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## Judicial Determination of Child Custody When a Parent is Mentally Ill: A Little Bit of Law, A Little Bit of Pop Psychology, and A Little Bit of Common Sense

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### I. Abstract

In adjudicating child custody, the court weighs multiple factors to determine the best interest of the child. Most state statutes and court decisions in the United States permit judges to consider the factor of parental mental health. To answer how judges consider this factor when adjudicating child custody, 17 judges who oversee child custody determinations participated in semi-structured in depth interviews conducted by the author. By providing judges with an opportunity to discuss their decision-making process in such cases, this paper provides a unique occasion to understand and gain insight into the process by which judges consider this best interest factor. Thus, the study reported here is the first to specifically examine judicial consideration of parental mental health when adjudicating custody. These interviews reveal that for judges, parental mental illness is not an *a priori* reason to deny custody. Judges make custody decisions based on information from the observations and recommendations of a Guardian ad litem, custody evaluations, and personal observations of the

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judge, framed by “common sense.” Judges, however, tend to overestimate their understanding of the psychological factors relevant to post-divorce adjustment. At the same time, they do not discharge effectively their gatekeeping role when they consider, without question, the evidence, opinions, and conclusions offered by evaluators. To address these problems, it is recommended that judges overseeing child custody proceedings be required to receive more effective training concerning the relevancy and significance of parental mental health, understanding and applying social science and behavioral research, and evaluating expert recommendations. In addition, the law should afford such judges more latitude to consider remissions of a contesting parent’s psychiatric symptoms. Lastly, both the law and the judges who enforce it should presumptively afford the mentally ill parent an opportunity for rehabilitation before implementing a permanent custody order.

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## II. Introduction

There is no prescribed formula for resolving contested child custody cases. Instead, in determining custody, the court weighs multiple factors to determine the best interest of the child.<sup>1</sup> In the United States, one of the factors most state statutes permit judges to consider is the mental health of a parent.<sup>2</sup> This paper focuses on the question of how, following un-

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<sup>1</sup> Thirty-one states and the District of Columbia have statutory best interest of the child guidelines. *E.g.*, ALASKA STAT. § 25.24.150(c) (2010) (requiring court to look at best interest of child factors); ARIZ. REV. STAT. ANN. § 25-403(A) (2010) (requiring court to look at best interest of child factors); CAL FAM. CODE §§ 3011, 3020(a), 3040(a)(1), 3040(b) (West 2011) (requiring court to look at best interest of child factors); IDAHO CODE ANN. § 32-717 (2010) (requiring court to look at best interest of child factors); 750 ILL. COMP. STAT. ANN. 5 / 602 (West 2010); IND. CODE § 31-17-2-8 (2010) (requiring court to look at best interest of child factors); TENN. CODE ANN. § 36-6-106 (2010) (requiring court to look at best interest of child factors); VA. CODE ANN. § 20-124. 3(a) (2008) (requiring court to look at best interest of child factors). Many states without statutory guidelines have court developed criteria. See, e.g., *Mississippi, Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) (putting forward several factors in affirming that the polestar consideration in child custody determination is the best interest of the child); *Rhode Island, Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990) (identifying factors to be weighed because there are no statutorily defined factors that compose the best interest of the child).

<sup>2</sup> *E.g.*, COLO. REV. STAT. § 14-10-124(1.5)(a)(V) (2010) (requiring courts to consider “mental health . . . of all individuals involved, except that a disability alone shall not be a basis to deny or restrict parenting time”); FLA. STAT. ANN. § 61.13(3)(g) (2011) (“mental . . . health of parents”); GA. CODE ANN. § 19-9-3 (a)(3) (I) (2010) (“mental . . . health of each parent”); 750 ILL. COMP. STAT. ANN. 5 / 602(a)(5) (2011) (“mental . . . health of all individuals involved”); IND. CODE § 31-17-2-8(6) (2011) (“mental health . . . of all individuals involved”); LA. CIV. CODE ANN. art 134(7) (2011) (“mental . . . health of each party”); MICH. COMP. LAWS ANN. § 722.23(3)(g) (West 2010) (“mental . . . health of the parties involved”); MINN. STAT. ANN. § 518.17(1)(a) (9)(West 2011) (“mental . . . health of all individuals involved; except that a disability . . . shall not be determinative of the custody of the child”); N.M. STAT. ANN. § 40-4-9A(5) (2010) (“mental . . . health of all individuals involved”); TENN. CODE ANN. § 36-6-106(a)(54) (2010) (“mental . . . health of the parents or caregivers”); WYO. STAT. ANN. § 20-2-201(a)(ix) (2009) (“...mental ability of each parent to care for each child”).

successful attempts at mediation, judges determine child custody when there is a dispute between divorcing parents and when there is a question about the mental health of a contesting parent.<sup>3</sup> This paper will explore child custody determinations under the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) as an illustration for understanding the foundations and principles by which judges, in general, consider the relationship between parental mental health and the best interest of the child.<sup>4</sup> This statute reflects the best interest of the child approach adopted throughout the United States and is typical of many state statutes. The empirical study reported herein is notable because for the first time it opens a window into decision making that is typically unavailable to the public.

To answer how judges consider parental mental health, 17 judges throughout the state of Illinois, who oversee child custody determinations, participated in confidential and individual semi-structured in depth interviews conducted by the author. The interviews focused on uncovering the information gathering, decision-making, and reasoning process of each judge in determining whether a parent's mental health was a relevant factor, and if so, how much weight or influence was attributed to it in deciding child custody. The disorders and behaviors I will consider in this paper will namely involve Axis I diagnoses—namely, bipolar disorder,<sup>5</sup> depression,<sup>6</sup> and Munchausen by proxy,<sup>7</sup> as well as actions related to

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<sup>3</sup> This paper is concerned exclusively with child custody decisions and does not examine judicial reasoning in determining other aspects of marital dissolution, such as child support, spousal support, the division of marital assets, and so on. This paper presumes that in the case of a disputed child custody case, there is no occurrence of ongoing or repeated abuse or domestic violence.

<sup>4</sup> 750 ILL. COMP. STAT. ANN. 5 / 101 (West 2011).

<sup>5</sup> The essential feature of bipolar disorder is a clinical course that is characterized by one or more manic episodes. Often individuals have also had one or more major depressive episodes. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – IV-TR 382 (4th ed., text rev. 2000) [hereinafter *DSM-IV*].

<sup>6</sup> The essential feature of depression is a period of at least two weeks during which there is either depressed mood or the loss of interest or pleasure

suicidality<sup>8</sup>—because each of the judges with whom I spoke focused primarily on custody determinations involving the aforementioned issues.<sup>9</sup>

The results of these interviews indicate that judges have a great amount of latitude to decide whether and how to consider the mental health of a contesting parent in adjudicating child custody and judges, though well versed in the legal components of child custody determinations, generally do not possess adequate knowledge and training to be able to make sufficiently informed decisions about the best interest of a child where a contesting parent has a mental health problem. That is, judges do not have sufficient understanding regarding the nature of mental illness, the state of mental health research, or scientifically valid ways to assess the effect of mental illness on parenting. Judges who follow the lead of mental health experts, but who are not aware of common reasoning and research errors committed by these professionals, are committing grave errors in determining custody. The result is that parents contesting custody who possess mental health problems may lose the opportunity to parent their children, even when it is in the child's best interest. At the same time, a lack of awareness of the effects of parental mental health on child well-being also means that granting custody to a mentally ill parent may not always be in the best interest of the child.

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in nearly all activities. *Id.* at 349.

<sup>7</sup> Munchausen by proxy is not an official DSM-IV diagnosis but is a subtype of factitious disorder by proxy. The essential feature of factitious disorder by proxy is the intentional production or feigning of physical or psychological symptoms in another individual who is, typically, under the individual's care. *Id.* at 781. Commonly, the individual victim is a young child, and the perpetrator is the child's mother. *Id.* Munchausen by proxy is a label for a pattern of behavior in which the caretaker exaggerates, fabricates, or induces physical symptoms in the child.

<sup>8</sup> Typically, suicidality is associated with depression and bipolar disorder. It is also associated with borderline personality disorder, but as will be discussed below, judges did not refer, of their own accord, to personality disorders during the interviews.

<sup>9</sup> Although there may be parallel concerns, this paper does not discuss cases in which a contesting parent's alcohol or substance use was a primary factor of consideration in determining a custody arrangement.

Possible solutions to this lack of judicial mental health proficiency may require the court 1) to increase and change the nature of judicial training on matters regarding child custody decisions, 2) to consider the challenges involved in modification of child custody and adopt more flexibility in child custody determinations in order to permit contemplation of remissions of psychiatric symptoms when the contesting and losing parent has a mental health problem, and 3) to provide a mentally ill parent with an opportunity for rehabilitation before a permanent custody order is put into place.

Part I of the paper will begin with a general overview of child custody determinations before turning to the specific consideration of parental mental health in determining the child's best interest. Part II will describe the methods used in this empirical study. Part III reports results from in-depth interviews with judges who adjudicate child custody. Part IV will delve into and analyze the judges' interview responses and the core problems their answers reveal regarding custody adjudications. Finally, in Part V, I propose some changes to the process of child custody determinations when a parent is mentally ill.

### **III. General Background**

When parents divorce, children experience significant disorder in family life. In most instances of divorces involving minor children, parents reach an agreement of custody without judicial intervention. In fact, nationwide, approximately 90% of custody decisions are the result of private bargaining between the parents.<sup>10</sup> Although there is concern about the role of money, power, and coercion in these circumstances involving a parent with mental illness, these privately settled

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<sup>10</sup> GARY B. MELTON, JOHN PETRILA, NORMAL G. POYTHRESS & CHRISTOPHER SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 539 (3d ed., Guilford Press 2007); *see also* Jay Lebow, *Integrative Family Therapy For Disputes Involving Child Custody and Visitation*, 17 J. FAM. PSYCHOL. 181, 182 (2003) (10% of divorcing families engage the court in dispute).

custody cases are beyond the scope of this research. In the remaining instances in which custody is contested, statutory guidelines provide judges with great discretion in determining the custody arrangement. There is no published statistic concerning the percentage of litigated custody disputes in which the mental health of a parent is a factor to be considered.

Contemporary judicial decision-making doctrine has rejected the default “tender years doctrine” which assumes that mothers should always be awarded custody.<sup>11</sup> Instead child custody determinations are made by conducting a case-specific analysis that considers which child custody arrangement is in the particular child’s best interest and welfare.<sup>12</sup> In effect, the “best interest of the child” standard places great emphasis on the *psychological* “best interest” of the child—a fact that becomes clearly perceptible when one examines the factors enumerated in child custody statutes.<sup>13</sup> The majority of jurisdictions base their best interest factors on the guidelines proposed by the Uniform Marriage and Divorce Act (UMDA) which states that:

“The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child’s parent or parents as to his

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<sup>11</sup> See, *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916) (“Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring . . .”).

<sup>12</sup> E.g., *Nye v. Nye*, 105 N.E.2d 300, 303-04 (Ill. 1952); *Kjellesvik v. Shannon*, 355 N.E.2d 120, 123 (Ill. App. Ct. 1976); see also 750 ILL. COMP. STAT. ANN. 5 / 602(a) (2011); *John A. v. Bridget M.*, 791 N.Y.S.2d 421, 429 (N.Y. App. Div. 2005) (Sullivan J., concurring) (“Child custody disputes, by their very nature, must be analyzed on a case-by-case basis.”); *Kane v. Szymczak*, 585 S.E.2d 349, 353 (Va. Ct. App. 2003) (“The trial court must provide a case-specific explanation (one that finds its contextual meaning from the evidence before the court) of the fundamental, pre-dominating reason or reasons for the decision.”).

<sup>13</sup> See, e.g., CAL. FAM. CODE §§ 3011, 3021(d)-(e) (West 2011) (requiring custody and visitation determinations to be made from the standpoint of the child’s best interest); IOWA CODE ANN. § 598.41(3) (West 2010) (custody); N.J. STAT. ANN. § 9:2-4 (West 2010) (custody).

custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his their parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to their home, school, and community; and

(5) the mental and physical health of all individuals involved.”<sup>14</sup>

#### A. *Child Custody Statutory Requirements*

In Illinois, as in other states, a child custody proceeding may be commenced in the court by a parent who files for dissolution of a marriage.<sup>15</sup> In a disputed child custody proceeding, parents are required to attend mediation before a judge adjudicates a case.<sup>16</sup> The court will decide custody by examining the best interest of the child,<sup>17</sup> and custody must be “resolved within 18 months from the date of service of the petition or complaint to final order.”<sup>18</sup>

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<sup>14</sup> UNIF. MARRIAGE & DIVORCE ACT, § 402, 9A U.L.A. 561 (1998); An alternative approach is the Approximation Standard in which postdivorce custody parallels predivorce parental care as much as possible. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08 (2002). This standard requires that a custody arrangement mirror, as closely as possible, the division of caregiving and childrearing responsibilities before the divorce. According to this approach, the child's psychological attachments and needs are not central to the decision-making. MELTON ET AL., *supra* note 10, at 546.

<sup>15</sup> 750 ILL. COMP. STAT. ANN. 5 / 601(b)(1)(i) (2011). In some circumstances, persons other than the biological parents may seek custody. For instance, stepparents and grandparents meeting the statutory requirements, may seek custody. *See* 750 ILL. COMP. STAT. ANN. 5 / 601(b)(2-4) (2011). This paper assumes that the dispute is between two parents who, prior to petitioning for divorce, shared child custody.

<sup>16</sup> ILL. SUP. CT. R. 905 (2010).

<sup>17</sup> 750 ILL. COMP. STAT. ANN. 5 / 602(a) (2011).

<sup>18</sup> ILL. SUP. CT. R. 922 (2011). Note that if the court believes it is in the best interest of the child, it may award joint custody. 750 ILL. COMP. STAT. ANN. 5 / 602.1(b) (2011). This may be either in response to a parental pe-

The Illinois best interest of the child guidelines are based on the UMDA factors and provide judges with the following factors:

“The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

The wishes of the child’s parent or parents as to his custody

The wishes of the child as to his custodian

The interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest

The child’s adjustment to his home, school and community

The mental and physical health of all individuals involved

The physical violence or threat of physical violence by the child’s potential custodian, whether directed against the child or directed against another person

The occurrence of ongoing or repeated abuse . . .

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tion or on its own motion. *Id.* There is no presumption for or against joint custody. *Id.* at 5 / 602.1(c). The statute does not define “joint custody,” but it has been understood to mean that both parents make major decisions together regarding the child. *See also, In re Marriage of Seitzinger*, 775 N.E.2d 282, 287 (Ill. App. Ct. 2002) (“Joint custody should be awarded only where the evidence indicates the parents are willing to cooperate in the upbringing of their child.”); Gemma B. Allen, *Survey of Illinois Law: Family Law*, 19 S. ILL. U. L.J. 819, 843 (1995). Generally, in a joint custody agreement, one parent will have residential custody and the other parent will have visitation (per a parenting plan). Allen, *supra*, at 843. Such an arrangement, however, does not mean equal parenting time. 750 ILL. COMP. STAT. ANN. 5 / 602.1(d) (2011). In order for the court to order joint custody, it is presumed that the parents can “cooperate effectively and consistently” in order to promote the best interest of the child. *Id.* at 5 / 602.1(c)(1). Other factors the court considers are: “(2) The residential circumstances of each parent; and (3) all other factors which may be relevant to the best interest of the child. *Id.* at 5/602.1(c)(2)–(3).” In contrast, in sole custody, only the custodial parent has major decision-making capability. *Id.* at 5 / 602.1(b).

The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and child; and

Whether one of the parents is a sex offender.”<sup>19</sup>

The Illinois statute provides further that these factors may only be considered if they affect the relationship of the parent to the child.<sup>20</sup>

Though these guidelines have a great deal of face validity and are intuitively appealing, no direction is provided to the court for applying these factors to specific cases. The statute does not offer the court any insight into when particular factors should be considered, and if so, how much weight to give to each factor considered. Indeed, it has been argued that the standards are ambiguous, too vague, and without concrete guidance as to their application, and accordingly, child custody determinations are particularly vulnerable to judicial idiosyncrasies and biases.<sup>21</sup> Without standardized and objective norms for determining custody, it becomes very hard to control for judicial bias when it comes to decisions involving mental disability.<sup>22</sup> This is especially the case, if inherent to the court is an unwitting value judgment that mentally ill par-

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<sup>19</sup> 750 ILL. COMP. STAT. ANN. 5/602(a) (2011).

<sup>20</sup> *Id.* at 5 / 602(b) (“The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.”). The statute does not explain what is meant by the “relationship to the child.”

<sup>21</sup> ROBERT E. EMERY, MARRIAGE, DIVORCE AND CHILDREN’S ADJUSTMENT 114 (2d ed. 1999) (identifying the problem with the best interest factor as that because it leaves such a high level of discretion in the hands of the judge, there is little predictability); MELTON ET AL., *supra* note 10, at 544 (“Lack of statutory guidance may make subjective influences about ‘best’ outcomes inevitable. . . . [B]est interest is at least as value-laden and unscientific as other legal determinations . . . .”); Paul Amato, *Divorce and the Well-Being of Adults and Children*, 52 NAT’L COUNCIL ON FAM. REL. REP. F3, F4, F18 (2007) (explaining that there is no ‘one size fits all’ solution to custody after divorce, making it difficult to say what the legal policy should be with respect to custody or visitation arrangements).

<sup>22</sup> Megan Kirshbaum, Daniel O. Taube & Rosalinda Lasian Baer, *Parents with Disabilities—Problems in Family Court Practice*, 4 J. CENTER FOR FAMILIES, CHILD. & COURTS 27, 28 (2003).

ents are not as “fit” to parent as those who are mentally “stable.”<sup>23</sup>

### B. *Assisting the Court in Child Custody Adjudications*

As in other states, in order to assist the court in considering the child custody guidelines, the judge in Illinois may appoint representation for the contested child,<sup>24</sup> and in addition, may order a custody evaluation.<sup>25</sup> The judge need not compel either, and further if he or she chooses to order representation or an evaluation, it is left to his or her discretion whether to require one or both. According to the Illinois stat-

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<sup>23</sup> *Id.* at 28-29.

<sup>24</sup> 750 ILL. COMP. STAT. ANN. 5 / 506 (2011) (“In any proceedings involving the . . . custody, visitation . . . of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities to address the issues the court delineates: (1) Attorney . . . (2) Guardian ad litem . . . (3) Child representative . . .”); *see also* ALASKA STAT. § 25.24.310(c) (2010) (allowing the court to appoint an attorney or other person or the office of public advocacy to provide guardian ad litem services to a child in any legal proceedings involving the child’s welfare); D.C. CODE § 16-914(g) (LexisNexis 2010) (providing that in a child custody proceeding, “[t]he [c]ourt, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney, or both, to represent the minor child’s interests”); WIS. STAT. ANN. § 767.407(1)(a) (West 2010) (requiring that when custody is contested, “[t]he court shall appoint a guardian ad litem for a minor child . . .”).

<sup>25</sup> 750 ILL. COMP. STAT. ANN. 5 / 604(b) (2011) (“The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court’s witness.”); *see also* CAL. FAM. CODE § 3111(a) (West 2011) (“In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation in cases where the court determines it is in the best interests of the child.”); FLA. STAT. ANN. § 61.20(1) (2010) (“[T]he court may order a social investigation and study concerning all pertinent details relating to the child and each parent . . .”); VA. CODE ANN. § 20-124.2D (2010) (“In any case in which custody or visitation of minor children is at issue . . . the court may order an independent mental health or psychological evaluation to assist the court in its determination of the best interests of the child.”).

ute, a Guardian ad litem (GAL) should be appointed if the court is seeking an investigator to examine the facts of the case, and if the court wants a recommendation based on the best interest of the child factors.<sup>26</sup> Other states have similar GAL statutes.<sup>27</sup> The GAL is the court's witness and is subject to cross-examination.<sup>28</sup> In contrast, a child's representative, who is also required to investigate the facts of the case, is appointed in order to advocate for the child based on the best interest of the child, even if this is not what the child wants.<sup>29</sup> The child's representative may not make a recommendation to the court and argues to the court based on "evidence-based legal arguments."<sup>30</sup>

The court may also seek a custody evaluation to assist

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<sup>26</sup> 750 ILL. COMP. STAT. ANN. 5 / 506(a)(2) (2011) ("The guardian ad litem shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties. The guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem's report or recommendations. The guardian ad litem shall investigate the facts of the case and interview the child and the parties.").

<sup>27</sup> See *supra* note 25.

<sup>28</sup> 750 ILL. COMP. STAT. ANN. 5 / 604(b) (2011).

<sup>29</sup> *Id.* at 5 / 506(a)(3) ("The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, and encourage settlement and the use of alternative forms of dispute resolution. The child representative shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem . . . . The child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments . . . . The court and the parties may consider the position of the child representative for purposes of a settlement conference.").

<sup>30</sup> *Id.* The judge may also appoint an attorney for the child. *Id.* at 5 / 506(a)(1) (allowing courts to appoint an attorney who "shall provide independent legal counsel for the child and shall owe the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client"). Unlike a GAL or child's representative, the child's attorney advocates for what the child wants, which is not necessarily that which is in the child's best interest.

in determining the best interest of the child. In Illinois, this is the 604(b) custody evaluation,<sup>31</sup> and such an evaluation is conducted by a custody evaluator.<sup>32</sup> Child custody evaluators are trained impartial professionals who have experience conducting evaluations that seek to assess the parenting skills of divorcing parties. These experts are commonly forensic or clinical psychologists, but may also include psychiatrists and social workers. Generally, courts requesting a custody evaluation, expect the evaluation to comport with the American Psychological Association's (APA) guidelines.<sup>33</sup> The APA guidelines state that the psychologist conducting an evaluation is to assist the court in determining the psychological best interest of the child.<sup>34</sup> To achieve this goal, the evaluator should examine the respective parents' strengths and weaknesses relevant to providing for the child's present and future psychological needs.<sup>35</sup> These guidelines are aspirational in nature; they are neither mandatory nor exhaustive.

Information gathered to support the evaluator's recommendation should be derived from consolidating information from multiple sources. Methods of data collection typically include clinical interviews, administration of a parenting history survey, psychological testing, and behavioral observation of each parent interacting with the child.<sup>36</sup> The

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<sup>31</sup> 750 ILL. COMP. STAT. ANN. 5 / 604(b) (2011).

<sup>32</sup> *Id.* ("The court may seek the advice of professional personnel . . .").

<sup>33</sup> Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863 (2010), available at <http://www.apa.org/practice/guidelines/child-custody.pdf>.

<sup>34</sup> *Id.* at 864.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 866. An example of a typical psychological test used in a custody evaluation is the Minnesota Multiphasic Personality Inventory (MMPI) which was designed to assess psychopathology and personality structure. KENNETH POPE, JAMES BURCHER, & JOYCE SEELEN, *THE MMPI, MMPI-2 AND MMPI-A IN COURT: A PRACTICAL GUIDE FOR EXPERT WITNESSES AND ATTORNEYS* (3d ed., American Psychological Association 2006). This standardized personality test is not a custody evaluation tool, per se, and in fact, the clinical scales were created based on a patient population known to have severe psychopathologies (e.g., schizophrenia, paranoia). *Id.* The MMPI scales are also designed to measure whether an individual is mini-

evaluators may interview other family members, health care providers, mental health specialists, school personnel, and so on.<sup>37</sup> It is also common for evaluators to read documentation from these sources.<sup>38</sup>

The American Academy of Child and Adolescent Psychiatry (AACAP) also has professional standards and guidelines for evaluators.<sup>39</sup> Although there is agreement with the APA about the factors to be evaluated, these two organizations do not agree entirely about the method of evaluation.<sup>40</sup> For instance, when conducting a custody evaluation, the AACAP puts little emphasis on psychological testing.

### *C. Considering Parental Mental Health*

It is evident that judges consider parental mental health in child custody adjudications. It is extremely difficult to state, however, whether judges consider this factor accurately and, if so, how much weight they assign to it. Parents with mental illness who are contesting custody are at a particular disadvantage, given that attorneys often do not possess sufficient mental health knowledge to provide appropriate representation.

Previous studies examining how judges navigate the “best-interest” factors and which of those factors are most influential in judicial decision-making in custody determinations have found that the presence of parental mental illness is a factor often considered which may preclude the award of custody. For instance, in a survey study asking judges to indicate the relative importance of factors used in determining

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mizing or exaggerating psychological symptoms. *Id.* The fact that the MMPI was psychometrically validated on a clinical population has led some critics to question the validity of drawing any conclusions from this test regarding child custody determinations.

<sup>37</sup> Am. Psychological Ass’n, *supra* note 36.

<sup>38</sup> *Id.*

<sup>39</sup> Stephen P. Herman & William Bernet, *Summary of the Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHOL. 1784 (1997).

<sup>40</sup> *Id.* at 1786.

custody, judges indicated that they paid great attention to parental mental stability, sense of responsibility toward the children, moral character, and ability to promote stable community involvement.<sup>41</sup>

In a more recent study exploring how child and family factors influence judicial decision-making, several common themes emerged from judges participating in semi-structured interviews.<sup>42</sup> The results indicated that judges consider: age and developmental status of the child, parental fitness—including mental health, stability, and other parent-related factors—including the history and quality of the parent-child relationship and who was the primary caregiver prior to the divorce.<sup>43</sup> Based on these findings, judges commonly consider parental mental health when determining child custody in disputed marital dissolution proceedings.

It is difficult to determine with certainty, however, whether judges weighing custody options consider the mental health factor appropriately. First, discrimination against persons with mental illness is subtle and usually not readily discernable. Second, there is no public record of the proceedings when judges are able to guide contesting parties to a settlement. Third, even if there is a trial, the record is often sealed when mental health is a factor considered. Finally, even if there is a public record of the trial, there is no requirement that the court catalog its precise reasoning in coming to a decision.<sup>44</sup>

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<sup>41</sup> C. R. Lowery, *Child Custody in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOL. 492, 494 (1981).

<sup>42</sup> S. R. Wallace & S. S. Koerner, *Influence of Child and Family Factors on Judicial Decisions in Contested Custody Cases*, 52 FAM. REL. 180, 183 (2003).

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

<sup>44</sup> *In re Koca*, 636 N.E.2d 672, 674 (Ill. App. Ct. 1993); *see also* *Harris v. Harris*, 546 A.2d 208, 211 (Vt. 1988) (“[T]he record must show that statutory factors were considered but there is no requirement of specific findings on each factor.”). *But cf.* *Terry v. Terry*, 636 A.2d 579, 587 (N.J. Super. Ct. App. Div. 1994) (“[A]rticulation of reasons by the trial court in a child custody proceeding must reference the pertinent statutory criteria with some specificity.”); *Painter v. Painter*, 752 P.2d 907, 909 (Utah Ct.

Given that most attorneys do not possess specialized mental health knowledge, parents with mental illness may be further disadvantaged and may not receive fully informed representation. Attorneys themselves may be operating based on negative stereotypes regarding the competence and parenting capacities of persons with psychological disorders. Though it is true that significant progress has been made in overcoming disability prejudice,<sup>45</sup> discrimination remains prevalent—particularly against people with psychological disabilities.<sup>46</sup>

This type of subtle stigmatization is often undetected because there is no public record of attorney-client consultations. Thus, parents with mental illness are dually disadvantaged. In addition to being inadequately represented, because they tend to have limited income, they may not have sufficient resources to hire legal representation.<sup>47</sup> Lacking financial resources means they may be compelled to appear pro se—further reducing the possibility of successfully litigating for child custody. An additional problem facing psychologically-impaired parents in a divorce dispute is that, in contrast

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App. 1988) (“[T]he facts and reasons for the court’s decision must be set forth fully in appropriate findings and conclusions.”).

<sup>45</sup> See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006) (as amended by the Americans with Disabilities Amendment Act of 2008, 42 U.S.C. §§ 12101-12300 (2009)).

<sup>46</sup> There is significant stigma associated with psychological illness. See, e.g., *Smith v. Schlesinger*, 513 F.2d 462, 477 (D.C. Cir. 1975) (“A finding of mental illness is unfortunately seen by many as a stigma . . . . The enlightened view is that mental illness is a disease similar to any physical ailment of the body and a condition for which there should be no blame or stigma. But we cannot blind ourselves to the fact that at present, despite lip service to the contrary, this enlightened view is not always observed in practice.”); STEPHEN P. HINSHAW, *THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE* 28–52, 93–114, 140 (2007) (pointing out that despite advances in scientific understanding of human behavior, mental illness remains stigmatizing); Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 *CARDOZO L. REV.* 749 (2010) (reviewing the use and relevance of psychiatric diagnosis in civil law and arguing that psychiatric diagnosis has a pervasive stigmatizing effect).

<sup>47</sup> See, e.g., Kirshbaum et al., *supra* note 22, at 27, 35.

to proceedings to terminate parental rights,<sup>48</sup> disability legal advocacy agencies rarely become involved in marital custody cases.<sup>49</sup>

#### D. The Nexus Requirement

The Marriage Act permits the court weighing child custody alternatives to consider the parent's mental health only if it is relevant to the parent's ability to care for the child and the child's best interest.<sup>50</sup> This is consistent with the landmark California Supreme Court case of *In re Marriage of Carney*,<sup>51</sup> where the court stressed that it is impermissible to rely on a diagnosis or disability as *prima facie* evidence of unfitness to parent.

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<sup>48</sup> Every state has statutes providing for the termination of parental rights by a court. *See e.g.*, Juvenile Court Act of 1987, 705 ILL. COMP. STAT. ANN. 405 / 2 *et seq.* (West 2010). Under this act, the State can terminate parental rights and place the child for adoption by another family if it can demonstrate that 1) The parent is unfit; and 2) Termination is in the child's best interest. "Unfit person means any person whom the court shall find to be unfit to have a child . . . . Grounds include . . . [i]nability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment . . . as defined in § 1-116 of the Mental Health and Developmental Disabilities Code . . . and there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period." Adoption Act, 750 ILL. COMP. STAT. ANN. 50 / 1(D)(p) (West 2010). For examples of similar statutes regarding termination of parental rights, *see also* ALASKA STAT. § 47.10.088 (2010); MINN. STAT. ANN. § 260C.301 (West 2011); TEX. FAM. CODE ANN. § 161.001 (West 2010).

<sup>49</sup> *See, e.g.*, Kirshbaum et al., *supra* note 22, at 36. Interestingly, research shows that mothers who experience greater psychological symptomatology are less likely to use an attorney, which predicts greater internalizing problems in their children. Marsha K. Pruett, Tamra Y. Williams, Glendessa Insabella & Todd D. Little, *Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children*, 17 J. FAM. PSYCHOL. 169, 177 (2003).

<sup>50</sup> *See* 750 ILL. COMP. STAT. ANN. 5 / 602(b)–(c) (West 2010).

<sup>51</sup> *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979). The court addressed the issue of disability as it pertained to physical disability, but the court's reasoning has been applied to cases involving not only physical disability, but also cognitive and psychological disability.

“Rather . . . the court must view the [ ] person as an individual and the family as a whole . . . [T]he court should inquire into the person’s actual and potential [ ] capabilities, learn how he or she has adapted to the disability and manages its problems, consider how other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite or even because of the handicap. Weighing these and all other relevant factors together, the court should determine whether the parent’s condition will in fact have a substantial and lasting adverse effect on the best interest of the child.”<sup>52</sup>

In practice, however, the Marriage Act does not provide any guidance regarding the character or nature of the outcomes constituting the child’s best interest or how parental mental health impacts this determination. This makes it very hard for the court to determine whether a parent with a psychological diagnosis is providing for the child’s best interest. It is not surprising, therefore, that there is a record of Illinois appellate cases determining custody, in part, based on the psychological disability of one parent but without contemplating the nature of the disability or the nexus between the statutory factor of parental mental health and the best interest of the child.

*1. No Nexus Identified Between Parental Mental Illness and Child’s Best Interest.*

In *Carlson v. Carlson*,<sup>53</sup> the mother had previously been adjudicated “insane” and committed to a mental health institution for 18 months.<sup>54</sup> The court denied her appeal for custody but, in its opinion, it failed to identify her mental illness in any specific terms (i.e., no diagnosis or symptoms are specified).<sup>55</sup> Further, the court did not identify how her mental illness affected her capacity to parent, and therefore it is not possible to identify how her symptoms relate to the child’s

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<sup>52</sup> *Id.* at 42.

<sup>53</sup> *Carlson v. Carlson*, 225 N.E.2d 130 (Ill. App. Ct. 1967).

<sup>54</sup> *Id.* at 131.

<sup>55</sup> *Id.* at 133.

best interest.<sup>56</sup> In effect, this decision awarding the father custody could have been based on the facts of the case, but it is also possible that it was rooted in negative stereotypes of mental illness, particularly in the 1960s when it was overwhelmingly women who were hospitalized for mental illness.<sup>57</sup>

Likewise, in *Corcoran v. Corcoran*,<sup>58</sup> where the wife had a history of an unspecified mental illness (but also including post-partum depression), with no evidence of recovery, the court held that the tender years doctrine did not determine custody.<sup>59</sup> Again, no mention is made in the opinion regarding the nexus between the mother's psychological difficulties and her failure, relative to the father, to satisfy the children's best interest.

In *Barbara v. Barbara*,<sup>60</sup> the court opined that, in contrast to the father who was diagnosed as having a passive-aggressive disorder, the mother with paranoid personality should not be awarded custody of the children.<sup>61</sup> The court's reasoning was that "it would be detrimental to . . . the children,"<sup>62</sup> and, in addition, it would cause [the mother] difficulty, and [she] would develop stress."<sup>63</sup> Though the court labeled the diagnosis, it failed to provide an explanation of how this mental illness would affect the welfare of the children.<sup>64</sup>

In another case, *In re Marriage of Willis*,<sup>65</sup> the mother was denied custody based on her diagnosis of an unspecified "personality disorder that would not respond to treatment"

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

<sup>57</sup> This case predates the Marriage Act which has only been in effect in Illinois since 1977.

<sup>58</sup> *Corcoran v. Corcoran*, 224 N.E.2d 611 (Ill. App. Ct. 1967).

<sup>59</sup> *Id.* at 613.

<sup>60</sup> *Barbara v. Barbara*, 249 N.E.2d 269 (Ill. App. Ct. 1969).

<sup>61</sup> *Id.* at 271.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 275.

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

<sup>65</sup> *In re Marriage of Willis*, 599 N.E.2d 179 (Ill. App. Ct. 1992).

and anorexia nervosa.<sup>66</sup> Here too, the court seemed to be operating under the assumption that providing a diagnosis constituted sufficient reasoning for the denial and no relationship between the purported mental illness and the child's best interest was established. The appellate court's primary reliance on the diagnosis (even though it was unspecified in the case of the personality disorder) and its failure to make clear the required nexus conveys a subtle attitudinal bias against persons who have psychological disorders and suggests that the court has a negative preconceived notion regarding the parenting skills of the mentally ill.

2. *When the Nexus is Provided, the Court Emphasizes the Relationship between Parental Mental Health and the Psychological Best Interest of the Child.*

By and large, in determining custody under the Marriage Act, when Illinois courts are concerned with the link between the parent's mental disorder and the best interest of the child, they focus on the psychological well-being of the child. This is consistent with the enumerated best interest of the child factors.<sup>67</sup> For instance, in *In re Marriage of Jerome*,<sup>68</sup> the father contesting custody was diagnosed as having an obsessive-compulsive personality disorder which involved a hypochondriacal preoccupation.<sup>69</sup> The father was convinced of his own imminent death, such that the children developed an ongoing fear of death and abandonment.<sup>70</sup> In denying the father custody, the court noted that his mental illness "encumbered his relationship with the children" and was psychologically damaging to them.<sup>71</sup>

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<sup>66</sup> *Id.* at 181; *see also* Prince v. Herrera, 633 N.E.2d 970, 976 (Ill. App. Ct. 1994) (basing denial of custody, in part, on the unspecified "mental problems" of the mother).

<sup>67</sup> *See, e.g., In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979); 750 ILL. COMP. STAT. ANN. 5 / 602(a)(1)–(10) (West 2010) (best interest of child factors).

<sup>68</sup> *In re Marriage of Jerome*, 625 N.E.2d 1195 (Ill. App. Ct. 1994).

<sup>69</sup> *Id.* at 1200.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1212.

Likewise, in *In re Koca*,<sup>72</sup> a mother who was not awarded custody had been diagnosed as having passive-aggressive personality disorder, depression, and being somewhat delusional.<sup>73</sup> The court focused on the negative effect these symptoms had on the psychological well-being of the child, and accordingly, held that the father would be a better custodian.<sup>74</sup> In this manner, in coming to its decision, the court noted the relevant nexus between the statutory factor of parental mental health and the child's psychological best interest.

3. *The Court May Consider the Nexus between Parental Mental Health and the Physical Best Interest of the Child.*

Of course, in weighing custody alternatives, the Illinois courts are also concerned with the physical best-interest of the child.<sup>75</sup> For instance, in a case in which the contesting mother had Munchausen by proxy, the court's primary concern in denying her custody (and even visitation) was the children's physical safety.<sup>76</sup> Similar concerns regarding the children's physical danger have also precluded custody and even unsupervised visitation in cases in which the parent has a diagnosis of bipolar disorder.<sup>77</sup>

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<sup>72</sup> *In re Koca*, 636 N.E.2d 672 (Ill. App. Ct. 1993).

<sup>73</sup> *Id.* at 674.

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., 750 ILL. COMP. STAT. ANN. 5 / 602(a)(5)–(6) (2011).

<sup>76</sup> *Cooney v. Bischoff*, No. 1-08-0783, 2009 WL 1940531, at \*1 (Ill. App. Ct. June 30, 2009) (description of trial court decision denying custody and visitation to mother diagnosed with Munchausen syndrome by proxy).

<sup>77</sup> See, e.g., *In re Marriage of Gocal*, 576 N.E.2d 946, 949 (Ill. App. Ct. 1991) (denying unsupervised visitation because the father, diagnosed with bipolar disorder, had two recent manic episodes in which he became violent and out of control). There are fewer reported cases concerning the child's physical safety. This may indicate any of the following: 1) A reflection of the fact that the best-interest factors put heavy emphasis on psychological well-being; 2) Where the parent has a mental health illness, the court is more concerned with the child's psychological well-being; or 3) Cases in which a parent's mental illness is said to result in physical risk to the child are less likely to be litigated. In contrast to reported cases,

There are a limited number of published opinions that reveal judicial reasoning in cases in which judges contemplate the effect of parental mental illness on a child's best interest. By providing judges with an opportunity to discuss their decision-making process in such cases, this paper provides a unique occasion to understand and gain insight into the process by which judges consider this best interest factor. Thus, the study reported here is the first to specifically examine judicial consideration of parental mental health when adjudicating custody.

#### **IV. Methods**

##### *A. Participants*

Seventeen judges participated in the study. Six judges were from Cook County, the remaining eleven sat in other judicial circuits throughout Illinois. The participants included judges who were currently hearing custody cases or who had recently sat in courtrooms hearing such disputes. The average age of the judges was 53.1 years (range: 40 - 71). The average number of years on the bench was 11.4 years (range: 3 - 21). Of the judges interviewed, four were female, thirteen were male. All judges participated on the condition of anonymity.

##### *B. Length of Interview*

The average interview lasted 69.3 minutes (range 46—97).

##### *C. Interview Instrument*

The interview instrument included a set of open-ended questions. The interview began with preliminary information about the judge and the judge's court. I asked judges about their professional and personal lives and inquired about their career as a lawyer and judge and whether they have children.

The initial questions were followed by open-ended

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however, judges interviewed for this paper, reported a primary concern with a child's physical best interest.

questions regarding the process of child custody determinations. Questions were designed to elicit answers regarding their views about child custody law and their experiences with child custody cases—with a specific focus on cases in which a contesting parent has a mental health illness. Topics typically covered during the semi-structured interviews include: parental mental health disorders and symptoms most often encountered in disputed child custody cases, understanding of mental illness, the impact of mental illness on parenting, the relationship between parental mental illness and the child's best interest, measuring the child's best interest, use of 3<sup>rd</sup> party evaluators, use of social science in the courtroom, and judicial common sense. These questions were derived by drawing upon themes in child custody case law and empirical research examining the relationship between mental illness and parenting. The sources relied upon are cited throughout this paper.

## V. Results

The quotes cited to in this section reflect themes expressed by judges interviewed. Quotes are used to illustrate either dominant or divergent judicial reasoning utilized in custody determinations.

### A. *General Thoughts Regarding Child Custody Determinations*

Judges interviewed remarked that the Domestic Relations appointment is tremendously stressful. One judge commented that, in particular, overseeing contested child custody cases was “probably [ ] [his] least favorite thing to do . . . People are at their worst . . . it's difficult . . . It's one of the least enjoyable things to do as a judge.”<sup>78</sup> Emphasizing this opinion, another judge said, “We have an adage that in criminal court you see the worst at their best, but in divorce court, you see the best at their worst.”<sup>79</sup>

It was also noted that overseeing child custody cases

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<sup>78</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>79</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

requires more than legal knowledge, and that in fact, adjudication of a case necessitates the application of a wide range of non-legal principles. “Think of all the different disciplines you have to be familiar with. From accounting, to substance abuse to emotional or mental illness to domestic violence, child welfare, child development. . . besides the different legal issues. . . You’ve really got to know a lot of stuff.”<sup>80</sup> One judge acknowledged that in making custody decisions, “some of [ ] [the decision-making process] has nothing to do with law. . . but, logic and human nature.”<sup>81</sup> Another judge pointed out that these cases are “very complicated. . . [with] complicated, very difficult legal issues . . . and then all the emotional issues that come with that . . . .”<sup>82</sup>

Adding to judicial stress in child custody cases is the fact that these cases are not based on static and fixed evidence from the past, but rather interpersonal relations that evolve as the case moves forward. “It’s a fluid situation that may change.”<sup>83</sup> Another judge observed that “every other area of law, is pretty much dealing with what happened at a specific point in time. Family law and particularly these custody cases . . . [are about] a whole life, and it’s also a whole life that’s still moving, and things could change the day of the trial, during the trial, something that happened [since the petition was filed].”<sup>84</sup>

Custody determinations are made based on the facts at the time of the trial. In the case of contesting parents who have mental health problems, adjudicating judges may be asked to consider the future functioning and prognosis of the parent. One judge noted that she takes into consideration that litigation stress may exacerbate mental health symptoms. Accordingly, she assumes that mentally ill parents will “get better. Every last one of them. . . [T]he ones that have problems are going to get better because. . . [divorce leads to] the kind

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<sup>80</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>81</sup> Interview with Anonymous Judge M\_2 (Nov. 17, 2009).

<sup>82</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>83</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>84</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

of stress that you don't anticipate in your life."<sup>85</sup> Other judges, however, said that they could not make a custody determination assuming that the parent's mental health symptoms will ameliorate. As one judge said, "You can't second guess. . . I can't second guess myself about what's going to happen if mom or dad gets better and starts acting right. . . [Y]ou deal with it during that time and whatever the facts are during that time. What ifs? I don't know."<sup>86</sup> Likewise, a different judge stressed the need to make the decision as quickly as possible based on the parent's current functioning. He said, "I still have to make a decision in a timely manner and even if [ ] the parent with mental health issues today is not the best parent as far as custody is concerned, maybe they will be in a few years . . . . [But], I have to deal with the facts as they are today."<sup>87</sup> A different judge, extending this point, expressed that he "could not see taking a case along month after month while one side gets his life together."<sup>88</sup>

Judges were also troubled that they were unable to follow-up on custody determinations they made once the final order was put in place. That is, having disposed of a case, there is no system in place for a judge to learn whether he or she is making decisions that are truly in the child's best interest. "You may never know. . . [whether] what you did was the best decision."<sup>89</sup> Another judge reiterated this position by stating, "I wish there was follow-up. I never know what happens down the road. . . . Was the right decision made?"<sup>90</sup>

### B. Nature of Custody Awarded

Judges are not likely to award joint custody when custody is contested.<sup>91</sup> Instead, the judge will award sole custody

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<sup>85</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>86</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>87</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>88</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>89</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>90</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>91</sup> Under the Illinois Marriage Act, 750 ILL. COMP STAT. ANN. 5 / 602.1(b) (West 2010), and throughout this paper, *joint custody* means par-

to one parent. “Most people who are trying a case, if it goes all the way to trial, I’m probably not going to be inclined to do joint custody because they can’t get along.”<sup>92</sup> This view was confirmed by a different judge who asserted, “I’m just making the assumption that when [ ] [the parents] come in, they’re not capable of making decisions together and that’s why one wants sole custody—to be able to make final decisions on his or her own. . . I don’t grant joint custody unless the couple comes into the court holding hands. . . I never grant joint custody in a case [ ] [in which] they’re fighting.”<sup>93</sup> Another judge stated, “Joint custody is about communication between the parents. If this is being litigated, how can I grant joint [custody]?”<sup>94</sup> Even if joint custody is awarded, the judge may not award residential custody to parent with mental illness. “If the parents can cooperate, I [ ] [will] tend to order joint custody. [But] the parent who is not coping or still having trouble coping with mental issues, then I would be more likely to give residential custody to the other parent.”<sup>95</sup>

### *C. How Prevalent is Parental Mental Illness in Contested Child Custody Disputes?*

Judges were asked how often they encounter parents with mental illness when a child custody case goes to trial. One judge answered, “I know that is a real broad brush, but I would bet you that well over half of the issues that I have seen in the court system over the years . . . that there has been some emotional or mental problem that has a very significant part to do with it. . . . People have issues. . . . There are a lot of dysfunctional people in the court system.”<sup>96</sup> Judges noted, however, that it was quite rare for parents with mental illness to contest custody at the trial level. “Well, in terms of an issue

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ents have joint legal decision-making capabilities.

<sup>92</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>93</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>94</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>95</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>96</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

that rises up to the surface. . . 3/100—something like that.”<sup>97</sup> Other judges reported a “[s]mall percentage”<sup>98</sup> and “very rare.”<sup>99</sup>

Judges may not be aware whether custody is disputed when a divorce petition is first filed because mediation is mandated in cases involving child custody or child visitation.<sup>100</sup> “We automatically refer [ ] [parents] to mediation immediately. . . If [ ] [the parties] agree to mediation, I sign off on it.”<sup>101</sup> And where the custody agreement was made prior to mediation, “it’s hard to tell [whether there ever was a contested child custody dispute in which parental mental illness was an issue] because. . . I don’t always know when there [ ] [are] children. . . .”<sup>102</sup>

Pre-judicial private-bargaining is often accomplished with the guidance of an attorney. One judge commented that “[The parents] dump those lawyers on it. [ ] [The lawyers] can’t afford to bill their clients for all the time it would take to have a full hearing on that. I think the lawyers tend to work out agreements because that’s the only way to get the case through. . . [Child custody arrangements] accommodate[e] the economic reality. . . That’s just reality.”<sup>103</sup>

#### *D. In Child Custody Disputes, What Are the Mental Health Issues that the Judge Observes?*

Judges can become aware of a mental health issue in one of several ways: 1) By a contesting party - “Often the other parent will bring it up if they are contesting custody,”<sup>104</sup> 2) By an attorney - “Sometimes you’re tipped off by the attorneys that there may be some problem going on . . . GALs will often tell say to me . . . there’s more going on than meets

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<sup>97</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>98</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>99</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>100</sup> ILL. SUP. CT. R. 905 (2010).

<sup>101</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>102</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>103</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>104</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

the eye,”<sup>105</sup> or 3) By observing courtroom behavior—”You just see how the person is acting in court . . . how they react . . . how they testify.”<sup>106</sup> Thus, “[e]ither the [ ] [parent] will demonstrate something in the courtroom, which raises a question [ ], or the other side makes the allegation.”<sup>107</sup>

Based on interviews with the judges, it is apparent that parents with severe functionally impairing mental health disorders rarely contest custody. As one judge commented, “Well. . . anyone that has a serious mental condition - typically we do not get to a trial.”<sup>108</sup> Another judge pointed out, “[P]eople who have mental health issues. . . they probably don’t go to trial because their attorneys realize they’re not going to win so they settle.”<sup>109</sup> Nonetheless, mental health issues do come up as matters to be considered in trial—primarily bipolar disorder and suicidality. Munchausen by proxy was also mentioned. Judges also commonly encounter parental depression but, despite the potential negative effects this disorder may have on parenting, they are typically not concerned about its impact on children.

### *1. Bipolar Disorder*<sup>110</sup>

Most commonly, judges reported bipolar disorder as a mental health issue that arose in a contested child custody trial. “We’ve got a lot of Bipolar.”<sup>111</sup> Another judge said, “I would guess that bipolar disorder would be the most.”<sup>112</sup> Similarly, one judge stated, “oh, I’ve had folks who were, I guess, bipolar. . . I mean those seem to be most of the mental health issues I’ve seen that I can recall right now.”<sup>113</sup> Another judge also referred to a case that was being litigated in his court-

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<sup>105</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>106</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>107</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>108</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>109</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>110</sup> See *supra* note 5 for the definition of Bipolar Disorder.

<sup>111</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>112</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>113</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

room, “I had a contested custody the case the other day. The father is Bipolar. One of the children is Bipolar. He wants custody because he says ‘I know what she’s going through as a bipolar person.’”<sup>114</sup> In a case to which another judge referred, he noted, “[T]he mom was bipolar. She had real serious issues and . . . occasionally would threaten to kill people, and . . . [she] had very paranoid delusions about things and so . . . there was just no chance with that that she could win on custody.”<sup>115</sup> One judge noted that “a bipolar parent is not necessarily a bad parent. What I want to know is whether they are getting treatment. Are they medicated? Are they aware of their condition? If the answer is yes—then the parent will do the right thing.”<sup>116</sup>

## 2. *Suicidality*

Judges also offered concerns about parents who had previously attempted to commit suicide. “I have to tell you a suicide attempt. . . I have to deal with. . . with kid gloves. Personally, previous suicide attempts make me nervous, so I’m very careful. . . .”<sup>117</sup> One judge noted that he does not distinguish between a “serious suicide attempt where there was actually a chance they would lose their life or whether it was just attention getting.”<sup>118</sup> In contrast, another judge was “interested in whether [it] was talk only. Or, was it cutting? Was it a real attempt?”<sup>119</sup> Concern about suicidality was echoed by another judge who recalled starting a trial as an attorney in which “one of the parents had attempted suicide. . . And that was one where [ ] everyone but the [ ] [parent] was pretty much in agreement on what should happen. . . . [At the end of the first day of trial], the judge wanted to talk to us and [ ] [asked] ‘Why are we going to keep going on with

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<sup>114</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>115</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>116</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>117</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>118</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>119</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

this. . . ?”<sup>120</sup>

### 3. *Munchausen by Proxy*<sup>121</sup>

Judges also referred to Munchausen by proxy. “I’ve had some Munchausen by proxy issues in the past [ ] years.”<sup>122</sup> In another interview, one judge spoke of a custody case in which the contesting mother was “administering enemas to a little. . . girl,”<sup>123</sup> which resulted in a temporary custody order being granted to the father.<sup>124</sup> Another judge noted that “Munchausen comes up on occasion. . . That’s when you worry for the kids.”<sup>125</sup>

### 4. *Depression*<sup>126</sup>

Overall, judges interviewed were not concerned about the impact of depression on parenting capacity. The common view was that depression is common, but most people are “mildly depressed but still able to function. . . A lot of people function at 85% and that’s just kind of life and the way people are. So, I don’t see that. . . as being a major factor - like wow, that person is depressed so I’m not giving custody of the child to that person.”<sup>127</sup> Depression was not necessarily viewed as abnormal because it was commonly framed as “situational depression.”<sup>128</sup> As one judge stated, “[A] lot of people are depressed going through [a divorce]. . . . Depression, in my mind comes in all forms and sizes and the standard depression. . . [ ] is not an impairment [ ] for custody.”<sup>129</sup> Depression seemed to be perceived as a transitory impairment that does not have permanent implications on parenting. “The issue for

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<sup>120</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>121</sup> See *supra* note 7 for the definition of Munchausen by proxy.

<sup>122</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>123</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

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

<sup>125</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>126</sup> See *supra* note 6 for the definition of depression.

<sup>127</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>128</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>129</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

me is not whether they are depressed but rather, whether it is situational. . . . related to litigation stress. . . This is when people are at their worst.”<sup>130</sup>

*E. How Does the Presence of Mental Illness Impact a Child Custody Decision?*

According to the Marriage Act, a parent’s mental health shall not be considered if it “does not affect his relationship to the child.”<sup>131</sup> That is, if there is no nexus between the mental illness and the best interest of the child, the judge may not consider the diagnosis in deciding child custody. Judges interviewed for this study overwhelmingly stated that they considered the parent’s mental illness only if it was perceived to relate to the child’s best interest.<sup>132</sup> “The issues is how does the [ ] [mental illness] affect your parenting, not do you have a mental health diagnosis.”<sup>133</sup> Another judge noted, “if there is a mental health issue. . . what can you do to make sure that the best interest of the child or children are not harmed. . . [I]t is certainly not a trump card for the other side.”<sup>134</sup> One judge stressed, “I don’t care about the diagnosis. I care whether the party can function if they had custody of the child.”<sup>135</sup> Another judge responded by saying, “[H]ow has the parent dealt with their condition? . . . [A]re they able to handle it and still look after the best interest of the child?

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<sup>130</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010). (Judge F\_8, did note that a depression could be functionally impairing, and as such, there is always a need to delve deeper into the nature and length of the depression symptoms and their impact on the parent. One issue to look into is “how long have they been prescribed anti-depressants.”)

<sup>131</sup> 750 ILL. COMP STAT. 5/602(b) (West 2010).

<sup>132</sup> Judges consider various best interest factors when making child custody decisions. Judges reported being fact-sensitive when making custody determinations. Not all best interest factors were weighted equally, and in fact, there was variability amongst the judges in terms of the significance accorded to some factors relative to others. In this paper, I am giving an account only of best interest factors that judges related to parental mental health.

<sup>133</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>134</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>135</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

So . . . without holding [ ] [the diagnosis] against them, the question comes down to ‘Are they handling it appropriately as to the child?’ . . . If they are stable, and they are looking after the best interest of the child, then it is not really held against them. I’m looking at other factors. It almost becomes a non-issue.”<sup>136</sup>

One judge, echoing the view of other judges, commented that many people with mental illness are very stable if medicated, so that he is very skeptical when one party bases the custody claim on the fact that the other party has been diagnosed with a disorder. “[U]nless they’ve got some evidence to back it up that his behavior or things he does are threatening to the kids’ welfare. . . and she produces evidence (to support the claim), then I don’t pay much attention to it.”<sup>137</sup> Before a judge decides whether to consider the parent’s mental health, he or she wants to know, “[H]ow’s it going to impact on this parent’s ability to be with the kids, to raise the kids, to make the decisions that need to be made, to do the day to day things that need to be done in order to be a parent . . . And if it’s something [ ] that would have no impact, then it’s not going to be a strong factor. [On the other hand], [t]he more obstacles [ ] in the parent’s way, the more weight you give to that particular factor. . . .”<sup>138</sup> One judge summarized the general concern by declaring: “[I]t really comes down to - is there a risk of harm that is created because of the mental illness. . . .”<sup>139</sup>

#### *F. Nature of the Nexus*

When judges consider parental mental health, it is in relationship to the child’s best interest as characterized by one of three common themes: 1) The child’s physical safety;<sup>140</sup> 2) “The child’s adjustment to his home, school and communi-

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<sup>136</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>137</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>138</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>139</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>140</sup> 750 ILL. COMP. STAT. 5/602(a)(5) (West 2010) (“[t]he mental and physical health of all individuals involved”).

ty;”<sup>141</sup> and 3) The child’s psychological relationship with the parent.<sup>142</sup>

### 1. *Physical Safety*

A concern for judges was the prospect of a parent’s mental illness jeopardizing a child’s physical welfare. In determining custody, a judge asks, “Is it a mental disability that’s physically endangering a child?”<sup>143</sup> “How does the disorder manifest itself? Does it affect the safety of the child?”<sup>144</sup> A judge expanded on this theme by saying, “[B]ecause it really comes down to—is there a risk of harm that is created because of the mental illness? Is it. . . neglect where they just, I don’t know, get up and walk out of the house and forget they have a kid? Or is it something that they can be of risk of harm to themselves or to others where there’s a risk of physical injury to the child or something? Those are the kinds of things that you [ ] [need to investigate and] get a little deeper into - what exactly the mental illness is . . . then I have a clear idea of what to do with it.”<sup>145</sup>

In particular, judges who emphasized physical well-being when determining the best interest of the child were concerned about the safety of children whose parents had previously attempted suicide. One judge said, “The one thing you don’t want [is] to wake up and find out the father or the mother got the kids. . . and. . . murder[ed] the kids. And. . . that happens rarely -but you think about it all the time and you’re consciously aware of the fact that . . . and in family court these people are so emotional. I mean, it’s unbelievable the im-

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<sup>141</sup> 750 ILL. COMP. STAT. 5/602(a)(4).

<sup>142</sup> 750 ILL. COMP. STAT. 5/602(a)(3) (“The interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest”). Judges may consider all three aspects of a child’s best interest. Although judges tended to focus on one aspect during the interviews, these concepts are not mutually exclusive.

<sup>143</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>144</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>145</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

pact that divorce has on these families.”<sup>146</sup> Another judge, reiterated this fear and said, “I could never award custody to a mother who had previously attempted suicide. . . That would be negligent. . . I would be afraid her children. . . that her children wouldn’t be safe. . . My ultimate concern is safety.”<sup>147</sup>

The apprehension a judge experiences in awarding child custody to a parent with mental illness may lessen as a child matures. One judge revealed that parental mental health is more likely to be a significant factor when the concern is the physical safety of young “[c]hildren who don’t know what’s going on and can’t report. Because I have no control over a person with severe mental health issues. . . if they put the two year old in the car without a car seat.” The judge continued by saying, “If [ ] [the child] can get on the phone, call the other parents and say - you know, dad is flipping out or mom’s flipping out, then I have less of a concern of them being with the one party.”<sup>148</sup> Another judge said, “You’re gonna have to look at the context. How much insight does the parent have? What is the age of the kid?”<sup>149</sup>

## 2. *Adjustment*

Parental mental health was also considered as it affected the child’s “adjustment to his home, school, and community.”<sup>150</sup> There was variability in how judges operationalized the child’s adjustment. One judge focused on the variable of school performance as a measure of adjustment. “[H]ow is the child doing at school. . . Is he doing okay? . . . If the parent is affecting the child in a negative way, then the child will not do well at school.”<sup>151</sup> Another judge defined adjustment in

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<sup>146</sup> Interview with Judge Anonymous M\_14 (Mar. 12, 2010).

<sup>147</sup> Interview with Judge Anonymous M\_2 (Nov. 17, 2009); this judge added, “The problem is that mom is still mom. Mom should have access [to her children]. This is also healthier for the child.”

<sup>148</sup> Interview with Judge Anonymous M\_13 (Mar. 25, 2010).

<sup>149</sup> Interview with Judge Anonymous M\_11 (Mar. 8, 2010).

<sup>150</sup> 750 ILL. COMP. STAT. 5/602(a)(4) (West 2010).

<sup>151</sup> Interview with Judge Anonymous F\_4 (Jan. 6, 2010).

terms of whether the child's basic needs were met. When he considers the impact of parental mental health on parenting, he examines whether, "[the child has a] parent who is going to be appropriately attentive to getting the kids up, fed, dressed, and to school? Or, are you going to have a parent that is so [ ] [mentally disabled], they can't function?"<sup>152</sup>

### 3. *Psychological Factors*

Judges also discussed a concern about the effect of a parent's mental illness on the psychological well-being of the child. As one judge pronounced, "If the parent is having difficulty dealing with life, in whatever way they are, the way they solve problems or deal with life, it is going to be seen by the kids . . . and that may be adopted by the kids. So you take that into account a little bit."<sup>153</sup> This notion was discussed further by a judge in reference to a mother with bipolar disorder who "was well-intended. She loved the children, but she clearly was just incapable because of her own mental health issues of taking care of the kids. She could not build a foundation for them to go out and be productive people."<sup>154</sup>

In determining child custody, some judges prioritized the "relationship between the child and the parent."<sup>155</sup> One judge stated, "You don't mess up a good relationship because it's going to end up ruining the child's future."<sup>156</sup> For this judge, child stability is conceptualized in terms of the "emotional connection" between the parent and child.<sup>157</sup> Accordingly, even if the parent experiences manic or depressive episodes requiring occasional hospitalization, such a parent with mental illness may be awarded child custody. "I have had cases where one parent may have had episodes but was a very good parent. It doesn't change their parenting. Good parents are still good parents but they just need. . . if they're hospital-

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<sup>152</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>153</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>154</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>155</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

ized somebody has got to take care of the child while they're hospitalized, but they're still good parents."<sup>158</sup> Another judge commented that "stability in the relationship between the parent and kid. . . that is key. I prioritize the bonding—the closeness between the parent and child."<sup>159</sup>

*G. How Does a Judge Determine that a Parent's  
Mental Health is Impacting the Child's Best  
Interest?*

Judges are provided with much discretion in deciding custody based on the child's best interest. The interviews revealed that when a judge considers mental health, he or she may rely on recommendations from one or all of the following sources: 1) The GAL or child's representative,<sup>160</sup> 2) The custody evaluation,<sup>161</sup> and 3) The judge's personal observations. At his or her own discretion, a judge may choose to disregard information from any one of these sources. For instance, the judge may deem an evaluation invalid. Alternatively, the judge may modify his or her own initial view regarding an individual's capacity to parent because of a convincing recommendation. The judge is also entitled to make a custody decision by drawing simultaneously upon information from each of these sources. In fact, the judge has the liberty to decide whether and how much weight to assign to each source information when making a recommendation.

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<sup>158</sup> *Id.*

<sup>159</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>160</sup> 750 ILL. COMP. STAT. 5/506(a) (West 2010).

<sup>161</sup> *Id.* at 5/604(b).

### H. *The GAL or Child's Representative*<sup>162</sup>

In contested child custody determinations, judges reported relying frequently on an attorney serving in the capacity as either a GAL or child's representative to screen whether there is a parental mental health issue to consider. Judges are interested in accessing a source that provides information about the parties' mental health that they are unable observe in the courtroom and that may help them decide whether to order a custody evaluation. In certain cases, however, judges consider the GAL or child's representative to be a substitute for a mental health expert evaluation.

Although the court may on its own motion appoint a GAL or child's representative, in some judicial districts, due to financial concerns, this rarely occurs. "[T]he parties. . . [ ] [cannot] afford it."<sup>163</sup> With such financial concerns in mind, a few judges reported that in contested child custody cases they first appoint a child's representative or GAL before considering the option of ordering a 604(b) evaluation. The reason for this approach is that such attorneys are "cheaper" than professional evaluators.<sup>164</sup> As one judge stated, "I tend to go cheap

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<sup>162</sup> In this section, some judges are quoted as referring to 'GALs' while others refer to 'child's representatives.' Statutorily, these are distinct types of attorneys. According to the Marriage Act, the GAL may make "recommendations in accordance with the best interest of the child . . . [and] may be called as a witness for purposes of cross-examination regarding the guardian ad litem's report or recommendations." *Id.* at 506(a)(2). In contrast, a child's representative, "shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments. 750 Ill. Comp. Stat. 5/506 (a)(3). Yet, some judges with whom I spoke, "[take] a lot of recommendation from the child's representative." Interview with Anonymous Judge M\_6 (Jan. 20, 2010). It should be noted that according to the recent case of *In re Marriage of Bates*, the court held that permitting admission of a child representative's recommendation without testifying, as applied to the mother in custody modification proceeding, deprived the mother of her 14th Amendment procedural due process. *In re Marriage of Bates*, 819 N.E.2d 714, 724 (Ill. 2004). As such, most judges prefer to appoint GALs in contested child custody cases.

<sup>163</sup> Interview with Anonymous Judge M\_16 (Mar. 12, 2010).

<sup>164</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

as I can because nobody has the money for this, and the GAL's tend to be cheaper and quicker than evaluators . . . So, I tend to go to GAL's first and then if that doesn't work out - maybe an evaluation. I hate doing both."<sup>165</sup> Another judge reported, "Lately I've been trying more GALs and they seem to be pretty effective and a lot cheaper so I've been swinging more towards GALs. I'd say I'm going about 60% 604(b)s and 40% the GALs."<sup>166</sup> A different judge observed, "We'll use [ ] [GALs] [to write a report] . . . and that's relatively inexpensive."<sup>167</sup>

Judges who appoint GALs or child's representatives report "start[ing] with the GAL to get a little better feel for the parties. . . And then, if I feel that there's mental health issues that I need to get into, then I'll bring in a psychologist."<sup>168</sup> One judge stated that he "appoints a GAL first. . . But. . . if there's really going to be a trial, I prefer to have both [a GAL and a 604(b) evaluation] because. . . I think they can have somewhat different insights and benefits."<sup>169</sup> For instance, judges think of GALs and child's representatives as serving an important function in giving an "unbiased view of the [family] situation."<sup>170</sup> One judge observed, "What I'm looking for is a more specific function. . . to point out things that maybe the attorneys or the parties won't. In other words. . . if there's information that the parties are hiding. . ."<sup>171</sup> A different judge reported appointing a GAL primarily when there were special concerns, such as when one of the parties is pro se. He said, "I appoint a GAL when one side is unrepresented because I can't do it without that. [Otherwise], it's just a sheer shot in the dark. I'm hearing half the story."<sup>172</sup> Another judge

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<sup>165</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>166</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>167</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>168</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>169</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>170</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>171</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>172</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

who always appoints a “child representative first,”<sup>173</sup> revealed that he uses such an attorney as a “mediator . . . a bridge . . . even if that’s not the official function.”<sup>174</sup>

Judges interviewed stressed the fact that a GAL “can actually make on- site visits with the parents in the house, he or she can meet with the parents and the child in an environment where they are intending to have the child live. And so . . . they can give me some information that the evaluators probably are not going to be able to do. . . . Also, the GAL is supposed to try to see if he or she can encourage settling the case.”<sup>175</sup> Another judge also considered the fact that “. . . most GAL’s [ ] do the home visit. They certainly do the interviews. They get it done fairly quickly. They are lawyers that practice in domestic relations area so they kind of know what’s going on.”<sup>176</sup> In contrast, “[t]he evaluators can give you more clinically based information . . . So, they have a different perspective . . . if there [ ] [are] mental health issues.”<sup>177</sup> Another judge, discussing the differences between GALs and custody evaluators, noted that with “[a] 604 you get an awful lot of psychological reports, a lot of testing in that regard. You don’t get quite the flavor that you might get from a GAL . . . So it depends on what’s going on.”<sup>178</sup>

Even when there are parental mental health issues to be considered, some judges are willing to substitute the opinion of a GAL or child’s representative for the recommendation of a custody evaluation. As one judge opined, “GALs are cheaper . . . and I don’t get more [out of a 604(b) evaluation].”<sup>179</sup> Another judge said, “Sometimes I appoint a child

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<sup>173</sup> Interview with Anonymous Judge M\_2 (Nov. 17, 2009).

<sup>174</sup> *Id.*

<sup>175</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010). (Judges’ responses indicate regional differences in the norms associated with 604(b) evaluations. In some judicial circuits, evaluators regularly make home visits. In other circuits, evaluators do not make home visits but observe the parent-child interactions in their office.)

<sup>176</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>177</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>178</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>179</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

representative—a neutral source of information . . . with no agenda. This is an attorney who can't testify—but I frequently use their recommendations.”<sup>180</sup> This sentiment was repeated by a different judge who stated, “I think it's very important to have a GAL if you do not have an evaluator . . . It's not as valuable as an evaluator but it's still a plus for me to get information to try to make a decision on the best interest of the child.”<sup>181</sup> Yet another judge pronounced, “I'm also trying to avoid [ ] [604(b) evaluations] as much as possible . . . because they're so time consuming . . . So a good child rep can really be tremendously useful.”<sup>182</sup>

Other judges, however, sharply distinguished between that which a GAL or child representative is capable of providing and that which a custody evaluator can offer in a disputed child custody case where mental health is a central issue. One judge commented that he preferred a custody evaluation “because they're trained in the mental health issues better than attorneys.”<sup>183</sup> Another judge was quite adamant that a GAL's opinion about mental health should never be used in a contested child custody case. She said:

“I wouldn't put any stock in their opinion as to mental health issues . . . No. They're going to tell me about observations, and if the observation is during an interview with the mother or the father in the home, and they notice that the house was unkempt, there were animal feces in the basement, there was an inability for her to get dressed and she was in a bathrobe when they came to the house . . . Those are all things that [ ] [make me think] there's probably depression going on here. But they're not telling me, ‘oh judge, I think this woman is depressed.’ I mean I wouldn't take their diagnosis . . . because they're not doctors . . . because they're not trained to give that [kind of information.]”<sup>184</sup>

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<sup>180</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>181</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>182</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>183</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>184</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

### I. *The Custody Evaluation*

In child custody cases in which parental mental illness was considered, judges stated that they like to use evaluations as a source of information in determining the best interest of the child. This is consistent with the Marriage Act which permits “[t]he court [ ] [to] seek the advice of professional personnel” in order provide guidance about issues pertaining to custody and visitation.<sup>185</sup> This is commonly known as the “604(b) evaluation.”<sup>186</sup> Judges believe that one function of the evaluation is to gather the facts. “I need somebody to interview both sides and to be able to tell me the truth of what’s going on.”<sup>187</sup> In the case of a mother who had been diagnosed with bipolar disorder, a judge described the critical nature of information that an evaluation reveals. “What do the episodes mean? . . . I mean is she gone for weeks or days at a time—either mentally or physically? . . . [W]as she off her meds [ ] willingly or [ ] was there a doctor? Was she over- or under-prescribed something? Can she get back on the right meds?”<sup>188</sup> The evaluations can serve as “important observation tool” for the judge.<sup>189</sup>

Another function of the evaluation is to help judges determine whether there is a nexus between parental mental health and parental functioning. As one judge commented, “Well, I can get more of a background in a summary report on how mental issues affect [ ] a parent or a child and I’m just getting more detail in a report on what the path has been . . . You can get more information than you can in various court appearances . . . [ ] getting the professional bias—what the behavior is, and how that impacts the other issues . . . it’s just helpful in summary from a professional.”<sup>190</sup>

Judges appreciate being informed about mental health

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<sup>185</sup> 750 ILL. COMP. STAT. 5/604(b) (West 2010).

<sup>186</sup> *Id.*

<sup>187</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>188</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>189</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>190</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

information from mental health professionals because “they’re trained in mental health issues . . . [T]raining that [ ] [judges] don’t [have].”<sup>191</sup> To be sure, judges “just [ ] [have] a law degree. [ ] [They] don’t have a psychology degree.”<sup>192</sup> Another judge opined that professional evaluators can be helpful because, “they’re trained to get into these people’s heads and make recommendations . . . They get into a lot of areas which are all generally helpful.”<sup>193</sup> One judge also added, “I can never have too much information in a divorce case.”<sup>194</sup>

### *1. When is an Evaluation Ordered?*

In general, it is the parties themselves who request a 604(b) evaluation. It is left to the judge’s discretion whether to order such an evaluation.

Generally, judges do not order evaluations on their own motion. This was stated explicitly by one judge who said, “Often [the parties] are [ ] asking for a 604.”<sup>195</sup> This theme was repeated by other judges declaring, “It’s the attorneys who are asking for the 604bs;”<sup>196</sup> “I have never on my own ordered one;”<sup>197</sup> “I have not, to date, ordered one on my own;”<sup>198</sup> “Usually, I let the attorney order [ ] [an evaluation]. I don’t order on my own.”<sup>199</sup>

Judges, however, may not always grant the request for an evaluation. Two common reasons for denying a custody evaluation include: 1) The expense of the evaluation,<sup>200</sup> and 2)

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<sup>191</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>192</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>193</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>194</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>195</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>196</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>197</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>198</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>199</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>200</sup> For instance, the fee for conducting an evaluation and writing a report in Cook County, where the city of Chicago is located, can reach \$12,000; this fee does not include testifying at a deposition or trial. Nationally, in

The judge's perception that it is unnecessary. As one judge reported, "I usually don't take an affirmative step [ ] [ordering an evaluation] . . . [and I] may not support it . . . because of the expense."<sup>201</sup> Another judge said, ". . . we have very little expert testimony in child custody cases . . . very little . . . [W]ho's going to pay for it?"<sup>202</sup> Yet, a different judge opined, "I [ ] look to cost . . . It's a lot of money."<sup>203</sup> One judge, stressing the need to consider the costs of an evaluation, expressed that she regularly denies the request "because there is an obligation to preserve the marital estate."<sup>204</sup>

This sensitivity to the parties' financial capabilities means that even fewer custody evaluations are being conducted now than ever before. One judge expressed the opinion that "lately people aren't doing them as much because they can't afford them."<sup>205</sup> Still, a different judge declared, "Early in my time as a judge, I ordered it more often than I do now. I just realized that [the parties] cannot afford it. So a 604 evaluation [ ] is pretty rare for me nowadays . . . They have trouble paying their attorney's fees . . ."<sup>206</sup> This judge, troubled by the limited resources available to parties, continued to say, "It's just that we have these wonderful statutes that promise all these things that are going to be out there for the people, and they cannot afford it."<sup>207</sup>

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2001, the average charge for an evaluations was approximately \$3,335 – reaching \$15, 000 in some cases. James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations Five Years After the American Psychological Association Guidelines*, 32 PROF. PSYCHOL. 261 (2001). In Cook County, when divorcing parties qualify, the court pays for court-appointed child custody evaluations in its Forensic Clinical Services. To qualify, the joint annual income of the divorcing parties may not exceed \$50, 000. Some counties appeal to professionals to conduct a certain number of pro bono evaluations per year. However, demand greatly exceeds supply.

<sup>201</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>202</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>203</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>204</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>205</sup> Interview with Anonymous Judge M\_6 (Jan 20, 2010).

<sup>206</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>207</sup> *Id.*

Judges also focused on the need for there to be a compelling reason for a custody evaluation to be ordered. “[U]sually the parties are requesting [ ] [the evaluation] . . . [and the decision to grant the request is based on] whether there are mental health issues.”<sup>208</sup> Indeed, “[t]here needs to be a good reason for it. . . I don’t go along with it unless the parent was a recent patient or a specific problem needs to be addressed . . . [For instance], was there a recent suicide attempt?”<sup>209</sup>

## 2. *How do judges use the custody evaluation?*

When looking at the custody evaluation, some judges claimed to “just flip over to [the last page] to see what the recommendation is.”<sup>210</sup> This was reiterated by another judge who commented that, “I’m really looking at the recommendations . . . that is the heart and soul of the report.”<sup>211</sup> Ordinarily, these custody recommendations are used to “validat[e]”<sup>212</sup> the judge’s own opinion about the custody arrangement. For instance, a judge may be searching for information to confirm his or her belief that the parent’s mental illness “had an impact on [ ] the child.”<sup>213</sup> Typically, judges report that the evaluation conclusions “fit with what [ ] [the judge] had in mind.”<sup>214</sup> One judge asserted that she does not “read [ ] [the report] until everybody has rested and I’m writing the decision. I’m looking to see if it substantiated anything that I’ve heard out there in the courtroom . . . [But] I don’t need it. I need the people.”<sup>215</sup>

Judges tend to agree with the conclusions of the evaluation and “rarely”<sup>216</sup> disagree. “I typically would agree with

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<sup>208</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>209</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>210</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>211</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>212</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

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

<sup>214</sup> Interview with Anonymous Judge M\_6 (Jan 20, 2010).

<sup>215</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

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

the evaluator.”<sup>217</sup> This opinion was expressed by a judge who said, “I usually would go with the custody recommendation, probably [ ] 80% of the time.”<sup>218</sup> Another judge said, “I’m consistent with the report of the 604(b) more often than I’m inconsistent—by a big shot.”<sup>219</sup> This view was further expanded upon by a judge who notes that “commonly—yes [I agree with the evaluation], but not all the time . . . [T]ypically if it’s [ ] [an evaluator] that you have a lot of confidence with and that’s usually the situation, that is, that’s what happens.”<sup>220</sup>

One judge who often defers to the evaluation in determining custody commented that “it’s hard to run counter to the evaluator because [ ] [judges have] just got a law degree. [ ] [We] don’t have a psychology degree . . . so it’s always been my mindset that if this were going to be appealed, I’ve got to have a really good basis for ignoring the expert, right?”<sup>221</sup> This sentiment was echoed by another judge who claimed that because he “[ ] [didn’t] want to be appealed . . . it would be hard to find against” the evaluation.<sup>222</sup>

Judges may often adopt the evaluator’s conclusion or recommendation; however, they were unequivocal in asserting that agreement is not inevitable. “It’s just one piece of evidence that I will receive. I will not rely on in blindly. I will make my own assessment based not only on that, but all the evidence in the record. . . I want people to know that I’m not relinquishing my role as finder of fact just because [of what] some expert says. . . I have relied on some. I have completely disregarded others.”<sup>223</sup> Ultimately, judges consider the 604(b) to be one source of information used to assess how the mental health of the parent is impacting the child. “It’s a tool [ ] that you use in trying to reach a decision. It’s like putting

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<sup>217</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>218</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010).

<sup>219</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>220</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>221</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>222</sup> Interview with Anonymous Judge M\_2 (Nov. 17, 2009).

<sup>223</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

weights on a scale. It's another weight to put on. It can be a pretty big weight when you put it on the scale."<sup>224</sup>

Judges commonly find against an evaluation when they perceive the report to be based on incomplete or false data, as reported by the parties. One judge I interviewed told me that she had “just found against a 604(b). The evaluator just didn't have all the information . . . the right information . . . .”<sup>225</sup> Another judge recounted a case in which “it was clear the evaluator had only received a partial truth from the party . . . So, I couldn't follow the recommendation.”<sup>226</sup> Similarly, another judge commented that, “The [ ] problem I've come across . . . is that a lot of time [ ] [the recommendation] depends on the information that the party gives the evaluator. . . I had a case recently . . . where incomplete information was given and outright false information was provided, so it really compromises the opinion.”<sup>227</sup>

Judges are the ultimate deciders of fact, the ones who, based on personal discretion, make the final child custody determination. In fact, judges are “not obligated to adopt [ ] [the] recommendations . . . .”<sup>228</sup> The “reason [for the rejection] can be intangible, or maybe because the evaluator and [ ] [the judge] disagree about which parental skills are important.”<sup>229</sup> One judge stated, “If I don't agree with the expert, I am not going with the expert. I'm the decider of facts. I have to make the decision. I have to live with myself. . . I always make a good record because [ ] it may go to the appellate court.”<sup>230</sup> Added another judge, “I ultimately have to make the decision myself—so [ ] [the evaluation] doesn't necessarily provide the ultimate answer for me, but it is helpful.”<sup>231</sup> As one judge observed, “[W]hen you look at the big picture, eve-

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<sup>224</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>225</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>226</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>227</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>228</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>229</sup> *Id.*

<sup>230</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>231</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

ry piece of evidence is something that the court considers, and I don't have [ ] [this] job so that all I have to do is just send the [ ] [parties] to this [ ] [evaluator] and say 'make a recommendation' and then whatever it comes back as, that's [ ] the way it [ ] [will be]."<sup>232</sup>

A few judges, however, do not consider custody evaluations to be consistently valuable. One judge argued that "Most cases, I find . . . that I don't find the report helps me that much. I just find that I come to the same conclusion but I came to that conclusion because I've had a lot of human experience . . . The report didn't add or subtract anything to me."<sup>233</sup> This judge added:

"[A] lot of [ ] [the reports] I could almost recite. They give an awful lot of history and what the parents said, and . . . they watch the parent play with the child on the floor in the [ ] room . . . Then [the evaluator reports], 'they play well together' or 'they came in together,' and 'they love each other,' and that kind of stuff . . . But then they do a lot of psychological testing. Almost 100% of the time it comes back normal. . . but, I'm not sure what that means as far as the parental relationship with the kid . . . how good a parent they're going to be. And now, I'm getting to the point, given the sort of seasoned family lawyer who has been around for a while . . . well, they give me a pretty good smell of what's going on."<sup>234</sup>

Another judge repeated some of the same criticisms, and also put forward, "Some [evaluations] have been informative, but overall . . . I don't feel like [the evaluation] is adding anything I don't know already. . . It's not magic."<sup>235</sup> These reports "give long self-report history . . . but, don't always relate [the mental health] condition with parenting . . . and not that much focus on parental strengths. . ."<sup>236</sup> This judge was of the opinion that "What I really need to know is how the

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<sup>232</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>233</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>234</sup> *Id.*

<sup>235</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>236</sup> *Id.*

parents are going to be at joint decision making. Nobody has helped me with that.”<sup>237</sup>

3. *How does a judge decide if the custody evaluation is of good quality?*

There is a range in the quality of evaluators throughout the state of Illinois. In less urban areas, there may not be many options from which to pick a professional to conduct an evaluation. Yet, in one judicial district in Illinois, the court has set up a list of hand-selected evaluators from which parties may select a professional for a 604(b) evaluation. In contrast to such a restricted system, in other counties, such as in Cook County (where Chicago is located), there is a larger pool of professionals from which to choose, but it may still be difficult to assess the quality of the evaluation.

Judges in less urban counties expressed a concern about the limited pool from which to draw evaluators and therefore some reservations about the quality of the evaluations. One judge said, “We have some licensed people that do [ ] [evaluations] but very few. . . usually psychologists or social workers.”<sup>238</sup> Another judge commented that “We just don’t have that many [evaluators] to pick from.”<sup>239</sup> One judge complained, “It’s a challenge . . . a small pool to pick from . . . I just ensure that the APA standards are met.”<sup>240</sup> A judge in a rural county observed that there were few evaluators from which to select a professional evaluator and that they “don’t have a list of [ ] evaluators . . . If one party wants one, then they bring in a curriculum vitae and say ‘Look this is who we want.’ If the other side has a real problem, they’ll bring it up. [ ] [The other side] will check it out.”<sup>241</sup>

In contrast, in one judicial circuit in Illinois, the court permits evaluations from a limited number of pre-selected

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<sup>237</sup> *Id.*

<sup>238</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>239</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>240</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>241</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

professionals who appear on a court-approved 604(b) evaluator list. Evaluators must apply and be approved to appear on this list. In addition, evaluators “have to be licensed clinical psychologists with experience in child custody cases . . . They have to be credentialed.”<sup>242</sup> In this manner, “the court is able to exert quality control over those who [ ] [may take part in the evaluation program.]”<sup>243</sup> These psychologists “have applied to be on our list and have agreed to the fees that we all allow them to charge and kind of agreed to our terms as to how much time they need to take and to get the thing done. . . . We’ve been doing it for 20 years and I would say [ ] [half of them] have been around that long . . . .”<sup>244</sup>

In other counties throughout Illinois, judges voiced differing methods in determining the qualifications of the evaluators. By and large, attorneys select the evaluator. “A lot of times the attorneys will come up with names.”<sup>245</sup> One judge reported “ask[ing] if the attorneys have somebody in mind. If it’s somebody that I’m familiar with, I generally go along with them. Sometimes, it’s simply a matter of financing . . . who [ ] [can] do it on the cheap.”<sup>246</sup> A different judge described her method of selection as involving a two-step procedure. “I’m going to ask for 3 names. Give me 3 people you have some faith in and then let me pick one . . . because the parties are not going to agree, and somebody is going to have to figure that out.”<sup>247</sup> Another judge explained that he relies on attorney selections because, “I don’t have a good feel yet on. . . who to name as a psychologist or psychiatrists to do these evaluations . . . So, I’m usually looking to the

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<sup>242</sup> For the purpose of increased anonymity, the identification of this judge is being concealed. Psychiatrists may also conduct evaluations, but to date, none have applied to be on the list.

<sup>243</sup> For the purpose of increased anonymity, the identification of this judge is being concealed.

<sup>244</sup> For the purpose of increased anonymity, the identification of this judge is being concealed.

<sup>245</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>246</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>247</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

lawyer for some help.”<sup>248</sup>

Other judges stressed relying on past experience either as an attorney or a judge in selecting an evaluator. One judge emphasized looking to his past experience as an attorney to select evaluators. “I draw upon when I was an attorney. Evaluators who I thought were insightful—so I draw on my past experience.”<sup>249</sup> Other judges focused on experience gained on the bench in Domestic Relations. “Experience. I’ve been doing this for [ ] years in this division. . . . [T]here’s probably a handful [of evaluators] that I see regularly . . . .”<sup>250</sup> Another judge also stressed the importance of experience. “After a while you start to know your evaluators and if it’s somebody from someplace that I don’t trust, I just don’t trust [ ] [him or her] . . . .”<sup>251</sup>

In assessing whether a professional can provide a valid and reliable custody evaluation, judges also report relying on the opinions of their colleagues in the division. “If [ ] other judges recommend them, then they probably have something to offer because we’re not going to use this person again if they’re losers—because it’s not working.”<sup>252</sup> This strategy was reiterated by other judges. One said, “If it’s somebody new that I’ve never heard of . . . [and] I see one of my neighbors has [ ] [an evaluation] with [this evaluator] . . . I will ask them about their experience with that person.”<sup>253</sup> Still another judge stated, “I get names from other judges and then I see if they are good.”<sup>254</sup>

Judges also looked to more explicit factors to determine the quality of the evaluations. One judge stressed that “If [ ] [the evaluators] are professional therapists, I’m going to trust that they know what they’re doing.”<sup>255</sup> But other judges,

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<sup>248</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>249</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>250</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>251</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>252</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>253</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>254</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>255</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

in assessing the quality of the evaluation, examined specific aspects of the report. One judge reported looking to basic spelling and grammar. “I think spelling counts. . . and also being able to write in a straight sentence. . . I have seen some [ ] reports that are garbage.”<sup>256</sup> Likewise, another judge argued, “[Y]ou’ve got to look at how the report is worded.”<sup>257</sup> Another judge opined, “I’m looking to the breadth . . . and to the depth of [ ] [the evaluation].”<sup>258</sup>

One judge declared that he looks to specific terms used in the custody evaluation to determine whether the evaluator is knowledgeable and may be relied upon to provide an accurate assessment of parental capacity as it relates to the best interest of the child. For instance, regarding the use of the term *psychopath*, he noted, “There are real standards on who really is a *sociopath*. That’s the older term for [ ] [psychopath]. If you see somebody banding that term, [sociopath], about then you know the person is badly trained and [so you ask], what else is he wrong about?”<sup>259</sup>

A different judge added that it is critical to look to the method of assessment. “You have to look [to] the test they might use to come to their conclusions . . . what facts they based them on. . .”<sup>260</sup> He stressed that the quality of the assessment is best appreciated “if [ ] [the evaluator is] called to testify . . . Then you’ve got an added bonus of assessing under cross-examination how much they know in their field, and how they came to their conclusions, and so on.”<sup>261</sup> Looking outside the report itself, another judge stated that when she assesses the quality of a custody evaluation, she ensures that the evaluator “[didn’t] side with one parent immediate-

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<sup>256</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>257</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>258</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>259</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010). *See generally* AM. PSYCHIATRIC ASS’N, DSM-IV, *supra* note 5, at 702 (According to the American Psychiatric Association, the pattern of behavior associated with antisocial personality disorder is often referred to as “psychopathy” or “sociopathy”).

<sup>260</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>261</sup> *Id.*

ly . . . [was] familiar with resources . . . [ ] [and saw] the kids.<sup>262</sup>

Several judges reported expecting evaluators to conduct psychological tests as part of the parental assessment but admitted to not being well informed regarding the characteristics of these tests. “I just kind of flip over to see what the recommendation is. Where I need to look further is at the testing results and stuff in there . . . I don’t really focus on that very much.”<sup>263</sup> Another judge, acknowledging a similar experience remarked, “I’m certainly not going to substitute my lay views for some professional tests that I probably don’t understand all the technical aspects of . . . But in general, [if] they can explain it to me, this is what we use it for and this is what it shows in this particular case - Fine.”<sup>264</sup> Psychological tests mentioned most frequently were the MMPI-2 and the Bricklin Perceptual Scales, and its companion test, the Bricklin Perception-of-Relationships Test.<sup>265</sup>

4. *Do judges have a preference regarding the type of professional who conducts the custody evaluation?*

According to the Marriage Act, when determining child custody and ordering a 604(b) evaluation, the court “may seek the advice of professional personnel.”<sup>266</sup> “Professional personnel” has generally been interpreted to mean psychiatrists, psychologists, and social workers. Each of these mental health professions has particular and unique philosophical underpinnings, education, and training standards.<sup>267</sup> Judges may prefer a custody recommendation from one type

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<sup>262</sup> Interview with Anonymous Judge F\_4 (Jan. 6, 2010).

<sup>263</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>264</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>265</sup> Interview with Anonymous Judge F\_8 (Mar. 15, 2010) (“I’m bringing in the psychologist who is going to do the different testing on the parents and the kids. I’m looking at probably Bricklin testing on preferences of the child. I’m looking at an MMPI 2 testing . . .”). For descriptions of these tests, see *supra* note 36 and accompanying text, and *infra* notes 331–333 and accompanying text.

<sup>266</sup> 750 ILL. COMP. STAT. 5/604(b) (West 2010).

<sup>267</sup> See *e.g.*, *supra* text accompanying notes 31–35, 39–40.

of evaluator over another. Of course, in some circuits, because there is a lack of mental health professionals to choose from, the court's preference must accommodate the reality of supply. As one judge stated, "We just don't have that many [evaluators] to pick from."<sup>268</sup> In other judicial circuits in Illinois, a circuit-wide policy has been adopted regarding evaluators. For instance, as described in the previous section, in one county, there is a directory of mental health professionals from which judges may select an evaluator. The list is presently limited to psychologists, but psychiatrists may apply.<sup>269</sup> Social workers are not invited to apply to this evaluator list.<sup>270</sup>

Some judges have no preference regarding who conducts the custody evaluation. Provided the evaluation is based on valid and complete information and is conducted by a mental health expert, significant weight is assigned to the child custody recommendation. One judge stated that when he looks to the evaluator, his primary focus is whether the evaluator has "experience with family dynamics . . . someone with background in that field . . . I find [that] more helpful than specifically whether it's a psychologist or psychiatrists, or even a licensed clinical social worker."<sup>271</sup>

In contrast, other judges have a preference. Certain judges prefer psychologists to conduct the evaluation. "I prefer psychologists because they're more touchy feely helpful to me . . . [They provide] social as well as scientific information. That's very helpful."<sup>272</sup> Whereas, this same judge believes that "[p]sychiatrists don't always get it right because I think [their] ego gets in the way . . . [and their evaluations] are scientific . . . not really what I really need."<sup>273</sup> This judge also noted that evaluations from "[s]ocial workers are ra-

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<sup>268</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>269</sup> For the purpose of anonymity, the identification of this judge is being concealed.

<sup>270</sup> *Id.*

<sup>271</sup> Interview with Anonymous Judge M\_5 (Dec. 30, 2009).

<sup>272</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>273</sup> *Id.*

re . . . [but] more affordable, and they're also good."<sup>274</sup>

Other judges, however, expressed a preference for psychiatrist-conducted evaluations. "I don't trust [psychologists] as well as psychiatrists. . . I don't have a lot of faith in [ ] [psychologists'] opinions . . . Psychiatrists at least had to attend medical school, right? So, that's it right there. And if you've dealt with some psychologists . . . I don't think all psychologists have the best training. I think it's so mushy—their so-called 'science.' It's very difficult to lay too much weight on it."<sup>275</sup>

Another judge stressed that under certain circumstances, psychologists cannot provide the necessary information for determining child custody. In particular, when a parent has attempted suicide, he does not believe that a custody evaluation conducted by a psychologist is sufficient. "If I got a suicide attempt, I go right out to a psychiatrist . . . [to tell me] mental pathology, if [ ] [the parent] needs treatment . . . predictability [of treatment] success. . . [because] now you're' talking about a [ ] more serious mental health issue . . . It's a bias I have that [suicide] is more than the average psychologist deals with. . . I'm sure they [ ] [know] the basics . . . [but no] experience dealing with adult psychiatric suicidal situations."<sup>276</sup>

One judge questioned to what extent evaluations, whether conducted by psychologists or psychiatrists, are essential and effective tools in determining child custody. "To me these mental health issues are such unknowns. Not even the people that are out there in the field, the psychologists and psychiatrists really understand it."<sup>277</sup> He added, "How do they treat these [mental health] problems? Talk therapy. I think talk therapy is going out of style . . . I think the modern thinking on that is this whole talk therapy probably really doesn't do any good. So, maybe we give ourselves some sense of as-

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<sup>274</sup> *Id.*

<sup>275</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

<sup>276</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>277</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

surance if we say, ‘Well, I got an evaluation.’ But, that’s only a blanket. What is it covering up? I don’t have a great deal of faith in the ability of a lot of evaluators to really understand a person and predict those future behaviors.”<sup>278</sup> This judge then expressed the opinion that understanding mental health is “not science. They don’t know any more than you and I can look up at the planet and say, ‘I think Jupiter is looking really good today. I think it’s probably about 400 degrees below centigrade there.’ We don’t really know.”<sup>279</sup>

### *J. Judge’s Personal Observations*

Judges who determine child custody when mental health is an issue do not always have a GAL or custody evaluation to rely upon for information. Sometimes, judges must make custody decisions based primarily on courtroom testimony and observations. Thus, in certain cases in which mental illness must be considered, the judge draws upon personal knowledge and experience to make a decision. Yet, given judges’ acknowledgement that they are not experts in psychology, it is not apparent by what means these decisions are made.

Judges are not mental health experts. This is a fact to which they readily admitted. “I have no expertise in [ ] [mental health] at all;”<sup>280</sup> “I [ ] don’t play amateur psychologist;”<sup>281</sup> and “judges aren’t shrinks.”<sup>282</sup> Still, judges revealed that even when mental health is a central issue in custody determination, they do not always have access to relevant information from a professional evaluator or even a GAL or child’s representative.

Several judges noted that when there is no neutral party evaluating the parenting situation, they often rely on com-

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Interview with Anonymous Judge M\_15 (Mar. 25, 2010).

<sup>281</sup> Interview with Anonymous Judge M\_13 (Mar. 25, 2010).

<sup>282</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

mon sense and “life experience”<sup>283</sup> to make sense of the testimony they hear in the courtroom. Indeed, if “there’s no evaluator, [ ] [the decision is based on] testimony of the parents and other witnesses.”<sup>284</sup> Another judge observed that without an evaluation or a GAL, he relies on “experience and [having] been down this road a hundred times before. And, your ability to read people. Your ability to make a common sense decisions and your ability to do what’s best for the child.”<sup>285</sup> This approach was repeated by a different judge who commented that he relies on a “[k]ind of sense . . . Any intelligent judge is going to tell you that you do the best you can, you don’t always know what’s detrimental and what isn’t, you do the best you can and go on . . . .”<sup>286</sup> In summarizing his own practice, one judge pronounced that determining child custody is “a little bit of law, a little bit of pop psychology, and a little bit of experience.”<sup>287</sup>

There was one judge who declared that evaluators rarely provided her with informative mental health data that she herself could not glean by interacting with the parents and children in the courtroom. “I don’t usually need [ ] [an evaluation]. If a person gets on the stand and tells you their story, you’re going to be able to figure this out . . . I think that a lot of money is spent uselessly [on evaluations] . . . I’m not reading any studies. I’m just going by the evidence that comes into the courtroom.”<sup>288</sup>

Judges also reported drawing upon their “personal background”<sup>289</sup> as parents in determining child custody. One judge stated that “[i]t helps to have been a parent to see . . . what’s best for the child.”<sup>290</sup> A different judge said, “Of course you rely to some extent on common sense from

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<sup>283</sup> Interview with Anonymous Judge M\_14 (Mar. 12, 2010).

<sup>284</sup> Interview with Anonymous Judge M\_12 (Mar. 10, 2010).

<sup>285</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>286</sup> Interview with Anonymous Judge M\_16 (Mar. 24, 2010).

<sup>287</sup> Interview with Anonymous Judge M\_11 (Mar. 8, 2010).

<sup>288</sup> Interview with Anonymous Judge F\_1 (Nov. 12, 2009).

<sup>289</sup> Interview with Anonymous Judge M\_6 (Jan. 20, 2010).

<sup>290</sup> Interview with Anonymous Judge M\_17 (Mar. 11, 2010).

being a parent.”<sup>291</sup> This notion was confirmed by yet another judge who said, “I think being a parent has made me a [ ] better judge.”<sup>292</sup> Another commented, “I’m not saying a judge who’s never had children cannot sit in divorce court, but I’ve got to tell you, having children makes a world of difference in my opinion - as to experience, lifetime experience.”<sup>293</sup> And, one judge remarked, “If somebody asked me, ‘Well, how do you raise turtles?’ Well, I’ve never raised a turtle. I can’t tell you. If somebody says, ‘What’s important in raising a child?’ Well, I have some ideas on that.”<sup>294</sup>

## VI. Discussion

Overseeing a child custody case can be a very stressful task for a judge. The breadth of knowledge required is vast, and the facts of the case develop and evolve as the cases progresses—even after the final order is put into place. These interviews reveal that for judges, parental mental illness is not an *a priori* reason to deny custody. A judge will deny custody only when he or she believes that parental mental illness negatively impacts the physical or psychological best interest of the child.<sup>295</sup> Judges make custody decisions based on in-

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<sup>291</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>292</sup> Interview with Anonymous Judge M\_9 (Mar. 12, 2010).

<sup>293</sup> Interview with Anonymous Judge M\_7 (Mar. 18, 2010).

<sup>294</sup> Interview with Judge Anonymous M\_17 (Mar. 11, 2010).

<sup>295</sup> Certainly, judges always have the option, on their own motion, to grant joint custody. 750 ILL. COMP. STAT. 5/602.1(b) (West 2010). The fact that custody is contested at trial, however, suggests that the divorcing parents cannot cooperate and make decisions together regarding the child—signifying that joint custody is not warranted. *Id.* at 5/602.1(c) (“The court may enter an order of joint custody if it determines that joint custody would be in the best interest of the child, taking into account the following: . . . the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child . . . .”); *see also* Arnold Blockman, *Survey of Illinois Law: Joint Custody Dilemmas and Views from the Bench*, 31 S. ILL. U. L.J. 941, 943 (2007) (Illinois court rarely awards joint custody on its own motion; most trial court awards of joint custody are a result of a joint parenting agreement, and in most contested custody cases, the court awards sole custody because the dispute centers on sole custody).

formation from: 1) The observations and recommendations of a GAL, 2) A custody evaluation, and 3) Personal observations of the judge, framed by “common sense.” Judges, however, tend to overestimate their understanding of the psychological factors relevant to post divorce adjustment. At the same time, they do not discharge effectively their gatekeeping role when they consider, without question, the evidence, opinions, and conclusions offered by evaluators.

A. *The Nexus between Parental Mental Health  
and the Child’s Best Interest*

In deciding whether parental mental health impacts the child’s best interest, judges interviewed claim to look beyond the diagnosis. Thus, in contrast to several reported Illinois appellate cases,<sup>296</sup> these judges only consider the mental health factor if they believe its effect on the child’s well-being can be established. The judges interviewed consider both the physical and psychological best interest of the contested child and examined the effect of parental mental illness on the child’s relationship to that parent. Judges are more likely to articulate concerns about the physical best interest of the child.<sup>297</sup> They expressed a greater concern about whether the child’s basic food and clothing needs were being met or whether the child was physically safe and not at risk of injury or death.

The reasons for the judicial focus on children’s physical best interest as opposed to psychological best interest are not obvious. Physical well-being and physical needs, however, are concepts that are independently observable and have tangible qualities, and accordingly, may serve more readily as the content of judicial focus. Physical variables are objective-

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<sup>296</sup> See, e.g., *In re Marriage of Willis*, 599 N.E.2d 179, 181 (Ill. App. Ct. 1992); *Barbara v. Barbara*, 249 N.E.2d 269, 271 (Ill. App. Ct. 1969); *Carlson v. Carlson*, 225 N.E.2d 130 (Ill. App. Ct. 1967); *Corcoran v. Corcoran*, 224 N.E.2d 611, 613 (Ill. App. Ct. 1967).

<sup>297</sup> See below for discussion concerning the need for increased judicial training regarding the psychological impact of parental mental health on children’s well-being.

ly verifiable and do not require significant specialized training to appreciate. In contrast, understanding psychological welfare, albeit ostensibly intuitive, requires specialized training and significant opportunities for the expert and the subject to interact. Judges, though experts in legal analysis, may not possess the prerequisite experience or occasions to interact that are necessary for detecting psychological matters. Yet, it is precisely such factors that best interest of the child guidelines emphasize.<sup>298</sup> The Act's emphasis on psychological well-being and interpersonal relationships is precisely that which is more difficult to assess by a judge in fleeting and structured courtroom proceedings.

Domestic Relations judges do not report encountering schizophrenia or related disorders (mental illness involving psychosis) in child custody litigation. This is likely because the disorder manifests as auditory hallucinations, delusions, and distorted thoughts, and it is accompanied by severe social and occupational dysfunction.<sup>299</sup> Attorneys may recommend against litigation<sup>300</sup> because the disorder is believed to have a

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<sup>298</sup> 750 ILL. COMP. STAT. 5/602(a) (West 2010).

<sup>299</sup> AM. PSYCHIATRIC ASS'N, DSM-IV, *supra* note 5, at 312.

<sup>300</sup> This conjecture is offered to explain why there may be no published record in Illinois of a parent diagnosed with schizophrenia, or a related disorder, litigating for custody under 750 ILL. COMP. STAT. 5/602. This is not to say that a parent diagnosed with schizophrenia cannot meet the child's best interest.

There are cases, however, litigated under 750 ILL. COMP. STAT. 5/610 (West 2010), in which the court has held that significant change in circumstances, such as the schizophrenic mother's decompensation or psychotic break, warranted modification of a custody order, pursuant to which sole custody to mother had been awarded previously. *See, e.g., McClelland v. McClelland*, 595 N.E.2d 1131, 1135 (Ill. App. Ct. 1992) (modifying where mother diagnosed with paranoid schizophrenia, or alternatively with major depressive disorder with psychosis, suffered from delusions centering on belief that son was being "ritualistically abused by a cult and sexually abused by father"); *In re Marriage of Scott*, 394 N.E.2d 779, 781 (Ill. App. Ct. 1979) (modification where mother with history of schizophrenia suffered psychotic episode while on a trip which necessitated overnight placement of the child in a children's home).

For an example of a court's reasoning in denying initial custody to a mother diagnosed with schizophrenia, *see, e.g., Kevin S.E., Sr. v. Diana*

poor prognosis.<sup>301</sup> One judge commented that “it is rare to get psychosis in child custody proceedings . . . I get [parents with] a higher functioning diagnosis in my courtroom.”<sup>302</sup> Not a single judge offered personality disorders as an issue implicated in custody disputes.<sup>303</sup>

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*M.E.*, 520 S.E.2d 197, 202 (W. Va. 1999) (denying custody because mother had history of paranoia and hallucinations telling her to kill herself). *But see id.* at 204 (“this case shows that the stereotypes [ ] and the stigma of mental illness are still a weaknesses in our court system”) (Starcher, C.J., dissenting).

<sup>301</sup> See, e.g., Glynn Harrison et al., *Recovery from Psychotic Illness: A 15- and 25-Year International Follow-Up Study*, 178 BR. J. PSYCH. 506, 510 (2001) (following-up long-term on persons diagnosed with schizophrenia showed that only about 50% of those with diagnosis had favorable outcome); Delbert G. Robinson et al., *Symptomatic and Functional Recovery from a First Episode of Schizophrenia or Schizoaffective Disorder*, 161 AM. J. PSYCH. 473, 475 (2004) (finding that although approximately half of the patients diagnosed with schizophrenia experienced symptom remission for two years or more, by the end of five years of follow-up, only one-eighth made full recovery).

<sup>302</sup> Interview with Anonymous Judge F\_10 (Jan. 11, 2010).

<sup>303</sup> *Id.* Axis II personality disorders are a class of personality types defined by a pervasive and enduring pattern of thinking and behavior that deviate markedly from the expectations of the culture of the individual who exhibits it. AM. PSYCHIATRIC ASS’N, DSM-IV, *supra* note 5, 685. Examples of personality disorders include antisocial personality disorder, borderline personality disorder, and narcissistic personality disorder. A common characteristic of persons diagnosed with such disorders is difficulty getting along with others and trouble developing and maintaining interpersonal relationships. Despite the disruptive personal and social tendencies of individuals with personality disorders, judges interviewed did not offer examples of contested child custody cases involving Axis II parents. Possible reasons for failing to spontaneously refer to parents from this population are: 1) Judge’s failure to identify such disorders on their own; 2) Failure of laypeople, including attorneys, to be aware of the existence of personality disorders and bring it to the judge’s attention; 3) Inflexible and rigid character traits of persons with personality disorder may not always be pathologized; or 4) Cases involving parents with personality disorders are resolved via private bargaining prior to direct judicial involvement.

*B. The Source of Information Considered in  
Custody Determinations*

Judges reported commonly relying only on their own judgment when determining child custody and not on a third party assessment. Nevertheless, judges often favored using neutral third party sources, such as GALs, child's representatives, and custody evaluators to assist them in making custody decisions. These results are consistent with those reported in a 2003 study examining the effect of child and family factors on judicial child custody determinations.<sup>304</sup> As in the present study, interview results from that study revealed that judges deemed third party assessments valuable, because these parties have more opportunity to interact with the families. As a result, the reports enable judges to gain insight into parent-child relations and parental fitness.<sup>305</sup>

Like the judges in the current study, judges in the 2003 study reported that they do not blindly follow the recommendations offered by the GALs or professional evaluators, but in fact rely also on their own perceptions and experience in making a final custody determination.<sup>306</sup> Further, as in the present study, judges in the Wallace and Koerner study noted that judicial decision-making consists of weighing multiple factors in a non-formulaic manner.<sup>307</sup> That is, there is no one-size fits all process by which custody decisions are made. As in the present study, judges reported looking to the specific facts of the case when making a decision.

*C. Relying on a GAL Recommendation*

In order to provide the judge with as much pertinent information as possible and knowing that a child may not be able to speak for him or herself, the judge may appoint a legal representative, such as a GAL.<sup>308</sup> In some Illinois counties, to

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<sup>304</sup> Wallace & Koerner, *supra* note 42, at 185.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 186.

<sup>307</sup> *Id.*

<sup>308</sup> 750 ILL. COMP. STAT. 5/506(a)(2) (West 2010). Some judges in this

become a court approved GAL, an attorney must attend yearly continuing education seminars targeting child custody-related issues.<sup>309</sup>

It is true that a GAL can make apparent to the judge information that he or she might otherwise not come to notice. Yet, it is not evident how the GAL education requirement creates an authority regarding the psychological or social factors relevant to making a custody determination when a parent has a mental diagnosis. GAL training, when it is mandated, is relatively minimal and focuses primarily on child adjustment variables such as child development, domestic violence, and separation and loss. It is not apparent whether sufficient competence is gained as a result of the required instruction. Additionally, there is no guarantee that the GAL receives any training on adult or pediatric mental health illness or the impact of specific mental symptoms on parenting and parent-child relations. Further, GALs are not trained to look to the strengths of those with mental illness which may compensate for potentially problematic symptoms, nor are they educated

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study reported appointing child's representatives and not GALs. These child's representatives functioned as a GAL, and accordingly, this discussion will focus only on the use of GALs in considering parental mental health in child custody determinations.

<sup>309</sup> See e.g., R. CIR. CT. COOK CNTY. 13.9 ("Requirements and Application Process for Attorneys for Children, Guardians ad Litem and Child Representatives . . . (b) Any attorney applying for placement on the approved list shall complete a notarized and sworn application provided by the Office of the Presiding Judge of the Domestic Relations Division, submit to an interview by the Domestic Relations Division Child Representative Screening Committee, and meet the minimum requirements promulgated by the Office of the Presiding Judge of the Domestic Relations Division of the Circuit Court of Cook County. The Presiding Judge shall have the authority to amend the minimum requirements for the appointment as attorney for the minor child, guardian ad litem or child representative based on recommendations by the Domestic Relations Division Child Representative Screening Committee ."). In Cook County, to become and remain a court approved GAL, an attorney must attend a total of 3 hours of GAL-targeted seminars per year. Some seminars may focus on psychological factors related to divorce and others target legal issues and case law relating to the Marriage Act. Attorneys may choose to attend seminars focusing on either psychological or legal issues.

regarding the interaction between parental characteristics and child temperament. Obviously, these are all factors that need to be considered when a judge determines the child's best interest.

Yet, judges often base a custody decision, at least in part, on a GAL recommendation. With an attorney who is not genuinely well-versed in nuanced mental health issues contributing so considerably to a child custody determination, it is apparent that stereotyped notions of mental illness may be improperly considered. This problem is further exacerbated if the judge decides that due to financial limitations, a custody evaluation is not feasible.

#### *D. Custody Evaluations*

The role of mental health professionals in custody litigation has increased significantly since the passage of the UMDA in 1974.<sup>310</sup> That Act has drawn attention to the psychological and emotional dynamics that are inherent to any child custody dispute. As a result, courts have sought the participation of mental health professionals to advise the court in making custody determinations.<sup>311</sup> Evaluators form child custody recommendations by drawing upon information gained via psychological testing, clinical interviews, and clinical observations.

Many judges interviewed used the evaluations not to direct a custody determination but rather to confirm and substantiate an already judicially -determined decision. At the same time, most judges were interested in the mental health expert evaluations and recommendations and did give information from this source some weight. Some judges believed that psychological factors are best evaluated by experts in the field, and therefore expert evaluations and recommendations must be given significant due.

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<sup>310</sup> UMDA, 402, 9A U.L.A. 561 (1974).

<sup>311</sup> See Erika M. Waller & A.E. Daniel, *Purpose and Utility of Child Custody Evaluations: From the Perspective of Judges*, 32 J. PSYCH. & L. 5, 6 (2004).

Judges interviewed are aware that expert evaluations are only as valid as the bases and reasons supporting them. This is consistent with state law.<sup>312</sup> Further, as established by Illinois law, judges noted that there is no need for them to follow expert recommendations.<sup>313</sup> At the same time, there is little doubt that judges look to experts to provide them with insight and data that they are otherwise incapable of accessing or conceiving.

### *1. Evaluation Guidelines are Insufficient*

As the gatekeeper of evidence, a judge must ensure that the evidence proffered by the mental health expert is generally accepted in the professional's community. Accordingly, judges expect evaluators to comply with the APA custody evaluation guidelines.<sup>314</sup> But these guidelines are not based on empirical research and they do not mandate a specific evaluation protocol. There are no requirements regarding who should be interviewed, who should be tested, which assessment techniques and tests should be used, or how the data should be conceptualized. Further, there is no mandate regarding specific categories of data that should be collected in order to generate a valid and reliable recommendation.

The APA guidelines recommend that the "evaluation focus[ ] upon parenting attributes, the child's psychological

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<sup>312</sup> See, e.g., *In re Marriage of Petraitis*, 636 N.E.2d 691, 698 (Ill. App. Ct. 1993) ("chasten[ing] trial judges to remember that 'psychiatric expert opinions are only as valid as the bases and reasons supporting them.'") (citing to *In re C.B.*, 618 N.E.2d 598, 603 (Ill. App. Ct. 1993)).

<sup>313</sup> 750 ILL. COMP. STAT. 5/604(b) (West 2010) (in determining custody, "[t]he court may seek the advice of professional personnel . . .") (emphasis added); *In re Marriage of Stopher*, 767 N.E.2d 925, 929 (Ill. App. Ct. 2002) ("[T]he trial court, not the custody evaluator, determines the child's best interest. The court need not accept the recommendation of an expert"); see also *In re Marriage of Felson*, 525 N.E.2d 1103, 1106 (Ill. App. Ct. 1988) ("A recommendation concerning the custody of a child is only that, a recommendation, and by its very nature is incapable of being binding on a trial court. Clearly, a trial court is free to evaluate the evidence presented, and accept or reject it in whole or in part").

<sup>314</sup> See Am. Psychological Ass'n, *supra* note 33.

needs, and the resulting fit.”<sup>315</sup> The guidelines, however, do not provide any direction regarding the desired parenting attributes, how such attributes relate to the child’s psychological needs, what a desired “fit” with the child would be, the nature of the aspired post-divorce outcome, and so on.<sup>316</sup> These guidelines offer no empirical evidence to support the objectives; yet, judges regularly understand evaluator opinions to be sufficiently scientific so as to consider them as evidence.<sup>317</sup> Further, although the guidelines “articulate the need for psychologists to remain aware of their own biases . . . regarding . . . disability . . .”, no guidance is provided in identifying which mental health symptoms are relevant to the child’s best interest and how these symptoms relate to post-divorce adjustment. As such, the guidelines do not genuinely protect parents with mental disability from discriminatory action in the hands of custody evaluators. In turn, judges who are unaware of these guideline deficiencies are bound to make unfounded judicial determinations.

## 2. Common Evaluator Reasoning Errors

Recommendations and opinions based on a custody evaluation requires the court to rely upon future predictions by a mental health expert based on faulty decision-making strategies.

A psychologist must somehow forecast how a particular child is likely to be psychologically adjusted several years postdivorce on the basis of a myriad of complex factors and interactions. It is well noted that psychologists as a group are particularly inaccurate in making future behavioral predictions and may be even more inaccurate than laypersons are.<sup>318</sup>

In making a clinical judgment, mental health evaluators, like laypersons, may adopt decision-making strategies

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<sup>315</sup> *Id.* at 864.

<sup>316</sup> See also Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL’Y & L. 843, 863–64 (2000).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 866.

that make them susceptible to committing cognitive errors, and consequently, prone to offering invalid and unreliable opinions. One such commonly adopted strategy is the confirmation bias.<sup>319</sup> In making a recommendation under this widespread approach, evaluators tend to form a hypothesis about the particular parenting and then search for clinical evidence that reinforces the preconceived hypothesis. If the evaluation is ordered because the judge suspects there is parental mental illness that is affecting parenting, the evaluator is “prone to search for information indicative of pathology and then interpret this information as indicative of more pathology than may exist.”<sup>320</sup> Accordingly, there is a real danger of over-pathologizing the parent. This problem is exacerbated by the fact that having a preconceived clinical hypothesis impacts the accuracy of what is, in fact, observed by a clinician during the forensic evaluation.<sup>321</sup> That is, an evaluator working with the hypothesis that parental mental illness is negatively impacting the child will select and record a narrow band of confirming data, even as disconfirming information is dismissed as irrelevant.<sup>322</sup> The result of these flawed judgmental distortions

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<sup>319</sup> Thomas A. Gionis & Anthony S. Zito, *A Call for the Adoption of Federal Rule of Evidence 702 for the Admissibility of Mental Health Professional Expert Testimony in Illinois Child Custody Cases*, 27 S. ILL. U. L.J. 1, 13 (2002); Mark Snyder et al., *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotype*, 35 J. PERSON. & SOC. PSYCHOL. 656, 657–59 (1977).

<sup>320</sup> Terrence J. Tracey & James Rounds, *Inference and Attribution Errors in Test Interpretation*, in SCIENTIST–PRACTITIONER PERSPECTIVES ON TEST INTERPRETATION 113, 116 (James W. Lichtenberg & Rodney K. Goodyear eds., 1999).

<sup>321</sup> Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 195 (2005). For other relevant cognitive biases, see HOWARD N. GARB, *STUDYING THE CLINICIAN: JUDGMENT RESEARCH AND PSYCHOLOGICAL ASSESSMENT* (APA 1998). (identifying clinical distortions due to attribution effects, illusory correlations, flawed estimation rules, framing, labeling bias, and so on).

<sup>322</sup> See Michael E. Lamb, Yael Orbach, Kathleen J. Sternberg, Irit Hershkowitz & Dvora Horowitz, *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 L. & HUMAN BEH. 699 (2000).

tions is the perpetuation of stereotype, such as a negative view of parental mental illness on the child's best interest. Judges, uninformed as to the evaluator's reasoning error and prone themselves to similar cognitive reasoning, are therefore certain to overpathologize parents with mental illness.

This reasoning problem is further intensified by the fact that experts evaluating the impact of mental illness on parenting often refer to empirical research examining post-divorce child adjustment. Such research, however, generally examines maladjustment variables and not variables related to positive outcomes. In effect, instead of answering the question of what *is* in a child's best interest, this post-divorce research is aimed toward understanding what is *not* in the child's best interest.<sup>323</sup>

This is not to say that mental health professionals do not have superior evaluating skills or methods that exceed those possessed by a layperson, including a judge. Mental health training emphasizes precisely such skills. These experts have specialized skills in investigating intra-family relations, present psychological maladjustment and difficulties, and parent and child custody preferences. Despite their vast clinical experience, however, evaluators enter questionable territory when their knowledge is "overextended into questionable higher-level inferences."<sup>324</sup>

Judges who follow the lead of mental health experts, but who are not aware of these potential mistakes in research conceptualization, are committing grave errors in determining custody. Although the initial error lies with the behavioral scientist interpreting the empirical data and the evaluator who bases the custody recommendation on the research, it is the judge who is the gatekeeper of evidence. That is, it is the judge who decides to consider the expert evidence, and it is the judge who resolves the custody decision, to some extent, based on the research. The possible consequence of premising a custody decision on such a faulty foundation is an unjust

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<sup>323</sup> Krauss & Sales, *supra* note 316, at 854.

<sup>324</sup> Tippins & Wittmann, *supra* note 321, at 196.

denial of custody that is in the best interest of the child.

### 3. *The Trouble with Psychological Testing*

Psychological testing is widely used in child custody evaluations. Judges expect testing to be conducted. This is the case despite the fact that they may not be familiar with the psychometric properties of these tests, and they question the utility of such testing. Indeed, professionals routinely use “objective” tests,<sup>325</sup> such as the MMPI-2,<sup>326</sup> Wechsler Adult Intelligence Scale-IV (WAIS),<sup>327</sup> the Wechsler Intelligence Scale for Children-IV (WISC),<sup>328</sup> and the Millon Multiaxial Personality Inventory - III (MCMI).<sup>329</sup> Judges in this study reported being provided only with information from the MMPI-2 and from custody batteries, such as the Bricklin custody scales,<sup>330</sup> which include the Bricklin Perceptual Scales (BPS)<sup>331</sup> and the Bricklin Perception of Relationships Test (PORT),<sup>332</sup> but that does not preclude the possibility that the other commonly used tests are being employed. It is significant that most judges were unable to identify the names of tests used by evaluators. Even when a judge acknowledged evaluating test results, it is evident that the validity or reliability of the tests is not being scrutinized consistently.

The APA guidelines specifically caution against over-

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<sup>325</sup> Francella A. Quinnell & James N. Bow, *Psychological Tests Used in Child Custody Evaluations*, 19 BEHAV. SCI. & L. 491, 496–97 (2001) (describing commonly used tests and discussing changes and evolution in the types of tests evaluators use).

<sup>326</sup> See text *supra* note 36.

<sup>327</sup> The WAIS is a common intelligence test for adults.

<sup>328</sup> The WISC is an intelligence test applicable to children. The use of the WAIS and the WISC has been critiqued because there is no clear relationship between intelligence and parental effectiveness.

<sup>329</sup> The MCMI is a self-report instrument assessing DSM-IV-related personality disorders and clinical syndromes.

<sup>330</sup> BARRY BRICKLIN, BRICKLIN PERCEPTUAL SCALES (1990).

<sup>331</sup> The BPS is a 32 question assessment tool asking children to describe their perceptions of each parent’s actions.

<sup>332</sup> PORT is a projective assessment tool measuring how close each child feels to each parent.

interpreting assessment data from the objective instruments, and there is strong criticism of the routine use of these tests.<sup>333</sup> Judges in this study wondered how these tests could aid them in understanding parenting capacity when a parent has a mental illness. Even supposing a parent has a mental health diagnosis or if psychopathology is revealed by a psychological test, it is not apparent to the judges how this information relates to the question of whether the parent is acting in the child's best interest.

A number of tests have been designed specifically to aid in the evaluation of child custody and visitation. These tests include the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT)<sup>334</sup> and the BPS and PORT. Not a single judge interviewed in this study mentioned the ASPECT but reference was made to the Bricklin tests and endorsed by one judge as being helpful in custody determination.

None of these tests are based on sound research studies or have been subjected to peer review in scientific articles.<sup>335</sup> The measures were developed on small unrepresentative samples based on untested assumptions.<sup>336</sup> There is little evidence for reliability or validity<sup>337</sup> and the psychometric

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<sup>333</sup> D. Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 PROF. PSYCHOL.: RES. & PRACTICE 213, 218 (1993); MELTON ET AL., *supra* note 10, at 558–59.

<sup>334</sup> MARK J. ACKERMAN & KATHLEEN SCHOENDORF, ACKERMAN-SCHOENDORF SCALES FOR PARENT EVALUATION OF CUSTODY (1992) (introducing a system for combining information obtained from various psychological tests, such as the MMPI and the WAIS).

<sup>335</sup> See e.g., MELTON ET AL., *supra* note 10, at 558–59.

<sup>336</sup> See e.g., Gary B. Melton, *Review of the Ackerman-Schoendorf Scales for Parent Evaluation of Custody*, in TWELFTH MENTAL MEASUREMENTS YEARBOOK 222 (Jane C. Conoley & James C. Impara, eds., 12th ed. 1995); Marcia B. Schaffer, *Review of the Bricklin Perceptual Scales*, in ELEVENTH MENTAL MEASUREMENTS YEARBOOK 118–19 (Jack K. Kramer & Jane C. Conoley eds., Buros Institute of Mental Measurements, 1992).

<sup>337</sup> *Id.*; RANDY K. OTTO & JOHN F. EDENS, PARENTING CAPACITY, IN EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 258, 268, 274 (Thomas Grisso, ed., 2d ed., Springer 2003).

qualities of the tests are not known.<sup>338</sup> Yet, evaluators utilize these tests regularly to assist them in forming a custody recommendation, and judges consider the evidence provided by evaluators without question. The result is that inherently flawed assumptions about the validity and reliability of test results may serve as the foundation for unsound decisions.

These flawed evaluation tools may inappropriately overreach in linking symptoms to parental functioning when parental mental health is involved. The lack of evidentiary gatekeeping is particularly problematic in such situations because more sophisticated knowledge and understanding of evidence is required in complex cases involving parental mental health.<sup>339</sup> As one scholar has noted, “If society wishes to use

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<sup>338</sup> *Id.* For a review see MELTON ET AL., *supra* note 10, 558–59, and Randy K. Otto, John F. Edens, & Elizabeth H. Barcus, *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM.AND CONCILIATION CTS. REV. 312 (2000).

<sup>339</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) established the legal principle that guides admissibility of evidence in Illinois. See *People v. McKown*, 875 N.E.2d 1029, 1031 n.2, 1036 (Ill. 2007) (recognizing that Frye test applies in Illinois and declining to consider the evidentiary standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); *In re Commitment of Simons*, 821 N.E.2d 1184, 1188–89 (Ill. 2004) (same). That is, in considering whether to admit evidence into the trial record, the judge considers whether the evidence is “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye* 293 F. at 1014. In federal court and in the majority of states, *Daubert* is binding precedent. *Daubert* provides four guidelines for judges in assessing the evidentiary reliability of proffered scientific evidence and “entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts at issue. *Id.* at 592–93. For evidence to be valid and considered by the court, it must (1) be falsifiable, (2) have a known error rate, (3) be subjected to peer review and publication, and (4) be generally accepted (an incorporation of Frye). *Id.* The decision is based loosely on Rule 702 of the Federal Rules of Evidence. FED. R. EVID 702 (2008).

In *Khumo Tire Co. v. Patrick Carmichael*, the Court held that *Daubert* applies to “technical and other specialized knowledge.” 526 U.S. 137, 141 (1999). Accordingly, the *Daubert* decision applies to social and behavioral science evidence, including proffered mental health expert evidence. For a general review see Veronica B. Dahir et al., *Judicial Application of Daub-*

mental health practitioners as experts in child custody cases, then law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence.”<sup>340</sup>

Interestingly, though the validity of the testing instruments is not challenged, judges did report considering the articulateness and clarity with which custody experts present the psychological and mental health evidence for the judge to evaluate. This is consistent with Dixon and Gill who found that judges look for coherence and logic in the expert’s explanation in assessing the accuracy of forensic mental health evidence.<sup>341</sup>

#### 4. *Valid Research Relied Upon Improperly*

Judges need to be aware that expert evaluators, relying on otherwise valid empirical research, may nonetheless draw questionable child custody conclusions. Evaluators often stress research showing that children who have a parent with mental illness are at greater risk of developing psychosocial difficulties in making custody recommendations.<sup>342</sup> For in-

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*ert to Psychological Syndrome and Profile Evidence*, 11 PSYCHOL. PUB. POL’Y & L. 62 (2005); Gionis & Zito, *supra* note 319 (calling for an adoption of *Daubert* standards in Illinois when admitting mental-health evidence proffered by professionals).

Even where *Daubert* is applied, its impact on mental health evidence has been minimal. “One reason that psychology is still considered part of the ‘soft sciences’ is that judges seldom hold the discipline to the same rigorous methodological standards as the ‘hard sciences’ . . . .” Dahir, *supra* at 78.

<sup>340</sup> Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests and Clinical Judgment*, 36 FAM. L.Q. 135, 162 (2002).

<sup>341</sup> Lloyd Dixon and Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, 8 PSYCHOL., PUBLIC POL’Y & L. 251, 278 (2002).

<sup>342</sup> It should be noted that most research on parenting with mental illness examines the parenting skills of women with mental illness but not men. This is because women with mental illness are more likely to have children than men with mental illness. Thus, any conclusions that can be drawn about the impact of parental illness on parenting and the child’s

stance, children of mothers with depression are more likely to demonstrate negative affect and show slight cognitive deficits.<sup>343</sup> Offspring of mothers diagnosed with bipolar disorder evidence problematic academic functioning and reduced social competence.<sup>344</sup> But the effects of these mental disorders are likely to be mediated through factors other than custody, per se.<sup>345</sup> For example, the effect of parental depression is mediated through parental conflict.<sup>346</sup> In addition, there is research indicating that some mental disorders, such as bipolar depression, are genetically transmitted from parents to children.<sup>347</sup> Denying custody is not a solution where genetic influences moderate the effect of parental illness. Parenting outcome of parents with mental illness is also confounded with environmental factors—such as social class.<sup>348</sup>

Although there is a relationship between parental symptomatology and post-divorce child adjustment, it is not

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best interest are really limited primarily to mothers. Michael J. Jenuwine & Bertram J. Cohler, *Child Custody Evaluations of Parents with Psychiatric Disorders*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 310 (Robert M. Galatzer-Levy, Louis Kraus, Jeanne Galatzer-Levy, eds., 2d ed., John Wiley & Sons 2009). Interestingly, judges interviewed in the present study reported that contested child custody cases were as likely to involve mothers with mental illness as fathers with mental illness.

<sup>343</sup> D. Sinclair & L. Murray, *Effects of Postnatal Depression on Children's Adjustment to School: Teacher's Reports*, 172 *BR. J. PSYCH.* 58 (1998).

<sup>344</sup> Carol T. Mowbray, Deborah Bybee, Daphna Oyserman, Peter MacFarlane & Nicholaw Bowersox, *Psychosocial Outcomes for Adult Children of Parents with Severe Mental Illnesses: Demographic and Clinical History Predictors*, 31 *HEALTH AND SOC. WORK* 99, 105 (2006).

<sup>345</sup> Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 *PSYCHOL. SCI. PUB. INTEREST* 1, 17 (2005).

<sup>346</sup> Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *PSYCHOL. BULL.*, 310 (1982).

<sup>347</sup> J. W. Smoller & C. T. Finn, *Family, Twin, & A Critical Assessment of Child Custody Evaluations Adoption Studies of Bipolar Disorder*, 60 *AM. J. MED. GENET.* 48 (2003).

<sup>348</sup> L. Howard, C. Goss, M. Leese, L. Appleby & G Thornicroft, *The Psychosocial Outcome of Pregnancy in Women with Psychotic Disorders*, 71 *SCHIZOPHRENIA RES.* 49 (2004).

possible to state a direct causal relationship between these factors. Further, because the child's outcome in response to parental mental illness may be present regardless of the parents' marital status, it is not possible presently to state that child maladjustment is due to the effects of divorce or is a function of which parent is awarded custody. In addition, literature on parents with mental illness fails to look into strengths many of these parents bring to raising their children,<sup>349</sup> or factors relating to child resiliency. This is particularly germane given that 88% of children are resilient to the effects of parental mental illness.<sup>350</sup> Research regarding the general effects of parental illness should have a limited role in shaping custody recommendations because there is no evidence examining the relationship between post-divorce adjustment and the nature of custody determinations when parental illness is present.

Much of the literature on parental mental health and child adjustment is based on investigations of families involved in the child welfare system, but this population is not necessarily representative of families involved in divorce. These studies typically focus on mothers with mental illness who also have to contend with poverty, poor living conditions, single parenthood, and the continued fear of losing children to child protection services.<sup>351</sup> Such environmental

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<sup>349</sup> See Barry J. Ackerson, *Parents with Serious and Persistent Mental Illness: Issues in Assessment and Services*, 48 SOC. WORK 187, 191 (2003).

<sup>350</sup> Jenuwine & Cohler, *supra* note 342, at 328.

<sup>351</sup> J. Zemencuk, F. A. Rogosch & C. T. Mowbray, *The Seriously Mentally Ill Woman in the Role of Parent: Characteristics, Parenting, Sensitivity, and Needs*, 18 PSYCHOSOC. REHAB. J. 77 (1995) (women studied have had issues other than serious mental illness, including: poverty, poor education, poor social supports, having given birth at an early age, being unmarried, and so on); see also Jenuwine & Cohler, *supra* note 342, at 313; Mowbray et al., *supra* note 344; P. Montgomery, C. Tompkins, C. Forchuk & S. French, *Keeping Close: Mothering with Serious Mental Illness*, 54 ADV. NURS. 20 (2006); P. Montgomery, *Mothers with a Serious Mental Illness: A Critical Review of the Literature*, 19 ARCH. PSYCH. NURS. 226 (2005); Daphna Oyserman, Deborah Bybee & Carol Mowbray, *Influences of Maternal Mental Illness on Psychological Outcomes for Adolescent*

stressors exacerbate the effect of parental mental illness. Studies focusing on families involved in child protection services do not consider the potentially stabilizing and mitigating effect of having another parent present to co-parent (i.e., the other parent involved in the custody dispute). Indeed, little is known about how variations of substitute care might mitigate the impact of mental illness.<sup>352</sup> Thus, applying outcome research from the context of child welfare to divorce may be erroneous and misleading, and it should not be given great emphasis in forming child custody recommendations when a divorcing parent has mental illness.<sup>353</sup>

### 5. Discipline of Evaluator

Although some judges interviewed stated no preference, there were judges who favored evaluations conducted by psychiatrists and others who preferred psychologists. The preference for psychiatrists replicates the results of a survey study examining judicial perceptions of mental health evidence and experts in the criminal court setting.<sup>354</sup> In that study, judges preferred forensic evaluations to be conducted by psychiatrists, followed by a preference for doctoral level psychologists. Social workers were the least preferred.<sup>355</sup> Yet, when blind to the discipline of the evaluator and unaware of the author's discipline, judges rate the forensic reports of psychologists as being of higher quality—that is, more meticulous, systematic, and legally germane.<sup>356</sup> Further psycholo-

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*Children*, 25 J. ADOLESCENCE 587 (2002).

<sup>352</sup> Jenuwine & Cohler, *supra* note 342, at 321.

<sup>353</sup> Of course, divorcing parents may possess many of the same characteristics as parents involved in the welfare system; one does not preclude the other. The point here is that there is variance both within and between each population so that results involving one population do not necessarily generalize to the other.

<sup>354</sup> Richard E. Redding, Marnita Y. Floyd, & Gary L. Hawk, *What Judges and Lawyers Think About the Testimony of Mental Health Experts: A Survey of the Courts and Bar*, 19 BEHAV. SCI. & L. 583, 587 (2001).

<sup>355</sup> *Id.*

<sup>356</sup> Robert Petrella & Norman G. Poythress, *The Quality of Forensic Examinations: An Interdisciplinary Study*, 51 J. CONSULTING & CLINICAL

gists have been found to conduct more thorough and labor intensive evaluations than psychiatrists.<sup>357</sup>

The preference for psychiatrists probably stems from the fact that there is a historical preference for medical experts and comfort with the medical model.<sup>358</sup> Judges who favor psychiatrists seemed not to be familiar with the training generally possessed by psychologists. Although it may appear to be acceptable to rely on the evaluator's discipline as a heuristic to determine relative credibility, judges should note that deciding who is a more credible evaluator is a case-specific inquiry. Generally psychologists have greater expertise in conducting psychological assessments and psychotherapy and in recognizing individual and family dynamics. In contrast, psychiatrists have greater skill in providing diagnosis and prescribing psychotropic medications. In both disciplines, individuals may specialize and work with specific populations—e.g., adolescents or divorcing families. Individual experts in each discipline may have different subspecialties—e.g., suicidality or anxiety. Knowing the discipline to which an evaluator belongs is never a sufficient method of judging the quality of an evaluation, especially since there is great variance within each field regarding the caliber and expertise of individual professionals.

#### E. Common Sense Judicial Decision-Making

Judges interviewed reported making many child custody decisions on their own, without the assistance of a GAL or custody evaluator.<sup>359</sup> Even when an evaluation was availa-

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PSYCHOL. 76 (1983).

<sup>357</sup> Richard E. Redding & Daniel C. Murrie, *Judicial Decision Making About Forensic Mental Health Evidence*, in FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES 686 (Alan M. Goldstein, ed., 2007) (citing Janet I. Warren & Daniel C. Murrie, Presentation at American Psychological Association Convention: *Opinion Formation in 8000 Evaluations of Competence to Stand Trial*, (2005)).

<sup>358</sup> Redding, *supra* note 357, at 686.

<sup>359</sup> This is consistent with Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. CT. REV. 377, 384 (1997) (judges lack scientific knowledge, increasing the likelihood that they make

ble, judges did not rely on this evidence as a deciding factor in a case. This probably reflects jurist's "common sense assumptions about human behavior."<sup>360</sup> In fact, it is a common finding that judges distrust social science and experts, believing that social science data are often irrelevant to on-the-job decisions.<sup>361</sup> Further, when there is relevant research, judges do not consider the social and behavioral science research related to parenting or divorce that may underlie expert evaluations.<sup>362</sup> In fact, judges are unaware of much of the existing available research that could assist in their decision-making. Of course, as discussed previously, many of the conclusions drawn from such research regarding the effect of divorce and the corollary of parental mental illness may be misleading if not properly interpreted. In addition, social scientists disagree which outcome variables are the most important in determining the child's best interest.<sup>363</sup> Such social science research, however, is critical in alerting judges to the kinds of variables and issues to which they should be attuned in making child custody decisions.

It is imprudent to believe that mere courtroom interaction with divorcing parents can provide a sufficient basis for determining child custody. Additionally, it is inconceivable that judges are able to make a decision that tends to a post-divorce child's emotional needs because they are not trained in understanding family dynamics, the quality of family interactions, the effects of mental illness on child outcomes, and so on. Common sense is not enough. It is true that judges are trained to make difficult decisions, but child custody decisions are unlike any other legal decision in that adjudication requires significant understanding of social science and mental health factors. Clearly, judges are not extensively trained in understanding these areas.<sup>364</sup>

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custody decisions based on personal experience).

<sup>360</sup> Redding, *supra* note 357, at 684.

<sup>361</sup> *Id.* at 699.

<sup>362</sup> *Id.*

<sup>363</sup> Krauss & Sales, *supra* note 316, at 866.

<sup>364</sup> For discussion of this issue, *see id.* at 859.

It is important not to be dismissive of mental health expertise. Experts can investigate current relationship between family members, assess current psychological maladjustment, and explore each party's wishes.<sup>365</sup> These are areas in which laypersons (and judges) have very little expertise. Experts could also summarize relevant social science research for the court.<sup>366</sup> To be certain, care must be taken in how these data are conceptualized, and it is important to remember that psychological assessments and research cannot predict custodial arrangements. Nonetheless, the court could use this information as a factor in determining custody. To do otherwise, is to hastily diminish the potential contributions of mental health experts and to prevent a proper assessment of present effects of parental mental illness on the child.

### VII. Modifying Child Custody Adjudications When a Parent has a Mental Illness

The court may consider the mental health of a parent in determining the child's best interest. To ensure that the court considers all the pertinent factors, judges should be required to do additional training and education regarding the non-legal but behavioral and psychological aspects involved in child custody decision-making. In addition, prior to finalizing the child custody decree, at the judge's discretion, a period of rehabilitation and treatment should be granted to a parent with mental illness. This is particularly vital, because once the court makes a final child custody determination, it is exceptionally difficult to modify it.<sup>367</sup> When a person with mental health symptoms is given an opportunity to stabilize, and the judge properly considers all the relevant factors, it increases the likelihood that the decision being made is, in fact, in the child's best interest.

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<sup>365</sup> *Id.* at 871.

<sup>366</sup> *Id.* at 871–72.

<sup>367</sup> For several examples of the modification restrictions, see *infra* note 373.

### A. *Judicial Training*

It is apparent that judges may benefit from increased training and education regarding the non-legal aspects of child custody decision-making. This is especially the case where parental mental illness is an issue, further complicating the circumstances being considered. According to the Illinois Supreme Court Rule 908, prior to hearing child custody cases, judges should have training in “(1) child development, child psychology and family dynamics; (2) domestic violence issues; (3) alternative dispute resolution strategies; (4) child sexual abuse issues; (5) financial issues in custody matters; (6) addiction and treatment issues; (7) statutory time limitations; and (8) cultural and diversity issues.”<sup>368</sup> The rule provides further, that such training can be obtained via judicial education opportunities offered at the mandatory bi-annual Illinois Supreme Court Judicial Education Conference or other opportunities made available by Chief Judges of judicial circuits.<sup>369</sup> It is of critical importance to note that, despite the centrality of these non-legal issues to child custody determinations, such training is not mandatory. In addition, jurisdictional differences exist—with some circuits having great access and sufficient finances to offer supplementary instruction and other jurisdictions not having such capabilities.

Child custody determinations rely heavily on under-

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<sup>368</sup> ILL. SUP. CT. R. 908(a) (2010).

<sup>369</sup> ILL. SUP. CT. R. 908(c) (2010) (“Judges who, by specific assignment or otherwise, may be called upon to hear child custody cases should participate in judicial education opportunities available on these topics, such as attending those sessions or portions of the Education Conference, presented bi-annually at the direction of the Supreme Court, which address the topics described in paragraph (a) of this rule. Judges may also elect to participate in any other Judicial Conference Judicial Education Seminars addressing these topics, participate in other judicial education programs approved for the award of continuing judicial education credit by the Supreme Court, complete individual training through the Internet, computer training programs, video presentations, or other relevant programs. The Chief Judges of the judicial circuits should make reasonable efforts to ensure that judges have the opportunity to attend programs approved for the award of continuing judicial education credit by the Supreme Court which address the topics and issues described in paragraph (a) of this rule”).

standing and applying social science research. Yet, judges lack training in social science reasoning and methodology and require guidance when it comes to reading basic research, understanding basic statistics, identifying whether a test introduced into evidence has been standardized and validated, comprehending the significance of error rates, correctly applying research findings to judicial decision-making, and so on. A 2001 study revealed that only 5% of state trial court judges understand the concept of falsifiability and only 4% understand error rate.<sup>370</sup> Surely child custody determinations cannot rest on such inaccurate evidence.

Particular attention should be paid to educating judges about the general utility of social science and mental health data, while at the same time, highlighting the limitations of conclusory legal testimony of mental health experts regarding custody. Further, judges should be instructed how to scrutinize and assess information provided by professionals belonging to different disciplines—and possibly to learn why the preference for psychiatrists is outmoded in terms of actual expertise.<sup>371</sup> Such training should not be optional or supplementary but a requirement for judges overseeing child custody cases. The argument has even been made that such training should be more regularly incorporated into the mainstay of the law school curriculum.<sup>372</sup>

Deciding to whom a child should be awarded in a custody dispute implicates critical interests, and to do so without properly considering and comprehending all the evidence is imprudent. Parents with mental illness are at a heightened disadvantage because adjudicating a custody case involving parental mental disability requires overcoming culturally embedded stigma and discrimination against people with mental health issues.

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<sup>370</sup> Sophia I. Gatowski, Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsburg, Mara L. Merlino, & Veronica Dahir, *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUM. BEHAV. 433, 444, 447 (2001).

<sup>371</sup> Redding et al., *supra* note 354, at 593.

<sup>372</sup> *Id.*

### B. Rehabilitation

The court should provide parents with mental illness an opportunity for treatment and rehabilitation prior to determining child custody. Indeed, it is problematic that child custody determinations are intended to be permanent, yet may be based in part on dynamic potentially transitory factors, such as parental mental illness. Further exacerbating this problem is the fact that litigation-related stress, though transient, may intensify existing symptoms—again undermining the long-term validity of a custody evaluation and implicating the child’s best interest.

Providing a period for rehabilitation is imperative because once a permanent order is decreed, a parent denied custody cannot request a modification based on his or her own changed circumstances.<sup>373</sup> Rather the change must be in the custodial parent.<sup>374</sup> Hence, a parent denied custody whose psychiatric symptoms later stabilize cannot modify custody “at the part[y]’s will,” even though his or her presentation at the time custody was determined is not an accurate reflection of general functioning.

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<sup>373</sup> See, e.g., *In re Marriage of Weber*, 619 N.E.2d 768, 771 (Ill. App. Ct. 1993) (no modification permissible where mother had rehabilitated from substance abuse problem because “[t]he only change in circumstances had occurred in the life of the non-custodial parent, and under section 610(b), custody cannot be based on that basis alone”); 750 ILL. COMP. STAT. 5/610(a) (West 2010) (“no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court . . . believe[s] the child’s present environment may endanger seriously his physical, mental, moral or emotional health”); *id.* at 5/610(b) (“The court shall not modify a prior custody judgment unless it finds by clear and convincing evidence, upon the basis of facts that have arisen since the prior judgment or that were unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian, or in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child.”). Thus, a custody arrangement cannot be modified merely in response to a parent rehabilitating or stabilizing. Accordingly, if the court is to accommodate the parent with mental illness, it is urged to do so when the initial custody determination is being made.

<sup>374</sup> *Id.*

### 1. Evolving Symptoms

A custody determination cannot be all-embracing if it lacks sensitivity to the reality that the facts of the case continue to evolve into the present and beyond the final order. Likewise, being inattentive to the notion that mental health characteristics are not static but rather transform with time means that custody decisions may not reflect accurately parental capacity in the long-run, resulting in a grave injustice to those parents with mental illness who may lose custody and to children whose best interests are implicated. For instance, there is research demonstrating that as clinical symptoms decline, parenting stress declines, and parenting nurturance improves.<sup>375</sup> Initial symptom levels do not show a lasting effect on parenting over time once the symptoms decrease.<sup>376</sup>

Critical to ensuring the child's best interest is to provide a parent who has psychiatric problems with a period of time to recover from severe symptoms that mask genuine more life-long patterns of functioning and parenting capacity.<sup>377</sup> Providing an occasion for rehabilitation gives the parent an opportunity to break free from the negative stereotypes associated with mental illness that might, otherwise, color the judge's view. This increased time for treatment will ensure the judge is more accurately informed and, in making a custody decision, decreases the need to fortune-tell.

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<sup>375</sup> Sang Kyoung Kahng, Daphna Oyserman, Deborah Bybee, & Carol Mowbray, *Mothers with Serious Mental Illness: When Symptoms Decline Does Parenting Improve?*, 22 J. FAM. PSYCHOL. 162, 164–65 (2008).

<sup>376</sup> *Id.*

<sup>377</sup> I am not suggesting that the mere passage of time will improve a parent's mental health symptoms. Rather, I expect that during this extended custody determination period, if symptoms are acute, the parent may seek additional treatment. *See, e.g.*, Jay Lebow, *Integrative Family Therapy for Disputes Involving Child Custody and Visitation*, 17 J. FAM. PSYCHOL. 181 (2003) (a systemic treatment approach, albeit for a family intervention, in the case of a high conflict divorce). Yet, in some cases, a parent needing only to demonstrate the stabilization of symptoms may benefit from an increased span of time during which no troublesome symptoms manifest themselves.

## 2. Divorce Stress

Rehabilitation also provides time for symptoms to ameliorate as divorce-related stress decreases. Divorce is always a source of stress for the parents and family. Stress can lead to an exacerbation of pre-existing psychiatric symptoms. Further, the period before the filing of a divorce petition is characterized as one of increasing tension and enmity. Undoubtedly, such a hostile environment may also contribute to the manifestation or even onset of a mental illness. This set of circumstances certainly cuts away at the validity of custody evaluations or judicial perception of a parent's characteristic functioning and parenting capacity. Judicial determination of custody during this period is based on unreliable and transforming data. Nevertheless, despite the ebb and flow in the expression of mental illness, an appraisal during this limited time forms the basis for a final and permanent custody order.<sup>378</sup>

## 3. Rehabilitation is in the Child's Best Interest

Needless to say, this period of rehabilitation should not be unlimited. As mandated by the Marriage Act, the best interest of the child needs to be considered.<sup>379</sup> There is significant evidence that children need stability,<sup>380</sup> and therefore, Illinois Supreme Court Rules require custody to be determined within 18 months of a divorce petition filing.<sup>381</sup> The Illinois court has presumed permanence to be of utmost importance and has codified the need for stability in § 610 of the Marriage Act.<sup>382</sup> In fact, the court has held that “[a] trial judge must make a permanent decision based on the evidence pre-

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<sup>378</sup> Past and current parental functioning are considered in an evaluation by a mental health professional or an assessment by a judge, but in the case of a parent with a mental health illness, current symptomatology may be disproportionately influential.

<sup>379</sup> 750 ILL. COMP. STAT. 5/602(a) (best interest factors).

<sup>380</sup> See note 384 *infra* and accompanying text.

<sup>381</sup> ILL. SUP. CT. R. 922 (2010).

<sup>382</sup> 750 ILL. COMP. STAT. 5/610(b) (no modification unless “change has occurred in the circumstances of the child or his custodian. . .”).

mented and cannot continue temporary custody from time to time either to avoid making a difficult decision or to avoid the requirements of section 610.”<sup>383</sup>

This sentiment emphasizing stability certainly reflects what the data show regarding the importance of this variable,<sup>384</sup> but it is not based on a complete research record. Such an assessment focuses on a narrow segment of research and does not take into consideration the effects of additional factors that may be implicated in a child’s adjustment to a judicially mandated custody arrangement. In addition to post-divorce stability, a judge considering the child’s best interest should consider other factors affecting psychological adjustment, including: potential for post-divorce parental conflict,<sup>385</sup> child-parent relations,<sup>386</sup> economic stability,<sup>387</sup> joint custody

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<sup>383</sup> *In re Marriage of Cesaretti*, 561 N.E.2d 306, 310 (Ill. App. 1990).

<sup>384</sup> Stable family structure post-divorce may minimize children’s psychological maladjustment. See e.g., Yongmin Sun & Yuanzhang Li, *Postdivorce Family Stability and Changes in Adolescents’ Academic Performance*, 30 J. FAM. ISSUES 1527 (2009) (adolescents from post-divorce unstable homes make less academic progress compared to their counterparts from stable post-divorce homes; girls make less progress than boys); Yongmin Sun & Yuanzhang Li, *Stable Postdivorce Family Structures During Late Adolescence and Socioeconomic Consequences in Adulthood*, 70 J. MARRIAGE & FAM. 129, 138–39 (2008) [hereinafter Sun & Li, *Stable Structures*] (compared to growing up in a stable post-divorce family, children growing up in an unstable divorced family environment attained lower socioeconomic status as young adults; variables examined include highest degree obtained, occupational prestige and income). But see Yongmin Sun & Yuanzhang Li, *Racial and Ethnic Differences in Experiencing Parents’ Marital Disruption During Late Adolescence*, 69 J. MARRIAGE & FAM. 742 (2007) (research indicates that there are racial and ethnic differences in how adolescents adjust to divorce).

<sup>385</sup> Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children’s Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 569 (1999); Judy Dunn, *Annotation: Children’s Relationships with Their Nonresident Fathers*, 45 J. CHILD PSYCHOL. & PSYCH. 659, 661–62 (2004); Pruett et al., *supra* note 49, at 170.

<sup>386</sup> ROBERT E. EMERY, *MARRIAGE, DIVORCE AND CHILDREN’S ADJUSTMENT* 81–84 (2d ed. 1999); Dunn, *supra* note 385, at 659–60. Quality of parent-child relations predicts adjustment to divorce. Factors include: (1) ability to resolve parent-child conflict, P. R. Amato & B. Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*,

arrangements,<sup>388</sup> and child temperament.<sup>389</sup> It is of note that

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110 PSYCHOL. BULL. 26 (1991); C. M. Buchanan, E. E. Maccoby & S. M. Dornbusch, *Caught Between Parents: Adolescents' Experience in Divorced Homes*, 62 CHILD DEV. 1008 (1991); E. Mavis Hetherington, M. Bridges, M & G. M. Insabella, *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment*, 53 AM. PSYCHOLOGIST 167 (1998), (2) cooperative relations, C. R. Ahrons & R. B. Miller, *The Effect of the Postdivorce Relationship on Paternal Involvement: A Longitudinal Analysis*, 63 AM. J. ORTHOPSYCHIATRY 441 (1993); and (3) meaningful contact with a supportive authoritative nonresidential parent. Hetherington, *supra*, at 172, 177.

<sup>387</sup> Lack of financial resources increases family stress and decreases quality time with parents. Amato & Gilbreth, *supra* note 385, at 564. For a review see, Christy M. Buchanan, & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*. 43 WAKE FOREST U. L. REV. 419 (2008).

<sup>388</sup> Chien-Chung Huang et al., *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERV. REV. 255, 272 (2003); see also Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCH. 91, (2002). A meta-analysis of research indicates that children in joint legal or physical custody arrangements are equally adjusted but both are better adjusted than children in sole-custody settings. *Id.* at 97. This is likely the consequence of continuous affirmative involvement by both custodial parents. *Id.* at 98. These results hold across externalizing (behavioral) and internalizing (emotional) measures. *Id.* at 94–97. This is also the case when self-esteem and academic performance are measured. *Id.* at 98. The benefits of joint custody did not vary across the age of the children. *Id.*

Most sole custody arrangements are maternal rather than paternal in nature, thus the comparator to joint custody is generally maternal sole custody. “Controlling for the quality of family relationships before separation and socioeconomic status, fathers with joint legal custody see their children more frequently, have more overnight visits, and pay more child support than fathers in families in which the mothers have sole legal custody.” Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Non-resident Fathers' Involvement with Children*, 35 DEMOGRAPHY 135, 140 (1998). These effects probably do not reflect a selection bias (more cooperative parents choosing joint custody), because even controlling for pre-divorce family relations, the effect of joint (legal) custody endures. *Id.* The effect of joint (legal) custody is to “clarif[y] that divorced fathers are 'by law' still fathers, [and, as a result] parents' negotiations about fathers' participation in child rearing after divorce may shift from trying to resolve whether fathers will be involved in child rearing to the matter of how fathers will be involved.” *Id.* at 145 (emphasis in original). Indeed, “joint

there is research suggesting that there is no additional adverse effect of custody modifications among adolescents already living in unstable post-divorce families.<sup>390</sup> This underscores the need for judges to adapt their decision-making to the facts of the case and not to stress excessively the need for stability in all circumstances. In fact, little research has been conducted examining the relative importance of various variables involved in realizing the child's best interest. Thus, though stability is plainly important, there are other factors need to be considered.<sup>391</sup>

#### 4. Awarding Child Custody Pending Future Rehabilitation

It is challenging for Domestic Relations judges, how-

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legal custody may, as advocates claim, make the lives of children after divorce more similar to their lives before divorce or to the lives of their peers in two-parent households." *Id.*; see also Michael Kaplan & Kyle Pruett, *Divorce and Custody: Developmental Implications in Handbook of Infant Mental Health* 533 (Charles H. Zeanah, 2d ed., Guilford Press 2000) (because children adjust better to divorce when there is continued meaningful contact with both parents, many states prefer to award joint custody).

<sup>389</sup> Elizabeth M. Ellis, *Divorce Wars: Interventions with Families in Conflict*, 154–55 (2000); see also Liliana J. Lengua, Sharlene A. Wolchik, Irwin N. Sandler, & Stephen G. West, *The Additive and Interactive Effects of Parenting and Temperament in Predicting Adjustment Problems of Children of Divorce*, 29 J. CLINICAL CHILD PSYCHOL. 232, 239–40 (2000) (children with easy going temperament, who measure high on "positive emotionality"—a measure of cheerfulness, laughing and smiling, adjust better to divorce); E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers, and Survivors*, 60 CHILD DEV. 1, 3–5 (1989).

<sup>390</sup> Sun & Li, *Stable Structures*, *supra* note 384, at 138–39.

<sup>391</sup> The objective of this paper is to demonstrate that that the goals of child custody adjudication are not necessarily consonant with the psychological needs of children at the heart of a custody dispute. Thus, the purpose of this paper is not to suggest definitively alternative models to adopt. More studies on child custody determination are necessary for that. For instance, the time period permitted for custody determinations that include a rehabilitation period should reflect research examining the effects of divorce on mental health and data on time for symptom stabilization. Determination of custody based on the child's best interest must be consistent with studies prioritizing the various statutory factors, and so forth.

ever, to make decisions based on future recovery. This option is limited further by the lack of flexibility in child custody adjudications to permit temporary custody orders allowing for an interim remedial period. In Illinois, the court has previously considered putting into place a custody arrangement that permits a mentally ill parent to rehabilitate before the final order was made. In *In re Marriage of Valliere*,<sup>392</sup> the trial court granted physical custody to the father pending the mother's rehabilitation.<sup>393</sup> The decision, however, was later modified. The court held that it was in contravention to the Marriage Act<sup>394</sup> to award physical custody to father pending a future hearing to allow mother to regain custody upon showing of rehabilitation, i.e., that her psychological problems had resolved.<sup>395</sup>

Yet, in some states, custody has been awarded based on the court's projection that mental illness will remit.<sup>396</sup> And there is evidence that courts can be flexible under certain circumstances. For instance in *Dietz v. McDonald*,<sup>397</sup> the court considered that the mother was still breast feeding the child when custody was being contested.<sup>398</sup> The court ordered graduated visitation during the period in which the child was so dependent, culminating in future joint physical custody.<sup>399</sup> Accordingly, the court considered that the state of affairs under which custody was being determined did not necessarily mirror future circumstances. The court proposed an innova-

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<sup>392</sup> *In re Marriage of Valliere*, 657 N.E.2d 1041 (Ill. App. 1995).

<sup>393</sup> *Id.* at 1043.

<sup>394</sup> 750 ILL. COMP. STAT. 5/610(b) (West 2010).

<sup>395</sup> *Valliere*, 657 N.E.2d at 1046.

<sup>396</sup> *See e.g.*, Washington state best interest factors, which include direction to consider each parent's "potential for future performance of parenting functioning." WASH. REV. CODE ANN. § 26.09.187(3)(a)(iii) (West 2011). Thus, statute superseded *In re Marriage of Nordby*, 705 P.2d 277 (Wash. Ct. App. 1985), where court held that it was impermissible to award custody to mother who was presently unfit based on court's projection that mother's mental illness would remit in future. *Id.* at 278.

<sup>397</sup> *Dietz v. McDonald*, No. 08-0129, 2008 WL 5234524 (Iowa Ct. App. Dec. 17, 2008).

<sup>398</sup> *Id.* at \*4.

<sup>399</sup> *Id.*

tive custody arrangement that considered the best interest of the child without being wed to a static assessment of parental ability. It is innovative and progressive judicial reasoning of this sort that should be applied in circumstances where a contesting parent has a mental illness that may remit.

### VIII. Conclusion

The north star of all child custody proceedings—the overriding goal—is identifying and effectuating what serves the “best interest” of the child. Illinois law—like that of other states—identifies several factors a court can consider in the course of determining a child’s best interest.<sup>400</sup> The Illinois Marriage Act, like its counterparts in other states, affords judges wide latitude about whether and how to apply such factors.

One legal factor considered in child custody adjudications is the mental health of a contesting parent.<sup>401</sup> The study reported in this paper is the first to examine specifically how judges consider the mental health of parents when determining custody. The results of this research reveal that in determining custody, judges regularly consider the nexus between parental mental health and the child’s best interest. Nevertheless, the interviews suggest that judges often do not appreciate fully the nature of the mental illness, the state of mental health research concerning disorders, or the scientifically valid ways to assess the effect of mental illness on parenting. These knowledge deficits risk adjudications that are not in the best interest of the child and threaten the judge’s role as evidentiary gatekeeper.

To address these problems, it is recommended that judges overseeing child custody proceedings be required to receive more effective training concerning the relevancy and significance of parental mental health, understanding and applying social science and behavioral research, and evaluating expert recommendations. In addition, the law should afford

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<sup>400</sup> 750 ILL. COMP. STAT. 5/602 (West 2010).

<sup>401</sup> *Id.* at 5/602(a)(5); sources cited *supra* note 2.

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such judges more latitude to consider remissions of a contesting parent's psychiatric symptoms. Lastly, both the law and the judges who enforce it should presumptively afford the mentally ill parent an opportunity for rehabilitation before implementing a permanent custody order.

