Bitter Battles: The Use of Psychological Evaluations in Child Custody Disputes in West Virginia

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I. INTRODUCTION

"The most critical and bitterly contested issues in many divorces are those concerning child custody and parental visitation."1 Nationally,

1. Robert D. Lyman & Michael C. Roberts, Mental Health Testimony in Child Cus-
the number of children involved in these disputes is astounding. Approximately 2.5 million people divorce each year in the United States.² Many divorcees are parents. Consequently, one million American children face the trauma of their parents’ divorce each year.³ As many as ninety percent of custody disputes are resolved outside the courtroom;⁴ therefore, approximately ten percent of children whose parents divorce become embroiled in custody litigation. Consequently, approximately, 100,000 children in America are the subjects of custody disputes each year.

West Virginia’s divorce and custody dispute statistics are equally grim. In 1992, approximately 1.8 million people resided in West Virginia.⁵ Within that population, 9,796 divorces were granted.⁶ Of those divorces, 5,061 involved couples with children under the age of eighteen.⁷ As a result, the total number of “children of divorce” in West Virginia annually approximates 8,300. It is likely that ten percent, or over 800 of these children will become the subjects of custody disputes.⁸

A number of children embroiled in custody disputes are subjected to psychological evaluations performed pursuant to the custody litigation by mental health professionals. The child custody evaluation exists

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⁶ Id. at 15.
⁷ See id. at 134.
⁸ See supra note 4 (ninety percent of child custody disputes are resolved outside the courtroom).
at the nexus between law and psychology. That nexus can be both fascinating and frustrating for lawyers and mental health professionals alike. The lawyer may not understand the seemingly mystic realm of psychological thought while the mental health professional can become lost in the complex and confusing maze of the law.

Consequently, the purpose of this Note is to examine child custody evaluations and thereby furnish practical information to legal decision-makers, mental health professionals, and attorneys involved in child custody litigation. Specifically, this Note provides legal decision-makers with information concerning many of the benefits, costs, procedures, and scope of custody evaluations. Furthermore, this Note supplies mental health professionals with information which will make their reports acceptable and usable by courts adjudicating child custody disputes. Finally, this Note should serve as a guide for attorneys whose clients are involved in custody evaluations and provide a method for supporting or attacking the results of such evaluations.

The term “custody evaluator” is used generically, throughout this Note, to refer to psychologists, psychiatrists, counselors, and social workers. The scope of this Note is limited to evaluations performed where both parents are seeking custody. However, the information provided within yields some insight into psychological evaluations used pursuant to adoptions, visitation conflicts, custody disputes where persons other than parents are seeking custody, and foster care decisions.

II. EVALUATING THE CUSTODY EVALUATION

Psychological and legal literature have both praised and criticized custody evaluations. However, the weight of literary authority tends to condemn such evaluations.9 The following criticisms are representative.

(1) Custody evaluations are an invasion of the family’s right to privacy.10


(2) Evaluations are based on limited contact and information.\textsuperscript{11}

(3) Evaluations often extend the length of the custody dispute.\textsuperscript{12}

(4) Evaluations are often confused with therapy. There is a striking contrast between the goals of therapy and an evaluation. In an evaluation, the role of the mental health professional is to produce information from which the court can decide which parent gets custody. Conversely, the goal of therapy is to bring understanding and relief to the child. Another vital difference is the absence of any semblance of confidentially in an evaluation whereas therapy is generally considered private.\textsuperscript{13}

(5) Evaluations are often costly.\textsuperscript{14}

(6) Evaluations may be used as a weapon against an opposing parent to the detriment of the child involved.\textsuperscript{15}

(7) Mental health professionals may be nonobjective or biased.\textsuperscript{16}

(8) There is no clinical data concerning the effects of various custody arrangements on children and families.\textsuperscript{17} Therefore, mental health pro-

\textsuperscript{11} AM. PSYCHIATRIC ASS’N, CHILD CUSTODY CONSULTATION: A REPORT OF THE TASK FORCE ON CLINICAL ASSESSMENT IN CHILD CUSTODY 18 (December 1988) [hereinafter PSIHYATRY TASK FORCE]; Alan M. Levy, Psychological Responses to Threatened Custody Loss, 14 J. PSYCHIATRY & L. 435, 440 (1986).

\textsuperscript{12} Custody Determinations, supra note 9, at 171.

\textsuperscript{13} Solnit, supra note 10, at 458.


\textsuperscript{15} Solnit, supra note 10, at 458.

\textsuperscript{16} Thomas R. Litwack et al., The Proper Role of Psychology in Child Custody Disputes, 18 J. FAM. L. 269, 272-73 (1979-80) (citing J. Ziskin, Coping with Psychiatric and Psychological Testimony (1975)). See also Custody Determinations, supra note 9, at 160 (when both parents are fit, evaluators behave like judges and base their recommendations on personal biases and life style preferences); Deborah Karras & Kenneth K. Berry, Custody Evaluations: A Critical Review, 16 PROF. PSYCHOL. RES. & PRACT. 76, 77-78 (1985) (discussing the effects of gender and profession on evaluator bias); Otto, supra note 9, at 268 (discussing the elements of intentional and unintentional evaluator bias); Jay Ziskin & David Faust, Psychiatric and Psychological Evidence in Child Custody Cases, 25 TRIAL 44, 45-46 (1989) (the evaluators social, political, or personal values may influence or alter the data produced, recalled, or recorded).

\textsuperscript{17} GARY B. MELTON ET. AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 330 (1987). See also Ziskin & Faust, supra note 16, at 435 ("[T]he understanding of human
professionals have limited information upon which to base their recommendations.

(9) Much of the information mental health professionals receive is tainted. Sources of information are often biased, whether consciously or not, in favor of a particular outcome. Even children are capable of purposely misrepresenting data to accomplish their own particular ends. Furthermore, a parent generally presents him or herself in the best possible light while casting psychological fault on the other parent.

(10) Mental health professionals cannot predict the long range efficacy of parenting skills and the effect of those skills on the children involved.

(11) Judges may have little regard for the evaluator’s findings.

(12) Evaluators are not subject to quality assurance review except perhaps the “ambiguous overview of state licensing departments.”

devlopment and behavior remains theoretical. There are few if any scientifically validated principles or theories ... which can even be considered to be generally accepted within the professions.”)


21. Beaber, supra note 19, at 312. See also Levy, supra note 11, at 440 (“parents deeply affected by the emotional conflicts of custody loss often ... make extravagant and dramatic allegations about their spouses”).

22. Jessica Pearson & Paul Munson, The Child’s Best Interest Principle: Theory and Practice, 22 CONCILIATION CTS. REV. 1, 3 (1984). See also Beaber, supra note 19, at 311 (“It is implicit in all child custody evaluations that the psychological or psychiatric examiner draw conclusions not only about the current mental state and current environment of the respective disputing parents, but also that the expert draw conclusions and inferences with regard to the effects of that environment over the longitudinal course of the child’s life. In sum, the expert is asked to engage in an extremely complex form of psychological futurism.”).


24. Werner, supra note 14, at 1 (“If the lack of quality assurance systems allows psychologists and other professionals to essentially conduct evaluations with only limited respon-
(13) Both parents and children are being observed at a time of unusually high stress, therefore, their behavior may be atypical. The results of evaluations based on atypical behavior are potentially unreliable.25

(14) Because young children are easily influenced and may seek to please adults, children may not respond truthfully or may say what they believe the evaluator wants to hear.26

(15) Judges may use the opinions of mental health professionals to avoid their legal duty to make hard decisions.27

Despite these potential and serious flaws, some commentators do promote custody evaluations and many mental health professionals actively perform them. In fact, some mental health professionals believe that child custody evaluations are the area in which their expertise is best utilized by the courts.28

One frequently cited benefit of custody evaluations is the ability of legal decision-makers to avoid the use of in camera interviews.29 An in camera interview is a private meeting between the judge and the child, usually conducted in the judge’s chambers.30 Unfortunately, judges may not be trained in interviewing children and a judge’s chamber is a highly artificial setting which can be threatening to the

25. Melton, supra note 17, at 337; Beaber, supra note 19, at 314; Lyman & Roberts, supra note 1, at 19-21. See also Ziskin & Faust, supra note 16, at 45 (“One problem termed ‘situation effects,’ refers to the fact that the behavior of a patient during an interview or his or her performance on psychological tests are often determined in part by current circumstances in the patient’s life. Such events may produce reactions that might not be present under different circumstances. Situational or transient effects may operate during the breakup of a marriage, particularly when children are involved.”).


Therefore, custody evaluators may glean more information from a child than a judge who conducts an in camera interview. Additionally, evaluators will probably spend more time with a child than will a judge.

In addition to the avoidance of in camera interviews, other benefits of custody evaluations include:

1. mental health professionals are generally trained in talking with, and gathering information from, children and families in crisis;  

2. mental health professionals are generally knowledgeable in areas such as child development, psychological functioning, interpersonal relationships and interactions, and the current and possible future effect of certain situations and conditions on the child;  

3. the mental health professional will be able to discern feelings, attitudes, personality traits, and family interaction patterns not readily apparent to the court;  

4. the mental health professional may help the child share his or her emotional distress and grief over the myriad of losses and changes in the child’s life.

When asked for their opinion of custody evaluations, West Virginia’s family law masters gave responses as diverse as the pro and con arguments listed above. A slight majority of respondents appeared to favor custody evaluations. Responses in favor of evaluations included: “a tool to use if the facts warrant,” “somewhat helpful,” “invaluable . . . if the psychologist is competent,” and “helpful mainly in cases involving sexual and physical abuse.” Conversely, the respons-

32. MELTON, supra note 17, at 331.  
33. CUSTODY DETERMINATIONS, supra note 9, at 161.  
34. Litwack, supra note 16, at 283.  
35. PSYCHIATRY TASK FORCE, supra note 11, at 2.  
36. WEST VIRGINIA FAMILY LAW MASTER SURVEY (November 1994) [hereinafter SURVEY]. The West Virginia Legislature has created a system of family law masters who hear family law issues, including custody disputes. W. VA. CODE § 48A-4-6 (Supp. 1994). Consequently, family law masters are the first legal decision-makers who hear evaluation-generated evidence. Because of their direct interaction with child custody disputes, the state’s twenty-six family law masters were surveyed to determine their experience with, and opinions on,
es disfavoring evaluations included: “overrated,” and “an unnecessary waste of time and money unless there are allegations of abuse.”

The Supreme Court of Appeals of West Virginia has twice commented on the use of psychological testimony where both parents were seeking custody. The court’s dicta in David M. v. Margaret M. and J.B. v. A.B. soundly criticized the use of custody evaluations. Surprisingly, however, none of the parties to the custody disputes in either case introduced evidence from a custody evaluation.

J.B. was the first case to include a discussion concerning custody evaluations. The court stated that the “behavioral sciences can contribute very little to the resolution of difficult custody problems, despite the inclination of some courts to rely on expert testimony in this area.” The court based this opinion upon the fact that there was virtually no empirical evidence to suggest the success of any particular custody arrangement. The court concluded that without evidence specifying how parents’ behavior affects their children, the evaluator has no scientific basis for an opinion on any issue in difficult cases.

In David M., decided eleven years after J.B., the court again attacked the efficacy of utilizing mental health professionals in custody disputes. The court stated that where both parties were considered “good parents,” the use of expert testimony resulted only in “gibberish.” Moreover, the court soundly condemned not only custody evaluations but the individual mental health professionals who perform them.

key custody evaluation issues. Fourteen law masters responded to the survey. The responding law masters’ time in office ranged from just four months to over eight years. Five of the respondents had less than one year in office. The average time in office was thirty months.

37. SURVEY, supra note 36.
39. J.B., 242 S.E.2d at 255.
40. Id. (citing Okpaku, Psychology: Impediment or Aid in Child Custody Cases?, 29 RUTGERS L. REV. 1117, 1140 (1976)).
41. Id. at 255.
42. David M., 385 S.E.2d at 918-19.
43. Id. at 919.
In order to assign custody, the court must explore the dark recesses of psychological theory to determine which parent will, in the long run, do a better job.

However, this undertaking inevitably leads to the hiring of expert witnesses — psychologists, psychiatrists, social workers and sociologists. These experts are paid by the parties to demonstrate that one or the other (coincidentally, always the client) is the superior parent in light of his or her personality, experience and aptitude for parenting. Consequently, the court opined that evaluators who combine integrity and competence are seldom found in courtrooms.

The court concluded that custody evaluations undermine the mental health of children and the emotional stability of parents. Consequently, "experts can create emotional imbalances in the very children they are trying to 'protect.'"

Despite this harsh criticism, the court has utilized evaluation-generated evidence in at least twelve cases where both parents were seeking custody.

III. CHOOSING THE EXPERT

Choosing a particular mental health professional to perform the evaluation is a critical first step in the custody evaluation process. Although the selection of an evaluator may be limited by issues such as availability, state laws, or the parents' preferences, the evaluator

44. Id. at 918-19 (citations omitted).
45. Id. at 919.
46. Id. citing S. GOLDSTEIN & A. SOLNIT, DIVORCE AND YOUR CHILD 64 (1984).
48. Lyman, supra note 1, at 33.
must be trained and experienced in conducting custody evaluations. Moreover, the evaluator should guard against partiality or bias. Finally, the parties should consider the use of multiple evaluators.

A. Training and Experience

Perhaps the most important factor to consider when choosing an evaluator is the level of the evaluator’s training and education. “Particular competencies and knowledge are required for child custody evaluations to provide adequate and appropriate psychological services to the court.” The evaluator who interviews the child should be trained in all areas of child development and child therapy in addition to family therapy training.

 Competence in performing psychological assessments of children, adults, and families is necessary but not sufficient. Education, training, experience, and/or supervision in the areas of child and family development, child and


[T]here are a variety of criteria that can be used to increase the likelihood that the clinician chosen will be competent and will abide by the profession’s standards of testing. First, the psychologist should be certified or licensed in his or her state. At present, all fifty states have statutory certification or licensure. Additionally, the psychologist should have a Ph.D. or Psy. D. degree in clinical psychology and a clinical psychology internship from programs approved by the American Psychological Association, which annually publishes its accreditation findings. In using this list, one must distinguish not just the university but also the specific program from which a degree was obtained, as many universities have more than one department granting graduate degrees in mental health professions. To further identify expertise in clinical assessment, a consideration could be given to membership in The Clinical Psychology or Clinical Neuropsychology divisions of the American Psychological Association or such learned societies as the Society for Personality Assessment and the International Neuropsychology Society. Finally, the ultimate criteria of expertise in clinical psychology is diplomat status from the American Board of Professional Psychology, a specialty board comparable to medical specialty boards which, unlike state regulatory agencies, administers a competency-based examination requiring advanced skill.

Id.

family psychopathology, and the impact of divorce on children help to prepare the psychologist to participate competently in child custody evaluations. The psychologist also strives to become familiar with applicable legal standards and procedures, including laws governing divorce and custody adjudication in his or her state or jurisdiction.\textsuperscript{51}

The evaluator must also be familiar with the real and threatened psychodynamics of parental custody loss.\textsuperscript{52} Additionally, evaluators working with abused children should have specific experience and training in the dynamics of child abuse.\textsuperscript{53} Finally, evaluators should be familiar with their particular profession’s code of ethics.\textsuperscript{54}

West Virginia’s family law masters report that they have heard custody evaluation testimony from psychologists, psychiatrists, counselors, social workers, and state agency employees.\textsuperscript{55}

B. Expert Impartiality

The custody evaluator must remain impartial.\textsuperscript{56} “The psychologist, bearing an influence on the outcome of custody conflicts, has an ethical and moral responsibility to conduct himself/herself as an impartial evaluator, whose primary function is to promote solutions in the best interest of the children.”\textsuperscript{57} The American Psychological Association suggests that psychologists become aware of how biases regarding age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status may interfere

\begin{thebibliography}{99}
\bibitem{51} APA Guidelines, \textit{supra} note 49, at 678.
\bibitem{52} Levy, \textit{supra} note 11, at 435 (real or threatened custody loss frequently precipitates regressive behavior and acting out).
\bibitem{55} \textit{SURVEY}, \textit{supra} note 36.
\bibitem{56} APA Guidelines, \textit{supra} note 49, at 678.
\bibitem{57} Werner, \textit{supra} note 14, at 2.
\end{thebibliography}
with an objective evaluation.\textsuperscript{58} Furthermore, regardless of the evaluator’s own opinion, he or she should respect the parents’ right to develop their own style of child rearing and family lifestyle.\textsuperscript{59}

Impartiality is at issue when the evaluator has had a previous therapeutic relationship with one of the adults or children to be evaluated. A former or current therapy relationship with a potential evaluatee makes evaluator objectivity virtually impossible.\textsuperscript{60}

[T]he therapist conducting a custody evaluation should not also be treating the child or parent. Although he or she would be in a better position to make recommendations based on extensive knowledge of the case, it would be unfair for the opposing lawyer and client. Serious ethical problems may be created for the therapist as well if the patient’s confidentiality is compromised during the hearing.\textsuperscript{61}

An evaluator’s bias may surface in a variety of ways, the most usual being the choice of words used in the report or stated while giving testimony. The adjectives the evaluator employs may be particularly revealing.\textsuperscript{62} For example, the evaluator’s choice of adjectives may reveal whether a child or adult appealed to the evaluator as a person.\textsuperscript{63} An evaluator’s possible bias may also be revealed by determining his or her history in making child custody recommendations. For example, does the evaluator always or frequently suggest that the father, as opposed to the mother, obtain sole custody or vice versa. Unfortunately, this type of information may be difficult to obtain, particularly if the evaluator is unaware of his or her own partiality. Moreover, subpoenaing records of the mental health professional’s past evaluations, even if sanitized to insure confidentiality, may be an intrusion into the privacy rights of former valuees.

At least one proposed evaluation procedure or model allows an attorney the right to disqualify a court-assigned psychologist if the

\textsuperscript{58} APA Guidelines, supra note 49, at 678.
\textsuperscript{59} Solnit, supra note 10, at 456.
\textsuperscript{60} PSYCHIATRY TASK FORCE, supra note 11, at 18.
\textsuperscript{61} Wood, supra note 20, at 16.
\textsuperscript{63} Id.
possibility of undue bias exists. Another model requires that the evaluator alternate interviews from one side of the dispute to the other over time to avoid forming a premature opinion.

C. Utilizing Team Evaluation

Several authors recommend that custody evaluations be performed by more than one mental health professional. For example, one custody evaluation model suggests a team approach where both a child psychiatrist and a psychiatric social worker interview all family members with relevant information. A second model recommends use of an evaluative multidisciplinary team approach. In other words, one evaluator interviews the children while a second evaluator interviews the parents. Consequently, evaluators are not burdened by the awareness of and the necessity to respond to the persons he or she does not evaluate. Finally, a third model utilizes cross-sex team evaluations "for the purpose of maximizing elicitation of particular types of family interactional patterns and to promote greater sensitivity in what is often a threatening experience."

Although the cost of team evaluations are certainly greater than those performed by a single mental health professional, there may be valid reasons to justify the expense. Multiple evaluators can increase impartiality, provide a check on an evaluator's work, help eliminate

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64. Werner, supra note 14, at 4 ("Comprehensive Child Custody Protocol" developed for use in Idaho Courts).
66. Everett & Volgy, supra note 50, at 347; Karras & Berry, supra note 16, at 80 (citing A. M. Jackson et al., Beyond the Best Interest of the Child Revisited: An Approach to Custody Evaluations, 3 J. DIVORCE 207-222 (1980)); Simmons, supra note 2, at 86; Werner, supra note 14, at 1 (citing Anna M. Jackson, Beyond the Best Interest of the Child Revisited: An Approach to Child Custody Evaluations, 3 J. DIVORCE 201-222 (1980)).
67. Simmons, supra note 2, at 86 (model developed for use at The Center for Families in Conflict, part of the Isaac Ray Center, Inc., which is affiliated with the Section on Psychiatry and the Law at Rush-Presbyterian-St. Luke's Medical Center in Chicago).
68. Karras & Berry, supra note 16, at 80.
69. Everett & Volgy, supra note 50, at 347.
gender bias when utilizing cross-sex team evaluation, and increase the total level of training and experience brought to the process.

IV. PROCEDURAL ISSUES

There are several procedural issues which effect child custody evaluations. The court, the evaluator, the parties, and their attorneys should carefully consider, and reach an understanding on, each of these issues before the evaluation process begins.

A. One-Parent versus Two-Parent Evaluations

Evaluations may involve one or both parents. One-parent evaluations occur where only one parent is available, where a parent refuses to voluntarily participate in an evaluation, or where a parent hires a mental health professional to specifically perform a one-parent-only evaluation. One-parent evaluations have potentially significant deficits, including:

1. The evaluator working with only one parent may lose his or her objectivity.
2. The evaluator may miss relevant data by having contact with only one side.
3. If each parent hires an evaluator, the child will be subjected to multiple examinations. Multiple examinations add to the traumatization of the child and the expense of the action.

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70. See Newman, 439 S.E.2d at 444-45 (custody evaluation where only one parent was available).
72. See Patricia Ann S., 435 S.E.2d at 10-11 (parents hired multiple evaluators to perform one-parent-only evaluations).
73. Custody Determinations, supra note 9, at 164; Psychiatry Task Force, supra note 11, at 14; Karras & Berry, supra note 16, at 78.
74. Custody Determinations, supra note 9, at 164.
75. Michaels & Walton, supra note 53, at 36. See also Jean M. Baker & Rachel Burkholder, Testing's Role in Custody Disputes, 10 Fam. Advoc. 21, (1988) (using separate evaluators may result in an emotional battle between parents, during which the child's needs are secondary).
One-parent evaluations frequently reinforce the animosity inherent in the adversarial process.\(^7^6\)

Because of the deficits of one-parent evaluations, the weight of literary authority strongly prefers two-parent evaluations.\(^7^7\) In fact, many evaluators will refuse to perform an evaluation unless they are permitted to talk to all parties to the case.\(^7^8\)

Eight West Virginia family law masters reported hearing testimony or using written reports which were the result of a custody evaluation involving only one parent. One law master reported discounting a one-parent evaluation on the ground that it did not involve both parties to the litigation.\(^7^9\) A second law master utilized evaluation testimony from one-parent evaluations where the parent evaluated had a history of mental health problems.\(^8^0\)

**B. Court-Ordered Evaluations**

Court-ordered custody evaluations may be preferable to an evaluation sought independently by the parties. If the court orders a custody evaluation, the evaluator may seem less like a "hired gun" and more like a neutral and credible witness.\(^8^1\) Additionally, a court order will likely require both parents to participate.\(^8^2\) Finally, the court order helps to dispel any notion that the information shared with the evaluator will remain confidential.\(^8^3\)

The statutory authority upon which a West Virginia family law master may base his or her authority to order a custody evaluation is unclear. The sole West Virginia statute which specifically grants the

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\(^{76}\) Werner, *supra* note 14, at 1.


\(^{78}\) Id.

\(^{79}\) SURVEY, *supra* note 36.

\(^{80}\) Id.

\(^{81}\) Michaels & Walton, *supra* note 53, at 36.

\(^{82}\) PSYCHIATRY TASK FORCE, *supra* note 11, at 15.

\(^{83}\) Id.
court power to order custody evaluations is the Uniform Child Custody Jurisdiction Act (UCCJA).\textsuperscript{84} The UCCJA provides that custody evaluation testimony is admissible where the state must determine or advise upon child custody.\textsuperscript{85} The court may order the evaluation upon the motion of any party or, if the parties do not agree, upon its own motion.\textsuperscript{86} A licensed psychologist performs the evaluation.\textsuperscript{87} The parties may agree to the choice of psychologist, or, in the absence of an agreement, the court chooses the psychologist.\textsuperscript{88} Costs are allocated among the parties.\textsuperscript{89} Unfortunately, West Virginia limits application of the UCCJA to cases where there is a question of personal jurisdiction over a child who is the subject of an interstate custody dispute.\textsuperscript{90}

West Virginia has no counterpart to the UCCJA concerning psychological evaluations performed pursuant to custody disputes where jurisdiction is not in question. This lack of clear statutory authority has resulted in confusion as to the basis upon which a family law master may order a psychological evaluation. In response to the question "I base my authority to order a psychological evaluation in a child custody dispute upon?", the majority of the family law masters responding did not cite to a specific statute or case.\textsuperscript{91}

However, two law masters did cite specific statutes which they believe give law masters the authority to order custody evaluations. The first law master relied upon West Virginia Rule of Civil Procedure 35 (Physical and Mental Examination of Persons).\textsuperscript{92} Conversely, the second law master relied upon Rule 34(b) of the West Virginia Rules

\textsuperscript{84} Uniform Child Custody Jurisdiction Act, W. VA. CODE §§ 48-10-1 to 48-10-26 (1992).
\textsuperscript{85} W. VA. CODE § 48-10-12 (1992).
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} See W. VA. CODE § 48-10-1(a) (1992).
\textsuperscript{91} SURVEY, supra note 36.
\textsuperscript{92} Id. See W. VA. R. CIV. P. 35 (1995) (The court may order a physical or mental examination of a person by a qualified expert upon a motion showing good cause and after notifying all parties and the person to be examined. The examining expert writes a detailed report, which includes results of tests made, diagnoses, and conclusions.)
of Practice and Procedure for Family Law.\textsuperscript{93} Rule 34(b) allows the law master to order an investigation or a home study of one or both parties by the Department of Health and Human Resources or other social service agency where abuse or neglect has been alleged concerning one of the parties or any of the parties’ children.\textsuperscript{94} Accordingly, application of Rule 34(b) is limited to abuse or neglect cases.

Despite the lack of clarity concerning statutory authority, it is clear from the case law that West Virginia courts are hearing, and in some cases relying upon, evidence gleaned from custody evaluations performed where both parents are seeking custody.\textsuperscript{95}

Nine West Virginia family law masters reported having ordered custody evaluations.\textsuperscript{96} When asked how often the law master ordered custody evaluations, the responses ranged markedly from “infrequently” or “rarely” to “as often as possible.”\textsuperscript{97} Of the five law masters who had never ordered an evaluation, all said that they would order an evaluation under the appropriate circumstances.\textsuperscript{98} When asked why the law master would order an evaluation, the responses, from most to least frequently cited, were: a suspicion of abuse; at the request of the parties; to determine parental fitness; to gain additional information; to determine whether a child was mature enough to state a custodial preference; and to have the evaluator help the family reach a compromise.\textsuperscript{99}

Seven of the fourteen survey respondents have refused a request to order a custody evaluation for reasons including: the evaluation was unnecessary or was being used as a delaying tactic; lack of funds; the information was already available; or the custody claim appeared frivolous.\textsuperscript{100}

\textsuperscript{93} W. VA. R. PRAC. & P. FAM. L. 34(b) (1995).
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} See \textit{supra} note 47.
\textsuperscript{96} `SURVEY, \textit{supra} note 36.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.}
Finally, West Virginia’s family law masters have utilized evidence from evaluations which were not court-ordered. Ten law masters have heard oral testimony, and eight masters have read reports, generated from non court-ordered evaluations.101

C. Confidentiality

Many evaluees mistakenly assume that any communication with the mental health professional conducting the evaluation is sanctioned by doctor-patient privilege.102 However, because no privilege attaches to evaluator/evaluee communication, the evaluator must inform evaluees that what they say is not confidential.103 The evaluator should also explain the lack of confidentiality to children, in terms that they can understand.104 The evaluator may choose to obtain a written waiver of confidentiality for all adult participants.105 Furthermore, the evaluator should inform the parents about who he or she will contact concerning the evaluation and specify for what reasons that contact will be made.106 Finally, the evaluator must tell the parties who will receive the evaluator’s written report.107

D. Fees

The parties, their lawyers, and the evaluator should discuss the fee at the outset of the evaluation process.108 The discussion should determine who will pay, how payment will be made, and the estimated total cost.109 In a court-ordered evaluation, the judge generally determines the relative amount each party is to pay.110 Additionally, before the

101. Survey, supra note 36.
102. Rieveschi, supra note 65, at 251.
103. Id.
104. Id.
106. Karras & Berry, supra note 16, at 79.
109. See Custody Determinations, supra note 9, at 198.
evaluation process begins, the evaluator may require payment of a retainer.\textsuperscript{111}

One commentator has suggested that both parents share the cost of the evaluator’s services in an effort to safeguard their best interests.\textsuperscript{112} The mental health professional paid by only one family member may appear to assume the role of advocate for that family member.\textsuperscript{113}

\textbf{E. Length of Contact}

The evaluation process may be lengthy. Typically, parents and children are interviewed many times.\textsuperscript{114} Although the required number of interviews is generally not possible to predict,\textsuperscript{115} some evaluators suggest: (1) eight to eighteen interviews;\textsuperscript{116} (2) fifteen to twenty interviews;\textsuperscript{117} or (3) three to four interviews with each parent followed by a fifth interview during which the parent and child are seen together and then the child is seen alone.\textsuperscript{118}

The length of time required to complete the evaluation process is critical. “Child experts should be sharply aware that the passage of time between the beginning of a placement conflict and its resolution is often detrimental to children, especially the younger ones.”\textsuperscript{119} In fact, at least one evaluation model requires that the final report be completed within six weeks after the conclusion of the evaluation period.\textsuperscript{120} Therefore, the evaluator’s challenge is to expedite the process without sacrificing the quality of the evaluation.

\begin{itemize}
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Karras & Berry, supra note 16, at 78-79 (citing A. P. Musetto, The Role of the Mental Health Professional in Contested Child Custody: Evaluator of Competence or Facilitator of Change, 4 J. DIVORCE 69-79 (1978)).
\item \textsuperscript{113} Id. at 78.
\item \textsuperscript{114} CUSTODY DETERMINATIONS, supra note 9, at 171.
\item \textsuperscript{115} PSYCHIATRY TASK FORCE, supra note 11, at 29.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Simmons, supra note 2, at 87 (interview period includes an attorney conference).
\item \textsuperscript{118} Rieveschi, supra note 65, at 251-52.
\item \textsuperscript{119} Solnit, supra note 10, at 459.
\item \textsuperscript{120} Werner, supra note 14, at 4.
\end{itemize}
F. Whom to Interview

Evaluators routinely interview individuals directly involved in the custody litigation.

The model custody evaluation includes direct assessment of all those parties whose functioning is relevant to the case at hand. Typically this includes all prospective custodians, the child whose custody is in question, and any other individuals whose relationships with the prospective custodians and the child will have an effect upon the child’s well being. . . . 121

Persons who affect the child’s well being, in addition to potential custodians, generally include grandparents,122 siblings whose custody is not being contested,123 the parents’ new spouses or live-in companions,124 and step-siblings.125 Additionally, some evaluators ask parents to provide a list of possible “witnesses” whom the evaluator can contact for additional information.126

Ordinarily, key persons are seen individually and in groups. For example, the evaluation should include observations of the interactions between the child and his or her parents.127 Unfortunately, the information obtained from these persons, although critical, is highly subjective and possibly tainted by bias or an attempt to create the best impression.128

Ideally, the evaluator should strive to obtain information from the most objective sources possible. The evaluator should remember, however, that even objective sources are susceptible to bias.129 “Parents, 

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121. CUSTODY DETERMINATIONS, supra note 9, at 175.
122. Hoorwitz & Burchardt, supra note 18, at 260.
123. Id.
124. Everett & Volgy, supra note 50, at 348.
125. Beaber, supra note 19, at 321.
126. Schoonmaker, supra note 62, at 39. See also Everett & Volgy, supra note 50, at 348 (evaluators should invite parents to submit the names and addresses of three to five character witnesses).
127. Simmons, supra note 2, at 86; Ziskin & Faust, supra note 16, at 46.
128. Beaber, supra note 19, at 312; Hoorwitz & Burchardt, supra note 18, at 261; Levy, supra note 11, at 440.
129. Werner, supra note 14, at 3.
other relatives, and friends tend to be less objective than other sources. Consequentiy, the evaluation should proceed beyond inter-
views with the immediate family. Other potential sources of in-
formation include: proposed or present baby sitters; teachers; the
child’s school principal; physicians; housekeepers; clergy; mental
health professionals who have worked with the parents or children; school guidance counselors; neighbors of both parents; parents of the children’s friends; the parents’ employers; and any other
individuals who have significant contact with the family. The eval-
uator may not contact all or even most of these sources. However, the
evaluator should choose sources who can potentially provide more
objective information than the information obtained from persons inti-
mately involved in the custody dispute.

The evaluator must carefully consider whom to interview. The
evaluator’s failure to interview key persons in the custody dispute
creates ethical problems and invites malpractice litigation. Moreover, the evaluator’s choice of information sources may provide fertile
ground for support or attack of the evaluation by the lawyers for the
parties.

G. Home Visits

Home visits are a potential evaluative mechanism for the custody
evaluator. The benefits of home visits include direct observation of

130. Id.
131. MELTON, supra note 17, at 342 (“[s]ources outside the nuclear family may also
give important, relatively objective glimpses of children’s responses to arrangements devel-
oped during separations and under temporary custody order”).
132. Schoonmaker, supra note 62, at 40.
133. MELTON, supra note 17, at 342.
135. Werner, supra note 14, at 3.
136. Simmons, supra note 2, at 87.
137. Id. (the pastor/parishioner privilege may preclude obtaining information from cler-
gy).
140. Everett & Volgy, supra note 50, at 349. See Simmons, supra note 2, at 86 (eval-
uator shall conduct home visits when the child is under ten years of age).
the house and neighborhood as well as the opportunity to observe spontaneous family interactions in a more typical setting than the evaluator’s office. Although potentially valuable, home visits may increase the time and expense necessary to conduct the interview.

H. Psychological Testing

Child custody evaluators routinely perform psychological testing. Evaluators utilize various types of testing, including, but not limited to: intelligence and academic tests; neuropsychological evaluations; personality inventories; and rating scales. Some of the most widely used psychological tests include: the Wechsler Intelligence Scale for Children; the Wechsler Adult Intelligence Scale; the Rorschach Inkblot Test; the Thematic Apperception Test; the Bender Gestalt Test; and the Minnesota Multiphasic Personality Inventory. Testing may help determine:

1. whether the parent exhibits a mental illness or a personality disorder serious enough to interfere with parenting;

2. whether a parent exhibits intellectual deficiencies which could interfere with parenting; and

3. whether a child exhibits behavioral or emotional disorders, learning disabilities, or unique needs that require special parenting skills.

Despite these specific uses, scholars have criticized evaluators’ overuse of psychological testing. Moreover, mental health professionals too often rely upon tests which address clinical questions of

141. Simmons, supra note 2, at 86-87.
143. Id. at 21-26 (includes a detailed discussion of commonly utilized psychological tests).
144. Kahn & Taft, supra note 49, at 75-81.
146. Id.
147. Id.
148. See Campbell, supra note 77, at 281; Melton, supra note 23, at 25; Werner, supra note 14, at 1-5.
psychiatric diagnosis.\textsuperscript{149} Tests used for psychiatric diagnosis fail to assess the parents' relationships to their children and the parents' child-rearing attitudes and capacities.\textsuperscript{150} Consequently, evaluators should not feel obligated to routinely employ psychological testing. Moreover, the extent to which test-generated data actually aids the legal decision-maker is questionable except where a parent has displayed serious psychopathology.\textsuperscript{151}

If the clinician chooses to test, he or she should carefully select proven testing techniques.\textsuperscript{152} Specifically, the tests should: meet adequate general psychometric standards of reliability and validity; describe parental abilities; assist in forming causal explanation for functional deficits; and suggest the special needs of children.\textsuperscript{153} Finally, the evaluator's report should state the clinical reasons for testing.\textsuperscript{154}

\textbf{I. Electronically Recorded Interviews}

Child custody evaluators may choose to electronically record interviews with parents, children, or other significant persons.\textsuperscript{155} Recording allows the court and the parents' attorneys to evaluate the custody determination process and the evaluator's conclusions. Recording is particularly important given the potential lack of quality assurance among custody evaluators and the fact that both evaluator and evaluee may have a vested interest in making self-serving statements concerning the evaluation.\textsuperscript{156} Furthermore, recording is likely to aid counsels' preparation of direct or cross examination of the evaluator. Finally,

\begin{itemize}
\item \textsuperscript{149} See Melton, \textit{supra} note 23, at 25.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} Campbell, \textit{supra} note 77, at 281.
\item \textsuperscript{152} Kahn & Taft, \textit{supra} note 49, at 81.
\item \textsuperscript{153} \textbf{CUSTODY DETERMINATIONS}, \textit{supra} note 9, at 176.
\item \textsuperscript{154} See Werner, \textit{supra} note 14, at 3.
\item \textsuperscript{155} Schoonmaker, \textit{supra} note 62, at 40.
\item \textsuperscript{156} Werner, \textit{supra} note 14, at 1. \textit{See also} Kahn & Taft, \textit{supra} note 49, at 71-73, 82 ("Erroneous diagnosis based on willful misconduct is difficult to substantiate due to the private nature of the diagnostic consultation. Typically a testing session involves only the psychologist and the test-taker, both parties to any ensuing action based on misadministration. Clearly, both witnesses have a strong vested interest in self-serving statements. Again the clinician controls any record keeping, disinterested witnesses are non-existent.").
\end{itemize}
recordings could be used either to expose the evaluator to, or protect the evaluator from, ethics charges or tort liability for malpractice. For example, one of the leading complaints to the American Psychological Association’s Ethics Committee is that a psychologist performing a custody evaluation has rendered an ill-founded opinion or has failed to remain neutral.157

Evaluators may view electronic recording as intrusive or as having a dampening effect on evaluatees’ willingness to be open. However, because evaluatees are aware that confidentiality is not possible, it seems unlikely that recording would be unreasonably intrusive.

The Supreme Court of Appeals of West Virginia has ruled that a party in a civil action has no inherent right to record a court-ordered medical examination to which that party must submit under West Virginia Rule of Civil Procedure 35.158 Rather, decisions about recording are left to the discretion of the trial court.159 However, upon a showing of good cause, the judge should allow the examined party to record the examination.160 Therefore, an evaluatee in West Virginia may need a court-order to record the interview process.

V. THE SCOPE OF THE EVALUATION

A. Substantive Factors

The child custody evaluator must know which substantive issues he or she should address when performing a custody evaluation. Some of the factors to consider in making custody decisions include keeping siblings together, following the child’s preference of custodian, awarding custody to the same sex parent, and following a preference for joint custody.161 The law of the state in which the litigation occurs will likely provide some insight into these and other factors. For example, the UCCJA limits the factors that mental health professionals may

159. Id. at 669.
160. Id.
161. Pearson & Munson, supra note 22, at 3 (citations omitted).
address in psychological evaluations pursuant to an interstate custody dispute. These factors include a child's academic skills and progress, socialization, physical well being, and emotional and mental status.

Evaluators may consider a tremendously diverse list of substantive factors. The factors may be divided into four distinct groups: parent variables; child variables; environmental variables; and interactive variables.

Relevant factors within the group of parent variables include:

1. the major parenting person;
2. the parent's current behavior as opposed to his or her behavior before the custody suit was instigated;
3. the adequacy of the individual's parenting skills;
4. the physical and mental health of the parent;
5. the parents' support systems;
6. the time the parent can spend with the child.

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163. Id.
164. See Baker & Burkholder, supra note 75, at 21; Beaber, supra note 19, at 324-26; Campbell, supra note 77, at 278-81; Hoowritz & Burchardt, supra note 18, at 260-64; Karras & Berry, supra note 16, at 80-83; Michaels & Walton, supra note 53, at 37; Werner, supra note 14, at 1-3.
165. CUSTODY DETERMINATIONS, supra note 9, at 158-59.
166. Hoowritz & Burchardt, supra note 18, at 261.
167. Schoonmaker, supra note 62, at 40 (evaluators should skeptically view parents who were uninvolved in child rearing until the onset of marital difficulties). See also Wood, supra note 20, at 17 ("parents tend to become 'supermoms' and 'superdads' just before the custody battle begins").
168. Beaber, supra note 19, at 324-26 (includes a comprehensive list of "parenting competence criteria"); Hoowritz & Burchardt, supra note 18, at 262-63.
169. Campbell, supra note 77, at 280; Hoowritz & Burchardt, supra note 18, at 260; Werner, supra note 14, at 1.
170. Karras & Berry, supra note 16, at 83.
171. Beaber, supra note 19, at 326.
(7) the parent's ability to cooperate with the other parent in making visitation arrangements;¹⁷²

(8) any history of abuse;¹⁷³ and

(9) any history of criminality or drug or alcohol abuse.¹⁷⁴

Factors specifically addressing the child include:

(1) whether the proposed custodial parent can meet the child's physical and emotional needs;¹⁷⁵

(2) the child's physical and mental health;¹⁷⁶

(3) the child's preference of custodian;¹⁷⁷ and

(4) whether siblings should be kept together or live apart.¹⁷⁸

Environmental variables include:

(1) whether compelling reasons exist to change the current custody situation;¹⁷⁹ and

(2) the child's level of adjustment to his or her home, school, and community.¹⁸⁰

¹⁷² Baker & Burkholder, supra note 75, at 21. See also Melton, supra note 17, at 342 (“special attention should be given to the parents' capacity for cooperation, the nature and intensity of disagreements about the children, and points of possible compromise”).

¹⁷³ Michaels & Walton, supra note 53, at 37 (the factors to consider where a parent seeking custody has abused a child include: (1) the attachment of the child to each parent; (2) the amount of trauma suffered; (3) the parent's remorse; (4) the length of time involved; and (5) the probability of recurrence).

¹⁷⁴ Werner, supra note 14, at 3.

¹⁷⁵ Hoorwitz & Burchardt, supra note 18, at 263.

¹⁷⁶ Werner, supra note 14, at 1.

¹⁷⁷ Campbell, supra note 77, at 280.

¹⁷⁸ Pearson & Munson, supra note 22, at 3.

¹⁷⁹ Hoorwitz & Burchardt, supra note 18, at 261. See also Campbell, supra note 77, at 280 (the evaluator should consider a parent's abilities to enable and support the other parent's continuing relationship with the child).

¹⁸⁰ Campbell, supra note 77, at 280; Hoorwitz & Burchardt, supra note 18, at 260; Werner, supra note 14, at 1.
Interactional factors address:

1. how well the parents work together for the benefit of the child;\textsuperscript{181}
2. the child’s interactions with each parent, his or her siblings, and significant others;\textsuperscript{182}
3. the alliances or conflicts within the family;\textsuperscript{183} and
4. joint custody, if applicable.\textsuperscript{184}

Separate evaluators can reach completely opposite conclusions on the same case unless there is a consensus between the court, the evaluator, and the parties concerning which factors the evaluator will explore.\textsuperscript{185} If the evaluation is court-ordered, the court may specify which factors the mental health professional should consider.\textsuperscript{186} Once the evaluator determines which factors to address, the evaluator must determine what weight to give each individual factor.\textsuperscript{187} Factor weight can be outcome determinative, particularly where the evaluator makes a recommendation as to which parent should receive custody.\textsuperscript{188} If the evaluator makes a custody recommendation, he or she should state which factors weighed most heavily in the recommendation.

B. The Report

Generally, the custody evaluator prepares a written report at the conclusion of the interview and testing process. Although each evaluator is likely to have his or her own format, the following comprehensive

\begin{itemize}
  \item \textsuperscript{181} Melton, supra note 17, at 331 ("opinions as to present and past intensity of marital conflict and its sources may provide the factfinder with some basis for prediction of the probable success of various conditions of custody and visitation").
  \item \textsuperscript{182} Werner, supra note 14, at 1.
  \item \textsuperscript{183} Melton, supra note 17, at 331.
  \item \textsuperscript{184} Hoorwitz & Burchardt, supra note 18, at 261-62.
  \item \textsuperscript{185} Id. at 260.
  \item \textsuperscript{186} See Goetz, 367 S.E.2d at 784 (court directed that the evaluator only address specified factors).
  \item \textsuperscript{187} Beaber, supra note 19, at 316.
  \item \textsuperscript{188} Hoorwitz & Burchardt, supra note 18, at 260. See infra notes 232-33.
\end{itemize}
sive model, prepared by the American Psychiatric Association suggests including:

(1) an introductory section stating the circumstances of the referral and the specific questions the evaluator will address;

(2) factual data including when the interviews took place, the length of the interviews, names of persons interviewed, missed or canceled appointments, and documentation of discussions concerning confidentiality and the purpose of the evaluation;

(3) a list of secondary information sources and the information obtained from those sources;

(4) a list of the factors addressed by the evaluator;

(5) an objective and descriptive list of clinical findings including psychiatric diagnosis where pertinent;

(6) specific quotes or observations; and

(7) a specific custody recommendation or a discussion of the advantages and disadvantages of various custodial alternatives. 189

The report should not contain jargon or theoretical discussions. 190

It is critically important that custody evaluators describe empirical data and specify the information upon which they base their conclusions. 191 Additionally, the evaluator should note when his or her own value structure effects the outcome of the evaluation. 192 Ideally, the evaluator should support any clinical opinion or inference with at least two sources of information. 193 Moreover, the evaluator should not give an opinion concerning the psychological functioning of nonevaluated individuals. 194 Finally, the evaluator should note the reli-

189. PSYCHIATRY TASK FORCE, supra note 11, at 30-32.
190. Id. at 31.
192. See Beaber, supra note 19, at 317-18.
193. CUSTODY DETERMINATIONS, supra note 9, at 178.
ability and validity of any psychological tests employed during the evaluation in his or her report. 195

Before the court utilizes the report, the evaluator should provide a copy of the report to the parents. 196 The parents have a right to know the results of the evaluation, how the evaluator interpreted interview and test-generated data, and the basis for the evaluator’s conclusions. 197 Given the great weight the evaluation may have in the custody determination, the court and the parties’ attorneys should carefully analyze the report. 198 The court should consider any conclusory judgments and whether those conclusions are supported by concrete, empirical evidence or persuasive logic. 199 Moreover, an attorney who intends to challenge the report, or examine the evaluator in court, should determine: the amount of time spent on the investigation and the report; the length of time since the evaluator received the case; when the evaluator actively began work; the number and length of interviews with various witnesses; and the completion date of the investigation and the report. 200 The parties’ lawyers should challenge any unsupported opinions 201 and notations of a parent’s shortcomings which do not effect the ability to parent. 202

C. Making a Custody Recommendation

Some custody evaluators recommend which parent should receive custody. 203 Conversely, other custody evaluators choose not to make

195. See Karras & Berry, supra note 16, at 82.
196. See Rozas, 342 S.E.2d at 207 (trial court erred in refusing to allow inspection of results of custody evaluation report produced by a court appointed expert even when the report was not admitted in the record).
197. Karras & Berry, supra note 16, at 82.
203. See Karras & Berry, supra note 16, at 76-77. See also APA Guidelines, supra note 49, at 679 (“Although the profession has not reached consensus about whether psychologists ought to make recommendations about the final custody determination to the courts, psychologists 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.”).
such a recommendation and limit their report to clinical findings and observations.204 Evaluators base their choice not to make a recommendation upon a hesitance to usurp the role of the court and a fear of losing impartiality.205

Critics of evaluators who make specific recommendations opine that the evaluator has been swept into the adversarial system.206 Moreover, critics construe the making of a custody recommendation as an unauthorized practice of law.207

VI. PRACTICAL APPLICATION OF EVALUATION GUIDELINES IN WEST VIRGINIA CASE LAW

The Supreme Court of Appeals of West Virginia, in Patricia Ann S. v. James Daniel S.,208 directly addressed the use of custody evaluation testimony. In Patricia Ann S., the wife appealed the circuit court’s award of the couple’s three children to the husband in a divorce action.209 Relying on the David M. admonition that the court should determine the child’s primary caretaker using lay testimony,210 the


206. Id.

207. Id. at 83 (“Mental health professionals must avoid the adversarial evaluator role. Given the minimal research on what constitutes acceptable custody arrangements, when pressed to conduct custody evaluations, professionals may be ethically bound to limit themselves to the generation of predictive statements regarding how the child will fare under various custody arrangements.”).

208. Patricia Ann S., 435 S.E.2d at 6.

209. Id. at 8.

210. Id. at 12. See David M., 385 S.E.2d at 924. See also Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (The person who has taken primary responsibility for the care and nurturing of the child is the child’s primary caretaker. The law presumes that the primary caretaker should receive custody of the child, if the primary caretaker is fit. The factors that determine which parent was the child’s primary caretaker include: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends’ houses or, for exam-
wife claimed that the circuit court "erred in utilizing psychological experts prior to the circuit court’s determination as to who was entitled to the status of primary caretaker." 211 The Supreme Court of Appeals of West Virginia held that the circuit court had not over-utilized the experts’ reports in making the primary caretaker decision. 212 Therefore, the court affirmed the circuit court’s ruling that the husband receive custody of the two male children. However, the court remanded the issue of custody of the female child for further factual development. 213

The court’s holding in Patricia Ann S. reaffirmed that custody evaluations are not needed to determine which parent is the child’s primary caretaker. Therefore, although the primary caretaker issue is a factor in custody evaluations, the evaluator should not advise the court upon which parent is a child’s primary caretaker. Furthermore, parents should not employ a custody evaluator to determine a child’s primary caretaker.

Aside from the specific holding, the facts of Patricia Ann S. provide significant insight into some of the pitfalls that plague custody evaluations. Three evaluators were involved in the case. The first evaluator, a psychologist, spent only ninety minutes with the husband and the children. 214 Despite the fact that the evaluator had no contact with the wife, she recommended that the husband receive temporary custody of the children. 215

The wife hired a second psychologist, although both parties subsequently agreed to use the psychologist as a neutral expert. 216 This psychologist interviewed the husband, the wife, and the three chil-

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211. Patricia Ann S., 435 S.E.2d at 10.
212. Id. at 12 (the Court based its ruling upon the fact that the parties and numerous witnesses testified as to who had primary responsibility for child care duties, while the psychologists barely touched upon the primary caretaker issue).
213. Id. at 15.
214. Id. at 11.
215. Id.
216. Patricia Ann S., 435 S.E.2d at 11.
Contrary to the opinion of the first evaluator, the second psychologist recommended that the husband receive custody of the two male children and that the wife receive custody of the female child. The second psychologist believed it would be in the best interests of the male children to reside with the husband. However, when asked upon what information the psychologist based his recommendation concerning the female child, he replied that he "did not have a lot to go on." Instead, he based his recommendation upon what the court termed "vague generalities."

At the final custody hearing, a third psychologist, apparently hired by the husband, testified. The third psychologist interviewed the husband, the children, and the husband's mother who had served as a care giver for the children. The case does not mention any contact between the psychologist and the wife. This psychologist, focusing on the factor of separation of the children, recommended that the husband receive custody of all three children.

Many of the potential problems of custody evaluations discussed throughout the body of this Note arose during the multiple evaluations in Patricia Ann S. The following problems relate to both procedural and substantive aspects of the evaluations.

(1) In violation of her own profession's code of ethics, the first psychologist made a recommendation based upon very limited interview time and without the input or consent of the wife.

217. Id.
218. Id.
219. Id.
220. Id.
221. Patricia Ann S., 435 S.E.2d at 11, 13 (the evaluator based his recommendation that the female child live with her mother on the following factors: "the interests of the two different parties, the 'activity levels,' the 'socialization issue,' and the 'involvements'").
222. Id. at 11.
223. Id.
224. Id. at 11-12.
225. Id. at 11 n.3 (court noted that the first psychologist was found to be in non-intentional technical violation of the Ethical Principles of Psychologists by the West Virginia Psychological Association, Inc., Peer Review for Ethics Committee). See supra note 54 (part of the evaluator's training includes becoming familiar with his or her profession's code of ethics).
The husband, and perhaps the wife, appeared to be using the evaluations to bolster their own cases at the expense of the children. 226

The court did not order any of the evaluations. 227

Two of the three evaluations involved only one parent. 228

Two of the three psychologists failed to interview the wife, a key person in the custody dispute. 229

At least some of the information the evaluators obtained was tainted. 230 The court noted that the father or brother had coached the female child as to what to say to the third, and perhaps the second, psychologist. 231

The individual factors the evaluators relied upon to make their respective recommendations were not consistent. The third psychologist based his recommendation upon a desire not to separate the children. 232 However, separation of the children was clearly not a deciding factor for the second psychologist who recommended that custody of the three children be split between the parents. 233

Justice Workman, in her dissent, noted that none of the psychologists appeared to have any information concerning the domestic violence, physical abuse, and domination that were allegedly part of this family's interactional patterns. 234

The second (neutral) evaluator failed to clearly and concretely state upon what information he based his custody recommendation con-

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226. See supra note 15 (a parent may use a custody evaluation as a weapon against another parent to the detriment of the child).
227. See supra notes 81-83 (discussing the benefits of court-ordered evaluations).
228. See supra notes 73-76 (citing deficits of one-parent evaluations).
229. Patricia Ann S., 435 S.E.2d at 10-11. See supra notes 121, 127 (discussing evaluators' duty to interview potential custodians).
230. Patricia Ann S., 435 S.E.2d at 12 n.4. See supra notes 18-21 (discussing the potential for bias among information sources).
231. Patricia Ann S., 435 S.E.2d at 12 n.4.
232. Id. at 11-12.
233. Id. at 11. See supra note 185 (evaluators will reach different conclusions in the same case unless the court, the evaluators, the parties, and their attorneys agree upon which substantive issues to address).
234. Patricia Ann S., 435 S.E.2d at 22. See supra notes 49-53 (evaluators must be trained in all aspects of family psychology, including the dynamics of child abuse).
cerning the female child. The resulting remand may subject the daughter to more evaluations.

The problematic issues raised by the multiple custody evaluations in Patricia Ann S. should be carefully considered by evaluators, legal decision-makers, and attorneys for parties involved in custody litigation. Specifically, evaluators should recognize and avoid problem areas when conducting custody evaluations. Moreover, legal decision-makers should consider these and other potential evaluation pitfalls when weighing the value of evaluation-based evidence. Finally, attorneys for the parties may use these types of problems, or the lack thereof, to attack or defend evaluation results.

VII. CONCLUSION

There may be valid reasons for parents to seek, or for the courts to order, custody evaluations. West Virginia's family law masters were most likely to order a custody evaluation where there were allegations of abuse. Furthermore, courts ordering custody evaluations may limit their scope by specifying which factors evaluators should address.

Despite these potentially beneficial uses, however, custody evaluations may be highly problematic. Evaluations are expensive, time-consuming, invasive, and subject to bias. More importantly, evaluations occur at a time when a family is under unusual stress. As a result, evaluations may tend to encourage parents to use their children as weapons in the bitterest of battles.

In addition to the these drawbacks, legal decision-maker acceptance of evaluation-generated evidence is in question. West Virginia's family law masters' opinions concerning custody evaluations were vastly divergent, ranging from "invaluable" to "a waste of time." Moreover, although the Supreme Court of Appeals of West Virginia, in dicta, has soundly criticized custody evaluations, that same court has relied upon evaluation-generated evidence in many of its opinions.

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235. Patricia Ann S., 435 S.E.2d at 11. See supra note 191 (the evaluator must support his or her recommendations with concrete, empirical evidence).
236. SURVEY, supra note 36.
In the final analysis, the goal of a custody evaluation is to aid the court and the parents in deciding the best possible custody arrangement for the child. To meet that goal, the evaluator, the legal decision-maker, the parties, and their attorneys should fully understand both the benefits and the deficits of custody evaluations before the process begins. Additionally, all relevant persons should agree upon the evaluation’s key procedural and substantive issues. Finally, a well-trained, experienced, impartial evaluator should be chosen. Ultimately, the value of the custody evaluation can only be determined by the quality of the mental health professional’s work.

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The author dedicates this Note to her children, James, Ann, and Paul McBurney.