

# ***NEW YORK TIMES***

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## **For Arbiters in Custody Battles, Wide Power and Little Scrutiny**

**By Leslie Eaton**

When warring parents head to court to fight over child custody in New York, their lawyers often let them in on a little secret: The most powerful person in the process is not the judge. It is not the other parent, not one of the lawyers, not even a child.

No, the most important person in determining who gets custody, and on what terms, is frequently a court-appointed forensic evaluator. Forensics, as they are often called, can be psychiatrists, psychologists or social workers; they interview the families and usually make detailed recommendations to judges, right down to who gets the children on Wednesdays and alternate weekends.

And the judges usually go along.

Forensic reports, which the parents pay for, can cost as much as \$40,000 or even more. There are no standards for who can be an evaluator or what should go into an assessment. The court system does not track who gets these lucrative appointments, much less whether evaluators tend to favor fathers or mothers or joint custody.

Some lawyers and parents suspect that cronyism plays a big role in some appointments, but given the secrecy surrounding matrimonial cases, that is hard to prove, or disprove. Others say there is nowhere to lodge complaints about mistreatment. And many – including some forensics – question whether there is any scientific basis to justify the evaluators' recommendations.

In Suffolk County, judges repeatedly appointed a psychologist who was not licensed to practice in New York State. In Manhattan, an evaluator remained on a case even though there was evidence that he had had business dealings with one spouse's lawyer. In Westchester County, an expert charged parents \$57,000 for a report that the judge found extremely biased toward the father.

Though they have been around for years, court-appointed forensics have become increasingly commonplace – and controversial – in New York, which may be the high-conflict custody capital of the nation. But similar debates about custody evaluators are going on across the country, experts say, as divorce rates continue to rise and courts try to cope with the needs of children caught up in a contentious process.

“It’s boiling over everywhere,” said Peter Salem, executive director of the Association of Family and Conciliation Courts, based in Madison, Wis.

In Arizona, the governor recently signed a law changing the state’s process for investigating complaints about psychologists, in part because of controversy over forensic evaluations. In Louisiana, a committee of the state board governing social workers is considering creating standards for evaluations.

And over the last few years, California has adopted a series of court rules that require training for forensics, set standards for evaluations and provide mechanisms for filing grievances against evaluators, said Philip M. Stahl, a psychologist and frequent lecturer on custody evaluations. “It’s the only state where the rules are very specific,” he said.

In New York, forensics’ roles are being debated at judicial conferences, psychiatric conventions and impromptu meetings of disgruntled parents. Even the court system has decided to take another look at them, through a commission appointed in February by the state’s chief judge.

Forensics “have really become arbiters of what happens in a case,” Raoul L. Felder, the divorce lawyer, said disapprovingly. “I just think somehow they’ve seeped into the judicial process.”

Some people think that is as it should be. “With some exceptions, I didn’t try a contested custody case without a forensic assessment,” said Philip C. Segal, a former Family Court judge now in private practice. “They were extremely helpful, even critical.”

Custody cases are difficult and emotionally fraught, he said, adding that judges need help “analyzing the family dynamics, analyzing the parents’ respective abilities.” Judges must decide custody cases based on the best interest of the child in question, and they can appoint a “neutral expert” whenever they think it would be helpful in making that decision.

Some judges ask the parties’ lawyers to agree on a forensic or to provide a list of candidates; others simply name an evaluator. Some judges have very specific questions they want addressed; others just call for an evaluation. Many, though not all, want detailed recommendations.

The American Psychological Association’s guidelines state that while evaluators may determine whether either parent has severe psychological problems, that is not their main goal. Rather, evaluators are supposed to judge the parties’ “parenting capacity” and how that fits the psychological needs of the child.

Forensics themselves do not agree on how to conduct a proper examination. Some order psychological tests, while others avoid them; some interview baby sitters and teachers, while others do not.

In the end, the evaluator gives the court a report that usually makes detailed recommendations about custody arrangements. The parents are not generally given copies; in some cases, they are not even allowed to read the reports.

At that point, the parents usually settle, “which we would much prefer, for the parties’ sake,” said Justice Jacqueline W. Silbermann, the administrative judge for matrimonial matters in New York State. The reports’ usefulness in encouraging settlements is one reason judges order them, she said.

But what pleases the judges sticks in the craw of some litigants, who say they feel bludgeoned into settling by a report that does not favor them, even when they believe that the report is deeply flawed. Some lawyers contend that the evaluations actually discourage settlements in certain cases because the favored party feels no need to compromise.

The only way to challenge a forensic report is to go through a full trial and then cross-examine the evaluator; parties can also hire their own experts to critique the court-appointed forensic, but generally cannot have the family evaluated by someone else.

In the meantime, judges are reading evaluators’ reports and making decisions based on them, with no way to know whether the observations and conclusions are correct, said William S. Beslow, a prominent matrimonial lawyer in Manhattan.

“In eight years, I have not participated in a case with a forensic report that was not substantially erroneous in one of its major conclusions,” Mr. Beslow said. “And some are so wrong that they have disastrous consequences for families.”

Underlying all the concerns about forensic evaluators is the question of whether they are offering the court scientific expertise or unsubstantiated opinions.

Jeffrey P. Wittmann, a forensic who has done hundreds of evaluations, says that his colleagues have been giving the courts both, and that they should stick to the scientific evidence. Dr. Wittmann, co-director of the Center for Forensic Psychology in Albany, said he stopped making specific recommendations to judges six years ago, and has urged colleagues to do the same.

The reason, he said, is that forensics do not really know, with any degree of certainty, what is in a child’s best interest. Little scientific research on the subject exists.

Forensics do provide courts with useful information, he said, but drawing conclusions about the child’s best interest and making recommendations on custody and on visiting is inappropriate, even unethical. “We have become like mini-judges,” he added, “and it’s a big mistake.”

Among psychiatrists and psychologists, Dr. Wittmann's argument is far from the most extreme. William O'Donohue, a psychology professor at the University of Nevada, Reno, is calling for a moratorium on forensic evaluations until more research is done.

"Psychologists don't have the knowledge to do what they attempt to do when they do custody evaluations," he said.

Many custody decisions, he said, involve not scientific findings, but competing values, like a father's wish that his child excel in sports versus the mother's emphasis on studying.

While mental health experts have been debating these issues for several years, the legal world has been slower to recognize them, at least in New York.

Enter Timothy M. Tippins, an Albany lawyer who increasingly specializes in cross-examining forensic experts. For almost a year, Mr. Tippins has been writing articles in *The New York Law Journal* questioning the role and expertise of forensic evaluators in custody cases. He has teamed up with Dr. Wittmann to write a paper titled "Empirical and Ethical Problems With Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance."

Among its recommendations is a call for judges to "begin to help the psychology discipline rein in itself" by not demanding or accepting specific custody plans.

In March and April, the two presented their arguments to conferences of New York State judges; later this year, they will speak to judges at the state's appellate level. Some judges have welcomed his arguments, Mr. Tippins said. "I think they had on their antennae that something was amiss with these reports."

In part as a response to Mr. Tippins, Dr. Alex Weintrob organized a symposium on the scientific basis of expert testimony in matrimonial disputes at the American Psychiatric Association's annual meeting this month in Manhattan.

Dr. Weintrob, a well-known child psychiatrist who does evaluations, said later that "there is more science than some people give us credit for." On the other hand, he added, "it is important that we be aware of our limitations," citing as an example the lack of follow-up studies to see if forensics' predictions worked out. "We all know it and are a little embarrassed by it."

Even proponents of forensic evaluations are troubled by the secrecy that envelops the business, and the large sums of money that change hands, by order of the court.

"It's an industry, and it's unregulated, and it affects precious family rights," said Andrew I. Shepard, director of the Center for Children, Families and the Law at Hofstra University. "It would be lots better if this process were more transparent."

The secrecy alone raises questions in the minds of some parents. One woman, a Manhattan financial analyst who spoke on the condition that her name not be used because her court case is continuing, said she had heard from other parents that the evaluator in her case had a history of recommending that custody go to fathers. But, she complained, there is no way to know for sure.

In *Kaye v. Kaye*, an extremely bitter divorce case in Manhattan, the mother discovered that her court-appointed forensic had participated in a business venture with four other people involved in her case, including her ex-husband's lawyer.

This gave her grave doubts about how neutral he truly was, she said, speaking on the condition that her first name not appear in print. Judges are required to disclose their ties, she said, "and the same should be true of neutral officers of the court."

Justice Judith J. Gische denied the woman's request for a mistrial, ruling that the business – a limited partnership with a divorce-related Web site called SoftSplit.com, now defunct – was a for-profit educational venture, and that the lawyers, forensics and others involved were not "in business" together. An appeal of that decision is pending.

But the conflict-of-interest allegations about SoftSplit, which were reported by The New York Post last year, are still stirring up such hard feelings among lawyers and forensics that Donald Frank, the lawyer for the mother, refused to discuss the case.

Few parents are willing to talk publicly about their experiences for fear of seeing painful family matters aired in the press, or of being dragged by into court by the other parent. They also say they are often dismissed as disgruntled litigants who are angry that the evaluator did not favor them (which, of course, they often are).

The American Psychological Association's ethics committee reports that a rising percentage of the complaints it receives involve forensic evaluations. And Dr. Spencer Eth, a member of the ethics committee of the American Psychiatric Association, said local branches of his group also investigate many complaints about forensic evaluations. While such complaints seldom result in a psychiatrist's being suspended or removed from the association, he said, doctors are sometimes reprimanded or educated about the proper way to conduct evaluations.

The association takes on this role in part, he said, because state licensing boards tend to be ill-equipped to deal with problems that crop up in psychiatric practices, including some that are almost etiquette issues: a doctor's rudeness, for example, or his failure to return telephone calls.

New York's court system does not have a formal mechanism for receiving complaints about forensics, and because they are officers of the court, they cannot be sued for malpractice. The rules governing matrimonial matters are being re-examined by a commission appointed by the state's chief judge, Judith S. Kaye.

The commission will examine the role and use of forensic examiners, said Justice Sondra Miller, the appellate division judge who is leading the group. After holding public hearings, she said, it will make recommendations to Judge Kaye, probably in about a year.

In the meantime, however, some lawyers say they believe that judges are becoming more skeptical about forensic reports, and may use them a little less. One such lawyer is Norman M. Sheresky, who represented a mother who prevailed in a Manhattan court despite an evaluator's recommendation in favor of the father. The judge tossed out the report's findings as biased, he said.

"I think that will happen more and more," Mr. Sheresky said. "I think the judges are getting wise."

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<http://www.nytimes.com/2004/05/23/nyregion/23complaint.html>

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### **Elizabeth R. Cockrell, a Stockbroker and Parent, says Child Custody Evaluators Do Not Seem to be Accountable to Anyone**

#### ***Parent Complains, Then Tries to Change the System***

By Leslie Eaton

In the mid-1990's, after the Internal Revenue Service dunned her for taxes owed by her long-divorced first husband, Elizabeth R. Cockrell helped lead a successful campaign to change the way the agency dealt with the innocent spouses of tax cheats. Now she has set her sights on changing the way New York courts use forensic evaluators.

"But fighting the I.R.S. was easier," she said, because at least she could turn to Congress for help. The evaluators, she said, seem to be accountable to no one.

A Manhattan stockbroker, Ms. Cockrell said she was not a disgruntled litigant; the evaluator in her case recommended that she retain custody of her daughter, although not on the terms she wanted.

Her grievance involves the way she says she was treated by the evaluator, Dr. Stephen P. Herman, a psychiatrist often appointed in custody cases. In a 25-page complaint filed with the State Health Department and the inspector general of New York's court system, she says he was hostile, raised his voice at her, ordered \$4,000 worth of psychological tests he did not use, refused to accept information she had tried to give him, and disparaged the other therapists her family was using.

Dr. Herman said he "would not discuss any case I've been involved in."

In general, he said, "I've always tried to maintain the highest level of ethics." He added that he supports the establishment of a grievance procedure for disgruntled parents, similar to the one used in California.

Ms. Cockrell said she could not protest to the American Psychiatric Association because it said Dr. Herman was not a member. She filed her complaint with the State Health Department's office of professional medical conduct, which quickly rejected it, saying that custody disputes must be handled by the courts.

Ms. Cockrell said she then met with Justice Jacqueline W. Silberman, the state's chief matrimonial judge, who was sympathetic but told her she should go back to the medical board. Ms. Cockrell has just refiled that complaint, signed by three other women who say they had similar experiences.

She and other parents say they have also complained to Sherrill R. Spatz, the inspector general of the court system. David Bookstaver, a spokesman for the courts, said that no one there would comment on specific cases, but that such complaints would be under the inspector general's purview.

Ms. Cockrell was among the parents who collected hundreds of signatures on a petition asking the Association of the Bar of the City of New York to investigate the custody evaluation process. That proposal was rejected.

Now in her third year of trying to fight the forensic-evaluation process in New York, Ms. Cockrell says she has met many other parents with similar problems. "I just think the whole system should be changed," she said. "It's hurting families."

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