. The professionals are divided on whether psychologists should make any recommendations for custody because they are not the fact finder. But if the evaluator makes any recommendations, they are to be limited to the psychological best interest of the child. The evaluator's role is solely limited to identifying the psychological needs of the child and which parent is best suited to meet those needs. Arguably, the psychological needs of a child are not even a factor for the court to consider. To now argue the psychological best interest of the child falls within the 16th factor makes the recommendation of an evaluator even less significant.

Courts like evaluations because they provide information that addresses psychological testing, collateral testimony and personal observations. Most of this information cannot be gathered during a trial. Judges certainly are not observing the parties exercising their parenting roles outside of the courtroom. The court also doesn't have the time to hear testimony from multiple collaterals. But the convenience of a report may have usurped the power of the court. If psychologists are truly limited to the psychological best interest of the child, all of the testing, observations and interviews of collaterals may be obsolete. If a court must consider all 16 factors and the court merely relies on a report focused only on the "psychological component," this should be grounds for an appeal. The significance of "any other relevant factor" lessens if only an evaluation is considered. Under no circumstances would it have been contemplated by the legislature this type of result would occur from a change in the statute.

Family law practitioners need to zealously represent their clients in custody cases and be willing to challenge the court's propensity to accept the evaluator's report as the final word. It is the attorney's job to make sure all 16 factors are considered in the final custody resolution. It is the attorney's job to present testimony on all 16 factors. It is the attorney's job to limit the role of the evaluation under the new statute. As family law practitioners, it is important for us to inform our clients of the role of the evaluator and the court and to understand the differences. More importantly, custody evaluations may have lost their significance under the new statute. •

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