

**FACT BASED CUSTODY DETERMINATIONS:
A CALL FOR FAMILY COURT JUDGES TO RECLAIM THEIR BASIC
ADJUDICATORY ROLE**

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Richard Ducote
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I. INTRODUCTION

Child custody adjudications generally fall into two categories. First, where rather equally competent, safe, and caring parents fail or refuse to agree on the terms of a post-divorce custody plan, a family court judge is required to decree the division of parenting time and authority. In those instances (called here “regular” cases), the court’s decision itself is unlikely to cause any significant harm to the parties’ children over and above that inherently generated by the family’s breakup, absent some extreme or bizarre deviation from the typical parenting plans.

In the second class of cases (called here “endangerment” cases), one or both parents engage in family violence, physical or sexual abuse, child neglect, or alcohol or drug excesses. Mental illness or some other persistent condition might also impact a parent’s ability to function as a capable parent. In this second group, the stakes for the children are very high since they are dependent for their short and long term physical and emotional protection on a correct factual and legal custody adjudication. Otherwise, where the children are juridically entrusted to the care

and control of an abusive, neglectful, controlling, intoxicated, or otherwise dangerous parent, the negative consequences are legion.

This article focuses on the “factual” aspects of endangerment cases. While the general inquiry in regular case litigation addresses whether, for the purpose of the child’s best interest, “*this plan is better than that plan*”, in endangerment cases the questions to be answered include, “*Did the parent abuse this child?*”, “*Has this parent committed family violence?*”, “*Is this parent often intoxicated?*”, etc. The affirmative resolution of such factual questions should then dictate the custody judgment, either by operation of law or through the application of reason and common sense.

Unfortunately, the current culture of many domestic relations courts is antithetical to accurate fact finding on the question of whether certain events directly affecting the welfare and safety of children did or did not occur.¹ While adjudicating civil or criminal cases, a judge will enforce the rules of evidence and will listen to witnesses who claim to have witnessed or been victimized by an event, will weigh competing presentations of physical and circumstantial evidence, will use logical inference to fill in evidentiary gaps, and will process the totality of the case in the context of his or her witness credibility calls. From this standard

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Regarding the variety of problems encountered in domestic violence custody cases, see, generally, Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 Am. U.J. Gender Soc. Pol’y & L. 163 (2009); Jay G. Silverman, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 Pace L. Rev. 231 (Fall 2003).

judicial exercise comes the answer on the central factual issue: “*Did the defendant commit the crime alleged?*” or “*Is the defendant liable for the accident?*” No jurisdiction would condone a criminal trial in which the court resolves the party’s guilt or innocence by appointing a psychologist to determine if the defendant is the type of person to commit such a crime, and to administer tests to the alleged victim to see if she is a fabricator. Nor would any judge likely remain on the bench after approaching every criminal or civil case with abundant outcome determinant skepticism that indictments and tort suits are simply “conflicts” between the prosecutor and the arrestee, or the motorist and the injured pedestrian, and the proper role of the court in such instances is to do everything possible to “reduce the conflict” by avoiding any determination of responsibility for inappropriate conduct and by disfavoring the party who insists that the court act otherwise.

Yet, many family court judges, emboldened by some professional associations, legal scholars, and mental health practitioners, in endangerment cases focused on reports of child abuse, family violence, and destructive intoxications routinely abdicate the critical fact finding role regarding these issues to people and processes incapable of, legally prohibited from, and ethically barred from doing so.

This article posits that family court judges should not ask, nor expect, mental health professionals, guardians *ad litem*, court investigators, and other such professionals to opine or “inform” the court whether or not a parent 1) has abused a

child, 2) is credible, 3) is violent, 4) or is a substance abuser. Of course, there may be direct or other admissible evidence in the form of personal observation or parental admissions which may be relevant and material to the court's fact finding task. This bright line is necessary because such a delegation, particularly where the context is a "custody evaluation" or psychological testing, generally violates evidentiary rules and is exceptionally unreliable. Accordingly, custody rulings premised on wrong factual determinations logically disserve the children whose welfare the system is designed to promote.

Domestic relations courts are urged here to reclaim their basic adjudicatory role in fact based custody determinations by doing the same things civil and criminal court judges do in deciding whether or not some specific conduct happened. First, they are challenged to shed the "high-conflict" custody case bias and consider the evidence with an open mind. Second, the rules of evidence should be enforced. Third, mental health professionals and other such investigators and "experts" cannot be designated as fact-finders. And fourth, where children are victims of, or witnesses to, the detrimental parental conduct at issue, the children's testimony should be heard as that of any other fact witness, with the attendant safeguards for comfort and security provided, when that testimony is necessary to establish proof of the relevant conduct.

II. DETERMINATIONS IN CUSTODY CASES:“FACTORS” VS. FACTS”

The modern approach to child custody determinations is summarized by the observation that:²

In disputed custody cases between parents, the best interest standard encompasses numerous factors which may be relevant in a particular case. Many states have enacted statutes setting forth the factors to be considered in determining the child’s best interests. In other jurisdictions, specific factors are not enumerated, but a compilation of relevant factors can be gleaned from decisional law.

No single factor is determinative in deciding custody. The court is usually instructed to consider all relevant factors, and the court’s decision is usually based on an aggregate of factors rather than any one factor. Furthermore, even where the factors are set forth in a statutory provision, the court is not limited to a consideration of these factors, but may also consider many other factors that are relevant, and almost anything affecting the child is considered relevant to the child’s welfare.

Certain “best interest factors” are commonly found in most state custody laws:³

² Kathryn D. Katz, *Child Custody and Visitation: Law and Practice*, §1.05[3][b], 143 (S. Little ed., 1993).

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Ann M. Haralambie,, *Handling Child Custody, Abuse and Adoption Cases*, § 4.06, 231-232 (West, 1993). State statutes and codes have adopted various combinations of these factors, which are reflected in the Uniform Marriage and Divorce Act, § 402. See, ALA. CODE § 30-2-40(e); ALASKA STAT. § 25.24.150(c); ARIZ. REV. STAT. ANN. § 25-403; ARIZ. CODE ANN. § 9-13-101; CAL. FAM. CODE § 3040; COLO. REV. STAT. ANN. § 14-10-124; CONN. GEN. STAT. ANN. § 46b-56; DEL. CODE ANN. tit. 13, § 722; D.C. CODE § 16-914; FLA. STAT. ANN. § 61.13(1)(a); GA. CODE ANN. § 19-9-1; HAW. REV. STAT. ANN. § 571-46; IDAHO CODE § 32-717; 750 ILL. COMP. STAT. ANN. 5/602(a); IND. CODE ANN. § 31-17-2-8; IOWA CODE ANN. § 598.41(1)(a); KAN. STAT. ANN. § 60-1610(a)(3); KY. REV. STAT. ANN. § 403.270(2); LA. Civ. CODE ANN. arts. 132, 134; ME. REV. STAT. ANN. tit. 19A, § 1653(3); MD. CODE ANN., FAM. LAW § 9-105; MASS. GEN. LAWS ANN. ch. 208, § 28; MICH. COMP. LAWS ANN. § 722.23-24; MINN. STAT. ANN. §§ 257.025(a), 518.17(1)(a); MISS. CODE ANN. § 93-5-24(1); MO. ANN. STAT. § 452.375(2); MONT. CODE ANN. § 40-4-212(1); NEB. REV. STAT. § 42-364(1); NEV. REV. STAT. § 125.480(1); N.H. REV. STAT. ANN. § 458:17(1); N.J. STAT. ANN. § 9:2-3; N.M. STAT. ANN. § 40-4-9(A); N.Y. DOM. REL. LAW § 240(1); N.C. GEN. STAT. § 50-13.2(a); N.D. CENT. CODE §§ 14-09-06.1 to .2; OHIO REV. CODE ANN. § 3109.04; OKLA. STAT. ANN. tit. 10, § 21.1; OR. REV. STAT. § 107.137(1); 23 PA. CONS. STAT. ANN. § 5303(a)(1); R.I. GEN. LAWS § 15-5-16(d)(2); S.C. CODE ANN. § 20-3-160; S.D. CODIFIED LAWS § 25-4-45; TENN. CODE ANN. § 36-6-101(a)(1); TEX. FAM. CODE ANN. § 153.002; UTAH CODE ANN. § 30-3-10-10.2; VT. STAT. ANN. tit. 15, § 665; VA. CODE ANN. § 20-124.3; WASH. REV. CODE ANN. § 26.09.184; W. VA. CODE § 48-9-101; WIS. STAT. ANN. § 767.24; WYO. STAT. ANN. § 20-2-201.

These factors may include the parent’s wishes, the wishes of the child, the love and affection or intimacy between the child and each parent, the interaction and interrelationship between the parent, child, siblings, and other significant persons, the benefit of continuity of environment, the child’s adjustment to home, school, and community, the health, safety, and welfare of the child, and the mental and physical health of all individuals involved. Some states provide that the court should consider the parent’s ability to provide love, affection, guidance, and education for the child, or to provide food, clothing and medical care for the child. Courts may consider which parent has more time to spend with the child, is better able to help the child with school, or to meet the child’s health needs, and which parent is more likely to encourage a close relationship between the child and the other parent.

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Abuse or neglect of the child is obviously relevant, and some states explicitly consider a parent’s alcohol or other substance abuse. There is an emerging trend towards including domestic violence, whether or not directed towards the child or in the child’s presence, as being a factor to be considered or to be weighed against the abusive parent, in some cases even constituting a presumption against custody in that parent [citations omitted]⁴.

It is important to distinguish the terms “factors” and “facts.” Generally, a “fact” is “*a thing that is definitely known to be true,*”⁵ or “*something known to exist or to have happened.*”⁶ For litigation purposes, most importantly a “fact” is, as defined by Black’s, “*An actual and absolute reality, as opposed to a mere*

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Forty-four (44) states (including D.C.) include domestic violence as one of the mandatory considerations in deciding the child’s best interest. Twenty-five (25) (including D.C.) states explicitly create a rebuttable presumption against the granting of any custody to a violent parent. See, American Bar Association Commission on Domestic Violence, *Child Custody and Domestic Violence by State*, www.abanet.org/domviol/docs/Custody.pdf (last visited June 30, 2010). The ABA’s chart is attached here as an appendix.

⁵ *Compact Oxford English Dictionary 356 (2005)*.

⁶ *Random House Webster’s Unabridged Dictionary 691 (2d Ed. 2001)*.

*supposition or opinion...reality of events or things the actual occurrence or existence of which is to be determined by evidence.”*⁷ The common general definition of a “factor”, on the other hand, is a “*circumstance, fact, or influence that contributes to a result*”⁸ or “*one of the elements contributing to a particular result or situation.*”⁹ Similarly, Black’s provides that a “factor” is “*any circumstance or influence which brings about or contributes to a result...*”¹⁰ Thus, the determination of a “factor” need not, by definition, be premised on the certainty of facts established by evidence. This is not a trivial distinction.

Parent-child love and affection, the child’s wishes, continuity of environment, sibling interaction, and everyone’s relative mental health can be treated and determined for the most part as “conditions,” rather than as concrete events which did or did not occur. Acts of violence, molestation, or excessive alcohol or illicit drug use, as actual events or “facts,” can be proved in family court litigation to the same extent that such would be established in a criminal or civil tort trial. The endangering facts, including exposure to violence and direct abuse,

⁷ Black’s Law Dictionary 531-532(5th Ed.1979).

⁸ Compact Oxford English Dictionary 356 (2005).

⁹ Random House Webster’s Unabridged Dictionary 691 (2d Ed. 2001).

¹⁰ Black’s Law Dictionary 532 (5th Ed.1979).

demonstratively have a more lasting negative impact on a child than the broader best interest “factors.”¹¹

Therefore, it is critical for family court judges, as fact-finders, to be as correct as possible when confronted with endangerment allegations, or in these situations the custody decision will be directly adverse to the child’s best interest. Accordingly, the data or evidence upon which the court relies must be admissible, reliable, and valid. Unfortunately, the family court gestalt in many jurisdictions militates toward the wrong outcomes.¹² Two prominent psychologists have noted:

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Generally, child sexual abuse has been shown to cause affective problems (guilt, shame, anxiety, fear, depression, anger), physical effects (genital trauma, somatic complaints, sexually transmitted diseases, eating disorders, sleep problems), behavioral problems (“acting out”, withdrawal, aggression, substance abuse, repetition of abusive relationships), self-destructive behaviors, psychopathology, and destructive traumatic sexualized conduct. National Institute of Justice, U.S. Dept. of Justice, *When the Child is a Victim* 18-24 (2d Ed. 1992); Erna Olafson & Barbara Boat, *Long-term Management of the Sexually Abused Child: Considerations and Challenges*, in *Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals* 14-35 (Robert M. Reece, M.D. ed., 2000). Physical abuse often results in long term posttraumatic stress disorder, low self-esteem, depression, poor social competence, cognitive and neurological damage, relationship difficulty, in addition to the obvious possibility of death, disfigurement, and other serious bodily injury. See, Robert H. Wharton, et al., *Long-Term Medical Consequences of Physical Abuse*, and Cynthia Cupit Swenson & David J. Kolko, *Long-term Management of the Developmental Consequences of Child Physical Abuse* in *Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals* 117-134, 135-154 (Robert M. Reece, M.D. ed., 2000). Even children who only witness domestic violence in their homes experience can suffer permanent emotional and cognitive scars, and grow up to emulate in their own interpersonal relationships the learned abusive power and control, thus contributing to the intergenerational cycle of violence. See, B.B. Robbie Rossman, *Descartes’s Error and Posttraumatic Stress Disorder: Cognition and Emotion in Children Who are Exposed to Parental Violence* and Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals* in *Children Exposed to Marital Violence: Theory, Research and Applied Issues* 223-256, 371-408 (George W. Holden, et al. eds., 1998); Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 Haw. L. Rev. 375, 388-392 (1998).

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See, e.g., Melinda L. Moseley, *Civil Contempt and Child Sexual Abuse Allegations: A Modern Solomon’s Choice?*, 40 Emory L.J. 203 (1991); Susan B. Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 Am. U.L. Rev. 491, 496 (1989) [“The most obvious problem of proof is that the sexual abuse of children, like rape, is a crime that is done privately, often in the home where there are few, if any, witnesses. The victim is the *only* witness. Adult women have suffered through decades of being unable to prove that they have been raped because no one else had seen it happen; until recently, the law itself demanded corroborating evidence to secure a conviction. In both cases, the problem has been the same’ albeit for different reasons; women are suspected of ‘consent,’ while children are suspected of ‘fabricating.’ Children are often accused of lying about sexual abuse, whether for reasons

Many clinicians have had the frustrating experience of seeing the courts return a child to caretakers whom the clinician believes to be dangerous or abusive. Faller has shown in her sample of separated parents that even after sexual abuse has been clinically substantiated, over one-third of children continued to have unsupervised contact with their alleged parental abuser.¹³ In some of the cases, judges refused even to hear the clinical evidence of sexual abuse, and one judge threw the clinical reports to the courtroom floor unread.¹⁴

The causes of and solutions to this paradox are described here.

III. POISONING THE WELL: THE “HIGH-CONFLICT” CASE LABEL

It is first necessary to describe the contextual mindset that surrounds many family court judges as they daily approach the bench. Essentially, they are discouraged by their peers and professional associations from acting like judges.¹⁵

The Association of Family and Conciliation Courts (AFCC) most hardily fosters

of their own or because they are suspected of being brainwashed by adults. Our culture is one that simply does not find children credible. The notion that children cannot be believed is entrenched in our legal system as well as the larger culture.” (internal footnotes omitted)); David Peterson, *Judicial Discretion is Insufficient: Minors’ Due Process Right to Participate With Counsel When Divorces Custody Disputes Involve Allegations of Child Abuse*, 25 Golden Gate U.L.Rev. 513 (1995); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand.L.Rev. 1041 (1991).

¹³ Kathleen Faller, *Allegations of Sexual Abuse in Divorce*, 4 J. of Child Sexual Abuse 1-25 (1995).

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Erna Olafson & Barbara Boat, *Long-term Management of the Sexually Abused Child: Considerations and Challenges*, in *Treatment of Child Abuse: Common Ground for Mental Health, Medical, and Legal Professionals* 19 (Robert M. Reece, M.D. ed., 2000).

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One prominent California Family Court judge wrote, “Trials may be a good mechanism for deciding the guilt or innocence of an accused murderer. They may be a good way to decide the damages to be awarded to a person injured in an automobile accident. They certainly are an acceptable way of dividing the property of a couple that has been married for years and acquired houses, pensions, and investments. But they are a just plain silly way to decide with which parent a child should live.” Roderic Duncan, *Trial of Custody Cases As Viewed By a Judge*, in *Child Custody & Visitation Law and Practice* §27.09 [4] (Sandra Morgan Little ed., 1999). The quote intractably and incorrectly assumes that there are no factual determinations upon which the custody decision will turn.

the siren luring family court judges away from judging.¹⁶ Professor Andrew Schepard, a leading AFCC scholar, has proposed cutting-edge role re-definition for the courts.¹⁷ An important problematic development driving the situation is the bar and bench's philosophy regarding what has come to be known as "high conflict" custody cases. Again, definitions are important. "Conflict" is defined as "a *serious disagreement or argument*"¹⁸ and "*a fight, battle, or struggle, esp. a long struggle; strife.*"¹⁹ Again, most importantly, Black's does not define "conflict," but does define "conflicting evidence" as "*evidence offered by plaintiff or defendant, or prosecutor and defendant which is inconsistent and cannot be reconciled.*"²⁰

In 2000, the American Bar Association sponsored the major conference (The Wingspread Conference) addressing the problem of these "high-conflict" custody cases, which are defined as arising:

when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional

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The primary organ of AFCC is the Family Court Review. See, e.g., Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 Fam.Ct.Rev. 203 (2004); Christine A. Coates, et al., *Parenting Coordination for High-Conflict Families*, 42 Fam.Ct.Rev. 246 (2004); Jana B. Singer, *Dispute Resolution and the Postdivorce Family, Implications of a Paradigm Shift*, 47 Fam.Ct.Rev.363 (July, 2009); Amy Holtzworth-Munroe, et al., *Family Dispute Resolution: Charting a Course for the Future*, 47 Fam. Ct.Rev. 493 (July, 2009).

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See, e.g. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark.Little Rock L.Rev. 395 (2000); Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Prospective*, 32 Fam. L.Q. 95 (1998).

¹⁸ Compact Oxford English Dictionary 204 (2005).

¹⁹ Random House Webster's Unabridged Dictionary 428 (2d Ed. 2001).

²⁰ Black's Law Dictionary 271(5th Ed.1979).

relationship, have mental disorders, or engaged in criminal or quasi-criminal conduct, substance abuse, or there are allegations of domestic violence, or child abuse or neglect.²¹

The “Basic Principle” suggested for lawyers in the Wingspread Conference is that, “*Lawyers should take a proactive role in reducing conflict between disputing parents and promote collaborative problem solving with parents, mental health professionals and the courts.*”²² Furthermore, the report urges that “*the ethical rules should be revised to develop separate rules specific to the context of family law, particularly to include rules which promote achievement of the collaborative, cooperative principles...*”²³

A more recent discussion of “high-conflict” custody cases reiterates the same context for analysis, lumping together as “conflict” true domestic violence and child abuse with allegations of domestic violence and child abuse.²⁴ That is, for one parent to claim that abuse is happening in the family is deemed, in terms of detriment to the children, the equivalent of perpetrating the domestic violence. In other words, the facts are not important, just the resulting “conflict” matters and

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High-Conflict Custody Cases: Reforming the System for Children-Conference Report and Action Plan, 34 Fam.L.Q. 589, 590 (2001).

²² *Id.* at 595.

²³ *Id.* at 596.

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Linda D. Elrod and Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 Fam. L. Q. 381, 387-390 (2008).

the parent fighting to protect the child from the abusive parent is as guilty as the parent abusing the child.²⁵

The troubled state of the family court system in this regard is abundantly illustrated by another article appearing in the same Family Law Quarterly Golden Anniversary issue cited in the paragraph above. In an article specifically addressing family violence problems in custody cases, the author writes:

Even where there is a change of law “on the books,” there has not been a change in the application of law “on the ground.” Custody decisions in cases involving domestic violence are an example of the uneven nature of the change. Custody is an area where there has been a considerable degree of statutory reform and revision respecting domestic violence. The classic “best interests of the child” standard allows for judicial discretion, including, in some states, taking a history of violence into consideration. Some jurisdictions have now made presumptions against custody to batterers explicit in their custody laws. Yet even with these presumptions, it appears that many abusers are awarded custody, even where they have allegedly been responsible for the mother’s death. Judges often do not recognize or acknowledge abuse or tend to minimize it. Even though there may be a statutory bar, judges do not take claims of abuse seriously when they are presented, or even see them when they are subtle, and so they do not factor abuse into custody determinations [citations omitted].²⁶

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The Pennsylvania Coalition Against Domestic Violence has warned that because of the confusion between domestic violence cases and “high conflict cases”, parenting coordinators are inappropriately used in true abuse situations. *Domestic Violence and Parent Coordination*, *The Jurist* (April 2009),1. See also, Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W.Va.L.Rev. 237 (1999).

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Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam.L.Q.353, 360 (2008).

Returning to Professor Elrod's article, *supra*, a partial explanation is provided for this conundrum in the "friendly parent" best interest factor rewarding the parent more likely to encourage the relationship between the child and the other parent:

When broadly construed, friendly parent provisions can profoundly impact cases by becoming the lens through which everything is viewed. In the visitation context, such provisions can function as two-sided shields. On one side they simultaneously protect against unwarranted withholding of parenting time and frivolous allegations of abuse or unfit parenting, while on the other side they may hinder reasonable inquiry into inappropriate or questionable parenting practices if such inquiries are labeled "unfriendly." The two types of problems most directly impacted by the provision- domestic violence and parental alienation- involve difficult-to-prove allegations and counter-allegations. They illustrate how the friendly parent provision is all too often a double-edged sword for parents and children caught in the middle of conflicts.²⁷

Why are domestic violence allegations considered difficult to prove by only a preponderance of evidence in custody cases?²⁸ Defendants are regularly convicted beyond a reasonable doubt in criminal court on basic testimonial evidence, which, when contested, is resolved by the fact finder. For example, in

²⁷ Elrod, *supra* at fn.24, 394.

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Professor Fineman warns that, "*Judges must confront the possibility that the very judicial system in which they make their family decisions can become weapons of further abuse. The nature of domestic violence as well as the ways it can interact with and distort the family law system must be kept in mind as courts attempt to determine custody of children. Judges should be encouraged to treat violence as a serious matter and attach appropriate consequences to it in domestic cases. Unfortunately, all too often a claim of spousal abuse at divorce is greeted with suspicion, and the system plays itself out according to old, worn stereotypes in an ancient battle of the sexes in which the interest of children are sacrificed.*" Martha Albertson Fineman, *Domestic Violence, Custody, and Visitation*, 36 Fam. L. Q. 211, 214 (2002).

Brooks v. State,²⁹ the appellate court described the matter as “a straightforward swearing contest. Brooks had his version, and the victim had hers. As succinctly put by the Solicitor during closing argument, ‘One person says it happened; one person says it didn’t happen. Y’all are going to have to decide...’ The jury decided.” The testimony of solely the victim supported the harassment conviction in *State v. Traxler*.³⁰

This thesis contends that the “conflict elimination” mentality on the bench, combined with the “friendly parent” factor and the misuse of mental health professionals and guardians *ad litem*, have caused the fact-finding role of the family court judges to atrophy. Instead, circularity results: abuse causes “allegations of abuse”, which equals “conflict”, which results in an “unfriendly parent” whose reports of abuse cannot be believed because she is an “unfriendly parent” increasing “conflict.”

In this same vein, some radically argue that courts should simply assume new roles and behave themselves as therapists and conflict managers.³¹ Professor Prescott has articulated an intricate philosophical justification for the Unified Family Court’s role as a forum for the integration of psychology and judicial fact-

²⁹ 532 S.E.2d 763, 768 (Ga.Ct.App.2000).

³⁰ 2001 Haw.App. LEXIS 2001 (Feb.8, 2001).

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See, e.g., Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 Cornell J. L. & Pub. Pol’y 1 (Fall 1996); Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U.Ark.Little Rock L.Rev. 395 (2000).

finding.³² In 2006, Washington State Supreme Court Justice Bridge proposed even going beyond the Uniform Family Court to the “problem solving court”:

They have an interdisciplinary approach emphasizing the emotional health of the parties. They strive to achieve healthy outcomes, resulting in a permanent resolution to historically intractable problems flooding courts with excessive litigation. The drug diversion and mental health courts of criminal and child welfare law and the unified family courts all fit the new paradigm. All have in common an approach which is largely nonadversarial. They are designed to change behavior, encourage compliance with court-ordered services or plans, and end the conflict by solving the problem, not just by making a decision.³³

While the goals expressed by Justice Bridge are certainly laudable, this thesis will assert that it is the failure of the courts to first make factual decisions based on evidentiary determinations which promotes and encourages the seemingly endless litigation in custody cases. Dr. Kathleen Faller, one of the country’s leading child abuse experts, sarcastically states that the real concern of the family court is that if it “*were to take seriously and explore thoroughly an allegation of parental sexual abuse or drunken endangering of a child, this would enflame*

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Dana E. Prescott, *Unified Family Courts and the Modern Judiciary as a “Street-Level Bureaucracy”: To What End for the “Mythical” Role of Judges in a Democracy*, 27 Quinnipiac L.R. 55 (2009).

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Hon. Bobbe J. Bridge, *Solving the Family Court Puzzle: Integrating Research, Policy, and Practice: Opening Remarks to the 42nd Annual Conference of the Association of Family and Conciliation Courts*, 44 Fam.Ct.Rev. 190, 196-197 (April 2006).

rather than assuage parental conflict."³⁴ Accordingly, Professor Freedman writes that true fact-finding is essential for abuse victims.³⁵

IV. INAPPROPRIATE DELEGATION OF FACT-FINDING RESPONSIBILITY TO MENTAL HEALTH PROFESSIONALS

Some of the most direct criticism of the role of mental health professionals in child custody cases comes from within the psychology field. Two psychology professors have studied the mental health practitioner's role in addressing the best interest standard in custody cases and have concluded that there is an inadequate justification for such professionals to make custodial recommendations for specific children.³⁶ Legal scholars have joined in the fray.³⁷ Professor Bowermaster has effectively argued that mental health professionals allow judges to in essence circumvent legal requirements in custody cases.³⁸ Professor Shuman has penned one of the more scathing critiques of the mental health professionals' role in child

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Kathleen C. Faller, Child Maltreatment and Endangerment in the Context of Divorce, 22 U. Ark. Little Rock L. Rev. 429, 431 (Spring 2000).

³⁵ Ann E. Freedman, Symposium, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 Am. U. J. Gender Soc. Pol'y & L. 567 (2003).

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Daniel A. Krauss and Bruce D. Sales, *Legal Standards, Expertise and Experts in the Resolution of Contested Child Custody Cases*, 6 Psych. Pub. Pol and L. 843 (2000).

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Perhaps the most essential and authoritative guide on this topic is Clare Dalton, et al, *Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge's Guide* (National Council of Juvenile and Family Court Judges, State Justice Institute 2004, 2006).

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Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 Duq. L. Rev. 265 (2002).

custody cases, arguing that their techniques lack sufficient validity and reliability to merit their use³⁹ and that they have been delegated judicial power without legislative approval.⁴⁰ His conclusion is concordant with the theme of this thesis:

If society wishes to use mental health practitioners as experts in child custody cases, then law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change in the process for resolving child custody cases. The stakes are too important to fail to speak openly about the transformation of the role of experts in custody litigation.⁴¹

One Florida appellate judge lamented the “*proliferating and extensive use of psychologists in these family law cases and the extreme reliance trial courts appear to place on their opinions.*”⁴² He decried that, “*These experts conduct interviews, sometimes do tests and then are allowed to render opinions on an*

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Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 Fam. L. Q. 135 (2002).

⁴⁰ *Id.* at. 160-161.

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Id. at 162. Professor Shuman suggests, probably accurately, that family court attorneys have allowed this problem to exist as a result of the lawyers’ issue conflicts of interest, *i.e.* they do not want to challenge today on behalf of one client what they will likely want to take advantage of tomorrow on behalf of another client. *Id.* at 155. One such conflict was detected by the concurring judge in *Keesee v. Keesee*, 675 So. 2d 655, 659 (Fl. Dist. Ct. App. 1996) (Griffin, J. concurring), where a lawyer was sponsoring the testimony of a psychologist to minimize his client’s addiction, when in an earlier case for another client the same lawyer attacked the same psychologist as being unqualified to opine on addiction issues due to the expert’s own addiction history.

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Keesee v. Keesee, 675 So. 2d 655, 659 (Fl. Dist. Ct. App. 1996) (Griffin, J. concurring), cited in Jane H. Aiken & Jane C. Murphy, *Dealing With Complex Evidence of Domestic Violence: A Primer for the Civil Bench*, 39 Court Rev. 12, 15 (Summer 2002).

extraordinary range of subjects...whether someone is prone to domestic violence, who is telling the truth, and who is in 'denial.' Yet, no one seems to be able to muster any measure of the competence or reliability of these opinions... These psychological evaluations in many cases amount to no more than an exercise in human lie detection.”⁴³ One seasoned Illinois psychologist/custody evaluator somewhat reluctantly admitted that regarding parent-child observations sessions, one of the evaluators' favorite tools:

there appear to be no empirical data on observing parents and children specifically in custody evaluations...At some point in the future, it may be feasible to create a methodology for observing parent-child interactions that is both forensically useful and includes adequately high levels of statistical reliability and validity. Clearly, the custody field, by being in early stages of development, is far from that point right now.⁴⁴

A variety of views on these questions was exchanged between lawyers and psychologists in the April, 2005, symposium issue on child custody evaluations of the Family Court Review.⁴⁵

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Id. Support for the judge's views is found in Steven K. Erickson, et al., *Psychological Testing and Child Custody Evaluations in Family Court: A Dialogue: A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 Fam.Ct.Rev. 157 (April 2007).

⁴⁴ Daniel J. Hynan, *Parent-Child Observations in Custody Evaluations*, 41 Fam.Ct. Rev. 214, 221 (April 2003).

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Timothy M. Tippins and Jeffrey P. Wittmann, *Empirical and Ethical Problems With Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 193 (April 2005); Thomas Grisso, *Commentary to Tippins and Wittmann: What Now?*, 43 Fam. Ct. 223 (April 2005); Joan B. Kelly and Janet R. Johnston, *Commentary To Tippins and Wittmann*, 43 Fam.Ct. Rev. 233 (April 2005).

In one of the more extreme contrary perspectives, one prominent psychologist flatly posits that in the desired multi-disciplinary approach to custody cases, judges should have no primary responsibility—it should all be left up to the mental health professionals.⁴⁶ She arrogates to the “qualified mental health professional” “*fact-finding...and a written report with recommendations presented to the court.*”⁴⁷ One mental health practitioner arrogantly urged the creation of “a behavioral psychologist judge” position to adjudicate child custody cases and, thus, eliminating the need for other expert testimony.⁴⁸

One authority claims that the “*neutral mental health evaluators in custody disputes is thus, in some ways, a healthy social development*” because they are a “*symbol that something more is at stake in a custody dispute than the grievances of one party against the other—the welfare of the child.*”⁴⁹ This reflects the flawed

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Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. Ark. Little Rock L.Rev. 453 (2000).

⁴⁷ *Id.* at 472.

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Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 Hofstra L. Rev. 115. 126 (1986).

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Andrew Schepard, *Mental Health Evaluations in Child Custody Disputes*, 43 Fam.Ct.Rev. 187 (April 2005). Two other psychologists suggest their professional field should dominate the “high-conflict” custody cases, because “*the adversarial nature of the legal system plays right into the self-righteous, blaming, punishing, and ego-centric attitudes of high conflict litigants. Their traits are amplified by the fact that a fault model, in contradistinction to the conceptual thrust of divorce resolution, lies at the core of child custody resolution. Even though the legal system speaks of the ‘best-interests’ standard, a ‘parental fitness’ paradigm is operationally at the center of legal child custody dispute resolution, reinforcing the already rabid zeal of high conflict litigants to prove that their adversaries are ‘unfit.’*” Barry Bricklin and Gail Elliot, *Qualifications and Techniques to Be Used by Judges, Attorneys, and Mental health Professionals Who deal With Children in High Conflict Divorce Cases*, 22 U. of Ark.Little Rock L.Rev. 501, 508-509 (2000). These authors’ attitude, with its resulting hostility to recognition of the fact that some parents are indeed dangerous and abusive and

general assumption in the “conflict”/ “friendly parent” model that a parent’s “grievance” is presumed to have nothing to do in reality with the child’s best interest. One New York clinical law professor found this reliance on custody investigators to be terribly flawed, biased, and archaic.⁵⁰ Still another law professor argues that custody evaluations are an overly costly and unwarranted invasion of privacy void of documented benefits.⁵¹

In the Louisiana child custody case of *Still v. Bourque*,⁵² the appellate court commended the trial judge for “*retaining the responsibility to evaluate the case himself, based on the evidence presented to him rather than turning it over to an independent evaluator.*” On the other hand, in the unreported Minnesota case of *In*

to the efforts of the non-abusive parents to provide the evidence of such necessary to protect their children, can be primarily explained by their embrace of the vastly discredited Richard Gardner and his rejected “parental alienation syndrome.” *Id.* at 517-519. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Fam. L. Q. 527 (2001); Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 Children’s Legal Rights J. 1 (2006); Clare Dalton, et al, *Navigating Custody & Visitation Evaluations in Cases With Domestic Violence: A Judge’s Guide* 24 (National Council of Juvenile and Family Court Judges, State Justice Institute 2004, 2006) [parental alienation “discredited by the scientific community.” “*Any testimony that a party to a custody case suffers from the syndrome or ‘parental alienation’ should therefore be ruled inadmissible and/or stricken from the evaluation report...*”]. In *Schmitz v. Schmitz*, 890 So.2d 1248 (Ct.App.Fl. 2005), the court vacated a custody transfer to a father against whom a domestic violence restraining order was pending, where the change was based on a last-minute custody evaluation “finding” severe parental alienation. In a well-reasoned factual analysis, the court rejected the opinions of Dr. Gardner himself, and found that the daughter was molested by her father in *Ford v. Ford*, 2000 Del.Fam.Ct. LEXIS 104 (Dec. 19, 2000).

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Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of The Court Ordered Investigation*, 40 Colum. J.L. & Soc. Probs. 527 (2007). For example, there should be no assumption that sexual abuse allegations are likely to be false in custody cases. See, e.g., Marilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, 35 Court Rev. 12 (Spring 1988).

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Mary E. O’Connell, *Child Custody Evaluations: Social Science and Public Policy: Mandated Custody Evaluations and the Limits of Judicial Power*, 47 Fam Ct. Rev. 304 (April 2009).

⁵² 870 So.2d 1088, 1091 (La.Ct.App.2004).

re the Child of R.G.Y. of S.P.V.C.,⁵³ the trial court indeed abdicated its authority and used very weak, contradictory, and inappropriate custody evaluator testimony in a domestic violence case to override direct victim testimony, and to ultimately rely on the “friendly parent” factor in granting sole legal and physical custody to the father accused of, *inter alia*, choking his wife:

[The mother] testified about a choking incident, an incident in which respondent punched the wall next to [her], and an incident in which [the father] held [the mother’s] head over the toilet demanding that she get her pregnancy sickness over with so she could fix dinner...The incidents were never reported to the police. [The father] denied [the mother’s] claims and testified about his own version of events.

* * *

When asked about investigating the abuse claims, the custody evaluator testified she had very little to go on because there were no police reports⁵⁴ and it was essentially a matter of “he said, she said.”⁵⁵ The district court did not explicitly state that it found either party’s testimony regarding the alleged domestic-abuse incidents to be credible, but the court’s finding that “there were no findings of abuse

⁵³ 2004 Minn.App. LEXIS 1374 (Dec.7, 2004).

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This statement suggests that the custody evaluator knew little about domestic violence, since perhaps half of all victims do not call the police. John E.B. Myers, Myers on Evidence in Child, Domestic and Elder Abuse Cases § 9.02 (2005). Recent studies indicate that mandatory arrest policies actually deter victims from calling the police. Alexandra Pavlidakis, *Mandatory Arrest: Past Its Prime*, 49 Santa Clara L. Rev. 1201, 1222 (2009) [“Calling the police is also not an attractive option for a woman who knows arrest will result and her abuser may react with retaliatory violence”].

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In *Douglas v. Douglas*, 2009 Ky.App.Unpub.LEXIS 948 (Nov.6, 2009), where no expert testimony was presented, the court specifically rejected the argument that “he said, she said” evidence was insufficient as a matter of law to support a domestic violence order of protection. The resolution of conflicting witness testimony requiring credibility determinations is a matter of weight, not sufficiency, in a so-called “he said, she said” case. *State v. Gullette*, 975 So.2d 753, 759-760 (La.Ct.App. 2008). See also, *State v. Johnson*, 944 A.2d 416 (App.Ct.Conn.2008), where the court rejected a proposed jury instruction attacking the credibility of a child sexual abuse victim in a so-called “he said, she said” case.

at trial” indicates that the court did not find the evidence sufficient to support a finding that the abuse occurred.

* * *

The child-custody evaluator testified that she believed [the father] would be more likely to include [the mother] in [the child’s] life than [the mother] would be to include [the father]. She also testified, however, that regarding this point, she “was a little concerned that [the father]’s actions didn’t always equate with his statements. I think that when push comes to shove [the father] likes things his way.”⁵⁶

Judges (the finder of fact in a bench trial), not mental health practitioners,⁵⁷ determine credibility. The law is clear in this regard, and if attorneys would simply object to these credibility opinions, and if the judges were to rule correctly, the problem would mostly be solved.⁵⁸ In *Capell v. Capell*,⁵⁹ the appellate court

⁵⁶ *Id.* at *16-17.

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Some prominent custody evaluators take the position that they, themselves, should determine credibility, or as they call it, “*opinions with regard to historical truth and validity of the psychological aspects of a party’s claims. Unlike therapy, in which information is often based on what is provided by the patient and therefore may be somewhat incomplete, grossly biased, or honestly misperceived, a competent custody evaluation includes an examination of the accuracy of each party’s story in addition to other informational sources.*” Jonathan W. Gould & Phillip M. Stahl, *The Art and Science of Child Custody Evaluations: Integrating Clinical and Forensic Mental Health Models*, 38 Fam. & Concil. Cts. Rev. 392, 399 (2000). Facts do not seem to matter, as the authors suggest that the focus be “*on the children and the family dynamics rather than taking sides in the family dispute. In writing the report, the evaluator may need to describe each parent’s concern and how that parent has engaged in tribal warfare against the other parent.*” *Id.* at 408. Furthermore, they write, “*Rather than being a technician who gathers data and reports on it, the artful custody evaluator will be mindful of the family and encourage resolution of conflict, minimize unnecessary negatives, and ultimately refocus parents on their children.*” *Id.* at 409. Abused women and children arguably stand little chance of belief and protection when facing such a mindset. Dr. Gould later contributed to another related article. Mary Johanna McCurley, et al., *Protecting Children From Incompetent Forensic Evaluations and Expert Testimony*, 19 J. Am. Acad. Matrimonial Law. 277 (2005). Assuming a “strategic incentive for both sides to distort historical events” in family violence cases, another psychologist explains credibility determinations through the usual “high-conflict” lens in custody evaluations. William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High-Conflict Custody Case*, 38 Fam. & Concil. Cts. Rev. 462 (Oct.2000).

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See, e.g., *State v. Caudill*, 2008 Ohio 1557 (Ohio Ct.App.2008) [Although an expert can testify to explain a victim’s behavior, he or she cannot opine that the victim was indeed abused, that the alleged abuser is guilty, and cannot comment on credibility]; *Gonzalez v. State*, 2009 Tex.App. LEXIS 8878 (Ct.App.Tex. 2009); *Bly v. State*, 660 S.E.2d 713

condemned a trial court's abdication of its factual determination in a domestic violence case to a "polygraph expert," despite the coerced consent of the parties to the plan. Whether an act of abuse or violence occurred is most appropriately adjudicated by listening to the parties' versions of the events in their direct testimony, and any available corroboration, even in so-called "he said, she said" situations. A pure instance of such a trial is found in *E.O. v. K.H.*,⁶⁰ a harassment restraining order case, where the only witnesses were the *pro se* husband and wife, but which provided sufficient evidence for the granting of the order. As the Montana Supreme Court explained in another domestic violence order of protection "he said, she said" case with no "expert" testimony, the trial court must base its decision "*on the relative credibility of the witnesses and strength of the evidence presented.*"⁶¹ There, the court reproduced the following excerpt from the trial court record, which is compelling in its simplicity:

The Court: So, I have conflicting testimony before me and have to decide who to believe. That's my job.

(Ga.2008); *State v. Hudson*, 208 P.3d 1236 (Ct.App.Wash. 2009); *Long v. State*, 2008 Tex.App. LEXIS 8885 (Ct.App. Tex 2008) (unpublished); *People v. Sandoval*, 79 Cal.Rptr. 3d 634 (Ct.App.Cal. 2008); *State v. Winterich*, 2008 Ohio 1813 (Ct.App.Ohio 2008); *Kansas v. Reed*, 191 P.3d 341 (Ct.App.Kan. 2008) [distinguishing expert testimony explaining dynamics of victim recantation from expert credibility opinions]; *State v. Vidrine*, 9 So.3d 1095 (Ct.App. La. 2009).

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817 A.2d 337 (Sup.Ct. N.J. App.Div. 2003). After the polygraph plan was abandoned in the trial court, the trial judge based his abuse findings on the actual trial testimony.

⁶⁰ 2009 N.J. Super. Unpub. LEXIS 2963 (Dec. 7, 2009).

⁶¹ *Williams v. Williams*, 2006 Mont. LEXIS 683 (Dec.27, 2006).

Counsel: That's true, but we do get to a "he said she said" situation unfortunately.

The Court: That's correct. And I have to decide who to believe. I'm about to do that.

Counsel: Okay.

The Court: The temporary order of protection issued by the justice court August 19, 2005, is made permanent...⁶²

An interesting example of a judge applying his own lay psychological analysis to resolve conflicting testimony in a "he said, she said" domestic violence case is found in *Iellimo v. Iellimo*.⁶³ The court, who found the wife petitioner credible and granted the order of protection, determined, with no expert assistance, that the defendant had deluded himself into believing that the abusive conduct did not occur, or occurred because his marriage to the victim entitled him to behave that way.⁶⁴ The Pennsylvania case of *Kline v. Kline*⁶⁵ illustrates the common flawed custody evaluator's approach to facts, where the court disregarded the custody evaluator's "glowing recommendation" that the father, who has a domestic violence adjudication against him, be awarded the children's custody. The judge summarized his rejection of the custody evaluator's opinions, and instead based his ruling, as a judge should do, on the real factual evidence he heard in open court:

⁶² *Id.* at **3-5.

⁶³ 2009 N.J. Super Unpub. LEXIS 226 (Sup Ct. App. Div. Feb. 18, 2009).

⁶⁴ *Id.* at *6-7.

⁶⁵ 2006 Pa. Dist & Cnty. Dec. LEXIS 557, 83 Pa. D. & C. 4th 424 (Com. Pl. Ct. Jun. 19, 2006).

Father's main evidence to support his request for a change is the custody evaluator's opinion. This Court was extremely interested in what the evaluator had to report and studied the evaluator's [sic] report and testimony carefully. The evaluator was extremely positive about Father, and extremely negative about Mother....

The evaluator portrayed Father as pro-active, patient, caring, and responsible. The evaluator portrayed Mother as angry, manipulative, self-centered, and fraudulent. If this Court had seen evidence to support the evaluator's conclusions, this custody decision would have been straightforward. But, that evidence was simply not there. This Court is at a loss to reconcile the evaluator's portrayals of the parents with the evidence in the record and with the evidence that came out at trial.⁶⁶

Guardians *ad litem*, or attorneys supposedly appointed to represent the best interests of children in custody cases, have also been criticized for usurping judicial fact finding, with the blessing of the court itself.⁶⁷

Perhaps the most improper attempted use of these evaluators is to expect them to determine if an accused parent "fits the profile" of an abuser, or committed the act in question. Quite simply- and it cannot be overstated- there is no such profile, and no mental health evaluation or psychological/physiological testing

⁶⁶ *Id.* at 428-430.

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See, eg., ABA, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 Fam. L.Q. 131 (2003); Raven C. Lidman & Betsy Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 Geo. Mason L.Rev. 255 (1998).; Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loy.J.of Pub.Int. L. 106 (2002); *Weisgarber v. Weisgarber*, 2009 Ohio 20 (Ct.App.Ohio 2009); *Bencomo v. Bencomo*, 147 P.3d 67 (Ct.App.Haw. 2006); *In Matter of M.H.B.*, 664 S.E.2d 583 (Ct.App. N.C. 2008); *In Matter of A.S.*, 661 S.E.2d 313 (Ct.App. N.C. 2008). In New York, "law guardians" are appointed to represent children's interests in custody cases, and they are often inappropriately viewed by attorneys and judges as "an assistant to the judge." Nancy S. Erickson, *The Role of The Law Guardian in a Custody Case Involving Domestic Violence*, 27 Fordham Urb. L. J. 817, 818 (2000).

(including the ABEL test of sexual arousal) can determine if an accused parent did or did not abuse a spouse or child, unless the accused admits the act in the process. Any such proffered testimony is inadmissible.⁶⁸

V. EXCLUDING THE TESTIMONY OF CHILD VICTIMS AND WITNESSES: PROTECTED FROM WHAT AND AT WHAT COST?

A parent who suggests that her child testify in a custody trial is frequently *ipso facto* immediately viewed by the court as placing her interests and wants above the child's welfare, and may risk a fatal setback in her efforts to maintain custody. Obviously, children should not be paraded willy-nilly up and down the witness stand to "take sides" or to be "put in the middle" in their parents' "battles." But, when parents beat or molest their children, or attack the child's other parent, the child victim or witness may be the only witness,⁶⁹ or an essential

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See, e.g., *State v. Miller*, 709 P.2d 350 (Utah 1985); *State v. Kallin*, 877 P.2d 138 (Utah 1994); *Doe v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000); *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995); *U.S. v. Birdsbill*, 243 F.Supp. 2d 1128 (D.Mont. 2003); *State v. Austin*, 727 N.W.2d 790 (N.D.2007); *U.S. v. Banks*, 36 M.J. 150 (C.M.A. 1992); *R.D. v. State*, 706 So.2d 770 (Ala.Ct.Crim.App. 1997); *U.S. v. White Horse*, 117 F.Supp.2d 973, *aff'd* 316 F.3d 769 (8th Cir. 2003), *cert den.* 124 S.Ct. 116 (2003); *Gentry v. State*, 443 S.E.2d 667 (Ga.Ct.App. 1994); *In re A.V.*, 849 S.W.2d 393 (Tex.Ct.App. 1993); *U.S.v. Gillespie*, 852 F.2d 475 (9th Cir. 1988). See, also, Annotation, *Admissibility of Expert Testimony as to Criminal Defendant's Propensity Toward Sexual Deviation*, 42 A.L.R.4th 937 (1985); John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §§6.31-6.32 (2005).

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In *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), the Supreme Court said, "Child abuse is one of the most difficult crimes to detect and prosecute because there are often no witnesses except the victim." This observation is frequently noted by courts nationwide. John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* § 6.01 (2005).

corroborator.⁷⁰ Professor John E.B. Myers cogently observes, “*All in all, testifying is difficult for children. Yet without children’s testimony, the legal system would be unable to protect them. Thus, children’s testimony is essential.*”⁷¹ Even though expert testimony concerning typical behaviors of sexually abused children may be admissible, the case law is settled that the child’s credibility is not for the expert to determine, but for the fact-finder, in custody cases the judge, to decide.⁷² Therefore, the child’s credibility is best ascertained by testimony in the judge’s presence. To condemn a parent who, under such circumstances, must present a child’s factual testimony in order to safeguard the child she is required by law to

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Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 New Eng. L. Rev. 1415, 1428-1429 (1991) [“Because there are usually no witnesses to the incident, and the perpetrator rarely confesses, in most cases, the determination that sexual abuse has occurred is based on the testimony of the child. Whether the perpetrator is being criminally charged, the child’s testimony is very important in proceedings in the family and juvenile courts.”]

⁷¹ John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* 134 (2005).

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See, e.g., *Bell v. Commonwealth*, 245 S.W.3d 744 (Ky.2008); *Al-Attaway v. State*, 657 S.E.2d 552, 554-555 (Ga.Ct.App. 2008); *State v. D.W.N.*, 290 S.W.3d 814 (Ct.App.Mo. 2009); *State v. Foster*, 244 S.W.3d 800 (Ct.App.Mo. 2008); *State v. Moran* 728 P.2d 248, 255 (Ariz.1986). For an excellent collection of the case law, see John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §§ 6-24-6.25 (2005).

protect⁷³ is to cynically undermine the purported universal judicial embrace of the child's "best interest."

Perhaps the best and most candid report of the range of judicial attitudes regarding child witnesses in custody cases comes from a 1999 survey of Michigan judges responding to the question, "What should the trial advocate understand about children as witnesses?" The replies indicate the various levels of understanding of the difference between the child as fact witness vs. the child simply being "put in the middle" (each statement is that of an individual judge):⁷⁴

-It is both unfair to the children and unwise for the advocate to compel them to testify. Furthermore, I don't allow it.

-The child's version will probably not conform with their client's.

-Children do not want to be caught in the middle of which parent is better or preferred. Children are quite capable of figuring out why a question is being asked and will normally give a neutral answer to avoid taking sides. When a child does take sides, it is important to show that it is for a balanced reason and not because one side is influencing or conditioning the child. Unfortunately some children will prefer a parent for the wrong reasons such as

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A parent who knowingly allows the other parent to abuse her child, or who refuses to acknowledge that the abuse is occurring, is subject to permanent parental rights termination. See, e.g., *In the Matter of Haven A.B.* 2010 WL 17129 (Tenn. Court of Appeals 4/28/10); *In Re the Adoption of B.D.W.*, 185 S.W.3d 727 (Mo.Ct.App.2006); *In Re: Tyler D.*, 578 S.E.2d 343 (W.Va. 2003); *In re S.S.*, 748 N.E.2d 729 (Ill.App.Ct. 2001); *In the Matter of Vivian OO*, 826 N.Y.S.2d 763 (N.Y.App.Div.2006); *In re Jason L.*, 810 A.2d 765 (R.I. 2002). See also Elizabeth Trainor, Annotation, *Sufficiency of Evidence to Establish Parent's Knowledge or Allowance of Child's Sexual Abuse by Another Under Statute Permitting Termination of Parental Rights for "Allowing" or "Knowingly Allowing" Such Abuse to Occur*, 53 A.L.R.5th 499 (2010). Accordingly, mothers are often in a "damned if you do, damned if you don't" dilemma when their children are sexually abused by the fathers.

⁷⁴ David C. Sarnacki, *Family Law: Effective Advocacy in Divorce Trials*, 78 Mich. Bar. J. 20, 24 (January 1999).

which parent lets the son or daughter stay out later, drive the car, or run with which friends. Some children will not admit such reasons. In other words, it is important to be aware of potential motives characteristic of children.

-I would say be careful and use them sparingly, if at all. Most judges do not like children being used as witnesses in divorce trials, myself included.

-Children who are "coached" are obvious to a judge. Also, advocates rely too much on the "preference" of a child. These "preferences" are not always as the advocate indicates they will be.

-They HATE being caught in the middle.

-Keep them out of the litigation. If necessary, create a nonadversarial setting.

-They should not be placed or allowed to be placed in a position where they are forced to choose between parents or become an advocate for one parent.

-They should be there only in the best interests of the entire family and should not be asked questions to which the answers are hurtful to one of the parents unless absolutely necessary to the best interests of the family as a whole.

-Most judges don't like to see the children called as witnesses except in the most unusual circumstances.

-In a custody dispute, many trial judges abhor the prospect of a child being called to the stand and being examined and cross-examined by counsel for his or her parents. Absent some unique circumstances (*e.g.*, physical or sexual abuse) children should be interviewed by the judge in chambers and should not be forced to testify regarding a preference in the presence of a parent or be subjected to cross-examination. Often, I find that the child has told both parents that he or she prefers them. This revelation is best received in chambers. I generally ask a parent who wishes to have a child testify against another parent if they have considered that I may

view this effort as evidence of their unwillingness to foster a strong parent-child bond with that other parent. Counsel who proposes to call a child as a witness should carefully examine why the child is being called and what other evidentiary sources there are to make the same points in the court.

-Children should only be called as a last resort. When called, a child advocate should understand the child's developmental state and question accordingly.

-Use in open court only if no other alternative exists and their testimony is absolutely necessary.

-Children of the relationship should be drawn into adult disputes only as a last resort, and then, only on a limited basis.

-Most judges are reluctant to base a decision on the testimony of a child. The credibility of a parent will not be enhanced by a child's testimony offered in substantiation. A child's testimony is given weight in situations where: the evidence concerns an abuse that the child has been subjected to; and where the mature child more objectively testifies to facts than do the parents.

A 1988 survey of eighty-eight Virginia judges yielded related observations in suggesting the use of the short “judicial interview” of the child to determine his or her preferences in custody cases.⁷⁵ Regarding the “fact” v. “factor” value of the “interview”, the article noted:

Judges described the most important purposes of the interview as getting an impression of the child to compare with other evidence and learning the child’s wishes regarding custody. Some judges also acknowledged that, through the interview, they hoped to learn about

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Elizabeth S. Scott, et al., *Parents, Children, and the Courts: Children’s Preferences in Adjudicated Custody Decisions*, 22 Ga. L. Rev. 1035 (1988).

the parents' behavior and activities and to confirm the veracity of the parents' evidence [footnotes omitted, emphasis added].⁷⁶

The terms "hoped" and "impression" do not suggest a fact driven inquiry, and may be partially explained by the blanket discouragement of any attorney involvement and the typical fifteen minute interview duration of the judge controlled interview.⁷⁷ Since the judge is operating without the benefit of all of the facts available to the trial attorney developing a case through the orderly presentation of evidence, is trained to evaluate evidence and not to elicit it, and is discouraged as a neutral adjudicator from pursuing a line of questioning designed to "prove" anything, the value of such an "interview" in the resolution of contested facts is highly questionable. This is further confirmed by additional responses to the survey:

Judges varied in their concern about the impact of evidence regarding the parents offered by the child in a confidential interview. When asked what their response would be to a damaging new disclosure about a parent, some judges said they would stop the interview; others would confront the parent; other responses included initiating a social service investigation, directing the guardian *ad litem* to look into the matter, and ignoring the disclosure.⁷⁸

⁷⁶ *Id.* at 1048.

⁷⁷ *Id.* at 1048.

⁷⁸ *Id.* at 1049.

These survey results clearly underscore the discomfort many judges have with actual direct evidence of parental misconduct provided by a child in the best position to provide it, even to the extraordinary point of admittedly ignoring it.⁷⁹

Instead of the judicial “interview”⁸⁰, the traditional alternative method of presenting a child’s evidence is the actual testimony elicited by attorney questioning and cross-examination, an exercise universally embraced as critical to accurate fact-finding in every other courtroom setting. The Virginia judges surveyed assumed this practice would harm the child and were strongly against it, even admitting to successfully pressuring attorneys, who did not want to antagonize the judge, to abandon the idea.⁸¹ So, if the child’s testimony is necessary to protect her from further abuse, she is failed by a court system more concerned about harming her in the process of protecting her. This perhaps well-meaning, but misguided presumption is further addressed below. In addition, there are preparation and accommodation tools that an attorney using a child witness can utilize to minimize any trauma.⁸²

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This is noted elsewhere. When a judge interviews a child, he “might disregard an accurate statement rather than try to verify it.” Lisa Carol Rogers, *Child Custody: The Judicial Interview of the Child*, 47 La.L.Rev. 559, 573 (1987).

⁸⁰ See generally, Barbara A. Atwood, *The Children’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Ariz.L.Rev. 629 (2003).

⁸¹ *Id.* at 1051-1052.

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Ann M. Haralambie, *The Role of the Child’s Attorney in Protecting the Child Throughout the Litigation Process*, 71 N. Dak. L. Rev. 939, 971-978 (1995); Chris A. Messerly, *The Child Witness in Tort Cases: The Trials and Tribulations of Representing Children*, 24 Wm. Mitchell L. Rev. 169 (1998); John E.B. Myers, Myers on Evidence in Child, Domestic and

One Texas family court judge discussed the “*most commonly-accepted methods for involving a child in the divorcing process...during the adversarial phase, when attention centers on the child’s ability to contribute to the fact-finding process, rather than on the child’s need to be empowered.*”⁸³ She further explained that, “*A distinction exists between involving a child in the adversarial phase of the lawsuit in order to facilitate the fact-finding process and giving a child the opportunity to participate in the process of developing a parenting plan that will govern his or her life.*”⁸⁴ She explained that involving children in the fact-finding phase often results in “family dysfunction” and that in “high-conflict” cases “*the child’s ability to objectively contribute to the fact-finding process is questionable.*”⁸⁵ This illogical perspective is extremely troubling in several respects. First, in endangerment cases, the child’s ability to assist in his or her own protection is empowering. Second, the fact-finding process is essential to developing a safe parenting plan that will best govern the child’s life. Third, the family is already dysfunctional from the underlying abusive parental conduct- not from “conflict.”

Elder Abuse Cases §3.02 (2005).

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Debra H. Lehrmann, *The Child’s Voice: An Analysis of the Methodology Used to involve Children in Custody Litigation*, 65 Tex. B.J. 882 (2002).

⁸⁴ *Id.* at 885-886.

⁸⁵ *Id.* at 886.

Live testimony by a child especially concerns family court judges, because the emotional trauma of cross-examination and “siding” against a parent is considered too great.⁸⁶ One judge writes that his judicial peers, “*will be found to be almost unanimous in condemning any party who seeks to put a child on the stand.*”⁸⁷ One Florida family lawyer vehemently criticized such attitudes:

“Testifying in a dissolution of marriage case is stressful, so lets’ not allow the parties to testify.” Sounds bizarre?

How about, “We know that appearing in court causes stress to attorneys so we are going to have the attorneys appear via social works who will present the attorneys’ arguments for them.” Sound absurd?

Then how about a judge saying, “I never allow children to testify in family court because it is stressful for them.” I attended a family law seminar in October 1997 at which a panel of six judges and general masters appeared. Two of the six proudly made this statement...this judicial view means the exclusion of the testimony of those most affected by the family court decisions. Yet this judicial view is growing.⁸⁸

This Florida lawyer went on to describe several of his cases in which the vocal seminar judges refused to allow a) a very willing 10 year old child witness to testify that her father smoked crack cocaine and that she had no food to eat; b) a 16 year old to testify about problems in her father’s home during visitation; and c) a 10 and 14 year old to testify that their father’s domestic violence allegations

⁸⁶ *Id.* at 887.,

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Roderic Duncan, *Trial of Custody Cases As Viewed By a Judge*, in *Child Custody & Visitation Law and Practice* §27.09 [4] (Sandra Morgan Little ed., 1999).

⁸⁸ William D. Slicker, *Child Testimony*, 72 Fla.Bar J. 46 (Nov.1998).

against their mother were false.⁸⁹ The children were angry for being left out of the decision making process, which was likely more stressful than would have been the excluded testimony.⁹⁰ Of course, any child witness must first be competent to testify.⁹¹

With a healthy blend of humor and outrage, the author concluded:⁹²

And so it is with the new theory that “it is never in the best interest of children to testify in family matters.” Poppycock. It’s another theory, creeping in on cat feet, that undermines the main purpose of our judicial system. “Although minimizing trauma for child witnesses is an important social objective, the paramount purpose of a trial is to discover the truth about some event or transaction.”⁹³ However, this theory not only contradicts common sense (are we to cancel school testing and dentist appointments for children because they cause stress?) but it also flies in the face of the social sciences research. Someone needs to stand up and say, “The judges, like the emperor, have no clothes.”

A recent Louisiana case supports these observations. In *Bandy v. Bandy*,⁹⁴ a twelve year old testified in the custody modification trial that he observed drugs in his father’s truck, and accordingly feared his father due to this and other incidents

⁸⁹ *Id.*

⁹⁰

Id., citing Note, *Lawyering for the Child, Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 Yale L.J. 1126, 1163-1164 (1978).

⁹¹ John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, §§2.01-2.19 (2005).

⁹² *Id.*

⁹³ Citing Lucy McGough, *Child Witnesses: Fragile Voices in the American Legal System* 17 (1994).

⁹⁴ 971 So.2d 456 (La.Ct.App. 2007).

involving drug chaos in his father's home. The appellate court reversed the trial court's refusal to limit the child's visitation with his father.⁹⁵

There is ample documentation that it is in the best interest of the children victimized in endangerment cases to have an effective, empowered voice in their own protection, and that their testimony is not presumptively damaging.⁹⁶ One major study of criminal cases by Dr. Gail Goodman confirmed that most children are able to testify in a traditional manner when prepared and supported, and that the child witnesses had good post-trial reports about the experience. Many of those who did not testify were disappointed.⁹⁷

To appreciate the over-reactive nature of the abhorrence of the child as fact witness in family court custody cases, it is helpful to examine the role of child witnesses in other, more difficult contexts. In *Snell v. State*,⁹⁸ a fifteen year old

⁹⁵ *Id.* at 461-466.

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Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W.Va.L.Rev. 237, 321-322 (1999); John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §301 (2005), citing many psychological and medical studies.

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Gail S. Goodman, et al., *Testifying in Criminal Court*, 57 Monographs of the Society for Research in Child Development 1-141, at 121 (1992), cited in Myers, *supra*, § 301 at 140. The follow-up study 13 years later on the same children reported that both testifying and not testifying could have both positive and negative consequences, depending on the circumstances. Jodi A. Quas, et al., *Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court*, 70 Monographs of the Society for Research in Child Development 1-45 (2005). In family court cases, unlike criminal cases, if a child is not protected because she did not testify, she may be subjected to more ongoing abuse during continued visitation with the abusive parent, which would undoubtedly exacerbate the negative consequences.

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677 So.2d 786 (Ct.Crim.App.Ala. 1995). A similar delayed report of sexual abuse was adequately explained by the child victim's testimony in *State v. Paulson*, 2007 Iowa App. LEXIS (Ct.App. Feb. 14, 2007).

testified extensively about her sexual abuse by a neighbor three years earlier, and adequately explained to the jury her delayed reporting of the crimes. In *State v. Mitchell*, a ten year old girl convincingly testified to her stepfather's vicious and bloody attack on her mother, despite his threat to the child at the time that "If you try to call the police, I'm gonna snap your neck." Her seven year old sister also testified. The defendant was sentenced to thirty-seven years.⁹⁹ In *Commonwealth v. Parmelee*,¹⁰⁰ a stepfather was sentenced to 105-210 years in the state prison after his conviction for 61 sexual offences, including rape and incest, against his three young stepdaughters. Despite several years of penile and digital vaginal, oral, and anal penetration, which left intensive scarring, and the abuser's death threats to keep them from revealing his crimes, all three victims testified in the jury trial. In *State v. Jones*¹⁰¹, a nine year child and his ten year old sister testified against their father, who stabbed and slashed their mother with a butcher knife in the children's presence, then threw her down the stairs where she bled to death. The conviction resulted in a life sentence. Both children were described by the sheriff who found them as "basket cases" covered in their mother's blood.¹⁰²

⁹⁹ 2006 Tenn.Crim.App. LEXIS 426 (Jun.1, 2006).

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74 Pa.D.& C. 4th 62 (Com.Pl.Ct.2005); *aff'd* at 829 A.2d 363 (Pa.Sup.Ct. 2003); subsequent habeas relief denied in *Parmalee v. Piazza*, 622 F.Supp.2d 212 (M.D.Pa.2008).

¹⁰¹ 2002 Ohio 2791 (Ct.App.Ohio 2002).

¹⁰² *Id.* at *P87.

In *In Matter of K.R.J.B.*,¹⁰³ a juvenile court termination of parental rights trial, an eight year old boy testified that he hoped his grandparents would “really” be his “mom and dad” and wanted his birth mother to be his “x-mom” because she “does not take care of [him] right.” He recalled being left alone at night by his birth mother, and that he was scared. The child also testified to hard spankings with a belt from his mother’s boyfriend, with whom she fought “a million times” when they would “hit and cuss” at each other. In *State v. Armstrong*,¹⁰⁴ a fifteen year old girl described to a jury digital and penile penetration at age thirteen by her neighbor, who first undressed her and then was “moving up and down” and “breathing hard.”

In *Bourdon v. State*,¹⁰⁵ four children (ages 4, 6, 7, and 10) testified before a jury in the conviction of their uncle that he touched them anally and genitally. In *McCloud v. U.S.*,¹⁰⁶ another criminal jury trial, three children (ages 11, 7, and 6 years old at trial) “testified in a reasonably consistent fashion” about the physical abuse inflicted by their mother and her husband. In the juvenile court

¹⁰³ 228 S.W.3d 611, 616 (Ct.App.Mo.2007).

¹⁰⁴ 2005 Tenn. Crim. App. LEXIS 768 (July 22, 2005).

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2002 Alas.App. LEXIS 245 (Dec.11,2002). Similar child testimony was presented in *State v. Reiter*, 2003 Wash.App.LEXIS 62 (Jan.17, 2003).

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781 A.2d 744, 746 (D.C.Ct.App.2001). Some of the counts were remanded for a hearing concerning one of the adult witnesses, which was unconnected to the children’s testimony. *Id.* at 754. Similar physical abuse testimony was presented against the child victims’ father in *State v. Cabinatan*, 2005 Haw.App. LEXIS 104 (Mar.8, 2005).

dependency trial of *In re Veronica G.*¹⁰⁷, twelve and ten year old siblings testified to a pattern of physical abuse by their mother, including burns from a cigarette lighter, and extensive domestic violence.

Finally, in *Whitham v. Arkansas Dept. of Human Services*,¹⁰⁸ a seven year old was able to testify in the juvenile court adjudicatory hearing that her father took off her clothes, touched her “potty spot”, and made her drink his semen from a cup (“yellow stuff that came out of his body front”).

It is not suggested here that live testimony from children is the only way for their statements detailing their experience or observations of abuse to be admitted into evidence. In very many cases, the traditional non-hearsay extrajudicial statements and hearsay exceptions, such as verbal assertions, non-verbal assertions, state of mind reports, present sense impressions, excited utterances, statements for the purpose of diagnosis and treatment, fresh complaints of rape or sexual abuse, and residual exceptions come into the record as substantive evidence.¹⁰⁹

VI. CONCLUSION

When a family court judge confronts an endangerment case where facts, as both a matter of law and in the child’s best interest, are key to a safe custody

¹⁰⁷ 68 Cal.Rptr. 465, 470 (Ct.App.Cal. 2007).

¹⁰⁸ *Id.* at *2-12.

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Unquestionably, the most authoritative treatise here is John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, §§ 7.01-7.25 (2005).

outcome, the pursuit of truth and accurate fact finding is best ensured by a return to the basic judicial role of listening to witnesses, examining any corroborative evidence, and using logical inferences to fill in the gaps. Delegation of that fact-finding role to mental health evaluators and guardians *ad litem* defeats that task. Finally, if a child victim or witness is offered to prove or corroborate an important fact, the trial judge should attend to such testimony carefully, and without any castigation of the party calling the child to the stand.