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SPECIAL ISSUE ARTICLE

The emperor has no clothes: A systemic view of the status and future of child custody evaluation (CCE)

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Abstract

For all of the time, effort, and money invested in child custody evaluation (CCE) and for all of evaluators' emphases on collecting empirically sound data, CCE is not itself an empirically robust process. The reliability, validity, efficacy, and efficiency of CCE has never yet been adequately demonstrated. The science has yet even to define and measure the variables that constitute a healthy family, much less how one is to measure and recommend changes for conflicted systems in the midst of tectonic transitions. This article proposes five ways in which family law professionals and the culture at large should work to better serve the needs of our children: (1) the establishment of proactive parenting and co-parenting education intended to diminish the frequency and magnitude of family conflict and improve the quality of child and family functioning; (2) the introduction of organized incentives that motivate healthy parenting and co-parenting practices as opposed to negative consequences that do too-little, too-late; (3) a greater emphasis on social equity, cultural humility, and universal professional training; (4) the creation of ethical guidelines that disconnect continuing conflict from professional income; and (5) outcome research that feeds back into the evolution of these and related processes.

KEYWORDS

assessment, child custody evaluation, child-centered, continuing parenting education, costs, efficiency, equity, ethics, family systems, methodology, research, validity

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Key points for the family court community

- Contemporary Child Custody Evaluations (CCEs) lack necessary reliability and validity
- Incentivized, proactive Continuing Parenting Education (CPE) can diminish family conflict, unhealthy developmental outcomes, and the need for CCEs.
- CCEs when necessary should focus on identifying family strengths and resources rather than pathologies and weaknesses.
- Cost-shifting methods must be instituted in order to make CCE more accessible to people across socio-economic strata.
- Ethically-informed, child-centered outcome research must immediately be established so as to make CCE into a reliable, valid, and affordable means of resolving co-parental conflict.

For all of the time, effort, and money invested in child custody evaluation (CCE) and for all of evaluators' emphases on collecting empirically sound data, CCE is not itself an empirically robust process. The reliability, validity, efficacy, and efficiency of CCE has never yet been adequately demonstrated. Science has yet to define and measure the variables that constitute a healthy family, much less how one is to measure and recommend changes for conflicted systems in the midst of tectonic transitions. This article proposes five ways in which family law professionals and the culture at large should work to better serve the needs of our children: (1) the establishment of proactive parenting and co-parenting education intended to diminish the frequency and magnitude of family conflict and improve the quality of child and family functioning; (2) the introduction of organized incentives that motivate healthy parenting and co-parenting practices as opposed to negatives consequences that do too-little, too-late; (3) a greater emphasis on social equity, cultural humility, and universal professional training; (4) the creation of ethical guidelines that disconnect continuing conflict from professional income; and (5) outcome research that feeds back into the evolution of these and related processes.

> "… if the legal system were shaped around the needs of families, rather than the traditions of an adversarial system, the considerations would be quite different.
> The role of [family law professionals] would be that of preventive professionals, primarily concerned with averting family conflict and only faced with helping family members resolve conflicts when dire circumstances arise."
> (Mosten & Traum, 2017, p. 26)

It's impossible to understand any particular tree without first understanding the forest in which it grows.[1] So it is with child custody evaluations (CCEs).

[1]Acknowledging the inspiring wisdom and insights of Peter Wohlleben in "The Hidden Life of Trees" (2016, Vancouver: Greystone Books Ltd).

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With tremendous respect for my esteemed co-authors' wisdom and insight concerned with improving the quality of contemporary CCEs, I believe that we need to step back and take a systemically-informed view. I believe that history's rejection of children as property, as better served by parents of one gender or the other, or as subject to a post-separation Solomon-like apportionment based upon pre-separation time-sharing are all as they should be, that is, antiquated solutions well-suited to their times and entirely inappropriate for ours (Emery et al., 2005; Stahl & Martin, 2013). Present-day focus on serving each child's unique needs is also as it should be, albeit a vague and terribly expensive mandate that ironically fuels larger societal schisms even as we seek to resolve family schisms one at a time (Prescott, 2020).

I believe that as family law professionals we have collectively invested more time, effort, energy, emotion, and money developing today's CCEs than NASA spent sending Neil Armstrong to the moon or the Human Genome Project spent mapping our alleles, with far less to show for it. Today's custody evaluators are inclined to argue the minutiae of whether to allow third party references to review and edit transcripts of their interviews, which MMPI scales have what meaning at what T-score level, and how to balance "see-saw" allegations of domestic violence and alienation as if we are fine tuning a Ferrari. We are not. The machine that we are working on is not even a Model T.

There is no evidence that CCEs are reliable or valid (Austin, 2009; Bala, 2004; Kelly & Ramsey, 2009; Saini, 2008).[2] That is, there is no reason to believe that any two custody evaluators given the same data would draw the same or even similar conclusions (inter-rater reliability) or that the conclusions thereby drawn have any necessary bearing on future child outcomes (predictive validity; Turkat, 2021).[3] Some wonder whether a simple coin toss would accomplish the same thing at far less cost (Chambers, 1984).[4]

We do not know if it's valid to evaluate individuals or systems under intense emotional pressure.[5] Yet CCEs presume to draw generalizations about families seen at the worst of times: when they are rubbed raw by the enormous social, emotional, and financial pressures of conflicted custody litigation, and then asked to put on their Sunday best to impress an unfamiliar professional whose opinions are likely to shape the rest of their lives.

We do not know how the impact of child custody disputes, benign or toxic, occurring in the adversarial system may reward the aggressor and punish survivors of interpersonal violence or emotional and economic abuse.[6]

We have yet to define healthy family functioning or development. We do not know which variables to measure or how to measure them. We are only now beginning to shift our focus from individual measurements to try to understand chaotic and complex family systems (Garber et al., 2022). Indeed, we have no consensual baseline defining how family systems function best, and yet we presume to advise the courts which relationships are healthier than others (Tippins & Wittmann, 2005).

But harder even than questions of measurement accuracy and prediction, are the larger cultural, moral, and existential issues so seldom addressed. We proudly claim to work in the best interests of each child, but cannot agree on

[2]"It has been argued that the methods used by forensic evaluators and the relationship of those methods to the inferences and conclusions reached on parenting issues are insufficiently 'scientific' to meet the admissibility standards set down by courts" Report to the chief judge of the state of New York. (Matrimonial Commission, 2022), accessed 06 February, 2022 at https://ocfs.ny.gov/programs/cwcs/assets/docs/Blue-Ribbon-Commission-Report-2022.pdf p. 46, 51. See Wittmann (2022) in response.

[3]"I once gave a workshop on child custody matters with a wise judge who started out by saying, 'you know, of course, there are no outcome data'. He was referring to the lack of research showing whether evaluators or judges get it right regarding the best interests of the child, or how the child fares over time when placed in a particular parenting arrangement after divorce. Nobody follows these cases over time" (Austin, 2009).

[4]"The prolonged legal process between warring parents may do greater damage than a coin toss which may shorten the process, but, as most lawyers learn, the human spirit is amazingly resilient and creative when it seeks to harm another. Even a coin toss may not stop the next iteration of conflict" (Prescott, 2011, p. 119, n. 36).

[5]"… [W]e have no empirically proven method for teasing out whether a child's symptoms are best viewed as a time-limited response to a court dispute (that will subside postdisposition regardless of the access plan) or a direct response to a specific custodial schedule" (Tippins & Wittmann, 2005, p. 202).

[6]"In Austin ZZ. v. Aimee A., 191 A.D.3d 1134 (2021), the court granted joint custody to a convicted domestic abuser whose violence had left the mother with lasting psychological damage. The court-appointed evaluator described the mother as impulsive and an inaccurate historian and asserted that, given the mother's fear of the father, she was incapable of regarding the father as an equal parenting partner. In contrast, the psychologist opined that the father was a psychologically reasonable parent, who would support the child's relationship with the mother." Tippins, 2022, p. 5.

how to operationalize that lofty goal.[7,8] Because child custody evaluators tend to be White, English-speaking males over 60 years old (Ackerman et al., 2021) who were raised in the Judeo-Christian tradition, we risk implicitly imposing our unspoken (and routinely unacknowledged) values on families that are often ethnically, culturally, religiously, morally, and linguistically very different (Gold, 2019; Maldonado, 2017).[9]

There, I said it. I feel like the little boy in the Hans Christian Andersen story who says something that is as true and obvious as it is forbidden. Or even more accurately, I feel like the dog who bites the hand that feeds him. I fear your censure, a flood of arguments countering these heretical disclosures, and the loss of my livelihood. I am, after all, a child custody evaluator. I have spent decades evaluating fractured families. I have conducted hundreds of hours of trainings intended to help others learn to do the same. I have consulted with lawyers around the world about child custody litigation and have often testified under oath about the meaning and value of the process.

Let me be clear: I do not regret these activities. I stand by my opinions. Like you, I have done my conscientious professional best to comply with a host of ethics, guidelines, standards, and laws relevant to the conduct of CCEs. Like you, I have made every effort to recognize and set aside my biases so as to genuinely understand each child in his or her or their cultural context and, like you, I have acted to promote what I understand to be the best interests of each child. But as experience accumulates and as maturity sneaks up unbidden across the years, it becomes harder and harder to assimilate new information into the same old model. There comes a time when accommodation takes over, demanding that the model must be changed.

This article proposes that it is necessary, but not at all sufficient, to work to improve CCEs. As much as the custody evaluation process has been criticized (e.g., Dawes, 1996; Hagen, 1997; O'Donohue & Bradley, 1999; Tippins, 2022) and must continue to be refined (e.g., AFCC, 2022; Cavallero & Hanks, 2012; Dale & Smith, 2021; Garber, 2016), I believe that we have an equal or greater responsibility to address much larger questions concerned with child and family development, family systems, custody determination, and family law practice in general. I presume here to describe five ways in which we must begin to approach families and family law differently so as to minimize the need for CCEs, conduct more effective CCEs when they are necessary, and thereby better provide for the well-being of children. In doing so, I take a systemic perspective in the belief that we have a responsibility to the larger social-legal-political ecology in which children grow, families function, and CCEs are conducted. Specifically, I call for (1) proactive parenting and co-parenting education, (2) incentives that motivate healthy parenting and co-parenting practices; (3) social equity, cultural humility and universal professional training in these domains; (4) ethical guidelines that diminish the professional's implicit incentive to prolong conflict; and (5) outcome research that feeds back into the evolution of these and related processes.

I do not pretend that the recommendations that follow are easy to implement or practical or presented with cookbook clarity. I offer these thoughts in the interest of forestalling a sweeping elimination of family forensic evaluations (Wittmann, 2022), prompting constructive dialogue, clarifying necessary future directions, promoting the well-being of children, and encouraging our field to devote at least as much attention to the forest as it does the trees.

PROACTIVE PARENTING AND CO-PARENTING EDUCATION: WE MUST OIL THE WHEEL BEFORE IT SQUEAKS

> "Counsel for the petitioner argues the court must be proactive and not just reactive … he argues the court cannot just wait for something bad to happen"[10]

[7]"This phrase itself implicates an extraordinary range of public policy and personal values. Best for whom? Who is designated the authority? What stereotypes and biases does that authority employ?" (Prescott, 2011 pp. 109–110.)

[8]"The coupling of the vague 'best interests of the child' test with the American adversary system of justice puts judges in the position of trying to perform an impossible task, and it exacerbates parental conflict and problems in parenting and coparenting, which psychological science clearly shows to be key factors predicting children's psychological difficulties in response to their parents' separation and divorce." Emery et al., 2005, p. 1.

[9]"… a colorblind approach, whereby racial, ethnic, or cultural differences are not acknowledged, is more likely to result in biased decisions" (Maldonado, 2017, p. 214).

[10]Babich v Babich, 2017 SKQB 32 (CanLII), <https://canlii.ca/t/gxlvh>, retrieved on 2021-09-30.

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The topic of education in the context of high conflict divorce, typically elicits two areas of discussion: The training of child custody evaluators (e.g., DePrizito, 2016) and the classes that many jurisdictions mandate for divorcing parents (e.g., Kopystynska et al., 2020; Stolz et al. 2017). Both topics are vitally important and deserve continuing study, but they are neither individually nor mutually sufficient.

Parenting is the most difficult and important job any human being will ever undertake. Nevertheless, qualifying for the job seldom requires little more than the indulgence of very basic biological drives. Whereas throughout most of history new parents enjoyed the benefits (and suffered the aggravations) of extended family's support, wisdom, and experience, our very mobile, digital, and impertinent society commonly leaves young people without community continuity and support. Even access to the pediatrician has been torturously confounded by automated digital portals, impossible wait times, and managed care mandates. These realities force each generation to reinvent the parenting and co-parenting wheel with the benefit of little more than a random collection of TikTok videos and Wikis. It should therefore be no surprise that many divorcing parents are terribly deficient in essential knowledge of development, parenting, and co-parenting skills.[11]

In response, custody evaluators are inclined to recommend, and courts are inclined to order divorcing parents to engage in various forms of education and/or therapies. This is how it should be, but time and again it proves to be too little, too late. By the time that a CCE is completed, and the court's orders are handed down, many children have already suffered the wages of adult ignorance, malice, or negligence and the polarizing pressures of co-parental conflict. These children needlessly endure abuse, neglect, overindulgence, estrangement, alienation, adultification, parentification, and infantilization (Garber et al., 2022). Social, emotional, and/or academic delays run rampant (Kelly, 2000). Family system molehills are needlessly turned into insurmountable Everests prompting police intervention, *ex parte* motions, and child protection investigations. As the ante goes up unchecked fueled in part by conformational bias, warring parents hire adversarial lawyers. Courts appoint Guardians ad litem, mediators, evaluators, and therapists.[12] No matter these many professionals' expertise, systemic insights, and conciliatory attitudes, expecting parents to learn and grow and benefit under this pressure is like expecting poetry from a drowning man.

Parent and co-parent education must be proactive and prophylactic (Schact, 2000).[13] It must begin from the time of conception and continue regularly at least through the child's minority. It must be available when and where and how consumers are most at ease and open to learning. It must communicate the basics of child and family development, parenting and co-parenting, self-advocacy, access to resources, conflict resolution, and authoritative caregiving (to name just a few critical topics) in the right language at the right educational level and at a time when there are no screaming infants, demanding bosses, or needy partners competing for attention. This means online education available at 2 a.m. in your pajamas, squeezed into lunch hour on the job, or podcasted on the bus on the long ride home.

Advance orientation and education improve outcomes

We know that proactive intervention improves outcomes and minimizes the need for more intensive services in many allied endeavors.[14] The medical profession has amply demonstrated that orientation and education in advance

[11]For example, a 2016 national survey observed that, "36% of parents surveyed said that children under age 2 have enough impulse control to resist the desire to do something forbidden, and 56% said this happens before age 3. In fact, most children are not able to master this until between 3.5 and 4 years of age." Zero to Three (2016, p. 4).

[12]"Participation in litigation or adversary negotiations impels parents in the opposite direction – toward antagonistic positions which imperil children and prolong litigation. It may be difficult for parents to retreat from such opposition, and the result is frequently protracted delays and unnecessary expenditure" (Kourlis et al., 2013, p. 354).

[13]"Federal support should be offered to develop and implement curricula for education in the basics of parenting, interpersonal relationships, and domestic safety in the K-12 curriculum of every public school." (Schact, 2000, pp. 577–578).

[14]One very notable exception concerns gun safety. Gun safety training for children of gun-owners has notoriously minimal benefit (Holly et al., 2018). A review of numerous studies spanning decades failed to find that participation in gun safety training classes significantly altered gun owners' subsequent behavior as compared to that of gun owners who did not participate in training (Rand Corporation, 2020). This review does, however, make the interesting observation that the credibility of the trainer in the eyes of participants may significantly influence the impact of the training.

of medical procedures diminish the need for post-procedure services and improves patient outcomes (American Association of Nurse Anesthesiology, 2017). In one particularly powerful example, preoperative education dramatically decreased spine surgery patients' post-surgery opioid use compared to matched samples that did not receive advance education (Ali et al., 2019).

We know that prospective psychotherapy clients who receive advance orientation and education are reliably more compliant, satisfied, and successful in therapy (Swift et al., 2012; Oldham et al., 2012; Lambert & Lambert, 1984; Walitzer et al., 1999; Whitaker et al., 2004; cf., Johansen, Lumley & Cano, 2011). Similar benefits have been documented with substance abuse detoxification (Bjelland et al., 2017). Advance orientation, augmented by hands-on practice, has been shown to significantly increase medication compliance among individuals with severe mental illness (Fenton, Blyler & Heinssen, 1997).

Custody litigants provided with uniform advance orientation and education about the CCE process may be more compliant, at ease, and accepting of outcomes (Barth, 2011). At least in theory, "[r]educed parental apprehension about a custody evaluation achieved through education and support provided by a mental health consultant is likely to result in a better-informed report to the court, as well as a better-informed judicial determination of the child's best interests" (Association of Family and Conciliation Courts Child Custody Consultant Task Force, 2011).[15] This is exactly the right idea, but again too little and too late.

Incentivized prophylactic parenting and co-parenting education

Adult education in all areas of parenting, co-parenting, and child development must begin no later than conception (and in high school more reasonably). This can be universally and inexpensively instituted. I propose that the United States' government should rescind the automatic dependent care tax deduction. A comprehensive program of disability-, culture-, and language-sensitive parenting and co-parenting Continuing Parenting Education (CPE) will be made available online (Gallo et al., 2021).[16] Parents who complete a requisite number of annual CPEs and submit certificates of completion with their federal income taxes will earn back their deduction. Those who do not complete CPEs will forego the deduction and those funds will subsidize the program.

This program will be subject to annual reviews and updates, Research will be conducted comparing social, emotional, educational, occupational, and health outcomes of the parents and children who choose to participate in the program against those who do not. I hypothesize that participants will be healthier and more successful on all dimensions measured, with a lower frequency of divorce and -among divorcing families- with lower levels of conflict and a greatly diminished need for CCEs. I hypothesize that, although start-up costs of such a program will be significant, the program will quickly become financially self-sustaining. Regardless of costs, I hypothesize that it will significantly diminish the demand for every family law service, freeing us up to devote more time to those few still in need.

CREATING INCENTIVES THAT MOTIVATE HEALTHY PARENTING AND CO-PARENTING PRACTICES: FIRST, CATCH THEM SUCCEEDING

> "The process by which 'bad' behavior and 'deficient' parenting is alleged by one parent regarding the other in an effort to buttress his or her position in court exacerbates existing hostility and engenders long-term mutual distrust." (Kourlis et al., 213, p. 354).

[15]Although some courts have tried to capitalize on the benefits of advance orientation and education for litigants (see for example "BEFORE COURT: PREPARING YOUR CASE & PREPARING YOURSELF" sponsored by the Nova Scotia courts at https://www.nsfamilylaw.ca/other/going-court/court-preparing-your-case-preparing-yourself) I am not aware of any corresponding analysis demonstrating its effectiveness.

[16]"Technology-mediated outreach could form the basis of norms-based intervention, convey parenting information and education, or provide the platform for targeted intervention with individual families." (Weismuller & Hilton, 2021 page 110).

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Every undergrad psychology student knows that rewards modify behavior longer and more effectively than punishments (Ardila, 1967; Scott & Cogburn, 2003).[17] Rewards fuel self-esteem and cooperative relationships, motivate future behavior, and teach successful coping skills. Punishments, by contrast, fuel anger, fear, and depression, erode relationships, encourage deception, and fail to teach more adaptive choices.

Court orders are, nevertheless, full of *thou shalt not* contingencies associated with threats of contempt, fines, incarceration, the loss of custody, and even the termination of parenting rights. Although a punitive approach may be easier to administer, it also hammers the wedge of acrimony between contesting parties deeper, inviting litigants and their lawyers to focus first and foremost on failure. In my experience, Right of First Refusal (RFR) clauses are among the worst offenders. RFR requires a parent who cannot exercise care for more than a pre-specified number of hours to first invite the other parent to provide care before delegating care to a surrogate. Although the spirit of RFR would seem sound -that is, to assure that a child is not left with a babysitter while his/her/their other parent is available to step in- in practice it can be very disruptive to the child. More to the point, RFR implicitly invites co-parents to monitor one another's activities with one eye on the clock, ready to file for contempt every time a meeting runs late, or traffic slows a commute (Brown et al., 2017).[18]

Parenting and co-parenting (and thereby the child's well-being) are better served by the carrot than the stick. This means writing orders and creating parenting plans that promise parents salient, immediate rewards for healthy choices (e.g., compliance, communication, cooperation, and compromise) and only secondarily resort to threats of punishment for failure. Obvious as this idea may appear, the zero-sum nature of custody disputes often means that one parent's reward is the other parent's punishment.[19] This problem can be relieved, and conflict diminished, by approaching the issue systemically rather than individually. We must create contingencies that reward mutual co-parenting and family system successes.

For example, parenting coordination (PC) can be a very helpful but expensive and time-consuming enterprise (Capdevila Brophy et al., 2020; Fidler & McHale, 2020). Working with a court-ordered PC means committing valuable time, effort, and money to the process. Holding PC meetings in abeyance until a problem erupts therefore seems desirable, but doing so makes those meetings into the punishment associated with a co-parenting failure. In the alternative, scheduling monthly PC meetings which can then be canceled when an advance review proves them unnecessary can create a timely and salient incentive for co-parenting success.[20]

For all of its procedural, empirical, legal, and theoretical complexity, the court and the evaluator can similarly choose to make CCE into a carrot rather than a stick. An evaluation that focuses on pathology and dysfunction is punitive to those involved, highlighting failures and weakness, driving antagonism, exacerbating the conflict that defines the child's world, and yielding little more than a least detrimental alternative formulation (Goldstein, 1972). By contrast, a CCE that focuses on strengths, capacities, and resilience can be rewarding to those involved. This is far more than the other side of a meaningless semantic coin. A strength-based approach to family system evaluation motivates growth, success, cooperation, and respect (Til Ogut et al., 2021; Walsh, 2016) and is more likely to yield a genuine best-fit formulation (American Psychological Association, 2010).[21] Most concretely, whereas a pathology-based CCE leaves the post-evaluation family blaming, defensive, and exposed, a strength-based CCE gifts the post-evaluation family with clearly defined resources with which they can build a healthier future.

[17]Although punishment may be the more effective means of interrupting a maladaptive behavior in the short run.

[18]"These provisions are notoriously difficult to navigate and often provide fodder to more conflict, leaving some to conclude that there should be no such provision in circumstances of high-conflict parenting relationships" (Brown et al., 2017, p. 349)

[19]This is often the case in "reunification" therapies (e.g., Garber, 2015, 2021) when one parent's successes earn him/her longer periods of access, an outcome that the other parent may claim to support as best for the child even as s/he experiences it as a loss of time with the child.

[20]While avoidance of a perceived negative outcome can be strongly motivating, it's not technically a positive reinforcement.

[21]For example, in a child welfare context, Kemp et al. (2014) found that clients who perceived workers as focused on strengths rather than deficits were significantly more invested in and compliant with services.

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IMPROVING SOCIAL EQUITY AND PROFESSIONAL TRAINING

Shifting costs from consumers to providers

> "A family court's decision as to custody based solely on a party's inability to pay is contrary to any sense of fairness and does not serve the best interests of the child."
> Ashkii v. Kayenta Family Court (Sup. Ct. of the Navajo Nation 2013)

As much as the courts debate the admissibility and value of CCEs (Emery et al., 2005), the public debates questions of equity and access, a societal issue known as epistemic injustice (Prescott 2020).[22] The reality is that a private child custody evaluation can cost in excess of 10,000 uninsured, unreimbursed, out-of-pocket dollars in the least affluent jurisdiction.[23] Some incur six-figure bills.[24] Of course, this court-ordered expense is incurred on top of participants' lost time at work while engaged in the process and the exorbitant costs of lawyers, mediators, therapists, visitation supervisors, and drug tests, all at a time when the family's income, assets, and expenses have become complete unknowns. In practice, this means that CCEs are only available to the wealthy, thereby creating an unconstitutional, two-tiered system of justice (Cecka, 2016).[25]

Media companies solved a similar problem decades ago. Rather than charge users prohibitive fees that would otherwise dramatically narrow their consumer base, they shifted their costs to advertisers and made their products free to consumers. This is not to suggest that child custody evaluators should wear soft drink manufacturers' logos or that child interviews should be interrupted by "a word from our sponsor." There is, however, a way to shift most or all costs so as to make access to CCEs more equitable and simultaneously improve the reliability and quality of the process.

With all necessary legal consents, permissions, and precautions in place, CCEs can be conducted as live training exercises and continuing education opportunities for family law professionals. Participants pay for the learning opportunity thereby subsidizing the family's costs. Transparency and participant-feedback not only improve the quality of the evaluation but more generally broaden and sharpen the skills of all professionals involved. Not only does this model reduce or potentially eliminate the consumer costs that presently make access to CCE inequitable, it is also a step toward improving provider inter-rater reliability and minimizing bias. Not incidentally, an intensive experience of this sort may help to create regional networks of similarly trained forensic professionals available for ongoing cross-consultation, referrals, and support.

The fact that CCE is far more time consuming and intensive than a 3-day continuing education program demands foresight, organization, and careful planning. Certainly, the evaluator/trainer's responsibility must begin long before and extend far beyond the training itself, creating the possibility for segmented training. For example: (1) organizing and collecting preliminary data, (2) conducting interviews and observations, and (3) integrating/summarizing/reporting data.

Real-time collaboration among professionals and in vivo training is not a new concept. Child Advocacy Centers (CAC) routinely rely on off-stage collaborators listening in and prompting interviewers via bug-in-the-ear technology.[26] Surgeons demonstrate techniques and train interns in live teaching hospital environments and in international

[22]"[T]he phrase epistemic injustice means the treatment of minority or oppressed groups or the inequitable allocation of resources and access to the equal delivery of justice" (Prescott, 2020, p. 114).

[23]"the costs for a forensic evaluation are not typically covered by third party payer sources because they are not medically necessary and the purpose of the evaluation is not directly related to treatment of a mental illness" (Archer & Wygant, 2012, p. 4).

[24]In the past 35 years, "… the average hourly rate has tripled in that time from $88 to $274, and the average cost of an evaluation has risen 13-fold from $965 to $12,465, which is 3.8 times the rate of inflation during that same period. In large part, the increase in cost is due to the fact that the number of hours spent in performing evaluations has tripled in the past 20 years." (Ackerman, Bow and Mathy (2021) p. 408).

[25]Various jurisdictions have tried to correct this inequity by capping costs. For example, Allegheny County, Pennsylvania, has established a fixed cost of 4000 dollars (Section II – CHILD CUSTODY (alleghenycourts.us)).

[26]*See* National Children's Advocacy Center. nationalcac.org.

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online conferences (Philip-Watson et al., 2014).[27] Many psychotherapy training programs rely on technology to provide real-time supervision and direction (Wark, 2017). Importing these well-established and valuable methods to family law would seem to be an obvious next step. The many associated legal questions concerned with privilege, confidentiality, liability, and the court's discovery process are far less vexing than the problems this process is likely to help us correct.

ESTABLISHING ETHICS, STANDARDS, AND GUIDELINES THAT DISCOURAGE FAMILY CONFLICT: DEFAULTING TO ZEALOUS CONFLICT PREVENTION AND RESOLUTION

> "… the professional involved in family law proceedings is at risk for being seen as, or for becoming, a vulture who creates or promotes stress and then profits from it …."
> (Schact, 2000, p. 569–570)

There is yet one additional truth about CCEs and high conflict divorce litigation that must be exposed: Many professionals engaged in the process have an unspoken and insidious conflict of interest. Those that charge by the hour find that their income is negatively correlated with the conflicted family's well-being. In effect, our reasonable wish to support our own families works against the best interests of the children whose needs we are paid to serve.

It is repugnant to imagine any family law professional failing to work in favor of a child's best interests or, worse, acting intentionally to exacerbate family conflict so as to increase billable hours, but it is naïve to pretend that this does not occur. On the larger stage of litigation, this means needlessly inflated and prolonged depositions, motions, discovery, experts, and hearings. In the narrower context of CCEs, this means needlessly broad, intrusive, redundant, and excessive interviews, observations, records reviewed, home visits, and testing. It means spending litigants' money "splitting hairs" in an effort to make distinctions that do not make a difference (Kelly & Johnston, 2005, p. 238).[28] And it means reports measured in pounds and gigabytes that document every moment of every argument and gesture. There is no literature to cite on this point, even if there is no shortage of malpractice suits and licensure board complaints sustaining it (e.g., The State of Washington v. Olson, 2020).[29] The reality that such an adversarial approach is built into constitutional and legal structures is no longer an excuse. Too many families, and another generation of children, are suffering under the present model.

Clarifying scope

The lesser part of this problem is a failure of communication between courts and evaluators that can triangulate litigants in just the same way that failed co-parental communications can triangulate children. "Child custody evaluation"

[27]Noting that Live Surgical Broadcasts [LSBs] "… in conferences are controversial, with some surgical disciplines banning them completely. Following the death of a patient undergoing live cardiovascular surgery in Japan, several medical associations… have revised their policies on LSBs and actively prohibit them."

[28]"Custody evaluators are now producing exhaustive, intrusive, negatively biased assessments, psychological testing, and written reports in which separating parents are scrutinized and held to a higher standard of accountability than those in non-disputing divorces and intact families. This seems unfair, unnecessarily stressful for already vulnerable families, and may even constitute grounds for claiming violation of parents' civil rights" (Kelly & Johnston, 2005, p. 238).

[29]"The respondent conducted parenting evaluations costing participants in excess of one hundred thousand dollars. The licensing board observed in its disciplinary proceedings that the respondent "conducted an excessive number of clinical interviews with the parents, thereby unnecessarily running up the costs of the evaluation. Respondent interviewed Client A over 40 times and Client B over 20 times … [and] Respondent administered a large battery of psychological and cognitive measures, the majority of which were not directly relevant to the issue of parenting and custody, thereby unnecessarily running up the coals of the evaluation.""

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is like "surgery" or "plumbing." Each term refers to a generic service which takes many distinct forms depending on the particular need. Although no one would ever send a patient for surgery without clarifying the organ in need of repair or a home for plumbing without clarifying which toilet is clogged, some courts order CCEs with no further direction whatsoever.

> "When a court orders a custody evaluation, too often the resulting product is unfocused, overly expensive, excessively intrusive and psychologically traumatic, and insufficiently relevant to the unique issues presented by a particular family. This unfortunate outcome may occur, in part, because many courts order a 'custody evaluation' as if this constituted a standard procedure, whose scope, direction, level of effort, and relevance to the proceedings at hand may be taken for granted" (Schact, 2000, p. 581).

Vague and generic court orders are reasons for the evaluator to seek clarification, not license to evaluate everyone and everything endlessly. Although extant guidelines caution evaluators not to look beyond the scope of the court's orders (e.g., AFCC, 2022, item 11.3), best practice makes it impingement on the evaluator to assure that the questions that the Court hopes to answer are well articulated and that the evaluation process conforms accordingly (Garber, 2021; Markan & Weinstock, 2005). This means crafting an evaluation that addresses the court's questions and only the court's questions in the least intrusive, least disruptive, and least expensive manner possible.

Amending ethical codes and practice guidelines

The larger part of the problem is the general absence of ethical guidance across guilds calling for efficiencies of time and money. We are not serving anyone's best interests but our own by providing a service that needlessly deprives a family of its resources.

Every mental health discipline has adopted some version of the Hippocratic Oath requiring that one must first and foremost do no harm. The American Psychological Association (APA, 2010), for example, calls for beneficence and non-malfeasance above all else. Thus, psychologists are cautioned against conflicts of interest and roles in which financial interests "… could reasonably be expected to … impair their objectivity, competence, or effectiveness …" (item 3.06). I find no reference, however, in any mental health guild's ethics, guidelines, or standards specifically addressing the financial rewards associated with ineffective, prolonged, and excessive services.[30]

While lawyers are not bound by any kind of Hippocratic Oath (American Bar Association [ABA], 2021), the myth that they are compelled to engage in zealous advocacy is just that – a myth (Harrington & Benecchi, 2021).[31] Lawyers are left to interpret their ethical obligations on a continuum somewhere between conciliator and aggressor or, in the poetic words of one professional, somewhere between dolphin and shark (Weber, 2015). Conspicuously absent here again is any direction about cost efficiency and its corollary "… a uniform ethical requirement that all attorneys in divorce proceedings involving children inform their clients about alternative dispute resolution (ADR)" (Vu, 2009, p. 586).

In the interest of beneficence, respect, and the best interests of the children whom we ultimately serve, I would have family law professionals of every stripe held to an ethic of time and cost-efficiency. As child custody evaluators, we must do more than simply work within the parameters set forth by the court's enabling order. We must do so efficiently and responsibly, carefully balancing the costs that we impose against the benefits that we provide.

[30]Note however: "Competent practice minimizes professional risk, reduces cost, and serves consumers of parenting plan evaluations." AFCC 2022, p. 6.

[31]"Every experienced litigator has encountered opposing lawyers who rely upon what they imagine is their duty of *zealous* representation to justify making things unnecessarily difficult and, usually, more expensive, for both sides" (Herrington & Benecchi, 2021, p. 3).

BUILDING OUTCOME RESEARCH INTO THE PROCESS: JUSTIFYING OUR CONTINUING EXISTENCE

> "The virtual absence of long-term outcomes of custody decisions made by family courts is indeed an embarrassment, if not a scandal, in the field."
> (Kelly & Johnston, 2005, p. 239).

It is simply irresponsible to ask needy and desperate families to invest their resources, trust, and hope, in a process that lacks any demonstrable scientific merit. Our own self-serving confidence in CCEs and our arguments that it's the best alternative available are not enough.[32] The court's deference to our self-anointed wisdom is not enough (Tippins & Wittmann, 2005). And certainly, those desperate families' willingness to subject themselves to the process is not enough. It is long past time to hold ourselves to the same rigorous standards of scientific reliability and validity that we require of others.

The fact that research involving highly conflicted, litigating families is confounded by issues of discovery and privilege and risks imposing stresses on an already overly-stressed population and the professionals who serve them is not reason enough to continue to neglect this call.[33] These hurdles can and must be overcome (e.g., Greiner & Matthews, 2016).

A full 18 years ago, Kelly and Johnston (2005, p. 239) recommended that a means of collecting and studying CCE data across disciplines and jurisdictions be established so as to "eventually make predictions based on actuarial data." That call has been echoed and elaborated in the years since (Kelly & Ramsey, 2009) but generally ignored. Had we been organized and courageous enough to heed that call, we might today be working more efficiently and effectively to serve the needs of children. It's not too late.

In 2009, Kelly and Ramsey (2009) offered seven hypotheses about the value of CCEs desperately in need of study. That need has only been amplified in the years since. Stepping back to view the larger forest, I presume to add the following hypotheses drawn from the preceding discussion:

1. The families of caregivers who routinely participate in prophylactic parenting and co-parenting education will require fewer mental health, physical health, special education, and forensic services (including CCE) than those who do not. This difference alone will generate a huge savings of time and money to society at large.
2. Families that engage in a strengths-based CCE process will be more likely to settle and, among those who do go to trial, will be more compliant with the court's orders and less likely to engage in recidivist litigation than those that engage in a conventional pathology-based CCE.
3. Child custody evaluators who engage in in vivo training will be more transparent about their methods, demonstrate higher inter-rater reliability among their peers, will be in higher demand within the judicial system, and will benefit both personally and professionally by establishing supportive peer networks than those who do not.

[32]"… judges might doubt that there would be as much voluntary compliance with law if, each time a judge sentenced a criminal defendant to a period of incarceration, the judge stated on the record, 'I do not know if confining you will do you any good. I also do not know if confining you will deter others, or give the victims of your crime closure, or will otherwise serve any useful purpose. But I will nevertheless sentence you to X years'. Instead, some judges may have internalized the belief that they must appear certain to be effective, and to appear certain they must be certain" (Greiner & Matthews, 2016, p. 12).

[33]"… research with court-involved populations demands rigorous attention to relevant legal and ethical mandates regarding informed consent, data collection, coding, storage and publication and the use of experimental methods. Moreover, sampling problems associated with some litigants' understandable reluctance to engage in any process that does not directly bear on the life-altering matters at hand threaten the generalizability of any conclusions … In addition, the legal process of discovery puts the well-intended forensic evaluator-cum-researcher in the tenuous position to argue that some data collected in the course of custody evaluation are relevant to the legal process while others are of yet-to-be-determined validity and must be excluded from judicial scrutiny." Garber (2009, p. 45 [citations excised]).

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4. Families who are the subject of in vivo CCE training will benefit financially but will not otherwise differ in terms of satisfaction with the experience, settlement, likelihood and duration of litigation, or child outcomes than those who do not.
5. Conflicted caregivers who choose to litigate with or without CCEs in jurisdictions/with professionals that endorse conciliation and time/cost efficiency guidelines will be more satisfied with the process, more likely to comply with its outcome, and financially advantaged over those who do not.
6. Even in lieu of the broad -if not grandiose- systemic changes discussed here, family law professionals who consider these matters carefully, who strive to utilize reliable and valid methods, who keep current with the literature across disciplines, who take a conciliatory approach, who respect litigants and their resources, and who genuinely intend to serve the best interests of each unique child will be professionally more successful, subject to fewer complaints, and personally more fulfilled than those who do not.

DISCUSSION

"Everyone in the streets and the windows said, "Oh, how fine are the Emperor's new clothes! Don't they fit him to perfection? And see his long train!" Nobody would confess that he could not see anything, for that would prove him either unfit for his position, or a fool. No costume the Emperor had worn before was ever such a complete success.

"But he hasn't got anything on," a little child said.

"Did you ever hear such innocent prattle?" said its father. And one person whispered to another what the child had said, "He hasn't anything on. A child says he hasn't anything on."

"But he hasn't got anything on!" the whole town cried out at last.

The Emperor shivered, for he suspected they were right. But he thought, "This procession has got to go on." So he walked more proudly than ever, as his noblemen held high the train that wasn't there at all."[34]

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Ben Garber is a New Hampshire licensed psychologist, trial consultant, and expert witness to family law matters across the globe. He is in high demand as a professional trainer and the proud author of hundreds of popular press articles, 30 peer-reviewed and law journal professional articles, and 10 books all concerned with understanding and serving children's needs from a systemic perspective. Dr. Garber's most recent book co-authored with Drs. Prescott and Mulchay, "The family law professional's field guide to high conflict litigation" (American Bar Association, 2022) is the first and only compendium of the various dynamics and relationship pressures typical of the high conflict family system. Learn more about Dr. Garber at www.FamilyLawConsulting.org.

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