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other endeavors, we expect this year will require a significant effort on our part participating in important juvenile legislative proceedings as well as addressing other important concerns in this area.

If you wish to become actively involved in Section activities, to offer suggestions or comments, or to let us know how we might improve our efforts and activities, let us hear from you. Our MSBA Web page lists the names and contact information for all of the members of the Section Council, including the present officers and past-chairs. If a Section Council member is from your jurisdiction, he or she may have some "local knowledge" that addresses certain concerns. The Family Law Listserv reaches every member of the Section who has provided an email address to MSBA unless a member has opted-out. Most questions or issues receive numerous responses from Section Members as well as Council Members. Section members who wish to contribute to the Newsletter should contact Walter Herbert. Anyone desiring to participate in MICPEL programs should contact Stacy LeBow Siegel.

Many family law attorneys are not members of the Section. For those who are not, we need you and want you to become members. Our collective voice becomes stronger and louder in the Courts, at the Legislature and elsewhere as our numbers increase. If you do not belong to the Family Law Section, sign-up, get involved and stay involved.

Is membership in the Family Law Section worthwhile? Do you get value for your dues? Are there opportunities for participation that will benefit not only individual practitioners but the Bar as a whole? Before being elected to the Section Council, I silently asked these questions. I found, after working on the Section Council with some of the most talented attorneys, masters, judges and legislators, the answer to each question is a resounding "YES".

Barry J. Dalnekoff, Chair 2004-5
Annapolis, Maryland

CHILD CUSTODY EVALUATIONS

By Ronald R. Tweel, Charlottesville

Maryland Law updates by Geraldine Welikson Hess, Rockville

I. INTRODUCTION.

Being a family lawyer in the 21st Century has become more and more complex. Not only does one need to know how to draft a QDRO, determine gross income for child support formulas, and keep up with the weekly decisions of our Court of Appeals, one must also know a considerable amount concerning the mental health profession, the effects of divorce on children and clients, and the methodology, including strengths and weaknesses, of a child custody evaluation performed by a mental health professional (MHP). This paper is by no means meant to be an exhaustive analysis of child custody evaluations ("evaluations") but hopefully it will provide some useful information. Each case is different, and research with appropriate resource materials, as well as the use of your own MHP, is often needed to represent your client in an adequate fashion. The following is an outline of some of the inquiries and considerations which should be made when representing a client in a custody dispute.

II. SHOULD I ADVISE MY CLIENT TO HAVE AN EVALUATION?

This question is not easily answered. My belief is that too often lawyers advise clients to engage in an evaluation when it is counterproductive for the client. Before the decision is made, one should take into consideration the following:

A. Does my client already have an advantage in the litigation? In other words, if I represent a custodial parent whose spouse is a non-involved parent, I generally see no need for an evaluation. I would probably already have the neighbors, the teachers, the doctors, and the Sunday school personnel to testify on my client's behalf. It is at that time that I play "four corners" and take my lead and sit on it. I do not want to risk interjecting a component that could damage my already strong case.

B. What are the children's ages and attitudes? If the children are of an age at which the MHP will listen to them, and if they have been or can be alienated or manipulated by the other parent, I have to consider seriously whether it is to my client's advantage to have an evaluation. I generally do not speak to the children, but I do on occasion, given the circumstances of each case. This is where judgment comes into play, as one cannot use a "cookie cutter" approach to all cases. Further, if I have a strong case, in which the children clearly want to reside primarily with my client, and there is a Guardian *ad litem* with a favorable view, the very substantial extra cost of an evaluation is probably not needed.

C. Where have the children been living since the separation? If the children have been living with my client and

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I have a strong case, then I will generally not seek an evaluation.

D. If I have a weak case with impediments to a successful outcome, i.e., a busy working parent, then I often will ask for an evaluation. It is almost as if the evaluation is a “no lose” situation for my client. When my client’s case has problems, I feel that the evaluation may be one of my only hopes for arriving at a successful outcome.

E. Does my client appear to me, a lay person, to have any emotional or mental disorder? Of course an attorney should never attempt to diagnose a client, but with some experience we certainly can discern certain obvious defects. For example, extreme narcissism on the part of the client is fairly easy to detect. It will be a key element in the evaluation since the MHP will quickly determine that the parent is more concerned about the divorce issues than the children. Also, the parent may be totally unable to avoid discussing the divorce in any conversation regarding the children. This behavior will be a very negative factor in any evaluation by a MHP and if, after coaching by counsel, a parent cannot overcome this mindset, an evaluation has to be viewed with caution.

F. It is often helpful to obtain all of the client’s mental health and medical records before a decision as to whether an evaluation should be requested. Do not, however, be afraid of a diagnosis of depression by your client’s treating physician. Most normal people experiencing a traumatic divorce have some degree of depression. Judges are accustomed to depression in divorce cases. Realize that there are two kinds of depression, i.e. situational depression and clinical or biological depression. Remember these are my terms and not the terms of the professionals. In other words, is this depression caused by the divorce (situational) or is this depression caused by some chemical imbalance (biological)? Therefore, one should speak to the client’s treating psychologist before the decision to request an evaluation is made.

G. Know your judge. Does the judge ignore this type of testimony, slavishly adopt it, or fall somewhere in between? If this information is unknown, contact other lawyers who are familiar with the judge’s proclivities.

H. With this information in hand and after a full and frank discussion of this information and your thought processes with the client, you and the client should decide jointly whether an evaluation will be helpful.

I. Can the client afford it?

III. HOW TO SELECT AN EVALUATOR.

A. Obtain the CV of each potential evaluator and scrutinize it for experience, education and particular biases. In this instance, one should review all articles or publications written by the MHP because they may provide some indication as to the MHP’s particular interests or propensities. Has the MHP received special forensics training?

B. Most MHPs come from a specific school of thought. Much of this is dependent upon where they did their training and to what extent they use one scientific model vs. various other models. This is something one should try to determine, especially with the help of other professionals in the field that an attorney can contact informally.

C. What is your personal experience with this MHP in other evaluations? This may be one of the most important factors. Does this person customarily recommend joint legal and physical custody unless there is some unusual circumstance? Does this person always tend to recommend custody for the primary caretaker? Keep a file in your mind or your file cabinet on every MHP within hiring range.

D. Have at least a phone interview with all potential evaluators if you are unfamiliar with them. Ask them for their CV before the interview. During the interview, one should inquire as to the school of thought adhered to; the methodology to be employed; the tests to be used; and the degree to which the MHP will use collateral witnesses. Further, find out the number of contacts with each parent and the children that will take place in the evaluation process, and determine whether this person is willing and/or able to take the requisite time to do a thorough evaluation.

E. There is obviously a difference between a psychologist, a psychiatrist, a licensed clinical social worker, a licensed clinical professional, etc. One must know the difference in the training and thought processes of these different MHPs.

F. Do not allow a treating professional to be an evaluator since it is a clear conflict of interest and violates the APA Guidelines.

G. The evaluator must have education, training and experience in:

- ♦ Child and family development
- ♦ Child and family psychology
- ♦ The impact of divorce on children

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H. Is the MHP acquainted with the APA Guidelines and are they followed in an evaluation?

I. Does the evaluator have a good reputation with the judge? Most judges have long memories.

J. Once all this information has been collected, discuss it with the client and make a knowledgeable decision as to the appropriate evaluator.

IV. CONFERENCE WITH CHOSEN EVALUATOR BEFORE THE EVALUATION COMMENCES.

A. Once an evaluator has been selected, it is important that you confer with the evaluator *before* the process begins. I have had unfortunate circumstances arise when I spoke with the evaluator well after she had proceeded with her evaluation. The evaluator had already made up her mind as to what she believed and what her opinions would be and, therefore, my input was basically disregarded. This relates not only to the analysis of certain facts which you may want to provide to the evaluator, but also to other information which may have been omitted from the evaluation process.

B. Be ready to state in a brief and cogent fashion the salient facts which support a favorable outcome for your client.

C. The evaluator expects counsel to be an advocate. Therefore, do not hesitate to provide a favorable slant, but be careful not to overstate your client's position. Also, do not overstate the bad attributes or actions of the other parent.

D. Do not be afraid to include some general analysis from a legal/psychological standpoint as to what you have been able to observe at hearings or depositions as to the other party, such as positions taken in negotiations, etc. We are not mental health professionals, but we *should* know more than the average person about mental health issues.

E. Provide the evaluator with important documents that will be helpful to him or her in reaching an opinion. An example of this may be letters written by the other parent that praise the parenting ability of your client; apologize for certain negative conduct; are vindictive statements; are statements indicating an unwillingness to cooperate in co-parenting the child, etc. I am often amazed at what parties put in writing, especially e-mail, in these types of cases.

F. Do not be afraid to state to the evaluator a position taken by the other parent in negotiations between the parties. One

must be careful about stating to the evaluator positions taken between counsel, because of potential ethical concerns.

G. Make sure that statements to the evaluator are consistent with what you are advising your client. Do not focus on the other party's deficiencies without directly relating them to the impact on the child. An exhaustive list of the other parent's faults that cannot be directly tied to a negative impact on the child is not useful and can make the wrong impression on the MHP. Advise your client to always give "child centered answers" to questions posed by the evaluator.

H. Do not establish an adversarial relationship with the evaluator. The evaluator should feel comfortable with counsel and have trust in what is presented in the process.

V. DISCOVERY.

A. As soon as the case commences, interrogatories, requests for production of documents, and perhaps even requests for admissions, should be submitted. This also relates to the potential evaluation.

B. In this discovery process, one will want to discover the names of any MHPs or medical doctors used by the opponent, plus other factors that would be helpful to the evaluator in the evaluation process. This information can then be used in your conference with the evaluator before the evaluation begins. As time progresses, I find requests for admissions to be more and more useful. Not only do I use them for information, but I use them for authentication of letters, e-mails and other documents.

C. Depositions are of course helpful in fleshing out information that cannot be discerned or obtained through written discovery techniques.

D. Subpoenae *duces tecum* are very important when it comes to obtaining the mental health records of the opposing party. Mental health records should be analyzed carefully.

In Maryland, a party has a patient-psychiatrist/licensed psychologist/licensed certified social worker privilege with regard to any diagnosis or treatment they received outside of the custody evaluation. Courts and Judicial Proceedings 9-109, 9-121. A party does not automatically waive their patient-psychiatrist/licensed psychologist privilege when custody is in issue or when a custody evaluator is appointed. Laznovsky v. Laznovsky, 357 Md. 586; 745 A.2d 1054 (2000).

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It is likely that there is no automatic waiver of the patient/licensed social worker either, although Laznovsky did not specifically address the patient-licensed social worker privilege. If the party chooses not to waive the privilege, you will not be able to obtain their mental health records. However, if the party waives the privilege so that the custody evaluator receives the mental health records, then you should be able to receive a copy as well.

E. Most important is whether to formally depose the evaluator. If one receives a favorable report, then talk to the evaluator on an informal basis. Formal discovery through subpoenas *duces tecum*, depositions, etc. may be counterproductive for several reasons. First, it will alert opposing counsel to do the same. Secondly, it may irritate a sensitive evaluator.

F. If the report, however, is critical of or disappointing to the client, then I believe that discovery is important. First, a subpoena *duces tecum* to the evaluator should request his entire file and especially the raw data from any tests. I will discuss below in the section on depositions why the test data can be so critical.

In Maryland, the raw data can only be directly provided to a psychiatrist or psychologist. Before the raw data is provided by the evaluator there must be a court determination that your chosen psychiatrist/psychologist is qualified by his/her training, education, or experience to receive and interpret the raw data. Md. Health-General Code Ann. 4-307(e)(2), (3).

G. Once one has obtained the file and the raw data from the evaluator, it should be reviewed with a consulting MHP. Do not feel so experienced or knowledgeable that you can completely analyze this information without the help of a mental health professional.

H. Where appropriate, review this material with your client. One may need to be selective about what information to share with your client.

I. Whether the evaluator's deposition is taken is based upon certain factors. Obviously, if one does not find information in the subpoenaed documents that would be helpful, then perhaps a deposition would not be useful. If your evaluation of the report, along with your consulting MHP, cannot discern any weaknesses in procedure or substance, then a deposition is questionable. Also, if the weakness in the documents, data or analysis of the evaluator is questionable or improper, then one must determine whether exposing this in a deposition is wise. One may want to wait until trial to surprise the other party and the evaluator and not give them an opportunity to repair the damage.

J. The bottom line is that discovery techniques are very important when a custody evaluation is used, and discretion must be used as to which particular techniques you employ.

VI. READING AND ANALYZING THE EVALUATOR'S REPORT.

Much of this section relates to both the potential deposition and the cross-examination of the MHP. This section therefore should be read in conjunction with the following section. Some of the issues to be considered in reading and evaluating the report are as follows:

A. Before reading the report, one should become thoroughly familiar with the APA Guidelines on the conduct of an evaluation. Even though these guidelines are merely aspirational, it is accepted within the field that they should be followed. Dr. Arnold Stohlberg testified in a case on my behalf that he is aware of certain Virginia psychologists who have been disciplined by the State Board for not following these aspirational guidelines.

B. The report at a minimum (according to APA Guidelines) should cover the following areas:

- ♦ Parenting capacity in conjunction with the psychological and developmental needs of each child.
- ♦ Assessment of the adult's capacity for parenting, including knowledge, attributes, skills and abilities, or lack thereof.
- ♦ Psychological functioning and developmental needs of each child, including an understanding of the child's custody preference where appropriate.
- ♦ Assessment of the functional ability of each parent to meet those needs, including the evaluation of parent/child interactions.
- ♦ The parents' values, as they relate to the ability of each to plan for a child's future and to provide a stable and loving home.
- ♦ Potential for inappropriate behavior or misconduct that might adversely affect the child.

C. Review the report for any societal biases or prejudices of the evaluator. Does it appear from the report that any bias based upon age, sex, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture or other socioeconomic status may prevent an objective evaluation? The APA Guidelines are clear that this is critical.

D. One should have access to a DSM IV, which categorizes mental health disorders and provides criteria for diagnosing

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them. This should be in every family lawyer's library. If you see a diagnosis of a mental illness or a disorder, syndrome, etc., you should look up the rules and criteria for that diagnosis, and indeed whether it is recognized by the DSM IV at all.

E. Is the evaluator familiar with the DSM IV, not the DSM III? (Believe it or not, I had a case where the evaluator was using the DSM III and not the DSM IV).

F. First, start with the procedural aspects of the report. Note specifically, the dates of all conferences, the length of time for all conferences and phone calls, the dates of all tests, the length of time for all tests, the setting in which the tests were taken, and the nature and extent of all contacts with collaterals.

G. Explore carefully the amount of time that the evaluator watches the parent and child interacting. Many MHPs opine that it takes at least two occasions to obtain an accurate analysis.

H. Note all conferences with the attorneys as to number and duration. I have seen several reports where the evaluator has spent more time with opposing counsel than with me and this should be highlighted at trial.

I. Note all factual statements that do not cite a source. This should be explored in discovery or at trial.

J. Note where the evaluator has relied upon a single factor or source of information to reach a conclusion. A report needs "convergent validity," which is when multiple sources corroborate one fact or conclusion. Note where the evaluator has mixed data and observational information with interpretations in the same sentence. Data and observational information should be in one section of the report, and the conclusion and inferences drawn therefrom should be in another.

K. Amazingly, one will occasionally find in some reports that the data and the information obtained are not consistent with the conclusions. This is critical. I have had several cases where this has occurred.

L. Make sure that the raw data from tests are included in a comprehensive fashion in the report. I had one psychologist include only 50% of the data from a MMPI II computer-generated test result in his report. He omitted all of the adverse information because of his bias in favor of the father. This is why obtaining the raw data is important. This is also why the use of a consulting MHP is critical.

In Maryland, the raw data will not be included in the report because as stated earlier, the raw data cannot be disclosed

to lay persons and can only be disclosed by court order to an appropriate psychologist or psychiatrist.

M. Beware the evaluator who sanitizes the report by omitting critical facts or observations which are inconsistent with his final conclusions. Make sure that all salient facts known to you and your client are listed in the report. If they are not, this is fodder for cross examination. Further, make sure there are no factual errors.

N. Scrutinize the report to determine if the conclusions that are reached are consistent with the observations and test results. One would be surprised as to how often they do not. This is one of the basic errors made by untrained MHPs or MHPs who are biased.

O. Write down every omitted fact that is not included in the report for use at a subsequent time, i.e., deposition or trial.

P. List all critical collaterals who were *not* interviewed. This will be important at deposition or trial.

Q. Review the entire report with your consulting MHP.

R. The APA Guidelines clearly dictate that the MHP should not be an advocate for either parent. However, certain reports will have either direct or indirect advocacy which should be highlighted at the appropriate time, i.e., deposition or trial.

S. Review the report to see how the evaluator relied upon empirical data or the behavioral sciences. The more scientific foundation that can be provided in the report, the more reliable and valid it will be. Reports that are not scientifically based are generally not considered to be valid or reliable.

T. Be sure that the report does not spend too much time in analyzing the causes for the divorce unrelated to child centered issues. This can happen if MHPs who have specialized in adult therapy venture into the realm of custody evaluations. Unfortunately, this has happened to me and produced a very superficial and inappropriate evaluation since the report did not center on parenting capacity.

U. Do not be misled by a report that diagnoses your client with some mental disorder that may not affect his or her parenting ability. I had one case where my client was diagnosed with a borderline personality disorder (serious problem), but none of her deficiencies affected her parenting capacity. This applies to such problems as depression and

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anxiety. Therefore, one must make sure that any diagnosed disorder, especially from testing such as the MMPI II, is related to parenting capacity.

V. The term “best interest” is freely used in child custody cases. Remember that if the order states that the primary purpose of this evaluation is to assess the “best psychological interest” of the child, you should scrutinize the report for opinions that do not relate to this issue.

W. Be careful where reports emphasize too much the child’s physical environment, school placement, and relative physical advantages of the home or neighborhood of the possible custodian, instead of the psychological best interest of the child. This is missing the forest for the trees.

X. Does the report clearly state the following?

- ♦ Assumptions.
- ♦ Data.
- ♦ Interpretations.
- ♦ Inferences all premised upon established professional standards.

The evaluator must be able to articulate these specific areas, show how they were used in the recommendation, and explain how they are based upon established professional and scientific standards.

Y. In attempting to determine whether or not it is a scientifically based evaluation, try to discern whether the scientific literature is consistent with the report. Allow your consulting expert to assist you in this process.

Z. If the report identifies a mental health problem for either party, does the report state how this will have an adverse impact on the child? Remember, the impact on the child is critical for every good or bad statement made in the report.

AA. Maryland subscribes to the *Frye-Reed* test for admissibility of evidence. It is important that the evaluators’ report and testimony address the experts chosen methodology and that it is shown that this methodology is generally accepted as reliable in the scientific community. If they are unable to do this, then the testimony should be excluded and/or they are ripe for cross examination.

BB. Determine whether the recommendation offered in the report exceeds the data collected from various sources. If so, highlight this at trial. Are the recommendations based upon absent information?

CC. Make sure that the report distinguishes data from inferences to be drawn from data. This is one of the most common mistakes by MHPs.

DD. Does the report describe or acknowledge the existence of parental conflict and its impact on the children? If so, what results and inferences are drawn from that fact?

EE. Does the report attempt to discern parental alienation? If so, what specific data or facts support this inference and what impact does it have on the children?

FF. Does the report answer questions that were not asked? If so, determine why this happened. Alternatively, did the report fail to address questions that needed to be addressed? If not, why not?

GG. Did the MHP use projective tests? Projective tests such as the Rorschach or T.A.T., cannot predict with accuracy the reliability of the information provided. Other types of tests need to be given to corroborate truthfulness of a test response.

HH. Has the evaluator received training on the MMPI II and not just the MMPI I? (Believe it or not, I had a case where this happened).

II. All major conclusions must be validated by at least two sources (convergent validity). A good report will assess the parental competencies by:

- ♦ Examining the functional abilities of each parent.
- ♦ Identifying the areas of strengths and weaknesses of parental competency.
- ♦ Exploring the relationship between observed parental strengths and weaknesses and specific parental demands.
- ♦ Assessing the fit between each parent’s observed competencies and their relationship with each specific child.
- ♦ Recommending remedial or dispositional options.

JJ. Did the evaluator have specific planned questions for each child in his interviews? Was it merely a random conversation? Planned and organized questioning should address these areas:

- ♦ Emotional well being of the child
- ♦ Physical well being of the child
- ♦ School performance
- ♦ After-school activities
- ♦ Recreational activities

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- ♦ Cognitive development
- ♦ Social development
- ♦ Social involvement, i.e. peer group involvement
- ♦ Religious identity
- ♦ Sexual identity and gender related issues
- ♦ Communication skills
- ♦ Child's perception, if any, of primary and secondary caretaker
- ♦ Child's perception, if any, of "psychological parent"
- ♦ Sibling relationships
- ♦ Child's perception of relationship with each parent
- ♦ Child's perception of extended-family involvement
- ♦ Child's description of daily routine and parental involvement in it
- ♦ Child's description of each parent's discipline and rules
- ♦ Child's involvement with each parent
- ♦ Child's custodial preference and explanation of why

If no structured interview process was used, then important issues may have been omitted. And if there is more than one child, then perhaps both children are not being asked the same questions.

LL. Since parental ability and capacity to meet the child's physical and psychological needs is the most important issue, does the report address the following questions:

1. Which parent provides the children with a safe, secure, predictable, consistent and stable environment?
2. Which parent is better able to provide for the child's physical, material and financial needs?
3. Which parent respects and encourages the children's religious heritage?
4. Which parent respects and encourages the children's cultural identity?
5. How does each parent perceive each child's understanding of who the child views as the psychological parent?
6. How does each parent perceive each child's understanding of who the child views as the primary and secondary caretaker?
7. Which parent provides the most encouragement for the children's educational performance?
8. Which parent provides the most guidance and assistance to the child's educational performance?
9. Which parent is available to help the child with homework on a consistent basis?
10. How does each parent participate in each child's daily life?
11. Which parent provides a more flexible schedule?
12. Which parent provides better supervision?
13. Which parent provides more reliable scheduling?
14. What is each parent's understanding of how each child feels about the proposed parenting plan?

15. In what ways are the age-related issues, for which each child needs the other parent's involvement, being appropriately addressed?

VII. CROSS EXAMINATION/DEPOSITION OF EVALUATOR.

A. Once the report has been reviewed thoroughly, the first question to be asked is whether it meets the necessary standards. In Maryland, the question is whether it meets the *Frye-Reed* test. In summary, the *Frye-Reed* test requires that the methodology used by the expert be generally accepted as reliable within the expert's particular scientific field. *Frye v. United States*, 54 U.S. App. D.C. 46, 54 App. D.C. 46, 293 F 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374., 391 A.2d 364 (1978).

B. If the report cannot meet the required standard, then a Motion in Limine should be filed. The basis for preventing the expert from testifying pursuant to a Motion in Limine, or restricting the expert to certain portions of his evaluation, is the violation of the *Frye-Reed* standard, the violation of the APA standards, or the violation of any State standards.

C. I have been successful on several occasions with a Motion in Limine in preventing the testimony in its entirety or limiting the testimony to accepted procedures. Most of the time, one can expect to lose these motions, as I have done, because the court will consider it a matter going to the weight of the evidence. Nonetheless, it can be valuable if it makes the court question the validity, reliability and acceptability of the MHP's report and testimony.

D. All of the observations made above in the section addressing the review of the report are potential lines of questioning in a deposition or at a trial.

E. For young children, one must be aware of attachment theory and the particular assessment that maybe used on rare occasions for children age 0 to 5. This is a new approach in which the principles of attachment theory need to be understood.

F. One of my favorite techniques in cross-examining evaluators is to determine what they don't know. I use a standard format by asking them if they are aware of a particular fact which was not included in their report. If the evaluator is not aware of the fact, then I ask hypothetically that if it were true, would it change his opinion. Usually, he will say that it will not. I then string together as many unknown facts as I can, asking the same question. After I have gone

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through two or three of these facts, I will ask a third question which is, "Hypothetically, if all of the stated facts are true, would these facts collectively change your opinion?" If I do that after each substantive question and set forth as many relevant unknown facts to the evaluator as possible, sometimes I can justifiably come up with 20 or 30 facts relative to the parents or the children. In essence, the format is as follows:

1. Are you aware of fact X?
2. Hypothetically, if this fact is true, would it change your opinion?
3. Hypothetically, if all of the above facts are true, would these facts collectively change your opinion?

This can greatly undermine the evaluator's credibility before the court.

G. It is always important to read everything that has been written by the evaluator in terms of articles, journals, CLE materials, treatises, etc. This can be very fertile ground.

H. In Maryland, the statutory basis for expert testimony is contained in Maryland Rule 5-702. Expert testimony may be admitted if it will assist the trier of fact to understand the evidence or determine a fact in issue. The court shall consider (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject and (3) whether a sufficient factual basis exists to support the expert testimony.

The Maryland Code does not specifically address the admissibility of expert testimony by a licensed social worker. The determination as to whether this witness is an expert is within the sound discretion of the Court. *In re Adoption/Guardianship No. CCJ14746*, 360 Md. 634, 759 A.2d 755 (2000).

Custody evaluation reports often contain hearsay, statements and opinions of collateral witnesses such as teachers, pediatricians, psychologists, and neighbors. A trial judge exercising his/her independent judgment in making a final decision can base his/her decision on these reports, however the parties need to be given an opportunity to review the report, cross examine the evaluator and produce outside witnesses to establish inaccuracies in the report. *Denningham v. Denningham*, 49 Md. App. 328, 431 A.2d 755 (1981).

I. As for the expert's credentials, some of the questions which you may want to ask are:

- ♦ Is the MHP a member of the American Psychological Association?

- ♦ Does the MHP treat or test children or adults?
- ♦ Has the MHP ever been denied a license or membership in a professional organization?
- ♦ If the MHP has been trained as a counseling psychologist, can he/she clearly delineate why he/she has confidence in utilizing the assessment techniques needed in an evaluation?

J. In questions relating to the evaluation procedure (in addition to those in the above section relative to reading the report), one might want to ask:

- ♦ Were significant persons excluded from the interview process and if so, why?
- ♦ What information was omitted from the report and why?
- ♦ What type of standardized administration procedures were prescribed for the tests, and were they followed? If not, why?
- ♦ What is the purpose or relevance of utilizing the standard methodology for taking a test and how can it skew the results if you don't follow that methodology?

K. If the evaluator used the MMPI II, inquire as to the following:

1. What is the difference between the MMPI I and the MMPI II?
2. Have the evaluator state the method by which the MMPI was originally established (by testing low-socioeconomic-level inpatient inmates in Minnesota who exhibited psychological disorders in the 1940s).
3. Have the evaluator admit that this test is not a custody evaluation.
4. Have the evaluator admit that the MMPI II test does not determine parental capacity.
5. How was the MMPI II scored? Was it scored by hand or by computer? What service was used to score it by computer?
6. If it was scored by computer, are there internal inconsistencies in the responses? If so, was there an attempt to reconcile these inconsistencies?
7. How many MMPI II tests has the evaluator administered and how many of them has he personally scored?
8. Did the evaluator personally administer the test?

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9. Have the evaluator admit that standing alone, an MMPI II has very little if any significance in a custody case.

10. Have the MHP admit that it is difficult to conceptualize or research characteristics that define good parenting capacity.

11. It is much easier for an MHP to identify bad parenting characteristics than to define good ones.

12. If one feels that the evaluator is not familiar with the APA Guidelines, ask about specific aspects of this document.

13. Ask the MHP what is an alternative competing hypothesis to the conclusions of the report and ask him to explain why it does not apply.

14. Attempt to lead the MHP into statements that go beyond the data and facts solicited.

15. Make sure that there is independent corroborative data to relate to any elevated scores on the MMPI II.

16. Question the MHP on his ability to determine deceptiveness or outright lying by the parent from this test.

17. Inquire as to relative strengths of a parent that may go untapped by the MMPI II because the test is designed to explore psychopathology.

18. What process and factors were used to compare the parental capacity of each parent?

19. Did the MHP fully inquire into each parent's background and history? How?

20. What process did the MHP use to observe the children with each parent?

21. Were these observations structured or unstructured? Why?

22. Who brought the child to the appointments?

23. If one's client possesses any of the following, ask the MHP to admit that good parenting behavior includes:

- a. Two-way communications
- b. Clear emotional and physical boundaries
- c. Clear priorities
- d. Good supervision of children's behavior
- e. Nurturing self-esteem
- f. Knowledge of children's strengths and weaknesses
- g. Good role model
- h. Good disciplinarian
- i. Encourages relationship with the other parent
- j. Good moral reasoning

VIII. CONCLUSION.

A good evaluation can be extremely helpful, but a poor one can be useless or harmful. Counsel is certainly part of the process of making sure that good evaluations are conducted and, if not, that the weaknesses of the bad ones are exposed.

IX. BIBLIOGRAPHY.

Some of the literature that may be reviewed is as follows:

1. Jonathan W. Gould, *Conducting Scientifically Crafted Child Custody Evaluations*, 1998, Sage Publications, Inc.

2. Mark J. Ackerman, *Clinician's Guide to Child Custody Evaluation*, 1995, John Wiley & Sons, Inc.

Ronald V. Tweel, Esquire, is a partner with Michie, Hamlett, Lowry, Rasmussen & Tweel in Charlottesville, Virginia. He is Past Chair of the Board of Governors of the Family Law Section, Virginia State Bar and a Fellow, American Bar Foundation, American Trial Lawyers Association and American Academy of Matrimonial Lawyers.

Geraldine Welikson Hess, Esquire is a partner at the Law offices of Cheryl Lynn Hepfer, a firm that practices family law in Montgomery, Prince Georges, Calvert, Charles Anne Arundel and Howard Counties.