

Getting Started

The Challenge

How do you know what you say you know? This is the question you should continually ask when evaluating the reports and testimony of mental health experts, their methods, and the materials that support their conclusions and opinions. This challenge fuels the *PLAN Model* (Psychology Law ANalysis Model), a practical, caselaw-based legal analysis model presented in this book. Applying the *PLAN Model* will enable you to handle difficult psychology-related issues and materials effectively and to hold mental health experts accountable for their methodology, reasoning, conclusions, and opinions.

Although our question seems straightforward, probing its layers with experts unveils a host of ill-defined, yet often used, theories and terms, particularly in divorces that involve children. These include notions about the importance of a primary caretaker, child access schedules, parenting plans for infants, so-called abuse syndromes, parent alienation, and parent relocation.

Divorce is a legal event infused with conflicting emotions whose seeds germinated during the marriage and whose byproducts will weigh—sometimes heavily—in the spouses’ lives for several years. Divorce evokes deep psychological feelings and reactions, and because the legal divorce is “no fault,” child custody and support disputes may become proxy battles for parents dealing with the emotional issues that attend the breakup of their marriages. As a result, lawyers often get drawn into the spousal recriminations and thereby find themselves limited in their ability to effectively manage the psychological aspects of these cases.

Consider the bread and butter of family law: husband and wife, after seven years and with two children, decide to divorce. For family lawyers, most of these cases are quite manageable. Much of the time, parents divide their property

amicably, agree on how they will deal with their children after the divorce, and settle on the conditions and access schedule under which the noncustodial parent will spend time with the children. Often, these parents, with their lawyers, “bargain in the shadow of the law” as they consider how the court might rule on their divorce issues and then factor that understanding into their agreements.¹

After the divorce, many of these parents and their children adapt well to their new post-divorce living arrangements. Some parents use their agreed-upon child access schedules flexibly, depending on their work or other demands or on the children’s wishes to spend more time with the noncustodial parent. Other parents, valuing more predictability, adhere strictly to child access schedules while continuing their heavy involvement with their children. Still other parents, while continuing to bear resentment from the marriage and divorce, nevertheless separate their relationship problems from their children’s needs and dutifully carry out their parenting responsibilities, albeit in parallel fashion.²

However, a small group of divorce or post-divorce modification lawsuits become more complicated. While some of these are solely financial—child support or alimony—others carry psychological concerns that significantly escalate tensions and ill-will. For example, what if one spouse does not favor getting a divorce and resists efforts to dissolve the marriage? Or what if one spouse is depressed or angry, or overly emotional, even impulsive, when interacting with the other? What if both parents use the child as a go-between for adult divorce issues that they have difficulty resolving between themselves? What if the child resists spending time with one parent and openly favors one over the other? What if the child has been experiencing emotional or behavior problems since the separation or divorce?

Given these difficult, psychologically oriented concerns that might arise in a conflict-ridden divorce, how can you distinguish what are common reactions to divorce from other emotional problems that may compromise the children’s well-being, during the divorce and after? Then add the possible layers of substance abuse, domestic violence and child abuse allegations, new marriages, additional siblings, and past counseling to confound the matter.

As complex divorce problems intensify, lawyers may have difficulty understanding, organizing, and addressing the attendant psychological concerns. Lawyers typically begin to seek relevant information through discovery by obtaining financial records, previous psychotherapy and medical records of family members, reports of previously conducted evaluations, children’s school reports, and other parent-supplied documents. But obtaining this information is only the first step when managing the psychological issues of a complicated family law case. Knowing what to make of the information, how to organize it,

1. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

2. See Joan B. Kelly, *Children’s Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35 (2007).

and how to use it to address the relevant mental health concerns is the next step. Doing this competently improves the lawyer's abilities to grasp essential issues and to craft a competent and convincing legal case. To do this, lawyers often retain mental health professionals (MHPs) to help them manage the materials and provide expert court testimony.³

Although MHPs may help lawyers understand, organize, and address psychological issues in these cases, some writers have proposed that MHPs have little, if any, reliable basis upon which to testify when the issues focus on the "best interest of the child"—the primary standard all state courts use to decide child custody cases. For example, because psychological research generally compares groups rather than individuals along different dimensions, questions arise about whether such findings apply to a specific family in court and to that family's legally relevant questions.⁴ Other writers contend that psychology's empirical knowledge base is too limited to predict consequences of MHPs' child custody recommendations in a particular case. These writers criticize MHPs for basing expert opinions on personal biases rather than on accepted research, for utilizing poor evaluation methods, and for misunderstanding the importance of distinguishing the role of a court-involved, or forensic, MHP from that of a therapeutic clinician involved with the litigant.⁵

Differences between law and social science styles and methods of reasoning also raise questions about how MHPs fit in the child custody process in court.⁶ For example, a court's order is prescriptive, directing people how to behave; the social sciences are more descriptive, seeking to describe behaviors as they occur.⁷ Also, a court focuses on the facts of the single case before it to reach its decision, whereas the social sciences focus more on principles and relationships derived from experimental studies of groups of people.⁸ Further, legal decision-making values certainty that leads to final decisions in which one party prevails. In contrast, social science conclusions are framed in probability terms. As a result, MHPs tend to qualify findings and statements and are more likely to view a person's behaviors as determined by multiple factors.⁹

Despite criticisms of MHPs in child custody cases and differences in the ways that MHPs and the legal system view data and issues, MHPs continue to play a significant role in the family law process. Legislatures and caselaw have enabled the legal system's reliance on MHPs in child custody cases. For example, note that while the best interest

3. Throughout this book, unless noted differently, "MHPs" references include psychologists, psychiatrists, social workers, licensed counselors, and marriage and family therapists.

4. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 12–13 (2d ed. 1997).

5. See William T. O'Donohue & A. R. Bradley, *Conceptual and Empirical Issues in Child Custody Evaluations*, 6 *CLINICAL PSYCHOL.: SCI. & PRAC.* 310 (1999); see also Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 *PSYCHOL. SCI. PUB. INT.* 1 (2005).

6. C. Haney, *Psychology and Legal Change: On the Limits of Factual Jurisprudence*, 4 *LAW & HUM. BEHAV.* 147, 158 (1980).

7. *Id.* at 163.

8. *Id.* at 164.

9. *Id.* at 164, 168.

of the child standard is “the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child,”¹⁰ this standard is generally ill-defined, and the trial court has wide discretion when applying it.¹¹ Consequently, legislatures and courts have tried to guide best interest of the child considerations by freighting their language with psychological terms or constructs. For example, although Michigan, in its Child Custody Act of 1970, identifies ten factors for a court to consider when making a child custody determination,¹² no definitions are provided for the words “love,” “affection,” “other emotional ties,” and “moral fitness,” among other concepts. Also, the Uniform Marriage and Divorce Act (UMDA)¹³ identifies five factors for a judge to consider when making child custody determinations: (1) the wishes of the child’s parent or parents as to his or her custody; (2) the wishes of the child as to his or her custodian; (3) the interaction and interrelationships of the child with the parent or parents, siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to home, school, and community; and (5) the mental and physical health of all individuals involved. The UMDA also allows courts to consider any other criterion that might be important in discerning the child’s best interest.¹⁴ Clearly, prevailing “best interest of the child” definitions and guidance—as indeterminate as they appear—in essence require the involvement of MHPs in child custody cases as consultants to lawyers, as retained experts, and as court-appointed evaluators and experts.

To that end, many MHPs in the past several years have focused on developing child custody work as a specialty. Several professional organizations have developed standards and guidelines for MHPs involved in these cases;¹⁵ consequently, MHPs have become more sensitized to ensure that their professional relationships with families, lawyers, and courts do not compromise the validity of their methods and opinions. Research, writing, and workshops have mushroomed to address evaluation methodology and psychological aspects of difficult cases.¹⁶ In sum, rather than shying away from the criticisms, many MHPs have addressed the complaints by seeking to define their expertise in the contexts of social science’s research and professional literature.

10. Tex. Fam. Code § 153.002 (parallels language of the best interest standard in most jurisdictions).

11. See *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).

12. Mich. Comp. Laws § 722.23.

13. UNIF. MARRIAGE AND DIVORCE ACT (1973), 402 9A U.L.A. 561 (1988) [hereinafter UMDA].

14. *Id.*

15. American Academy of Child and Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY (1997) [hereinafter *Psychiatry Parameters*]; American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOL. 863 (2010) [hereinafter *APA Child Custody Guidelines*]; Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70 (2007) [hereinafter *AFCC Child Custody Standards*].

16. See, e.g., journals such as *Family Court Review*, *Journal of Child Custody*, and the *Journal of Divorce and Remarriage*.

Meet the Challenge: Understand Three Key Perspectives

To best flesh out our central question for MHP experts—How do you know what you say you know?—and meet the challenge of evaluating MHPs’ reports and testimony, you should understand, separately *and* jointly, three key perspectives: the emotional, the legal, and the psychological. Considering each perspective separately allows you to draw upon unique information that each perspective offers for understanding and using the work and testimony of mental health experts. Considering the perspectives jointly, using this book’s *PLAN Model*, offers an integrated framework that orients analysis of mental health testimony, directs deposition and courtroom examinations of experts, and shows the court a roadmap for oral and written arguments about the expert testimony. So, what does each perspective address separately?

The first critical perspective, *the emotional perspective*, addresses the emotional dynamics of divorce that underlie spouses’ mindsets and behaviors. These dynamics provide useful insights about spouses’ actions and motivations in a given case and sensitizes the lawyer about what issues might address the children’s best interests. Also, key events leading to the marital separation may foretell issues that facilitate or frustrate resolution of the divorce. In addition, understanding the nature of impasses that stall progress in settling tough issues can help you fashion constructive and creative steps to move a case forward.

The second critical perspective, *the legal perspective*, addresses legal principles that test the reliability of mental health reports and testimony. Examining mental health testimony from the legal perspective presents challenges. In most state court jurisdictions, *Frye*¹⁷ or *Daubert*¹⁸ principles help the court test the reliability and determine the admissibility of expert testimony.

But family courts have not been awash with *Frye* or *Daubert* challenges to proffered expert mental health testimony. Neither *Frye* nor *Daubert* requires trial judges to raise questions of admissibility of expert testimony on their own initiative. As with other evidentiary issues, trial lawyers are responsible to identify and object to such issues.¹⁹ Yet many lawyers are uncertain about how to apply the *Frye* or *Daubert* principles to mental health testimony. Also, a lawyer may fear that raising *Frye* or *Daubert* concerns with opposing counsel’s mental health expert may offer opposing counsel a roadmap to undermine the lawyer’s own expert’s testimony.²⁰ In addition, *Daubert* requires the judge to be the evidence gatekeeper. The appellate standard of review for assessing a trial court’s decision to admit an expert’s testimony is whether the court abused its discretion by acting without

17. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

18. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

19. Daniel W. Shuman & Bruce D. Sales, *Daubert’s Wager*, 1 J. FORENSIC PSYCHOL. PRAC. 69, 71 (2001).

20. John A. Zervopoulos, *Robinson/Daubert and Mental Health Testimony: The Sky Is Not Falling*, 64 TEX. B.J. 350, 352 (2001).

reference to guiding rules and principles.²¹ Thus, the lawyer may believe that appealing a judge's *Frye* or *Daubert* hearing decision to admit an expert's testimony would be futile.²²

While lawyers must weigh these admissibility concerns, this book's approach takes the legal perspective beyond admissibility. In the end, the finder of fact is always weighing whether to trust expert testimony—even after testimony is admitted. The practical, case-law-based *PLAN Model*, introduced in Chapter 3 and developed in this book, organizes *Frye* and *Daubert* principles into a four-step framework to help you test the trustworthiness of expert testimony at all trial stages and to marshal caselaw-based arguments to support or challenge that testimony.

The third critical perspective, *the psychological perspective*, uses psychology's literature, professional practice guidelines, and ethics to address mental health experts' conclusions and the methods and reasoning that experts use to reach those conclusions and resulting opinions. The analysis can be confusing because of the layers that must be addressed. For example:

- Mental health experts come to court with different kinds of professional qualifications; not all are equivalent. What do these qualifications mean, and what level of competence is defined by a particular qualification?
- How may lawyers evaluate the methods by which mental health experts arrive at their conclusions and opinions?
- How do experts use psychological testing results to support their opinions?
- How have experts guarded against the influence of biases when gathering or evaluating the data that informs their opinions?
- How do experts handle special issues—allegations of domestic violence, child abuse, child resistance to visitation, and interference with custodial access, as well as concerns about access schedules for young children and relocation—that complicate child custody cases?
- How do experts justify their child access schedule recommendations? And how might a prospective relocation of one parent with the children affect the schedule and the children's relationships with each parent?

Understanding these three key perspectives separately—the emotional perspective, the legal perspective, and the psychological perspective—is critical to sorting through the mental health issues, materials, and testimony in family law cases. The next step is to join the contributions of each perspective into a framework, the *PLAN Model*, that will

21. See *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996); see also *General Elec. Co. v. Joiner*, 522 U.S. 136, 138–39 (1997).

22. Zervopoulos, *supra* note 20, at 352.

organize your approach to mental health experts and their work and to guide your written or oral legal arguments.

Meet the Challenge: Apply the PLAN Model

Jointly applying the three key perspectives empowers you to highlight strengths or confront shortcomings of mental health evidence. The *PLAN Model*, a four-step, practical, caselaw-based framework presented in this book, weaves together these perspectives to meet this challenge: The legal perspective, drawing from caselaw and the rules of evidence, provides the *PLAN Model*'s skeleton; the psychological and emotional perspectives, drawing from professional psychology's ethics code, practice guidelines, and literature, put meat on the bones. By applying the *PLAN Model*, you will enhance your abilities to test the quality of mental health materials and testimony; to devise effective direct and cross-examinations; and to sharpen your courtroom arguments, whether in *Frye* or *Daubert* hearings or in trial when testing the quality of already admitted mental health evidence. In the end, you will be able to address most effectively the central question for mental health experts: "How do you know what you say you know?" Let's look at this book's roadmap to meet these goals.

The Roadmap

This book is divided into three parts. Part One—Chapters 2, 3, and 4—addresses the three critical perspectives you should understand to manage mental health materials and expert testimony. Chapter 2 introduces the emotional perspective, addressing emotional dynamics of the divorce process that clarify the underlying personal and relationship concerns of your clients and their spouses that could facilitate or impede the progress of a particular case.

Chapter 3 examines mental health testimony from the legal perspective. First, we discuss the *Frye* and *Daubert* lines of cases, noting key evidentiary principles in each. From these principles, we develop the practical four-step *PLAN Model* as a framework with which to organize and analyze experts' methods and testimony.

Chapter 4 uses the *PLAN Model* to address the psychological perspective in family law cases. From an admissibility standpoint, *Watkins v. Telsmith, Inc.* states, "[T]he district court should ensure that the opinion ... will have a reliable basis in the knowledge and experience of the discipline."²³ Understanding what standards, methods, and ethics MHPs

23. 121 F.3d 984, 991 (5th Cir. 1997).

bring to family law cases is essential for lawyers who will evaluate and manage mental health materials and expert testimony. We will explore how MHPs' views of each step in our *PLAN Model* can help you construct more informed direct and cross-examination questions by discussing several key issues:

- Experts' professional qualifications
- The critical issue of the roles mental health experts adopt in their forensic tasks
- The methods experts use to gather their data, including the use and misuse of psychological testing
- Experts' use of research in their testimony
- The debate about whether mental health experts should offer opinions on the ultimate issue in family law cases

At the chapter's end, we will show how mental health experts should conceptualize child custody evaluations, to illustrate how you may focus experts on the objectives of such evaluations rather than on concerns less relevant to the parents' capacities to care for their children.

Part Two of this book will help you address the most challenging of the *Frye-Daubert* tasks when dealing with mental health testimony: exposing analytical gaps in the empirical and logical reasoning that tie experts' methods and data to their opinions. Courts may view opinions with analytical gaps that are too wide as unreliable and thus inadmissible.²⁴ With that in mind, we will first discuss the scientific-critical thinking mindset that provides the prism through which *Frye-Daubert* questions should be considered. We will then use that mindset to describe six ways in which mental health experts may hide analytical gaps in their empirical and logical reasoning. As a result, you will learn to expose analytical gaps hidden by:

- Overly abstract psychological concepts
- "Common sense" notions unsupported by empirical or logical reasoning
- *Ipse dixit* assertions whereby experts offer opinions devoid of support
- Reliance on general acceptance factors absent other support
- Judgment biases that color, if not corrupt, experts' conclusions and opinions
- Misapplication or misrepresentation of research
- Confirmation bias
- Misused DSM-5 diagnoses that support experts' testimony.

24. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The topics of the pernicious effects of judgment biases and the misuse of *Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition* (DSM-5) diagnoses are addressed in two new separate chapters that were not included in this book's first edition. The judgment bias chapter helps you identify biases that experts bring to their work and offers an approach—the *REAL CHECK*—for challenging those biases when you depose or examine experts. The DSM-5 chapter offers a lawyer's approach to examining experts whose opinions rely on DSM-5 diagnoses. Too often, lawyers get “lost in the weeds” of the numerous psychiatric diagnoses, trying to out-psychologize the expert by focusing solely on particular diagnoses. The DSM-5 chapter's approach will help you examine experts more effectively by stepping back and understanding the purposes, structure, and methodology of the DSM-5, as well as its cautions about its use in court.

Part Three of the book includes an expanded, rewritten chapter on issues that arise when lawyers seek to obtain mental health records. Lawyers often encounter roadblocks when they try to negotiate the interplay of patient confidentiality, privacy laws represented by HIPAA—the Health Insurance Portability and Accountability Act²⁵—and the psychotherapist-patient privilege. Questions about whether and how psychologists should release test data to lawyers add to the mix. We will look at how these concerns overlap and outline ways to manage them.

Finally, Appendix A presents a short essay on deconstructing a typical research article published in an American Psychological Association journal (note that many social science journals adopt the APA's article format). In addition to showing you how to read an APA-published article section-by-section, questions are provided to help you assess the quality of an article's study, the study's limitations, and whether an expert is making use of the study's findings properly. Appendix B lists Internet sources for relevant mental health ethical codes and practice guidelines.

Dealing with mental health issues and information in family law cases may, at times, seem confusing and even daunting. But appreciating important emotional dynamics of divorce and organizing the legal case and arguments around the practical four-step *PLAN Model* presented in this book will provide the support you need to pose the key question to mental health experts—“How do you know what you say you know?”—and meet the challenge of evaluating experts' work, their reports, and their testimony.

25. Pub. L. No. 104-191, 42 U.S.C. § 1320d-1 *et seq.*