

# INTRODUCTION

The first edition of this book was published in 2013, seven years ago. Work on the first edition began in 2011, so it has been nearly a decade since we began work on this book. During the past decade, both of us have been fortunate to have consulted on many, many cases. We have also been fortunate enough to have opportunities to lecture and teach on topics related to forensic psychology consulting and to discuss this area with numerous colleagues. Through our various layers of involvement in the forensic psychology consulting area, we have had the chance to observe many colleagues as they do this work. It has been and continues to be an immense privilege to do this work and to have earned the trust of many attorneys, psychologists, litigants, and courts. We have learned a great deal.

We believe strongly that it is the duty and obligation of professionals to be lifelong learners and to always remain open to our experiences. In the working-learning life, it is essential to recognize what it is about what we do that works and succeeds and what we do that does not work so well and that needs to be changed. As we approach the decade mark of the life of this book, one thing we wish most to do is to take an open, honest, critical, and candid look at the work of forensic psychology consultation.

Foremost, we wish to observe that child custody matters, child custody litigation, and child custody evaluation are deeply human endeavors. This cannot be emphasized enough or said enough. As with all human endeavors, there are inevitable and inherent flaws, as well as differences of opinion about the way such work should be carried out and how it should be used. There have to be such flaws because we humans are flawed, and there will always be differences of opinion. We all do not think the same way and psychological concepts are sometimes vague. Some of the flaws are related to weaknesses and vulnerabilities inherent to human nature. To quote the Hon. Thomas Trent Lewis (retired), former supervising family law judge in Los Angeles, CA, "Custody evaluations are done by imperfect evaluators, presented in court by imperfect attorneys and heard by an imperfect judge."

Those who approach child custody work with purpose, passion, and integrity, no matter what their professional training and background, and no matter how they approach this work, recognize the immense responsibility given to us and the immense privilege afforded to us in being entrusted with this work. It is a huge responsibility to be given the opportunity to weigh in on and impact the lives of other people's children. It is a huge privilege to be trusted with the well-being of other people's children. At all times, professionals who advocate for, weigh in on, or make decisions about the lives of other people's children should approach their work with humility and with respect for the family. The family honors us by giving us the chance to do this work, not the reverse.

For those who approach the work with passion (and those without passion are probably best off not doing child custody work), ideally the passion comes from an unyielding commitment to the well-being of children and families, along with a desire to benefit others. Those who are not passionate about the integrity of such work should probably not do this work because the passion helps increase a commitment to excellence and decreases unforced errors. Yet, for any who have worked in the family law system for a length of time, it is easy to recognize how flawed the system is, to become jaded, skeptical, and cynical. We all see the many ways the family law system, which exists to benefit people, has the potential to produce results that are harmful or far too belated. To put it simply, the realities of working in the field of family law can be frustrating and upsetting.

When people put the well-being of their children in front of the family court, they do so because they have a personal relationship problem rather than typical legal concerns. Theirs are not truly legal problems. Our legal system is primarily designed to adjudicate true legal problems, not interpersonal problems. Child custody cases are typically the result of relationship problems. So, when there is a round hole but we are only given square pegs to fill the holes, the essential mismatch causes problems no matter how hard we try. We strongly believe that the legal system is ill designed to make wise decisions about the well-being of children. Yet it is the system we have, and many people far smarter than the two of us have spent their lives trying (and failing) to devise robust alternatives to the family law courts. If we work in the system, we must accept the system, recognize its strengths and weaknesses, and accept realities we do not like but never stop imagining, thinking, and trying to implement improvements.

The passion that comes with dedication to this work has a downside as well. It has the potential to cause child custody professionals to expect too much from others and themselves, to have unrealistic expectations for the system, and to anticipate outcomes that are not realistic. There is a downside to taking on work that brings with it huge responsibility. Think about it—when you reckon with how responsible we are for the well-being of other people's

children, there has to be a certain amount of ego and a certain amount of hubris involved. If you believe that you can enter into the lives of strangers with complex and long-standing problems and somehow arrive at solutions that will work and lead to meaningful change within a legal system that is not truly designed for the task, you're presumptuous and perhaps even somewhat arrogant! Who would take on such a task without the psychological protection of believing, perhaps too much so, in one's self? Who would take on such a task without the psychological protection of feeling somehow even a little bit exceptional?

So, let's put this together in the context of forensic psychology consulting and reviewing the work of other professionals. We have (hopefully passionate) professionals and we know that while the passion is a very good thing, it has downsides. It can bring with it blind spots, a sense of righteousness, ego, and hubris. When these downside risks are in operation, especially if they operate unchecked, there is the risk of them translating into a sense of superiority and being "better than" the person whose work one is reviewing. The nature of review work creates the perfect setup for this.

The reviewer is typically, or should be, a senior member of the field and someone who has done custody evaluation work for many years, having been recognized by peers and other professionals for their skill. The reviewer sits in a position to assess someone's work while not having their work assessed or exposed.<sup>1</sup> When you put these together, the potential for the reviewing professional to take something other than an ego-free stance toward the work of the person they are reviewing becomes real. Review work can be lucrative. The human tendency to measure one's worth or value by the amount of money one makes is ever present. In turn, this tendency can lead a person to do things and make decisions that, if they did not result in making even more money, the person might not otherwise make. Retention bias has a lot to do with this (retention bias is more fully discussed in Chapter 4). This is a challenge and may lead to a slippery slope impacting the integrity of the expert witness's opinion. Experts, even senior experts, can be bitten by the hubris bug, the money bug, and the ego bug. We must all be on guard for this in ourselves and in one another. We believe there is no room for this in our work.

We said earlier that child custody work is very human work. It is essential to remember that the work of reviewers is every bit as human. With the clearest focus possible, the reviewing professional must bring to the task awareness and respect for the fact that they are reviewing the work of another human. Whether or not they think that the person whose work they are reviewing did

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1. Sometimes, the child custody reviewer still does child custody evaluations and remains subject to being reviewed by a colleague. Sometimes, the child custody reviewer has "retired" from performing any new child custody evaluations and is even more at risk of bringing hubris and ego into the review work.

a good job, we believe that it is important that the reviewer never assume that the person whose work they are reviewing is not earnest and is not trying their best. Moreover, the reviewer should not judge the individual whose work they are reviewing—their job is to review a work product, not a person.

No child custody evaluation is perfect, and everyone could find fault in each and every evaluation if one wants to. At all times, family law professionals must remember and embody the values of kindness, collegiality, and compassion. This means not making it personal and not using one's role as a reviewer as an opportunity overtly or covertly to increase one's sense of self, stroke one's ego, or attempt to lift up one's status in the eyes of peers. This means being honest and describing strengths and weaknesses of a reviewed evaluation even when the retaining attorney would rather the review consultant reach a different conclusion (and, yes, this means detailing the strengths of an evaluation even when one honestly believes that the work product is deeply flawed). This means advising a retaining attorney, when appropriate, that it may be best not to take a case to trial (and therefore offering advice counter to the reviewing expert's and the attorney's financial well-being). This means always looking for opportunities to help settle cases even though settlement results in lower fees because a case does not go to trial. This means not personalizing the review or seeing the person whose work is being reviewed in static and stereotypical ways (many times, in casual discussions, we've heard our review colleagues call the people whose work they are reviewing stupid, horrible, idiotic, and the like). Sadly, all too often we have seen our colleagues who undertake review work behaving in their own financial interests or in the interests of their egos. What this results in, by intention or not, is work that sets out to essentially be a review of the person who did the work, not limiting the work to an objective and balanced review of the strengths and weaknesses of the work product. What this results in is reviewers who hold others to standards they themselves do not or cannot maintain.

Family law professionals are in the field of helping parents, children, and families resolve complex, difficult, tenacious, and contentious problems. On a daily basis, we encounter our own clients or the clients of an opposing attorney who are behaving provocatively, angrily, aggressively, and in ways that are unkind and even mean-spirited. We look at these people and these families and we wonder why they can't take the high road or why they can't behave in ways that diminish rather than promote acrimony. Yet we often don't look at ourselves and see how we, in our professional roles, sometimes act similarly. If we do not expect better of ourselves, how can we expect our clients to act differently?

So let's be mindful and aware of our "footprint" on the family. An old adage reminds us that in order to change, people have to want to change. When they don't want to change, they're not going to change. Every time we

intervene, we also change the family. If and when successive interventions fail to stop the cycle of conflict in the family, we need to step back and ask if our footprint on the family may be a part of the problem. The principle of Occam's razor is applicable here, as is the simple observation that sometimes less is more. When we act on families, we change families. We have the very real potential to become a part of the problem, something we rarely, if ever, hear being discussed at professional conferences and meetings.

We have seen some terrible examples of reviewers behaving badly and failing to respect the family, the lawyers, the court, the trust invested in them, and the process. In one case where the matter was set for a four-week trial and the expert reviewer was asked to be present in court for every day of trial (at a substantial daily fee), the case settled after two weeks. This expert was overheard saying, "Dammit, that will cost me thousands of dollars!" We know of a reviewing colleague who, upon giving evidence regarding the work product of another custody evaluator, lambasted the evaluator for having incomplete and hard-to-read notes. On the witness stand, this individual was incredulous and remarked in great detail about the inadequacy of the record and the extreme lack of professionalism by the psychologist who did the evaluation. Several months later, a case for which this reviewing expert did an evaluation went to trial. In response to discovery requests, this individual did not produce their notes. When asked on the witness stand about this, the individual indicated that their notes were essentially incorporated into the written report! In another case, a reviewing expert remarked that the evaluator's work product went outside the scope specified in the order appointing the evaluator. They were roundly critical of this evaluator and spoke to the lack of respect that the evaluator had for the court and for the family, describing the evaluator as "going rogue." Several months later, when this reviewing expert had a case go to trial in which they were the evaluator, it turned out that during testimony, the individual could not explain what the scope of their evaluation was to be, nor could they find in their file the court's appointment order. Glass Houses! We know of a reviewer involved in a high-profile case with a widely known litigant. This person took ample opportunities to regale colleagues at professional conferences with stories of the case, inappropriately using the name of the well-known litigant in a manner that appeared intended to lift the reviewer's visibility and status. Examples like this are plentiful, and these examples are not particularly egregious.

In the past decade, it has become more commonplace for custody evaluations to be reviewed by other experts, particularly in higher-end cases where the litigants have the financial resources. This is a good thing if this means that the court is being given broader, more detailed, and more useful information about the weaknesses and the strengths of a custody evaluation from a reviewer who adheres to a principled, human, collegial, and nonpersonal pro-

cess. The more useful information the court has, the more likely the court will make a wise decision. This is the reason both of us got into consulting work to begin with, and this is the intended purpose of the work. Unfortunately, over the past decade, we have seen the review and critique of forensic work products become a cottage industry with some poorly qualified and improperly motivated professionals engaging in the work.

Whereas attorneys are trained to expect everything they do to be scrutinized by others, mental health professionals are not. Instead, mental health professionals are accustomed to doing their work behind closed doors, keeping their records carefully guarded, and not discussing the specifics of their work. The scrutiny that comes with being reviewed is something that custody evaluators, who are after all mental health professionals, have not been accustomed to. It is typically experienced as unwanted and unwelcomed. If they are candid, most evaluators feel a gnawing sensation in the pit of their stomach upon learning they are being reviewed. If you hear this as an oblique argument against reviews, we apologize. We support the review process because it is a form of quality control and peer as well as judicial education. Forensic psychology consulting can also keep cases focused on the children rather than co-parent destruction when custody is litigated. We call upon our colleagues to be mindful that review is also a process with a collegial element. If one of our goals is to improve the quality of practice, then we have to remind ourselves that people learn better when they don't feel attacked but, instead, feel informed.

We assert that reviews should be done by seasoned and experienced professionals. Unless and until one has at least 15 years of this work under their belt, and unless and until one has undertaken at least several hundred custody evaluations of their own, it is our view that one simply cannot have the depth of experience or the perspective to do this work well. By the way, we have no research to back this up. It's just our opinion.

One of our major concerns is that the work and the writing we have done may have had the unintended consequence of raising the level of risk for evaluators and raising the level of anxiety evaluators feel. We are concerned this may also have unintentionally increased the level of hostility and mistrust toward evaluators by attorneys, mental health professionals, judicial officers, and parents. Both of us have seen review and critique work used by others in the service of complaints of evaluators to their licensing boards. This is unfortunate and not at all the purpose of the work. Yet contained within these unintended consequences are important messages and important lessons.

No doubt you've witnessed, as we have, the striking decline in the number of mental health professionals doing court-related child custody work. Custody evaluators are choosing to stop providing evaluations, choosing instead to do other types of work. Some choose retirement. Therapists are deciding to stop doing court-connected work in favor of less risky and less stressful clinical cases.



We are also seeing many mental health professionals beginning their careers choosing to do anything other than work related to families with contested child custody matters. Thus, our ranks are declining, and new practitioners are not filling the void. In our discussions and at our professional conferences, those of us who have had rewarding and satisfying careers in this field bemoan our diminishing ranks while not doing enough to illuminate the reasons for our shrinking area of specialization and not addressing the causes for our ranks shrinking. We do not have all the answers. However, we are certain of one thing. To the extent that we family law professionals choose to engage in our work, be it legal work or mental health work, in a manner that mimics, mirrors, or unintentionally takes guidance from the rancor, acrimony, and conflict that our clients bring with them to these cases, we are a part of the problem. Because we notice that forensic consulting and review work, the subject of this book, is more and more being done with an inappropriate tone and in a nitpicky manner with not nearly enough attention being given to the essentially human nature of family law work, we hold ourselves partly accountable for the way in which this element of family law work has become unnecessarily confrontational. This must change.

We are at a crossroads in our field. From coast to coast and even in other nations (we both have the privilege of working internationally), we hear family law professionals of all stripes saying that custody evaluations are too expensive, that they take too long, that they are being done in an increasingly defensive manner with the evaluator's risk management appearing to be the first priority. Sadly, the current "scientific" model of custody evaluation that has influenced our work, and in some important ways advanced the work, is not a truly sustainable model, except for a small minority of families engaged with the family court.

We fool ourselves if we think that what we do is truly science. It is social science, but our scientific model is patterned after that of the natural sciences or hard sciences where the rigorous application of the scientific method is possible. In the social sciences, our inability to experiment with people's lives does not allow us to approach the scientific rigor of the natural sciences. Thus, the scientific model places burdens on evaluators that cannot possibly be met. It also leads us to firmly hold beliefs that we cannot truly prove through the scientific method. Not coincidentally, the Association of Family and Conciliation Courts recently appointed a task force to review and revise the Model Standards of Practice for child custody evaluations. We anticipate significant revisions and clear acknowledgment of the important problems with the scientific model. While we do not in any manner advocate or argue for a return to the earlier clinical model of doing evaluations, we are hopeful that what emerges is a more sustainable, approachable, scalable, flexible, and realistic model.

We are seeing and hearing that child custody cases are more and more turning into litigation about the evaluation and the evaluator rather than focusing on the family, the needs of the children, the capacities of the parents, and the

dynamics of the family system. We hear that judicial officers are less inclined to order evaluations because the evaluation itself becomes a lightning rod in the litigation that ensues. While there are multiple reasons for this, we assert that one of them is the divisive, noncollegial, strident, and inappropriate attitude with which too many review experts and behind-the-scenes consultants approach their work.

Going back to the reason we engage in consultation and review, again we state that the purpose is to help obtain good outcomes for children when their parents cannot agree on what is best for their children. Even when working behind the scenes, assisting attorneys with their cases as a member of the team, let's remember that our obligation is to the best interests of the children and to minimize harm to children and the family as much as possible, not to a specific case outcome. Attorneys are zealous advocates for their client. Mental health professionals are zealous advocates for the best interests of children and for avoiding harm. So, with that in mind, what is the greatest risk to the well-being of children when their parents cannot agree about what is best for the children? The answer is simple. The greatest risk to the children (except for true neglect or abuse) is the conflict between the parents. When we align ourselves with the goal of winning at all costs, we align ourselves with the use of strategies and tactics that have increased risk of harming the family. In so doing, we may drive up the level of conflict between the parents and create a significant potential to inflict deep and potentially unhealable wounds that the family is left to wrestle with once the case is done.

It is unfortunate whenever a family cannot resolve their differences about their children without the assistance of the court. Of course, it is inevitable that this happens and when it happens, we are the custodians of the trust and the well-being of the family. Our job is to respect the family, honor the family, and honor the trust placed in our hands. No one among us would seek the services of a physician who recommends unnecessary treatment or who performs unneeded procedures. We must think of ourselves similarly. As consultants, reviewers, and expert witnesses, we look for opportunities to benefit the family, not ourselves. Our job is to perform our consulting and expert witness tasks while assisting in shepherding the family through the minefield of custody litigation with as little damage as possible. We hope that with the publication of the second edition of this book, we can inspire and encourage all of our family law colleagues to take the viewpoint described above—one that honors the family, one that respects one another, one that de-emphasizes our individual contributions and emphasizes professional collaboration and healthy outcomes for children. Let us all respect the trust invested in us when we undertake this important work and respect one another rather than looking for opportunities to lift ourselves up at the cost of others. Let's restore to our field a reputation of doing good, family-focused work. Our clients invest their trust in us, and we are obligated to treat it with respect.