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Mixing Oil & Water: Why Child-Custody Evaluations are not Meshing with the Best Interest of the Child

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Comment

Mixing Oil & Water: Why Child-Custody Evaluations are not Meshing with the Best Interests of the Child

*Bari L. Nathan**

The Illinois Marriage and Dissolution of Marriage Act provides the statutory requirements for marriage and dissolution of marriage in Illinois. Section 604(b) gives courts the discretion to appoint an evaluator in order to aid in the determination of child custody by evaluating the relevant parties and writing a report. If and when these 604(b) evaluators are appointed, there are virtually no guidelines that set forth what they may or may not do in the course of their evaluations. As a result of this lack of guidelines, 604(b) evaluators often employ clinical assessment instruments (i.e., psychological tests that assess clinical constructs such as personality) in order to aid in coming to a conclusion concerning custody. Judges often tend to favor an evaluator's opinion and fail to notice the tests' biases and lack of validity. As a result, the main determinant in child-custody decisions often comes down to the conclusions of faulty psychological testing despite the fact that other more effective methods such as interviewing may have been used in the course of evaluation. This process leaves much room for questioning whether the way child-custody evaluations are being employed are in fact serving the best interests of the child.

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INTRODUCTION

The purposes of the Illinois Marriage and Dissolution of Marriage Act (“IMDMA”)¹ are to strengthen the integrity of marriage and safeguard family relationships, promote settlement of disputes, mitigate potential harm to spouses and their children, and crucially, to secure the maximum possible involvement of both parents regarding their children’s well-being.² The language of the statute gives Illinois courts

1. 750 ILL. COMP. STAT 5/101 (2014).

2. *Id.* at 5/102; see *In re Marriage of Wade*, 946 N.E.2d 485, 490 (Ill. App. Ct. 2011) (“It is clear that the legislature intended for the circuit court to take the best interests and well-being of the parties’ children into account while conducting the proceedings on a dissolution of marriage.”); *In re Marriage of Davis*, 792 N.E.2d 391, 394 (Ill. App. Ct. 2003) (“[T]he overarching purpose of the [IMDMA] is to promote the best interest of the children . . .”).

the discretion to appoint an evaluator in order to help determine the outcome of custody decisions.³ While the statute effectively grants this authority to the courts, there are virtually no guidelines that set forth who the evaluator can be, what qualifications he or she must have, how the evaluators should conduct their evaluations, and what, if any, methods should be employed in the evaluation.⁴ In most cases, courts appoint mental-health experts like psychologists, psychiatrists, or social workers.⁵

Given the flexibility that they have in conducting their evaluations, most of these mental-health experts choose to conduct psychological tests on the parents and child involved in the litigation in order to come to a conclusion regarding their recommendation to the court.⁶ This

3. The statute uses the word “may” rather than “shall” to indicate that seeking the advice of professional personnel is discretionary, not mandatory. *See In re Marriage of Debra N. & Michael S.*, 4 N.E.3d 78, 90 (Ill. App. Ct. 2013) (acknowledging that it is within the court’s discretion to seek independent expert advice).

4. David I. Grund & Danielle E. Kestnbaum, *Child Custody Evaluations in the Circuit Court of Cook County and Throughout Illinois Do Not Serve the Best Interest of the Child: A Critical Consideration of the Flaws and Possible Solutions Thereto*, in 2ND ANNUAL GRUND & LEAVITT SYMPOSIUM ON CUTTING-EDGE FAMILY LAW ISSUES COURSE NOTEBOOK § 2-1, at 2 (2014); *cf.* 750 ILL. COMP. STAT. 5/604.5. In contrast to section 604(b)’s lack of guidelines, section 605.5 evaluations, which are ordered at the request of one of the litigants, outline requirements for these evaluations, including the requirement that the court must designate the time, place, conditions, and scope of the evaluation. “Section 605 provides the remedy intended by the legislature in cases where a party in a postdissolution proceeding seeks relevant evidence adduced in another postdissolution proceeding.” *Johnston v. Weil*, 946 N.E.2d 329, 336 (Ill. 2011).

5. *See In re Marriage of Auer*, 407 N.E.2d 1034, 1037 (Ill. App. Ct. 1980) (stating that the testimony of psychologists is generally acceptable in child-custody cases); *In re Marriage of Sieck*, 396 N.E.2d 1214, 1223 (Ill. App. Ct. 1979) (stating that the testimony of the psychologist is not determinative of the issue of custody, yet it may be properly considered with respect to whatever enlightenment it may provide the court in identifying the best interests of the children); *see also Johnston*, 946 N.E.2d at 332 (discussing how a psychiatrist was appointed by the court to conduct an independent evaluation and assist the court pursuant to section 604(b)); *In re Marriage of Saheb and Khazal*, 880 N.E.2d 537, 539 (Ill. App. Ct. 2007) (appointing a person with a doctorate in social work to evaluate the parties and minor child); *People ex rel. Rathbun v. Rathbun*, 362 N.E.2d 1136, 1141 (Ill. App. Ct. 1977) (stating that the trial court appointed a clinical psychologist to interview the parties and everyone involved in the controversy and present recommendations to the trial court).

6. *See, e.g., In re Marriage of Iqbal and Khan*, 11 N.E.3d 1, 16 (Ill. App. Ct. 2014) (stating that the evaluator conducted the Minnesota Multiphasic Personality Inventory); *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 851 (Ill. App. Ct. 2006) (discussing how specific parties completed the Minnesota Multiphasic Personality Inventory-2 (“MMPI-2”), the Adult-Adolescent Parenting Inventory, and the Millon Clinical Multiaxial Inventory-3 (“MCMI-3”)); *In re Marriage of Johnson*, 815 N.E.2d 1283, 1287 (Ill. App. Ct. 2004) (stating that the court-appointed psychologist administered the MMPI-2 to the parents in the litigation); *In re Marriage of Jaster*, 583 N.E.2d 659, 660 (Ill. App. Ct. 1991) (discussing how the court-appointed evaluator administered the MMPI-2 to the parties and met with the family members on approximately eight days); *In re Marriage of L.R. and A.L.R.*, 559 N.E.2d 779, 783 (Ill. App. Ct. 1990) (stating that the psychologist’s recommendations were based, in part, on the results of the Millon Clinical

presents a problem because the most commonly used psychological tests in family-court settings are what are known as clinical assessment instruments (“CAIs”), which have been demonstrated to be unreliable, invalid, and irrelevant in the context of child-custody proceedings.⁷ Evaluators base their conclusions on the results of these tests,⁸ and judges often fail to notice or concern themselves with the tests’ biases.⁹ Judges tend to rely heavily on expert opinion, and therefore these evaluations and testimonies are often dispositive on the outcome of the custody decision.¹⁰ Consequently, judges’ custody decisions are often influenced by the results of faulty psychological testing.¹¹

Choosing whether or not to appoint an evaluator and deciding other custody disputes requires courts to use the “best interest of the child” standard, which requires courts to make decisions in accordance with the child’s best interest.¹² Courts weigh many factors in ascertaining

Multiaxial Inventory).

7. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 48 (3d ed. 2007); see Grund & Kestnbaum, *supra* note 4, at 5 (stating that there is no reliable, custody-specific psychological test currently available that is tailored for people in the middle of a custody battle, nor are there any reliable tests that measure parenting capacity).

8. See David Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 PROF. PSYCHOL.: RES. & PRAC. 213, 214 (1993) (“[P]sychologists routinely overstep the boundaries of their professional role by offering opinions about custody and visitation matters based to a great extent, and sometimes exclusively, on the results of psychological testing.”).

9. See *infra* Part III.B.1 (discussing how courts have given psychological tests such as the MMPI-2 unsophisticated attention and fail to question the validity of these tests).

10. Robert M. Galatzer-Levy & Louis Krauss, *Introduction to SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 2–6 (Robert M. Galatzer-Levy & Louis Krauss, eds., 1999); Dana R. Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIM. L. 35, 35 (2002); see James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Reports*, 40 FAM. CT. REV. 164, 165 (2002) (stating that the expert’s report is usually taken at face value in court and not subject to cross-examination).

11. Baerger et al., *supra* note 10, at 35. The issue of admissibility of the evidence collected during the evaluation process and the recommendations that come from the evaluations are closely related to the problems that psychological tests pose in child-custody evaluations; however, this Comment is limited to the analyzing the problems that certain psychological tests pose rather than the issue of admissibility.

12. See *Johnston v. Weil*, 946 N.E.2d 329, 335 (Ill. 2011) (noting that section 603 of the IMDMA mandates that the court shall determine custody in accordance with the best interest of the child and shall consider all relevant factors in doing so); *People ex rel. Morris v. Morris*, 254 N.E.2d 478, 479 (Ill. 1969) (stating that the custody of a child should be awarded to any person only where such action is consistent with the welfare and best interests of the child); *In re Marriage of Bhati and Singh*, 920 N.E.2d 1147, 1153 (Ill. App. Ct. 2007) (discussing how a determination of the best interests of the child cannot be reduced to a bright-line test and must be made on a case-by-case basis); *In re Marriage of Bailey*, 474 N.E.2d 394, 396 (Ill. App. Ct. 1985) (“The trial court is directed to determine custody in accordance to the best interest of that child . . . [i]n custody cases the trial court is vested with great discretion because it has a better

what exactly is in the child's best interest, including: (1) the likelihood that the proposed move will enhance the general quality of life for both the custodial parent and the children; (2) the motives of the custodial parent in seeking the move; (3) the motives of the noncustodial parent in resisting the removal; (4) the effect on the non-custodial parent's visitation rights; and (5) whether a realistic and reasonable visitation schedule can be reached if removal is permitted.¹³ Section 604(b) of the IMDMA grants courts the discretion to appoint a child-custody evaluator, and its lack of guidelines for implementation, the use of faulty psychological testing in the evaluations, and judges' heavy reliance on evaluators' recommendations all cast doubt on whether the resulting custody decision is in the best interests of the child, and raise the question of whether there is a better way to ensure children's best interests are truly protected.¹⁴

This Comment provides background about the evolution of custody standards that eventually transformed into the "best interest of the child" standard, the statutory and common law "best interest of the child" standard in Illinois, the difference between forensic and therapeutic assessments, the different types of psychological instruments, the use of certain psychological tests and how they are administered, and the history of section 604(b) of the IMDMA.¹⁵ Part II discusses how the Illinois statute is enforced in practice as well as how other states approach using court-appointed evaluators in order to provide a context in which to place Illinois' law.¹⁶ Part III analyzes the current state of the law in Illinois; the use of psychological tests by 604(b) evaluators and their biases, unreliability, and flawed administration; and the direct effect these tests have on the outcome of

opportunity to observe the witnesses and to determine the best interests of the child."); *In re Marriage of Sieck*, 396 N.E.2d 1214, 1222 (Ill. App. Ct. 1979) ("In reviewing orders bearing upon child custody, it is also the duty of this court to give constant and unswerving attention to the best interests of the child."); *People ex rel. Rathbun v. Rathbun*, 362 N.E.2d 1136, 1141 (1977) ("Under a petition for change of custody, the best interests and welfare of the child are of primary concern to the court.").

13. *In re Marriage of Eckert*, 518 N.E.2d 1041, 1045 (Ill. 1988); *Winebright v. Winebright*, 508 N.E.2d 774, 776 (Ill. App. Ct. 1987); *In re Custody of Anderson*, 496 N.E.2d 345, 349 (Ill. App. Ct. 1986); *Gallagher v. Gallagher*, 376 N.E.2d 279, 281–82 (Ill. App. Ct. 1978).

14. See generally *Grund & Kestnbaum*, *supra* note 4, at 4–15 (opining that child-custody evaluations do not serve the best interest of the child because of scientific concerns and arguing for the implementation of a better system).

15. See *infra* Part I.A–F (providing context that will help understand why the use of CAIs are inappropriate in a child-custody litigation context).

16. See *infra* Part II.A–C (discussing how Illinois courts apply the language of section 604(b) when appointment of evaluator is contested by a party).

the child-custody proceedings.¹⁷ Finally, Part IV discusses the need for statutory guidelines of section 604(b) regarding the scope of an evaluator's evaluation, and ultimately proposes that the use of certain psychological tests in child-custody proceedings, namely CAIs, in custody proceedings should be abolished.¹⁸

I. BACKGROUND

The law governing child-custody evaluators is stated in section 604(b) of the IMDMA, and its lack of comprehensiveness leaves room for courts to interpret its meaning and determine how it should be enforced.¹⁹ Section 604(b) states:

The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court's witness. Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate. Upon the request of any party or upon the court's own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.²⁰

This Part begins by examining how child-custody standards have evolved over time.²¹ Next, this Part provides background about the "best interest of the child" standard in Illinois.²² This Part then examines the difference between therapeutic and forensic

17. See *infra* Part III.A–C (analyzing the lack of guidelines that section 604(b) has, leaving Illinois courts to apply it on an ad hoc basis, as well as the outcome-determinative nature of flawed psychological testing used in child-custody litigation).

18. See *infra* Part IV.A–B (proposing that Illinois should adopt a rule similar to that of California Rule of Court 5.225 and restrict psychological testing to tests that are meant to be used in the legal system, rather than psychological tests designed to be used in a clinical therapeutic setting).

19. 750 ILL. COMP. STAT 5/604(b) (2014).

20. *Id.*; see *In re Marriage of Debra N. & Michael S.*, 4 N.E.3d 78, 90 (Ill. App. Ct. 2013) (stating that section 604(b) of the IMDMA provides a mechanism for the court to appoint an independent evaluator on custody and visitation issues, the purpose of the statute is to make the information available to assist the circuit court, and the expert witness is appointed to protect the interests of minor children regarding custody and visitation issues).

21. See *infra* Part I.A (discussing the evolution of child-custody standards that eventually resulted in the "best interest of the child," the prevailing standard today).

22. See *infra* Part I.B (discussing how the standard is codified in Illinois law and how courts apply the standard).

assessments,²³ and compares certain psychological instruments.²⁴ Next, this Part provides background about the specifics of certain psychological tests and their typical administrations.²⁵ Finally, this Part explores the legislative history of section 604(b), and how the statutory language came to be what it is today.²⁶

A. *Evolution of Child-Custody Standards*

In the early nineteenth century, English law resolved custody disputes by placing the child in custody with the father.²⁷ Only one factual inquiry was made in these custody proceedings: whether one of the claimants was the biological father of the child and was married to the mother when the child was born.²⁸ This rule derived from ancient Rome where the “*paterfamilias*” was in control of all domestic and public life.²⁹ Children were seen as the property of their father, and this resulted in fathers having total control over their children.³⁰ All the slaves, children, and grandchildren of everyone in the patriarch’s power legally belonged to him.³¹

In colonial America, fathers were the economic head of the household and were awarded custody of children because of their economic importance.³² It was assumed that the father would be better

23. See *infra* Part I.C (discussing how therapeutic assessment occurs in the context of a clinical setting, such as therapy, while forensic assessment occurs at the behest of the legal system).

24. See *infra* Part I.D (discussing the difference between CAIs, forensic assessment instruments (“FAIs”), and forensically relevant instruments (“FRIs”).)

25. See *infra* Part I.E (discussing the differences between the MMPI-2, MCMI, and Rorschach tests, and how they are typically administered).

26. See *infra* Part I.F (discussing how the language of section 604(b) has developed over time, and whether any changes have been significant).

27. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 234 (1975); see *King v. DeManneville*, 102 Eng. Rep. 1054, 1055 (K.B. 1804) (stating that the father is entitled by law to the custody of his child).

28. Mnookin, *supra* note 27, at 234. A husband’s cruelty, violence, or infidelity were not enough to justify granting custody to the wife, even if the father was in jail at the time. See generally *King v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836); *Ex parte Skinner*, 27 Rev. R. 710 (C.P. 1824).

29. THOMAS H. MURRAY, *THE WORTH OF A CHILD* 53 (1996); Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 452 (2005).

30. Peskind, *supra* note 29, at 452.

31. MURRAY, *supra* note 29, at 53.

32. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 219 (1997); Mary Ann Mason, *Masters and Servants: The American Colonial Model of Child Custody and Control*, 2 INT’L J. CHILDREN’S RTS. 317, 319 (1994); Peskind, *supra* note 29, at

able to supervise the children because he was in control of apprentices and other laborers in his home.³³ This patriarchal preference began to erode in Revolutionary America.³⁴ The American Revolution transformed the idea of the family into a collection of individuals, each with his or her own rights, as opposed to the earlier idea of a unit headed by the patriarch.³⁵

By the end of the eighteenth century, children were no longer seen as their fathers' economic tools and the focus shifted into a consideration of children's needs and an inquiry into which parent would be better able to provide for those needs.³⁶ This shift in focus implicitly recognized the importance of separating the children's needs from their parents' needs.³⁷

Nineteenth-century American law continued to reject the idea of absolute paternal preference.³⁸ In nineteenth-century America, the family still had a patriarch as its head, and the law still considered women and children to be inferior, but judges increasingly began to intervene in family matters in order to protect individual family members' interests.³⁹ Many jurisdictions were authorized to grant custody to either the husband or wife in a custody proceeding.⁴⁰ Despite some statutes expressing a preference for paternal custody, a fault-based rule eventually emerged: "The children will be best taken care of and instructed by the innocent party."⁴¹

452; see Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1154 (stating that the common-law doctrine gave virtually absolute custody of any child to the father).

33. Mason & Quirk, *supra* note 32, at 219; Peskind, *supra* note 29, at 452; Teitelbaum, *supra* note 32, at 1154.

34. MURRAY, *supra* note 29, at 54; Peskind, *supra* note 29, at 452.

35. Peskind, *supra* note 29, at 452; see MURRAY, *supra* note 29, at 54 (commenting that the American Revolution, with its "fierce opposition to patriarchy," began a transformation: the family became a collectivity of individuals with their own rights and interests as opposed to an "organic whole with the patriarch as its head").

36. Peskind, *supra* note 29, at 454.

37. *Id.*

38. Mnookin, *supra* note 27, at 234; Peskind, *supra* note 29, at 452. During the course of the nineteenth century, the judiciary began to re-balance spouses' rights in determining custody. See generally Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts 1796–1851*, 73 NW. U. L. REV. 1038 (1979) (examining the evolution of American family law from 1796 through 1851).

39. MURRAY, *supra* note 29, at 54.

40. Mnookin, *supra* note 27, at 234. Many earlier cases demonstrate that the mother as well as the father could claim custody of the children. See, e.g., *Cole v. Cole*, 23 Iowa 433, 446 (1867); *Cook v. Cook*, 1 Barb. Ch. 639 (N.Y. 1846).

41. J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 518, 520 (1852); Mnookin, *supra* note 27, at 234; Bernadette Weaver-Catalana, Comment, *The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583, 613 (1995). See generally A. LLOYD, LAW OF DIVORCE 40–145 (1887) (discussing how courts were authorized to grant custody to

During the late nineteenth century and into the twentieth century, the wife typically filed for divorce, and she was required to prove that her husband was at fault in order to prevail in a custody proceeding.⁴² Given this social convention, courts began to award custody to the mother more often than the father.⁴³

Gradually during the twentieth century, the law evolved into favoring a maternal preference for child custody.⁴⁴ During this period, women began to obtain more social and economic power, their education levels increased, and society began to view women as having “maternal instincts” which were thought to make them better suited to care for children than men.⁴⁵ The courts began to interpret this movement as giving the mother a substantial preference, especially if the children involved were young.⁴⁶ This maternal preference rule, also known as the “tender years doctrine,” became incorporated into statutes and common law.⁴⁷ The law began to view women as having better morals and being better able to nurture and raise children than men.⁴⁸ This

either the mother or father).

42. Peskind, *supra* note 29, at 453–54.

43. *Id.*; Mnookin, *supra* note 27, at 235.

44. Mason & Quirk, *supra* note 32, at 219; Peskind, *supra* note 29, at 454; *see* Andre P. Derdeyn, *Child Custody Contests in Historical Perspectives*, 133 AM. J. PSYCHIATRY 1369, 1370–71 (1976) (noting that the presumption for custodial maternal preference corresponded with the rise in women’s rights and changes in how society perceived children’s needs).

45. Peskind, *supra* note 29, at 454; *see* Mason & Quirk, *supra* note 32, at 220.

As a general rule a *father* is entitled to the custody of his *minor children*; but when the parents live apart under a *voluntary separation*, and the father has left an infant child in the custody of its mother, such custody *will not be transferred* to the father . . . when the infant is of *tender age*, and of a *delicate and sickly habit*, peculiarly requiring a mother’s care and attention; and especially will not an order for such transfer be made where the qualifications of the father for the proper discharge of the parental office are not equal to those of the mother.

Mercein v. People, 25 Wend. 64, 64 (N.Y. 1840).

46. Mnookin, *supra* note 27, at 235; Peskind, *supra* note 29, at 454; *see* Ullman v. Ullman, 135 N.Y.S. 1080, 1083 (1926) (stating that a child at tender age is entitled to have the care, love and discipline that only a good and devoted mother can usually give).

47. Mnookin, *supra* note 27, at 235; Peskind, *supra* note 29, at 454; *see* *Miner v. Miner* 11 Ill. 43, 50 (1849) (affirming an order giving custody of a seven-year-old girl to her mother over the objection of the father, and basing its holding on the “tender care which nature requires, and which it is the peculiar province of a mother to supply”); *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322, 325 (N.Y. 1904) (stating that courts do not hesitate to award custody of young infants to the wife “as against the paramount right of the husband where the wife has shown herself to be the proper person”); Mason & Quirk, *supra* note 32, at 219 (stating that the relevant factors for determining the best interests of the child included the desires of the parents, the wishes of the child, the child’s needs, any special mental or physical conditions, the child’s sex and age, parental fitness, the moral fortitude of the parents, and a presumption in favor of the mother if the children were young).

48. Mason & Quirk, *supra* note 32, at 220; *see* MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 49–84 (1994) (stating that this “cult of motherhood” focused

maternal presumption of child custody remained intact for the first sixty years of the twentieth century.⁴⁹

In the mid-twentieth century, the rules affecting child custody transformed.⁵⁰ Society's attitudes toward children and families changed as a result of the feminist movement and the increasing presence of the federal government in family law matters.⁵¹ Feminism promoted theories of equal rights between men and women, and this contributed largely to the obviation of the maternal custodial preference.⁵² Moreover, in the 1960s and 1970s divorce rates were rising, women's traditional roles were challenged, and men began claiming sex discrimination in custody awards.⁵³ As a result of this turmoil, most states abandoned the maternal preference for custody and sought a more gender-neutral standard.⁵⁴ State legislatures drafted statutes for judges to apply the "best interest of the child" standard, and this standard became the new gender-neutral standard for courts to apply in child-custody proceedings.⁵⁵

on the superior nurturing and moral qualities of women that better suited them for raising children, as opposed to men, and the welfare of the child was no longer clearly served best by the father).

49. Mason & Quirk, *supra* note 32, at 220.

50. Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950–2000*, in *CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND* 3, 4 (Sanford N. Katz et al., eds., 2000); Peskind, *supra* note 29, at 455.

51. Grossberg, *supra* note 50, at 4.

52. Peskind, *supra* note 29, at 455. The irony is that feminism promoted theories of equal rights between men and women, but this led to getting rid of a presumption that favored women. Mason & Quirk, *supra* note 32, at 220.

53. Grossberg, *supra* note 50, at 8.

54. *Id.*; Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interest Standard*, in *ALL OUR FAMILIES, NEW POLICIES FOR A NEW CENTURY* 242–43 (Mary Ann Mason et al., eds., 1998); see Mason & Quirk, *supra* note 32, at 220 (stating that the presumption that the interests of a child during his or her "tender years" is best served by maternal custody was legally abolished and demoted to a "factor to be considered" in nearly all states between 1960 and 1990). By 1982, the only remaining states that gave mothers a custodial preference over fathers during the child's tender years were Alabama, Florida, Kentucky, Louisiana, Mississippi, Utah, and Virginia. Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 *FAM. L.Q.* 1, 11 (1984).

55. Mason & Quirk, *supra* note 32, at 220–21. The Uniform Marriage and Divorce Act defined the child's best interests as taking into account the following factors:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community;
- and (5) the mental and physical health of all individuals involved.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 282 (1998). The Act further notes that "[t]he court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." *Id.*

B. The Best Interest of the Child Standard in Illinois

The “best interest of the child” standard is codified in section 602 of the IMDMA, and it delineates all relevant factors that the court must consider in determining custody based on the best interests of the child, including:

(1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child’s potential custodian, whether directed against the child or directed against another person; (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; [and] (9) whether one of the parents is a sex offender[.]”⁵⁶

The “best interest of the child” standard does not support any legal presumptions that favor a particular sex, but rather aims to resolve custody disputes in a gender-neutral manner.⁵⁷ A court must consider many different factors and circumstances in order to ensure that the children’s welfare and best interests are protected.⁵⁸ Inherent in applying this standard is the requirement that courts predict future conditions that may affect a child’s welfare.⁵⁹ Resolving a custody dispute by applying this standard involves evaluating the attitudes, dispositions, capacities, and shortcomings of each parent, and the

56. 750 ILL. COMP. STAT. 5/602 (2014).

57. Peskind, *supra* note 29, at 455. In attempts to come to a more gender-neutral standard, many legislatures suggested joint custody, which gave men and women equal rights, or a primary caretaker preference, which quantified time spent with the child in order to decide who obtains custody. Despite these efforts, most states maintained the best interest standard. Mason & Quirk, *supra* note 32, at 221.

58. Peskind, *supra* note 29, at 455; *see In re Marriage of Sieck*, 396 N.E.2d 1214, 1222 (Ill. App. Ct. 1979) (stating that each situation is different and the general principles exist for the trial and reviewing court to reach a decision designed to protect children’s best interests).

59. Peskind, *supra* note 29, at 460.

Adjudication usually requires the determination of *past* acts and facts, not a prediction of *future* events. Applying the best-interests standard requires an individualized prediction: with whom will this child be better off in the years to come? Proof of what happened in the past is relevant only insofar as it enables the court to decide what is likely to happen in the future.

Mnookin, *supra* note 27, at 251.

inquiry focuses on the kind of person each parent is and what the child is like.⁶⁰

Despite this seemingly commendable nature of the standard's goals and objectives, courts have faced many challenges in applying it.⁶¹ Nonetheless, "best interest of the child" remains the favored standard for child-custody proceedings.⁶²

C. *Therapeutic v. Forensic Assessment*

Section 604(b) of the IMDMA gives the court the discretion to appoint an evaluator to help the court come to a conclusion regarding custody.⁶³ When a court appoints an evaluator in child-custody proceedings, the evaluators are often psychologists or other mental-health experts who provide evaluations in order to ascertain what, in fact, is the best interest of the child.⁶⁴ As part of their evaluations, these evaluators often conduct psychological tests to assess the parents, guardians, and children.⁶⁵

In order to understand why using psychological examinations in child-custody proceedings is problematic, it is important to understand the distinction between therapeutic assessments, which occur at the request and on behalf of the patient in a clinical setting,⁶⁶ and forensic

60. Mnookin, *supra* note 27, at 251.

61. Peskind, *supra* note 29, at 455. The best interest standard applies uniquely in each situation because each individual child and family is unique. See Mnookin, *supra* note 27, at 227 ("Custody law today reflects a complicated and chaotic multiplicity of such factors as the doctrinal thread invoked, the identity of the disputants, their prior relationship to the child, and the setting from which the dispute arose.")

62. Mason & Quirk, *supra* note 32, at 221; see *In re Marriage of Turk*, 12 N.E.3d 40, 45 (Ill. 2014) (stating that a range of considerations may affect the court's assessment of custody with the ultimate objective of serving the best interest of the child).

63. 750 ILL. COMP. STAT. 5/604(b) (2014).

64. Steven K. Erickson et al., *A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157, 158 (2007); see Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say about the "Best Interests of the Child"? An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 565–66 (1997) (stating that the best interests standard assumes that mental-health professionals have a sound basis for determining the best child-custody arrangements and impliedly, that lawyers and judges do not).

65. Erickson et al., *supra* note 64, at 157; see Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135, 142 (2002) (opining that given the risk of error associated with unstructured clinical decision-making, it is not surprising that mental-health professionals conducting custody evaluations have resorted to using psychological tests); see also Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 FAM. L.Q. 565, 573 (1996) (stating that when a child-custody evaluation is conducted by a psychologist, the MMPI-2 is often used as part of the evaluation process).

66. MELTON ET AL., *supra* note 7, at 43.

assessments, which occur at the behest of the legal system.⁶⁷ These two types of assessments differ in a number of aspects, particularly the identity of the client, the focus and scope of the examination, the response style and involvement of the client, and the pace of the evaluation.⁶⁸ Assessment in a child-custody proceeding is always a forensic evaluation, because the goal is not to diagnose or treat the examinee, but rather to answer legal questions and analyze the effect the evaluation should have on the litigation.⁶⁹

Therapeutic assessments occur at the request and on behalf of a patient as a function of a clinical environment, such as a personality test administered in a therapy session.⁷⁰ In this type of setting, evaluators discuss with their patients broad issues such as diagnosis, personality functioning, and treatment to change behavior.⁷¹ The treating clinician is focused on understanding the client's subjective point of view of the issue or situation,⁷² and the client typically is voluntarily seeking an assessment rather than at the request of a third party.⁷³ Clients have great autonomy and input regarding the objectives and procedures of their assessment, and the therapist and client seek to develop a common agenda based on the client's needs.⁷⁴ Therapeutic assessment

67. *Id.*

68. *Id.* at 44; *see Johnston v. Weil*, 946 N.E.2d 329 (Ill. 2011) (finding that the 604(b) report was not privileged under the Confidentiality Act because the parties were interviewed in the context of child-custody proceedings, not a therapeutic setting where they were receiving mental-health services). *See generally* Stuart Greenberg & Daniel Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL.: RES. & PRAC. 50, 54 (1997) (comprehensively discussing the ten major differences between therapeutic and forensic relationships).

69. *See* MELTON ET AL., *supra* note 7, at 45 (discussing that the most obvious difference between a forensic and therapeutic evaluation is that the focus of forensic evaluations is dictated by a legal system that is only occasionally interested in information about treatment); Kirk Heilbrun, *Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests*, 29 FAM. L.Q. 63, 67 (1995) [hereinafter Heilbrun, *Child Custody Evaluation*] (stating that when a mental-health professional is asked by a judge to perform an evaluation for the purpose of a legal proceeding, the mental-health professional assumes a forensic role in that case).

70. MELTON ET AL., *supra* note 7, at 43; *see* Greenberg & Shuman, *supra* note 68, at 54 (stating that the therapist is answerable to the client, who decides whether or not to use the therapist's services).

71. MELTON ET AL., *supra* note 7, at 44.

72. *Id.* at 45. This is because the goal of therapeutic assessment is to diagnose issues and provide treatment, which varies from person to person.

73. *Id.* at 44. Therapeutic assessment is obviously not voluntary in the case of someone being forced to go to court-ordered therapy, but in the majority of circumstances, individuals seek therapy because they are looking to improve some aspect of their mental health and want to seek help.

74. *Id.*; *see* Greenberg & Shuman, *supra* note 68, at 54 (stating that the therapist is usually supportive, accepting, and empathic).

emphasizes caring, trust, and empathic understanding,⁷⁵ and the evaluations typically proceed at a leisurely pace.⁷⁶

In contrast, forensic evaluations address narrowly defined, non-clinical events, and evaluators minimally address clinical issues such as treatment or diagnosis.⁷⁷ In a forensic examination setting, the forensic examiner is concerned with assisting a third party—such as an attorney, court, or employer—by providing these parties with information about the examinee that it might not otherwise have.⁷⁸ People undergoing a forensic evaluation in the context of a legal issue almost always do so at the request of a third party such as a judge or attorney.⁷⁹ Statutes or common-law tests that are relevant to the legal issue rather than the examinee, determine the objectives in forensic evaluations.⁸⁰ The threat of conscious and intentional distortion of information is substantially greater in the forensic, rather than therapeutic, context.⁸¹ A forensic evaluator is more likely than a therapist to be confronted with resistant and uncooperative individuals; therefore, the coerced nature of the evaluation process and the importance of its outcome threatens the validity by way of possible misrepresentation.⁸² Further, the forensic examiners may not communicate to their examinees the idea that they are playing a “helping” role.⁸³ There is greater emotional distance between the forensic clinician and the client, and factors such as court schedules and limited resources limit opportunities for contact between them.⁸⁴ A forensic evaluation should address the threshold issues,

75. MELTON ET AL., *supra* note 7, at 44. See generally Nicholas Hobbs, *Sources of Gain in Psychotherapy*, 17 AM. PSYCHOLOGIST 741 (1962) (noting that empathic understanding by the therapist is one general source of gain in therapy).

76. MELTON ET AL., *supra* note 7, at 44. In therapeutic contexts, diagnoses may be reconsidered during the course of treatment and revised after the initial interviews are conducted.

77. *Id.* at 44; see *id.* at 45 (“It is neither proper nor necessary to subvert the forensic assessment process with a misplaced emphasis on diagnostic and treatment concerns.”).

78. *Id.* at 44; see Greenberg & Shuman, *supra* note 68, at 54 (stating that the forensic evaluator is ultimately answerable to the attorney or court in the case of a court-appointed expert, who decides whether to use the evaluator’s services).

79. MELTON ET AL., *supra* note 7, at 44; see Greenberg & Shuman, *supra* note 68, at 55 (stating that in the context of a forensic evaluation, the court or attorney retains the forensic evaluator for litigation).

80. MELTON ET AL., *supra* note 7, at 44; see Greenberg & Shuman, *supra* note 68, at 55 (stating that the forensic evaluator must know the law as it relates to the assessment of the particular impairment claimed).

81. MELTON ET AL., *supra* note 7, at 46.

82. *Id.*

83. *Id.* at 44; see Greenberg & Shuman, *supra* note 68, at 54 (stating that forensic evaluators are usually neutral and objective, and their task is to remain dispassionate as to the psycholegal issues being evaluated).

84. MELTON ET AL., *supra* note 7, at 44; Greenberg & Shuman, *supra* note 68 and accompanying text.

which are typically a description of relevant mental functioning, the relevant legal capacity, and the relationship between the two.⁸⁵

D. Psychological Instruments

Testing has become a significant aspect of forensic evaluation for many reasons, especially because it offers a scientific dimension and objectivity to opinions, which lawyers and judges favor.⁸⁶ Psychological testing instruments can be broken into three categories: CAIs, forensically relevant instruments (“FRIs”), and forensic assessment instruments (“FAIs”).⁸⁷ The most common psychological instruments are CAIs.⁸⁸ These are psychological tests that were initially developed for use in assessment, diagnosis, and treatment planning in the context of therapy.⁸⁹ CAIs are the least likely of the three types of psychological instruments to be of direct help in forensic evaluations, because they assess general psychological constructs such as depression, intelligence, and anxiety that are too far removed from the issues courts consider in custody disputes.⁹⁰

FRIs assess clinical constructs that are most relevant to the evaluation of people involved in the legal system, such as psychopathy and violence risk.⁹¹ They are less frequently used by mental-health professionals and tend to be less thoroughly researched.⁹²

FAIs are specifically designed to be used in the legal system and to assess “psycholegal” capacities such as competence to stand trial or the ability to handle certain legal matters, such as an estate.⁹³ In the case of

85. Heilbrun, *Child Custody Evaluation*, *supra* note 69, at 67.

86. MELTON ET AL., *supra* note 7, at 47; David Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 PROF. PSYCHOL.: RES. & PRAC. 213, 216 (1993).

87. MELTON ET AL., *supra* note 7, at 47–48. *See generally* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 31–53 (2d ed. 1986) (introducing the concept of FAIs).

88. MELTON ET AL., *supra* note 7, at 48. This should not be surprising considering therapeutic assessments are more common than forensic assessments, and CAIs are used in therapeutic assessments to measure clinical constructs such as personality and depression.

89. *Id.*

90. *Id.* *But cf.* FORENSIC USES OF CLINICAL ASSESSMENT INSTRUMENTS (Robert P. Archer ed., 1st ed. 2006) (providing a basis to understand the appropriate uses and limitations of CAIs in forensic contexts).

91. MELTON ET AL., *supra* note 7, at 48.

92. *See id.* (stating that FRIs that are proven valid provide a good balance between clinical confidence and legal relevance).

93. *Id.*; *see* GRISSO, *supra* note 87, at 34 (“A forensic assessment instrument is an operational definition of a legally relevant functional ability concept. Therefore, FAIs are intended to provide data that can manage the conceptual gap between legal constructs and psychological constructs.”); Kirk Heilbrun, *The Role of Psychological Testing in Forensic Assessment*, 16 LAW

child custody, the legal competency in question is parental competency, or which parental situation represents the best prospects for the child's best interests.⁹⁴ The development of FAIs suggests that mental-health professionals are aware that CAIs have limited relevance in forensic contexts.⁹⁵

FAIs offer several benefits for forensic assessments.⁹⁶ They provide the examiner with structure and make clear what it is that the law wants to know about human capacities, because these capacities are part of the FAI structure.⁹⁷ They can help the examiner in logically arriving at data and inferences that are consistent with the purpose of forensic assessments: to make legally relevant assessments for legal competencies—such as parental competency.⁹⁸ Further, FAI data that are valid on their face in relation to the legal competency construct would require a smaller inferential leap than when an expert attempts to relate psychiatric symptoms or personality traits⁹⁹ to the legal competency construct at issue in the litigation.¹⁰⁰

E. Psychological Tests and How They Are Administered

Before discussing commonly used psychological tests in child-custody proceedings, it is necessary to understand certain psychological terms, namely validity, reliability, and relevance. The concepts of validity and reliability are two fundamental psychometric properties of psychological tests that describe the scientific characteristics of a test.¹⁰¹ The validity of a test is the degree to which it measures what it purports

& HUM. BEHAV. 257, 257 (1992) [hereinafter Heilbrun, *Role of Psychological Testing*] (stating in a footnote that forensic assessment refers to information produced by mental-health experts intended for application to legal issues).

94. GRISSO, *supra* note 87, at 6.

95. MELTON ET AL., *supra* note 7, at 48; *see* GRISSO, *supra* note 87, at 31 (discussing how the use of these CAIs will not satisfy courts' needs for relevant and credible information about the examinee's functional abilities related to the relevant legal competency at issue).

96. *Id.* at 35. *But see id.* at 38 (discussing the potential for misuse and misinterpretation of FAIs and the need to approach them with caution and scrutiny).

97. *Id.*

98. *Id.*; *see* MELTON ET AL., *supra* note 7, at 52 (stating that some FAIs are described as interview guides that provide a list of topics to help clinicians structure their interviews around appropriate legal issues).

99. Psychiatric symptoms or general personality traits are assessed by CAI, which require an expert or evaluator to make an inference as to what the specific symptom or trait says about the legal competency construct at issue.

100. GRISSO, *supra* note 87, at 35; *see* MELTON ET AL., *supra* note 7, at 53 (stating that when FAIs are used, the chain of inferences from test behavior to legal criterion is typically reduced).

101. David Medoff, *The Scientific Basis of Psychological Testing: Considerations Following Daubert, Kumho, and Joiner*, 41 FAM. CT. REV. 199, 200 (2003).

to measure.¹⁰² It describes the accuracy of a test and the degree to which it provides a true measurement of whatever is being assessed.¹⁰³ Another way of thinking about validity is by posing the question: “Are we measuring what we think we are measuring?”¹⁰⁴ Reliability relates to the consistency or stability of the test results.¹⁰⁵ It provides information about whether a test provides similar results after it is repeated over time or across situations.¹⁰⁶

A test must be scientifically reliable to be scientifically valid; however, a test does not have to be scientifically valid to be scientifically reliable.¹⁰⁷ Both reliability and validity are vital in assessing whether or not a test is accurate, and they relate to each other because they provide meaningful insight about the truthfulness and consistency of the test results.¹⁰⁸ Reliability is a part of what makes a test valid, because if a test cannot consistently yield the same results, then it is unlikely that the test is conveying useful information.¹⁰⁹ While the two concepts are related, it is possible for a test to have a high level of reliability and a low level of validity, and vice versa.¹¹⁰ For example, a test could yield the same results each time it is repeated, thus having a high level of reliability, but it could be a completely inaccurate way of measuring what is trying to be measured, thus having a low level of validity.¹¹¹

Not all tests are valid for measuring aspects of emotion, cognition, or

102. *Id.*; Saul McLeod, *What is Validity?*, SIMPLY PSYCHOLOGY (2013), <http://www.simplypsychology.org/validity.html>.

103. Medoff, *supra* note 101, at 200; McLeod, *supra* note 102.

104. Dana R. Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIM. L. 35, 47 (2002).

105. Medoff, *supra* note 101, at 200; Saul McLeod, *What is Reliability?*, SIMPLY PSYCHOLOGY (2013), <http://www.simplypsychology.org/reliability.html>.

106. Medoff, *supra* note 101, at 200; *see* McLeod, *supra* note 105 (stating that if research findings yield consistent results, they are reliable).

107. Baerger et al., *supra* note 104, at 47. A common-sense example of the relationship between validity and reliability is the traditional accuracy v. precision analogy in target practice. You can be precise but not accurate (every arrow hits the same spot, but that spot is off to the side of the bull’s-eye), accurate but not precise (you always hit around the bull’s-eye, but never the same spot twice), or both accurate and precise (all bull’s-eyes).

108. Medoff, *supra* note 101, at 200–01.

109. Baerger et al., *supra* note 104, at 47.

110. Medoff, *supra* note 101, at 201; *see* Heilbrun, *Role of Psychological Testing*, *supra* note 93, at 265 (stating that the lower the reliability of a given test, the lower the limit on the validity of the construct being measured, and it should come as no surprise that tests with reliability coefficients below .80 have been criticized for containing excessive error variance and thus, poorer validity).

111. Medoff, *supra* note 101, at 201. In this situation, even though there is a high level of reliability, the test is not accurate because it has a low level of validity. A test is meaningless if it yields the same results each time but the test is not measuring what it is supposed to measure.

personality functioning.¹¹² Relevance refers to the extent to which a test is valid for the purpose for which it is used.¹¹³ A psychological test can be both reliable and valid, but it can also lack relevance if used in an inappropriate context.¹¹⁴ In deciding whether to administer a test in either a therapeutic or forensic context, the primary factor considered should be the degree to which the results will inform the decision that has to be made in the specific instance.¹¹⁵ Therefore, forensic examiners should be most concerned with the scientific research that links certain test results to relevant legal outcomes.¹¹⁶ If thorough research shows a relationship between the results of a certain test and a construct that is related to legally relevant behaviors, then administration of that test may be warranted.¹¹⁷ However, if a test only provides information about diagnosis or a general level of functioning and does not speak to legally relevant conclusions, then speculating about legally relevant behavior is not warranted and the clinician should inquire about a more direct way of addressing the issue.¹¹⁸

1. Minnesota Multiphasic Personality Inventory-2

The Minnesota Multiphasic Personality Inventory-2 (“MMPI-2”) is the most widely used objective personality inventory in the world,¹¹⁹ as well as the most frequently used objective adult personality test in family court evaluations.¹²⁰ It was originally developed to screen for

112. *Id.*

113. Baerger et al., *supra* note 104, at 47.

Psychological tests may simply be irrelevant when clinicians attempt to use them in a straightforward fashion to measure legal concepts. The translation between the results of a test developed to measure a psychological construct such as “impulsivity” or “depression,” and the outcome on a legal dimension such as “ability to assist counsel in one’s own defense,” *must* be justified by the *relevance* of that psychological construct to the legal construct.

Heilbrun, *Role of Psychological Testing*, *supra* note 93, at 265 (internal citations omitted).

114. See Baerger et al., *supra* note 104, at 47 (“A psychological test can be reliable and valid, and still lack relevance in the context of a [child-custody evaluation] because it is not valid for the purpose of determining parenting capacity.”).

115. MELTON ET AL., *supra* note 7, at 50.

116. *Id.*; Heilbrun, *Role of Psychological Testing*, *supra* note 93, at 265.

117. MELTON ET AL., *supra* note 7, at 50.

118. *Id.*

119. ALAN F. FRIEDMAN ET AL., *PSYCHOLOGICAL ASSESSMENT WITH THE MMPI-2*, at 1 (2001). The widespread use of the MMPI-2 is attributable to many factors including its simplicity of scoring and administration, an objective response format important for research designs, a large item pool, many useful applications, and thousands of empirically established correlates.

120. Grund & Kestnbaum, *supra* note 4, at 13; Shuman, *supra* note 65, at 144; see Michaela C. Heinze & Thomas Grisso, *Review of Instruments Assessing Parenting Competencies Used in Child Custody Evaluations*, 14 BEHAV. SCI. & L. 293, 294–95 (1996) (explaining how the most frequently used test to identify parenting capacity was the Ackerman-Schoendorf Scales for

severe psychopathology like depression, paranoia, and schizophrenia.¹²¹ A 1986 national survey reported that about seventy percent of custody evaluators used the MMPI in their custody evaluations,¹²² and a 1997 national survey reported that ninety-two percent of clinicians used the MMPI in their evaluations.¹²³ A 2005 national study analyzing the administration, scoring, and interpretation of the MMPI-2 in child-custody evaluations found that ninety-eight percent of child-custody evaluators used the MMPI-2 in their evaluations.¹²⁴

The MMPI-2 is designed to make it difficult for people to fake their answers, deny their problems, or give a particular impression.¹²⁵ The test is based on empirical research rather than a clinician's assumptions on what certain answers reveal about a particular personality trait.¹²⁶ The test is a self-report measure of the test-taker's psychological state that entails 567 true-or-false items.¹²⁷

The MMPI-2 has ten main clinical scales and three main validity scales.¹²⁸ Eight of the clinical scales address psychopathology such as depression, anxiety, and post-traumatic stress disorder, while two of the clinical scales address personality traits such as anger and hypochondriasis.¹²⁹ The three validity scales are designed to assess whether the subject's responses are an accurate representation of the

Parent Evaluation of Custody ("ASPECT"), which includes having parents complete the MMPI-2 in addition to several other assessment steps).

121. Shuman, *supra* note 65, at 145; *see infra* Part III.B.1 (analyzing why using a test originally designed to screen for such psychopathologies is a problem in the context of measuring the "best interest of the child").

122. William G. Keilin & Larry J. Bloom, *Child Custody Evaluation Practices: A Survey of Experienced Professionals*, 17 PROF. PSYCHOL. RESP. & PRACT. 338, 341 tbl.3 (1986); Joseph T. McCann et al., *The MCMI-III in Child Custody Evaluations: A Normative Study*, 1 J. FORENSIC PSYCHOL. PRAC. 27, 29 (2001).

123. Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL. RESP. & PRACT. 137, 140 (1997); McCann et al., *supra* note 122, at 29.

124. James N. Bow et al., *An Analysis of Administration, Scoring, and Interpretation of the MMPI-2 and MCMI-II/III in Child Custody Evaluations*, 2 J. CHILD. CUSTODY 1, 8 (2005).

125. Mike Drayton, *The Minnesota Multiphasic Personality Inventory-2 (MMPI-2)*, 59 OCCUPATIONAL MED. 135, 135 (2009).

126. *Id.*

127. *Id.*; *see* MELTON ET AL., *supra* note 7, at 48 (stating that the MMPI-2 consists of objectively scored items and produce protocols that have been related to global symptom patterns, likely diagnoses, and characteristics of general personality functioning and behavior).

128. Shuman, *supra* note 65, at 145; *see* FRIEDMAN ET AL., *supra* note 119, at 2-3 (the three validity scales include: Lie (*L*), Infrequency (*F*), and Correction (*K*). The ten clinical scales include: Hypochondriasis (*Hs*), Depression (*D*), Hysteria (*Hy*), Psychopathic Deviate (*Pd*), Masculinity-Femininity (*Mf*), Paranoia (*Pa*), Psychasthenia (*Pt*), Schizophrenia (*Sc*), Hypomania (*Ma*), and Social Introversion (*Si*)).

129. Shuman, *supra* note 65, at 145.

psychopathology being tested and the subject's approach to the testing.¹³⁰

However, the MMPI-2 is not intended for use with adolescents.¹³¹ The MMPI-2 committee recognized that adult norms would not apply to an adolescent form, and a separate revision of the test was conducted for the sole purpose of developing an adolescent instrument derived from the MMPI-2.¹³² This revision was named the MMPI-A (Adolescent).¹³³

2. Rorschach Inkblot Technique

The Rorschach Inkblot Technique ("Rorschach") is the second most frequently used test in child-custody evaluations and the most frequently used projective test (as opposed to "objective" in the case of the MMPI) in child-custody evaluations.¹³⁴ The test consists of ten ambiguous inkblot drawings that are individually shown to a test subject, who is then asked to explain or describe what he or she sees.¹³⁵ The test administrator then records the responses and asks follow-up questions.¹³⁶

The theory behind projective tests is that test subjects will unknowingly project aspects of their emotional lives, involving unconscious material, in an unstructured test.¹³⁷ How a subject constructs the stimulus is assumed to project the subject's psychological functioning and personality.¹³⁸

3. Millon Clinical Multiaxial Inventory

The Millon Clinical Multiaxial Inventory ("MCMI") is the second

130. Erickson, *supra* note 64, at 161; *see* FRIEDMAN ET AL., *supra* note 119, at 3 (stating that the validity scales were developed in order to assist in recognizing test records produced by uncooperative or deceptive participants with various test-taking attitudes or participants who had a difficult time understanding or reading the test items).

131. FRIEDMAN ET AL., *supra* note 119, at 9.

132. *Id.*; R. P. Archer, *Use of the MMPI with Adolescents: A Review of Salient Issues*, 4 CLINICAL PSYCHOL. REV. 241, 241-51 (1984).

133. FRIEDMAN ET AL., *supra* note 119, at 9. The MMPI-A was released in 1992 and is intended for adolescents between the ages of fourteen and eighteen, although if an individual possesses the necessary reading level and comprehension abilities but less than fourteen years old, it can still be used on that individual. Because the adolescent norms include eighteen-year-olds, a clinician who is testing an eighteen-year-old could use either the MMPI-A or the MMPI-2.

134. MELTON ET AL., *supra* note 7, at 559; Ackerman & Ackerman, *supra* note 123, at 140; Keilin & Bloom, *supra* note 122, at 341 tbl. 3.

135. Erickson et al., *supra* note 64, at 164; Shuman, *supra* note 65, at 148.

136. Erickson et al., *supra* note 64, at 164; Shuman, *supra* note 65, at 148.

137. *See* MELTON ET AL., *supra* note 7, at 49 ("By 'projecting' their own perceptions and interpretations onto these ambiguous stimuli, clients reveal something about the ways in which they view and comprehend their environment.")

138. MELTON ET AL. *supra* note 7, at 49; Shuman, *supra* note 65, at 148.

most frequently used objective personality test in child-custody litigation.¹³⁹ While a 1997 national study found that only about thirty-four percent of child-custody evaluators utilized the MCMI with adults,¹⁴⁰ a 2005 national study found that the use of the MCMI by child-custody evaluators in their evaluations increased to sixty-three percent.¹⁴¹ The test was designed for use with individuals who evidence problematic emotional and interpersonal symptoms, who are undergoing professional psychotherapy, or who are undergoing a psychodiagnostic evaluation.¹⁴²

The MCMI is a paper-and-pencil test that consists of 175 true-or-false items that assess personality disorders based on Theodore Millon's theory of personality and psychopathology.¹⁴³ It provides a measure of twenty-four personality disorders and clinical syndromes for adults undergoing psychological assessment or treatment and assists clinicians in diagnosing psychiatric conditions and developing treatments that take into account the subject's personality style and coping behavior.¹⁴⁴ The test is often given in a clinical setting when questions arise over a specific diagnosis or personality characteristics that are affecting the patient's ability to cope with his or her life.¹⁴⁵

F. History of Section 604(b)

In 1977, the Illinois General Assembly enacted the IMDMA,¹⁴⁶ which borrowed from the Uniform Marriage and Divorce Act.¹⁴⁷ The

139. Ackerman & Ackerman, *supra* note 123, at 140; Shuman, *supra* note 65, at 146.

140. McCann et al., *supra* note 122, at 29.

141. Bow et al., *supra* note 124, at 12.

142. Jane Framingham, *Millon Clinical Multiaxial Inventory (MCMI-III)*, PSYCH CENTRAL, <http://psychcentral.com/lib/millon-clinical-multiaxial-inventory-mcmi-iii/0006106> (last visited Apr. 26, 2015).

143. Shuman, *supra* note 65, at 146. *See generally* THEODORE MILLON, CLINICAL MANUAL FOR THE MCMI-II (1987); James N. Bow et al., *MMPI-2 and MCMI-III in Forensic Evaluations: A Survey of Psychologists*, 10 J. FORENSIC PSYCHOL. PRAC. 37, 38 (2010) (stating that unlike the MMPI-2, the MMCI is a criterion-referenced test and does not assume a normal curve of traits or disorders and that the MCMI's items correspond closely with criteria from the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders*).

144. Framingham, *supra* note 142; *see* Bow et al., *supra* note 143, at 39 (stating that unlike the MMPI-2, the MMCI is a criterion-referenced test and does not assume a normal curve of traits or disorders).

145. Framingham, *supra* note 142.

146. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

147. The Uniform Marriage and Divorce Act was an attempt by the National Conference of Commissioners on Uniform State Laws to make marriage and divorce laws more uniform and has had a huge impact on marriage and divorce laws in all states. *Marriage and Divorce Act, Model Summary*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/ActSummary.aspx?title=Marriage%20and%20Divorce%20Act,%20Model> (last visited Apr. 26, 2015).

custody provisions of the IMDMA codified Illinois custody law and set the statutory standards for multiple facets of child-custody proceedings in divorce cases.¹⁴⁸

Section 604 of the IMDMA derives from section 404 of the Uniform Marriage and Divorce Act, which states in a comment: “This section . . . [is] designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.”¹⁴⁹ From 1992 to 2011, section 604(b) stated:

The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel. Counsel may examine, as a witness, any professional personnel consulted by the court, designated as a court’s witness.¹⁵⁰

Yet, in 2011, the statute was amended to add the following language:

Professional personnel consulted by the court are subject to subpoena for the purposes of discovery, trial, or both. The court shall allocate the costs and fees of those professional personnel between the parties based upon the financial ability of each party and any other criteria the court considers appropriate. Upon the request of any party or upon the court’s own motion, the court may conduct a hearing as to the reasonableness of those fees and costs.¹⁵¹

This amendment essentially added a provision addressing how the costs and fees should be allocated and did nothing to affect the relevant part of section 604(b). The 2011 amendment remains in place today, and section 604(b) as a whole remains functionally the same.¹⁵²

II. DISCUSSION

This Part discusses how section 604(b) has been enforced in Illinois courts, and how other states have crafted their related statutes.¹⁵³ Comparing Illinois to California and Pennsylvania illustrates how different states address the child-custody evaluation process, and provides a scale with California being the most comprehensive, Pennsylvania being less comprehensive, and Illinois being the least

148. John H. Doll, *The Child Custody Provisions of the Illinois Marriage and Dissolution of Marriage Act*, 56 CHI.-KENT L. REV. 671, 672 (1980).

149. UNIF. MARRIAGE AND DIVORCE ACT § 404, 9A U.L.A. 381, cmt. (1998).

150. 750 ILL. COMP. STAT. 5/604 (2010).

151. 750 ILL. COMP. STAT. 5/604 (2011).

152. 750 ILL. COMP. STAT. 5/604 (West 2014).

153. See *infra* Part II.A–C (discussing the enforcement of section 604(b) and California’s codification of an evidentiary rule governing disputed child-custody suits).

comprehensive.¹⁵⁴

A. *The Current State of the Law: Enforcement of Section 604(b)*

In practice, Illinois courts may or may not decide to appoint an evaluator, and if they choose to do so, they may or may not decide to follow the evaluator's recommendations, because section 604(b) uses extremely vague language and provides virtually no guidance as to how courts should apply it.¹⁵⁵ When a court appoints a 604(b) evaluator and a party to the litigation opposes the evaluator's testimony or evaluation, the court tends to resolve the issue in most cases by acknowledging its discretion in being able to appoint an evaluator and choose whether or not to follow the evaluator's recommendations, and denying any objections the party claims.¹⁵⁶ The lack of statutory guidance leaves much room for courts to reject a party's argument that the court erred in either accepting or rejecting an evaluator's recommendation, or appointing an evaluator at all.¹⁵⁷ The statute gives courts the option to

154. *Id.*

155. The majority of cases deal with issues about a party opposing the appointment of an evaluator, or failing to adopt or not adopt the recommendation, rather than a party arguing that the court erred in failing to appoint an evaluator.

156. *See generally* Johnston v. Weil, 946 N.E.2d 329 (Ill. 2011) (finding that the 604(b) report may only be disclosed to the court, counsel, and parties in the particular proceeding after the wife alleged violations by disseminating the information obtained by the 604(b) evaluator); *In re* Marriage of Lonvick, 995 N.E.2d 1007, 1017 (Ill. App. Ct. 2013) (finding that 604(b) allows a trial court to seek advice in making a custody determination and denying the court the ability to consider the advice contained in the evaluator's report would make no sense when an opposing party argued that the report should not be admitted into evidence); *In re* Marriage of Debra N. & Michael S., 4 N.E.3d 78, 90 (Ill. App. Ct. 2013) (finding that the court has the discretion to go against the recommendation of the evaluator when the opposing party argues that the court's order was not consistent with the evaluator's recommendation); *In re* Marriage of Bhati and Singh, 920 N.E.2d 1147, 1158 (Ill. App. Ct. 2009) (finding that section 604(b) refers to the advice of professional personnel, and does not refer to or intend to include "expert" opinions when an opposing party argues that the psychiatrist should not have been permitted to testify because she was not an expert); *In re* Marriage of Auer, 407 N.E.2d 1034, 1037 (Ill. App. Ct. 1980) (noting that the policy of section 604(b) is to provide the court with as much relevant evidence as can be secured concerning the best interests of the child and finding that there was no error in the trial court's acceptance of the psychologist's testimony); *In re* Marriage of Sieck, 396 N.E.2d 1214, 1123 (Ill. App. Ct. 1979) (finding that the language of 604(b) is permissive and not mandatory when the petitioner argued that the trial court should have ordered psychiatric tests in accordance with 604(a), 604(b) and 605); *People ex rel. Rathbun v. Rathbun*, 362 N.E.2d 1136, 1142 (Ill. App. Ct. 1977) (finding that where the parties agreed to consult with a psychologist and agreed that he would present a recommendation to the court, the appointment of the evaluator was not reversible error on the part of the trial court).

157. *See, e.g., In re* Marriage of Lonvick, 995 N.E.2d at 1017 (stating that the trial court did not err in accepting the 604(b) report as substantive evidence because the doctor made his recommendations based on personal observation, interviews with the parties' doctors, and interviews with and correspondence from the parties' friends, neighbors, and family members); *In re* Marriage of Debra N. & Michael S., 4 N.E.3d at 91 (finding that based on the record, the trial

appoint an evaluator, but nothing in the language of the statute requires the court to agree or disagree with the recommendation given by the evaluator.¹⁵⁸ More importantly, there are no standards in assessing how much weight the evaluator's opinion should be given.¹⁵⁹

Further, the statute does not require the evaluator to have any specific qualifications, but in most cases judges appoint mental-health experts such as psychologists, psychiatrists, or social workers.¹⁶⁰ The purpose of the statute is to give courts the option to appoint an evaluator in order to ascertain the best interests of the child, whether or not that results in following or rejecting the evaluator's opinion.¹⁶¹ Even without any statutory requirement or clearly stated required qualifications for the evaluators, in most cases, courts tend to follow the evaluator's recommendation.¹⁶²

court's finding was not against the manifest weight of the evidence even though it went against some of the evaluator's suggestions).

158. See, e.g., *In re Marriage of Saheb & Khazal*, 880 N.E.2d 537, 547 (Ill. App. Ct. 2007) (stating that an appellate court will not reverse a trial court's decision simply because it decided not to follow all of a 604(b) evaluator's recommendations and nothing in 604(b) requires a trial court to follow the advice of the evaluator); *In re Marriage of Bailey*, 474 N.E.2d 394, 396 (Ill. App. Ct. 1985) (noting that the testimony of psychologists and social workers are relevant in determining custody, but their opinions are not binding on the court).

159. See *supra* notes 157–58 and accompanying text (citing examples of courts grappling with how much weight to give evaluators' opinions).

160. See *Johnston*, 946 N.E.2d at 335 (discussing the appellate court's conclusion that the plain language of 604(b) provides no limitations or exceptions when the court-appointed expert witness is a psychiatrist or other mental-health professional, and stating that a court must not depart from this plain language by reading such an exception into the statute); see also *id.* at 336 (stating that the term "professional personnel" is intentionally broad).

161. See *In re Marriage of Bailey*, 474 N.E.2d at 396 (stating that in custody cases, the trial court is vested with great discretion because it has a better opportunity to observe the witnesses and determine the best interests of the child, and the testimony of psychologists and social workers are relevant to that determination, but their opinions are not binding on the court).

162. See, e.g., *In re Marriage of Lonvick*, 995 N.E.2d at 1021 (affirming the trial court's judgment which accepted and relied on the evaluator's testimony); *In re Marriage of Saheb & Khazal*, 880 N.E. 2d at 547 (finding that the trial court implemented most of the evaluator's recommendations but deciding not to implement all of the recommendations is not a ground for reversal); *In re Marriage of Auer*, 407 N.E.2d 1034, 1038 (Ill. App. Ct. 1980) (affirming the decision of the trial court which accepted the testimony of a psychologist as to the mother's mental condition); *In re Marriage of Sieck*, 396 N.E.2d 1214, 1224 (Ill. App. Ct. 1979) (affirming the order of the trial court which granted custody to the father and was consistent with the evaluator's recommendation); *People ex rel. Rathbun v. Rathbun*, 362 N.E.2d 1136, 1143 (Ill. App. Ct. 1977) (affirming the order of the trial court which found that, based on the evidence provided by the evaluator, the petitioner would be able to provide a more stable environment for the children and the children ought to remain together). But see *In re Marriage of Debra N. & Michael S.*, 4 N.E.3d at 90 (going against the evaluator's recommendation by granting custody to the parent the evaluator believed would not serve the best interests of the child); *In re Marriage of Bailey*, 474 N.E.2d at 396 (discussing the trial court's decision to depart from the advice from the evaluator because it believed the evaluator's recommendation was not in the best interests of the children involved).

In 2011, the Supreme Court of Illinois was faced with a different type of dispute from those that Illinois courts previously faced. The court in *Johnston v. Weil* found that the evaluations, communications, reports, and information obtained pursuant to section 604(b) are not confidential under the Mental Health and Developmental Disabilities Confidentiality Act when the evaluator is a mental-health professional such as psychologist or psychiatrist.¹⁶³ This decision differed from most disputes arising out of section 604(b) as most disputes arose from the appointment of an evaluator and whether or not the court chose to follow the evaluator's recommendations.¹⁶⁴ In *Johnston*, an ex-wife filed a complaint against her two ex-husbands, the child's appointed representatives in the divorce proceedings, and her ex-husbands' attorneys alleging that they violated the Mental Health and Developmental Disabilities Confidentiality Act by disseminating information obtained by the 604(b) evaluator.¹⁶⁵ The court held that section 604(b) limited disclosure of the evaluator's report to the parties in the particular proceeding and provided no limitations or exceptions when the professional is a mental-health professional.¹⁶⁶ The court further found that the 604(b) evaluator's report was not privileged because the ex-wife was being evaluated for forensic purposes, not for mental-health purposes from a therapist in a therapeutic context.¹⁶⁷

B. How California Crafts Its Statute

Section 730 of the California Evidence Code is the substantive rule that gives California courts the authority to appoint an expert to evaluate the facts and circumstances surrounding a disputed child-custody request.¹⁶⁸ In 1999, California became the first state to promulgate statewide Rules of Court that set forth all necessary components of a court-ordered child-custody evaluation and the ethical rules that all evaluators must follow.¹⁶⁹ Today, California still remains the only state to enact such rules.¹⁷⁰

California Rule of Court 5.220¹⁷¹ governs court-ordered child-

163. *Johnston*, 946 N.E.2d at 332.

164. *See supra* note 156 and accompanying text (discussing cases where the court used its discretion in deciding whether to consider evaluators' recommendations).

165. *Johnston*, 946 N.E.2d at 329–30.

166. *Id.* at 330.

167. *Id.*

168. CAL. EVID. CODE § 730.

169. Philip M. Shahl & Lorraine Martin, *An Historical Look at Child Custody Evaluations and the Influence of AFCC*, 5 FAM. CT. REV. 42, 43 (2013).

170. *Id.*

171. CAL. R. CT. 5.220.

custody evaluations and delineates several requirements for the responsibility for evaluation services; the scope of evaluations; cooperation with professionals in another jurisdiction; evaluator qualifications, training, continuing education, and experience; the service of the evaluation report; and cost-effective procedures for cross-examination of evaluators.¹⁷² The Rule further requires each court in California to adopt a local rule in order to implement Rule 5.220,¹⁷³ and requires a child-custody evaluator to consider the best interest of the child within the scope and purpose of the evaluation, strive to minimize the potential for psychological trauma to children during the evaluation process, and include in the initial meeting with each child an age-appropriate explanation of the evaluation process.¹⁷⁴

Moreover, all evaluations are required to include a written explanation of the process that clearly describes the purpose of the evaluation,¹⁷⁵ procedures used, and time required to gather and assess the information.¹⁷⁶ If psychological tests will be used, the written explanation must clearly describe the role of the results in confirming or questioning other information or previous conclusions, scope and distribution of the report, limitations on the confidentiality process, and cost and payment responsibility for the evaluation.¹⁷⁷ The Rule also provides that, in the data collection and analysis process, the evaluator may review pertinent documents related to custody, including local police records; observe the interaction between the parents and child; interview the parents; conduct age-appropriate interviews; observe the children with their parents; and consult with other experts to develop information that may be outside the evaluator's area of expertise.¹⁷⁸

Ethical duties for child-custody evaluators include maintaining objectivity, providing and gathering balanced information for both parties, and controlling variables for bias.¹⁷⁹ They must not offer any

172. CAL. R. CT. 5.220(c)–(j).

173. CAL. R. CT. 5.220(d)(1)(A)(i).

174. CAL. R. CT. 5.220(d)(2)(A)–(C).

175. See *In re Marriage of Seagondollar*, 43 Cal. Rptr. 3d 575, 586–87 (Ct. App. 2006) (finding that the order appointing the evaluator was “woefully inadequate” because it failed to define the purpose and scope of the evaluation at all, and the evaluator could have corrected the trial court’s error by supplying a written protocol describing the purpose of the evaluation and explaining the procedures he intended to follow as required by California Rule of Court 5.220(e)(1)(A)).

176. CAL. R. CT. 5.220(e)(1)(A)–(B).

177. CAL. R. CT. 5.220(e)(1)(B)–(E).

178. CAL. R. CT. 5.220(e)(2)(A)–(F).

179. CAL. R. CT. 5.220(h)(1); see *In re Marriage of Adams & Jack A.*, 148 Cal. Rptr. 3d 83, 102–03 (Ct. App. 2012) (finding that because the court awarded the mother sole custody based on the evaluator’s biased report and on a child statement which may have been influenced by the

recommendations about a party unless that party has been evaluated directly or in consultation with another qualified neutral professional, and they must operate within the limits of their own experience and must disclose any limitations or bias that may affect the evaluators' ability to conduct the evaluation.¹⁸⁰

California Rule of Court 5.225 governs the requirements for appointing child-custody evaluators and is divided into fifteen parts and numerous sub-parts that thoroughly explain the requirements for licensing, education, training, experience, procedures for selecting an alternative evaluator, the use of interns, and evaluator responsibilities.¹⁸¹ Under the Rule, in order to become an evaluator, a person must be licensed as a psychiatrist, psychologist, marriage and family therapist, or clinical social worker.¹⁸² If a person is not so licensed, the rule provides that the person may be appointed if there are no other certified evaluators who are willing and available to perform custody evaluations within a reasonable amount of time, the parties stipulate to the person, and the court approves the person.¹⁸³ Further, a child-custody evaluator is required to complete forty hours of education and training on topics including psychological and developmental needs of children; family dynamics; and the effects of separation, divorce, domestic violence, sexual abuse, and physical, emotional, and substance abuse.¹⁸⁴ Child-custody evaluators must complete at least four partial or full court-appointed child-custody evaluations within the preceding three years and each of the four evaluations must result in a written or oral report.¹⁸⁵ In addition to the licensing, education, and training requirements, a court-appointed evaluator is required to complete continuing education and training requirements in order to remain eligible for appointment.¹⁸⁶

A court-appointed evaluator must submit a declaration of compliance with all of the applicable education, training, and experience requirements; inform each adult party of the purpose, nature, and method of the evaluation; and provide information about the evaluator's

evaluator's bias, the custody order denying the father's motion to remove the evaluator was reversed). According to the court, impartial objectivity is a critical requirement for a section 730 child-custody evaluator. *Id.* at 99.

180. CAL. R. CT. 5.220(h)(3) & (6).

181. CAL. R. CT. 5.225(a); *see* Grund & Kestnbaum, *supra* note 4, at 23.

182. CAL. R. CT. 5.255(c)(1)(A)–(D).

183. CAL. R. CT. 5.255(c)(2)(A)–(B).

184. CAL. R. CT. 5.255(d)(1)–(3).

185. CAL. R. CT. 5.225(g).

186. CAL. R. CT. 5.225(i)(1).

education, experience, and training.¹⁸⁷ An evaluator is also required to use interview, assessment, and testing procedures that are consistent with generally accepted clinical, forensic, scientific, diagnostic, or medical standards.¹⁸⁸ In addition to providing for the qualifications of the evaluator, the Rule also delineates qualifications of interns if used in the custody evaluation process.¹⁸⁹ Interns must be enrolled in a master's or doctorate program or have obtained a graduate degree qualifying for licensure or certification as a clinical social worker, marriage and family therapist, psychiatrist, or psychologist.¹⁹⁰ The interns must be currently completing or have completed the necessary coursework to qualify for their degree in the subjects of child-abuse assessments and spousal or partner abuse assessment.¹⁹¹

C. How Pennsylvania Crafts Its Statute

Pennsylvania's statute, while much less comprehensive than California's, includes more administrative language that would allow a court to reasonably interpret the legislature's intent of how the evaluation process should proceed.¹⁹²

Rule 1915.8 of Pennsylvania Rules of Civil Procedure states:

The court may order the child(ren) and/or any party to submit to and fully participate in an evaluation by an appropriate expert or experts. The order, which shall be substantially in the form set forth in Rule 1915.18, may be made upon the court's own motion, upon the motion of a party with reasonable notice to the person to be examined, or by agreement of the parties. The order shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it shall be made and to whom distributed.¹⁹³

The statute additionally provides that upon entering an order directing an evaluation pursuant to the Rule, the court must consider all appropriate factors including the allocation of costs, execution of appropriate authorizations and consents to facilitate the examination, any deadlines imposed regarding the completion of the examination, the production of any report and underlying data to counsel, and any additional safeguards that are deemed appropriate as a result of alleged domestic violence or child abuse.¹⁹⁴

187. CAL. R. CT. 5.225(I).

188. CAL. R. CT. 5.225(I)(3).

189. CAL. R. CT. 5.225(m).

190. CAL. R. CT. 5.225(m)(2)(A).

191. CAL. R. CT. 5.225(m)(2)(B).

192. PA. R. CIV. P. 1915.8(a)-(d).

193. PA. R. CIV. P. 1915.8(a).

194. PA. R. CIV. P. 1915.8(a)(1)-(5).

Further, the expert is required to give the court any copies of any reports arising out of the evaluation, including the findings, results of all tests given, diagnoses, and conclusions.¹⁹⁵ The evaluator is subject to cross-examination by all counsel, regardless of who obtains or pays for the evaluation.¹⁹⁶ If a party refuses to obey an order of the court made under subsection (a) of the rule, the court is allowed to enter an order disallowing the disobedient party to support or oppose any designated claims or defenses and prohibit the party from introducing into evidence certain testimony or documents.¹⁹⁷ Willful failure or refusal to comply with an order entered pursuant to the rule may give rise to a finding of contempt, and the court may impose sanctions as it deems appropriate.¹⁹⁸

Unlike Illinois' statute, Pennsylvania's refers to a substantive form that must be filled out when ordering an expert child-custody evaluation.¹⁹⁹ It provides whether the evaluator shall or shall not make specific recommendations for legal custody, depending on what the parties decide.²⁰⁰ Further, it mandates that the parties fully participate with the evaluator on a timely basis, and that the evaluation be covered by insurance if it is medically necessary.²⁰¹ The form additionally states that the evaluator may consult with and interview anyone who the evaluator reasonably believes can provide relevant information, including other experts and fact witnesses.²⁰² Additionally, the evaluator is allowed to consult with other qualified professionals without court approval.²⁰³ Similar to Illinois and California, Pennsylvania's statute also states that the evaluation report must be made available to counsel and the evaluator must be subject to cross-examination by all counsel.²⁰⁴

D. Conclusion

Comparing Illinois' statute granting courts authority to conduct an evaluation for child-custody purposes to other states provides a context for where Illinois stands in relation to other states, and sheds light on its

195. PA. R. CIV. P. 1915.8(b).

196. *Id.*

197. PA. R. CIV. P. 1915.8(c).

198. *Id.*

199. PA. R. CIV. P. 1915.8(a); *see* PA. R. CIV. P. 1915.18 (providing the form to be used for the order of the court in directing expert evaluation in a custody matter pursuant to Rule 1915.8).

200. PA. R. CIV. P. 1915.18(3).

201. PA. R. CIV. P. 1915.18(4)–(5).

202. PA. R. CIV. P. 1915.18(8).

203. PA. R. CIV. P. 1915.18(9).

204. PA. R. CIV. P. 1915.18(11), (13).

lack of detail and comprehensiveness.²⁰⁵ California has the most comprehensive statute, as it is the only state that has promulgated necessary components of a child-custody evaluation and the ethical rules that all evaluators must follow.²⁰⁶ Pennsylvania's statute, while having more substance than Illinois', still fails to have the level of detail that California's statute provides.²⁰⁷ Illinois fails to provide any guidance, as it grants authority to the courts without delineating any necessary components of a child-custody evaluation or ethical duties of evaluators.²⁰⁸

III. ANALYSIS

The development of the "best interest of the child" standard has led mental-health professionals to increasingly become part of the decision-making process in custody cases in order to provide an objective analysis of the child's psychological state to aid the court in determining the best interests of the child.²⁰⁹

To determine the child's psychological state and what custody decision is in his or her best interest, most mental-health professionals conduct psychological evaluations.²¹⁰ Typically, comprehensive psychological evaluations are conducted on each parent, child, and potential stepparent.²¹¹ The mental-health expert's role is to provide a

205. See *infra* Part III.A (analyzing section 604(b)'s lack of guidelines for Illinois courts to follow in the course of the evaluation).

206. Shahl & Martin, *supra* note 169, at 43.

207. Pennsylvania's statute does not include ethical duties of the evaluator; any licensing, training, or experience requirements for evaluators; and it does not require a detailed explanation of the evaluation and procedures used.

208. See *infra* Part III.A (analyzing section 604(b)'s lack of guidelines for Illinois courts to follow in the course of the evaluation).

209. See H. D. Kirkpatrick et al., *Psychological and Legal Considerations in Reviewing the Work Product of a Colleague in Child Custody Evaluations*, 8 J. CHILD. CUSTODY 103, 104 (2011) (describing the custody evaluator's role); Shuman, *supra* note 65, at 136 (explaining the transformation of the role of mental-health professionals in child-custody determinations); see also McCann et al., *supra* note 122, at 28 (stating that increased attention is given to using psychological tests in child-custody proceedings as a result of the growing area of psychological expertise in court).

Psychological testing of parents in custody cases (for intelligence, personality, and/or psychopathology) has been described variously as of no utility, of dubious value, potentially useful when performed selectively and only when a clear need is identified, and one of the better indications of a parent's true feelings and intentions. Rarely are opinions of this type offered with any empirical support or with reference to any particular psychological tests.

GRISSE, *supra* note 87, at 200 (internal citations omitted).

210. McCann et al., *supra* note 122, at 28.

211. McCann et al., *supra* note 122, at 28; see Erickson et al., *supra* note 64, at 158 (explaining the goals of psychological testing in custody determinations).

neutral and objective evaluation of the parents and children and make recommendations to the court based on the psychological best interests of the child.²¹² This role requires mental-health experts to assess the connection between the child's developmental and socio-emotional needs and the parents' ability to meet those needs.²¹³ When psychological tests are employed in a forensic context, it is the duty of the expert to use methods that are valid, reliable, and relevant to the ultimate issue in the litigation.²¹⁴ In the context of child-custody proceedings, a psychological test is relevant if it provides data that will help guide the determination of what the best interests of the child actually are.²¹⁵

The American Psychological Association ("APA") first published its guidelines for child-custody evaluations in divorce proceedings in 1994.²¹⁶ The APA guidelines stressed the need for multiple methods of collecting data, cautioned against over-interpreting or inappropriately interpreting the data in the evaluation process, and emphasized the importance of parenting capacity, the needs of the child, and the resulting "fit" in assessing the child's best interests.²¹⁷

The way in which child-custody evaluations are conducted by 604(b) evaluators is problematic, because section 604(b) lacks clear guidelines that would provide consistency in the outcomes of custody cases,²¹⁸ the

212. Heilbrun, *Child Custody Evaluation*, *supra* note 69, at 63; Kirkpatrick et al., *supra* note 209, at 104; *see* American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 863 (2010) [hereinafter *Guidelines for Child Custody Evaluations*] ("Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the psychological best interests of the child." (internal quotation marks omitted)).

213. Baerger et al., *supra* note 104, at 35; *see Guidelines for Child Custody Evaluations*, *supra* note 212, at 864 (stating that the most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child's psychological needs).

214. McCann et al., *supra* note 122, at 29; *see* Heilbrun, *Role of Psychological Testing*, *supra* note 93, at 265 (suggesting that mental-health professionals consider the reliability of a test before using it in a psychological evaluation); Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L.Q. 97, 99 (1995) (discussing how mental-health professionals have been criticized for going beyond the limitations of scientific knowledge in custody cases).

215. McCann et al., *supra* note 122, at 29. If the test measures anything other than the best interests of the child, it is not valid in the context of child-custody proceedings.

216. Francella A. Quinell & James N. Bow, *Psychological Tests Used in Child Custody Evaluations*, 19 BEHAV. SCI. L. 491, 492 (2001). *See generally Guidelines for Child Custody Evaluations*, *supra* note 212 (discussing the 2010 version of the APA's child-custody evaluation guidelines).

217. Quinell & Bow, *supra* note 216, at 492. The APA guidelines have continued to stress the same ideas over the years. *See generally Guidelines for Child Custody Evaluations*, *supra* note 212 (discussing the 2010 version of the APA guidelines for child-custody evaluations).

218. Grund & Kestbaum, *supra* note 4, at 4.

science behind certain psychological tests used in evaluations lacks reliability, validity, and relevance,²¹⁹ and the lack of guidelines exacerbates the potential risks of evaluator bias.²²⁰ Further, evaluators' opinions tend to directly affect the outcome of the decision, which is problematic because their opinions are often based on the faulty results that arise when CAIs are conducted in forensic contexts.²²¹ These problems call into question the utility of using CAIs such as the MMPI-2 in child-custody evaluations to help the court come to a determination regarding the best interest of the child.²²² This Part first addresses the lack of guidelines for 604(b) evaluators regarding the scope of their evaluation.²²³ Then, it analyzes how certain psychological tests may be unreliable, invalid, and biased when used in a family court setting.²²⁴ Lastly, it analyzes the direct effects that evaluators' opinions have on the custody decision.²²⁵

A. Lack of 604(b) Guidelines for Illinois Courts

The language of section 604(b) is vague and leaves much room for interpreting what is and is not allowed during the appointment process.²²⁶ Section 604(b) merely states that the court "may seek the

219. *Id.* But cf. STANLEY KISSEL & NELSON W. FREELING, *EVALUATING CHILDREN FOR COURTS USING PSYCHOLOGICAL TESTS* 5 (1990).

[Testing] can provide information . . . to determine fitness in being able to parent adequately. . . . Psychological testing can also reveal the emotional makeup of the child and parents and can provide information about such dimensions as maturity, antisocial tendencies, propensity to anxiety and depression, and dangerousness to self and others. . . . Psychological testing may provide important information regarding which parent may be more capable to raise a child and also in resolving visitation issues.

Id.

220. The lack of guidelines leads to psychologists and other mental-health professionals utilizing faulty psychological testing and administration, and research has demonstrated that the particular professional conducting the tests can affect the outcome of the tests based on their biases. See *infra* Part III.B.2 (discussing the effect that psychologists have on the outcome of psychological tests).

221. See *supra* note 10 and accompanying text (discussing how the judiciary's heavy reliance on expert testimony results in most expert opinions being the dispositive factor in child-custody cases).

222. Grund & Kestnbaum, *supra* note 4, at 4.

223. See *infra* Part III.A (analyzing section 604(b)'s lack of guidelines for Illinois courts to follow in the course of the evaluation).

224. See *infra* Part III.B (discussing the unreliability and biased nature of CAIs in family court settings).

225. See *infra* Part III.C (analyzing the direct effects of using court-appointed mental-health experts in child-custody cases).

226. See 750 ILL. COMP. STAT. 5/604(b) (2014) ("The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis.").

advice of professional personnel” but does not provide further explanation as to what that entails; rather, the statute only uses vague language that grants courts the discretion to appoint an evaluator to help in the determination of child custody.²²⁷ When Illinois courts choose to appoint an evaluator, psychologists or psychiatrists are usually appointed even though they are not required, and the evaluator has free reign to employ whatever method he or she chooses in conducting the evaluation and report.²²⁸ The Illinois Supreme Court even expressly stated that section 604(b) does not provide any limitations or exceptions when the appointed professional is a mental-health professional.²²⁹

Another issue is that section 604(b) does not provide a minimum level of training or education and therefore implies that someone with a low level of knowledge and skills about conducting psychological evaluations could complete the evaluation.²³⁰ Furthermore, no rules require a certain level of experience in evaluators.²³¹ It is necessary for Illinois to set minimum experience requirements because the quality of the evaluator affects the overall quality of the evaluation itself.²³²

In addition to the lack of requirements regarding experience, section 604(b) lacks any rules regarding time constraints for the evaluation process.²³³ Under the language of section 604(b) and the lack of guidelines that steer the evaluation process, an evaluator could

227. *See id.* (“The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis.”); *Johnston v. Weil*, 946 N.E.2d 329, 336 (Ill. 2011) (“[T]he term professional personnel is intentionally broad” (internal quotation marks omitted)); Grund & Kestnbaum, *supra* note 4, at 3 (“The lack of clarity in ‘the best interest of the child’ standard is only further compounded by the fact that there is nothing within the IMDMA that defines the term ‘professional’ specifically within the context of [child-custody evaluations], nor is there any instruction as to acceptable methods for execution of the evaluations.”).

228. *See supra* Part II.A. (discussing what happens in practice when Illinois courts appoint an evaluator pursuant to section 604(b)).

229. *Johnston*, 946 N.E.2d at 337.

230. Grund & Kestnbaum, *supra* note 4, at 4; *see* 750 ILL. COMP. STAT. 5/604(b) (allowing the court to “seek the advice of professional personnel,” but not establishing minimum credentials for the professional personnel).

231. Grund & Kestnbaum, *supra* note 4, at 5; *see* 750 ILL. COMP. STAT. 5/604(b) (omitting a requirement that professional personnel have a certain level of experience).

232. Grund & Kestnbaum, *supra* note 4, at 5.

233. Compare Katherine J. Baker, *Addressing the Pre-Admission and Extrajudicial Use of Child Custody Reports*, 23 J. AM. ACAD. MATRIM. L. 155, 170–74 (2010) (discussing the research that discusses both the positive and negative implications of having a mental-health professional versus a lay person providing observational data to the court), and Kirkpatrick et al., *supra* note 209, at 105 (opining that research shows there are reasons to be concerned about the quality of child-custody evaluations given the wide variance in the evaluators’ training and experience to conduct what may be the most complex and difficult forensic mental-health evaluation); *with* 750 ILL. COMP. STAT. 5/604(b) (omitting any requirement that professional personnel have a certain level of experience).

theoretically choose to spend one hour with the child and parents before reaching a decision.²³⁴ Nothing in the statute even states that interviews must be conducted, although interviews are usually part of the evaluation process.²³⁵ Further, the lack of guidelines is problematic because there is no consistency with which to apply the statute in practice: Illinois courts can appoint whomever they want²³⁶, and the evaluator can essentially do whatever he or she wants in the evaluation process.²³⁷ Because section 604(b) lacks guidelines regarding requirements for evaluators' experience, training, education, and time constraints for the evaluations, courts are left to interpret the statute as narrowly or broadly as they see fit, and it makes it difficult to adequately control the evaluation process.²³⁸

*B. Unreliability and Biased Nature
of Clinical Assessment Instruments in Family
Court Settings*

This Subpart first analyzes the likely flawed validity and reliability of CAIs when used in child-custody proceedings.²³⁹ It then proceeds to

234. This does not usually happen in practice, but the statute allows for it based on its plain language. *See infra* note 235 and accompanying text (discussing cases where an evaluator's interview with parties was considered in the evaluator's final recommendation).

235. *See, e.g., In re Marriage of Lonvick*, 995 N.E.2d 1007, 1011 (Ill. App. Ct. 2013) (describing how the court-appointed evaluator met with the parties on multiple occasions and conducted several interviews with different people, ultimately recommending that the father be granted sole custody of the child); *In re Marriage of Debra N. & Michael S.*, 4 N.E.3d 78, 80–81 (Ill. App. Ct. 2013) (stating that the court-appointed licensed clinical psychologist interviewed both parents and observed their interactions with the child in addition to observing the child's interactions with her stepbrother and half brothers); *In re Marriage of Bhati & Singh*, 920 N.E.2d 1147, 1152 (Ill. App. Ct. 2009) (discussing how the court-appointed clinical psychologist interviewed all of the relevant parties, visited the parties' homes, and spoke with the child's teacher and daycare provider); *In re Marriage of Bailey*, 474 N.E.2d 394, 395 (Ill. App. Ct. 1985) (stating that the psychiatrist interviewed both the parties and the children); *In re Marriage of Sieck*, 396 N.E.2d 1214, 1217 (Ill. App. Ct. 1979) (stating that the court-appointed psychologist interviewed each child separately and then together with the father); *People ex rel. Rathbun v. Rathbun*, 362 N.E.2d 1136, 1141 (Ill. App. Ct. 1977) (stating that the court-appointed clinical psychologist interviewed the parties and all persons involved in the controversy).

236. "Professional personnel" is the only limitation. As long as the person is a "professional," he or she can be appointed. *See* 750 ILL. COMP. STAT. 5/604(b) ("The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis.").

237. *See Johnston v. Weil*, 946 N.E.2d 329, 337 (Ill. 2011) ("[S]ection 604(b) of the [IMDMA] provides no limitations or exceptions when the section 604(b) professional is a mental health professional.").

238. A child-custody evaluation is a complicated process because numerous variables and sources must be considered. It seems necessary that strict guidelines exist in order for the evaluation process to be tightly controlled and conducted consistently throughout custody cases.

239. *See infra* Part III.B.1 (explaining that CAIs are likely flawed in both validity and reliability when used in child-custody proceedings because these tests were not designed and

analyze the flawed administration of these tests.²⁴⁰

1. Flawed Validity & Reliability

Based on the results of meta-analyses, the validity estimates for the Rorschach and MMPI were not significantly different. The tests can be considered an adequate measure of psychometric properties *if used for the purposes for which they were designed and validated*.²⁴¹ Meta-analyses that have been used to support the Rorschach test have been flawed by way of not analyzing validity and reliability separately.²⁴² Further, research has shown that the Rorschach is not as valid as the MMPI, and the incremental validity of the Rorschach is poor.²⁴³ In fact, the academic community has recognized the Rorschach's flaws, and some researchers propose deemphasizing it in the graduate school curriculum in favor of stronger emphasis on courses about judgment, decision making, and the use of structured interviews.²⁴⁴

The value of a psychological test parallels its validity, and a valid test only has meaning if we acknowledge the purposes for which it is valid.²⁴⁵ Despite this qualifying characteristic of validity, many psychologists make the mistake of assuming that a psychological test is valid for any kind of evaluation.²⁴⁶ Thus, the issue of using a test

validated for use in that context).

240. See *infra* Part III.B.2 (identifying why the administration of these tests in the child-custody context is flawed).

241. See Howard N. Garb et al., *The Validity of the Rorschach and the Minnesota Multiphasic Personality Inventory: Results From Meta-Analyses*, 9 PSYCHOL. SCI. 402, 402 (1998) (exploring the flaws in specific meta-analyses of the Rorschach and MMPI tests). Although these studies are from 1988 and therefore more than twenty-five years old, their methodology is still accurate, and their fundamental critique remains unchanged.

242. *Id.*

243. *Id.*; see Bow et al., *supra* note 143, at 38 (stating that the prevailing view is that objective tests are more valid and reliable than projective tests, and that the scoring and interpretation of objective tests is less ambiguous and controversial than projective tests); B. K. Clark, *Acting in the Best Interests of the Child: Essential Components of a Child Custody Evaluation*, 29 FAM. L.Q. 19, 31 (1995) (opining that if projective tests such as the Rorschach are used in custody cases, they should be used with extreme caution because of their lack of validity, reliability, and level of subjectivity used in their interpretation); Mel Hamel et al., *A Study of Nonpatient Preadolescent Rorschach Protocols*, 75 J. PERSONALITY ASSESSMENT 280, 284-290 (2000) (finding that above-average children without any history of mental illness appeared to be psychotic, clinically depressed, cognitively impaired, or highly resistant to establishing and maintaining relationships on the Rorschach test).

244. Garb et al., *supra* note 241, at 402; see Erickson et al., *supra* note 64, at 164 (describing criticisms of the Rorschach based on its questionable validity and reliability in measuring psychological constructs).

245. Terrence W. Campbell, *Challenging Psychologists and Psychiatrists as Witnesses*, 73 MICH. B.J. 68, 71 (1994). For example, an IQ test may be valid for purposes of predicting future academic success, but it is not valid for diagnosing brain abnormalities.

246. *Id.*

designed to detect personality disorders and other psychopathologies in an evaluation of a child's best interest presents itself.²⁴⁷

An ideally valid test for purposes of child-custody litigation would accurately measure the best interests of the child.²⁴⁸ Unfortunately, the "best interest of the child" construct is so subjective and value-laden that it is impossible to accurately measure it in a forensic assessment evaluation.²⁴⁹ The "best interest of the child" needs an operational definition in order to be tested for, and given that no specific operational definition exists, validating a psychological test that aims to predict what is in the child's best interests is theoretically impossible.²⁵⁰ There are plenty of tests that aim to measure some aspect of personality, but speculating as to how that personality characteristic would result in superior or inferior parenting is beyond the scope of these tests.²⁵¹ No psychological tests have been validated to directly assess parenting ability,²⁵² and given the complex nature of relationships and parenting, it is not surprising that no test is available to determine parents' abilities and what arrangements would be in the child's best interests.²⁵³ Because the ideal test does not exist, evaluators use CAIs that do not measure the "best interest of the child."²⁵⁴

The MMPI, for example, was developed to screen for severe psychopathologies such as depression and schizophrenia.²⁵⁵ The MMPI involves the correlation of individual MMPI profiles with group MMPI

247. See *supra* Part I.D. (discussing the difference between different assessment instruments and how CAIs are designed to be used a therapeutic context).

248. Any personality test, such as the MMPI-2, is not valid in the context of child-custody proceedings because it cannot accurately measure the best interests of the child, even if they are valid for diagnosing personality disorders.

249. Shuman, *supra* note 65, at 143. What is in the best interests of one child will not be the same as what is in the best interests of another child; therefore, each parent's definition of the "best interest of the child" will vary by case.

250. *Id.*; see MELTON ET AL., *supra* note 7, at 559 (commenting that tests of intellectual capacity, achievement, personality style, and psychopathology assess clinical constructs that are linked only indirectly, at best, to the key issues concerning custody and visitation).

251. Shuman, *supra* note 65, at 143; see Heilbrun, *Child Custody Evaluation*, *supra* note 69, at 68 (discussing how an evaluator who attempts to use a therapeutic evaluation for forensic purposes extrapolates the implications about legal capacities from mental-state information that may be insufficient for such a determination).

252. Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 FAM. L.Q. 97, 105 (1995); Shuman, *supra* note 65, at 144.

253. Shuman, *supra* note 65, at 144. Psychological tests that assess clinical constructs may be helpful if the child needs to be tested for a learning disability or if there is an issue about whether the child has a serious mental disorder, such as depression.

254. These tests include the MMPI-2, MCMI, and Rorschach, and they are the most widely used psychological tests in child-custody litigation. They measure psychopathologies such as personality abnormalities and depression, rather than the best interest of the child.

255. Shuman, *supra* note 65, at 145.

profiles, and using the MMPI in child-custody evaluations to predict how a parent's profile will affect his or her children requires drawing inferences that are well beyond the original design of the test.²⁵⁶ The MMPI does not measure whether a person is a good or bad parent, and, though it may provide reliable information about parents' personalities, there is no scale that predicts what custodial arrangements are in the child's best interests.²⁵⁷ Concluding that the best interests of a child can be measured by certain findings of parents' personalities and psychopathologies is an unwarranted extrapolation from what the test is designed to measure and is pure speculation.²⁵⁸

In addition, though there are no studies that correlate personality attributes identified by the Rorschach with good parenting, the test is still frequently used in custody litigation and infrequently challenged.²⁵⁹ No cases address whether, when, or how the Rorschach should be used in child-custody evaluations.²⁶⁰

Further, the forensic context in which these tests are used threatens their validity because of the coerced nature of the assessment.²⁶¹ Examinees do not take these tests voluntarily, and they have added incentive to misrepresent their statements and be less than candid.²⁶²

256. *Id.*; see BENJAMIN M. SCHUTZ ET AL., SOLOMON'S SWORD: A PRACTICAL GUIDE TO CONDUCTING CHILD CUSTODY EVALUATIONS 69 (1989) ("It requires many inferential leaps to connect [traditional tests] with parental competencies we are attempting to measure.").

257. Shuman, *supra* note 65, at 145. Again, this is because each case is subjective and what is in each child's best interests will vary.

258. See Brodzinsky, *supra* note 86, at 218 ("There is a clear need for standardized assessment procedures that are geared specifically to the issues confronting the child custody evaluator. Such procedures, though, whether they are clinician-administered tests or self-report questionnaires, must have proven reliability and validity for forensic purposes. Unfortunately, the current array of tests and questionnaires typically used by custody evaluators does not meet these criteria.").

259. Shuman, *supra* note 65, at 148; see J. Reid Meloy et al., *Authority of the Rorschach: Legal Citations During the Last 50 Years*, 69 J. PERSONALITY ASSESSMENT 53, 53 (1997) (finding between 1945 and 1995, the Rorschach was cited in 247 state, federal, and military courts of appeal, and 26 cases were identified in which the reliability or validity of the Rorschach data were at issue); Irving B. Weiner et al., *Is the Rorschach Welcome in the Courtroom?*, 67 J. PERSONALITY ASSESSMENT 422, 422 (1996) (finding that in a survey of 7934 federal and state court cases in which psychologists presented Rorschach testimony, only 6 challenged the appropriateness of the test); Lois A. Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles, and Procedures*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 157, 165 (Lois A. Weithorn ed., 1987) ("Projective measures have not been shown to have the requisite psychometric properties to render them reliable or valid for predicting custodial functioning.").

260. Shuman, *supra* note 65, at 148.

261. MELTON ET AL., *supra* note 7, at 46.

262. *Id.*; see Heilbrun, *Child Custody Evaluation*, *supra* note 69, at 68 (stating that when forensic evaluations are conducted pursuant to child-custody litigation, examinees have a clear motivation to minimize psychopathology or negative characteristics). The tests have control

These tests are designed to assess a voluntary test subject, and the distinction skews the results.²⁶³

Given how often the MMPI is utilized in custody proceedings, it is ironic and shocking how rarely the courts address how it should be used.²⁶⁴ One would think that the validity and reliability of a psychological test in child-custody proceedings would be an important analysis before resorting to its use; courts, however, have ignored the fundamentals and methodologies.²⁶⁵ Hundreds of decisions refer to an expert's use of psychological tests such as the MMPI-2 and MCMI, but only a handful of decisions raise the issue of the tests' underlying reliability or validity.²⁶⁶

Another threat to the validity of psychological testing in child-custody contexts is a concept called test-item transparency.²⁶⁷ This term refers to the ease with which test subjects can distinguish what aspects of their perceptions, emotions, cognitions, or patterns of behavior are likely to be revealed by their answers to specific test questions.²⁶⁸ When test subjects can easily figure out what will be revealed about them by their responses to certain test questions, they can offer responses that will generate data, which when scored and interpreted will create the impression that suits what they want to portray.²⁶⁹ To try and combat this, some test items are included for the sole purpose of measuring test subject's attempts at "impression management."²⁷⁰ Test subjects on the receiving end of psychological questioning and evaluations likely believe that their interests will be best served if they can successfully create an image that is consistent with their litigation strategy.²⁷¹ In the context of child custody, litigants are "motivated to endorse statements descriptive of virtues not

scales for deception, but they are not perfect.

263. See Heilbrun, *Child Custody Evaluation*, *supra* note 69, at 68 (opining that it is reasonable to assume that an examinee in a therapeutic context is describing his or her experience and symptoms accurately because he or she has an interest in seeking improvement or recovery; however, exceptions exist when an examinee feels coerced and is concerned about what his or her test results will reveal in a forensic setting).

264. Shuman, *supra* note 65, at 145.

265. *Id.*

266. *Id.* at 146. *But see In re Marriage of L.R.*, 559 N.E.2d 779, 788 (Ill. App. Ct. 1990) (finding that the use of the MCMI in determining that the father was a child molester was questionable given the fact that the test was designed for clinical rather than forensic purposes).

267. David A. Martindale & James R. Flens, *Test Item Transparency: The Undisclosed Threat to Test Validity*, 29 THE MATRIMONIAL STRATEGIST 3 (2011).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 4.

characteristic of [them] and reject as not applicable statements that may, in fact, provide accurate descriptions of psychological problems experienced by them.”²⁷²

2. Flawed Administration

Tests such as the MMPI-2 and MCMI provide manuals with specific instructions on how to administer, score, and interpret each test.²⁷³ Past research on child-custody evaluations utilizing the MMPI-2 and MCMI raise questions not only about the tests’ effectiveness, but also about their implementation.²⁷⁴ Such areas of concern include unmonitored test administration, underestimation of the test readability level, lack of verification of computer-entered data, over-reliance on computer-generated interpretive reports, and use of inappropriate significance cutoffs.²⁷⁵ All psychological tests require a relatively quiet setting free from distractions, and, to the extent that the testing instructions and administrative conditions are less than ideal, the performance on the tests will be less than ideal.²⁷⁶

A psychologist who conducts the psychological test can heavily influence the results because a psychologist’s expectations affect the way he or she administers and scores the test.²⁷⁷ For example, a psychologist who views his or her test subject as smart will assign them a higher IQ score than when he or she views the subject as unintelligent.²⁷⁸ Research also shows that African-American males obtain a higher IQ score when their examiner is African-American compared to Caucasian.²⁷⁹

While it is reasonable to assume that mental-health experts are

272. *Id.*

273. Bow et al., *supra* note 124, at 39; *see* FRIEDMAN, ET AL., *supra* note 119, at 163 (stating that because administering the MMPI-2 is relatively easy, many professionals overlook important factors that tend to influence the participants’ test-taking attitudes and contribute to invalid results).

274. Bow et al., *supra* note 124, at 39.

275. *Id.*

276. Heilbrun, *Role of Psychological Testing*, *supra* note 93, at 266.

277. Campbell, *supra* note 245, at 71. *But see* FRIEDMAN ET AL., *supra* note 119, at 163 (discussing how the test participants often believe the test is not important so they compromise their cooperation by reading the test items too quickly and lessening their overall investment in the task.).

278. Campbell, *supra* note 245, at 71; *see, e.g.*, Harold E. Schroeder & Dennis L. Kleinsasser, *Examiner Bias: A Determinant of Children’s Verbal Behavior on the WISC.*, 39 J. CONSULTING & CLINICAL PSYCHOL. 451, 451 (1972) (finding that the test subject’s total verbal IQ scores were significantly affected by the expectations of the evaluators).

279. Campbell, *supra* note 245, at 71; Francis Terrell et al., *Effects of Race of Examiner and Cultural Mistrust on the WAIS Performance of Black Students*, 49 J. CONSULTING & CLINICAL PSYCHOL. 750, 750 (1981).

experts in their clinical judgments based upon their level of education, training, and experience, this is often not the case.²⁸⁰ Typically, psychologists and psychiatrists evaluate their patients by comparing how close their patients' symptoms correspond to the disorder being tested.²⁸¹ However, some of these symptoms occur in people without mental disorders and it is therefore difficult to discriminate between someone with or without a disorder because both types of people exhibit these symptoms.²⁸² Tests that measure abnormal personality such as the MMPI-2 detect sub-clinical presence of personality characteristics that are present in the general population and are only of clinical concern when they surpass a certain level.²⁸³

Psychologists and psychiatrists often find evidence of abnormality because they expect to find it, not because the abnormality actually exists.²⁸⁴ During interviews, these mental-health experts question their subject in a way that biases the information received.²⁸⁵ Assumptions about some aspect of a subject's life, such as drinking or marriage, increase the number of questions the expert will ask about these topics, and as a result the expert will find the answers for which they are looking.²⁸⁶

Psychologists and psychiatrists often reach their diagnostic conclusions very early on in their interviews, and they tend to adhere to their conclusions even when contrary evidence manifests itself.²⁸⁷ They overestimate the amount of information they utilize in their evaluations, and they believe they weigh multiple factors, when in fact they rely only upon a minimal amount of data.²⁸⁸ Research shows that mental-health experts arrive at their conclusions within minutes of an evaluation,

280. Campbell, *supra* note 245, at 68.

281. *Id.*

282. Campbell, *supra* note 245, at 68; Erickson et al., *supra* note 64, at 161.

283. Erickson et al., *supra* note 64, at 161.

284. Campbell, *supra* note 245, at 68; see Dana B. Sattin, *Possible Sources of Error in the Evaluation of Psychopathology*, 36 J. CLINICAL PSYCHOL. 99, 99 (1980) (finding that the perception of mental illness occurred for all subjects when mental illness expectancies were high).

285. Campbell, *supra* note 245, at 68.

286. *Id.*; see Hal R. Arkes, *Impediments to Accurate Clinical Judgment and Possible Ways to Minimize Their Impact*, 49 J. CONSULTING & CLINICAL PSYCHOL. 323, 323-26 (1981) (discussing five impediments to accurate clinical judgment: inability to assess co-variation, influence of preconceived notions, lack of awareness of one's judgmental processes, overconfidence, and hindsight bias).

287. Campbell, *supra* note 245, at 68; Lee N. Robins & John E. Helzer, *Diagnosis and Clinical Assessment: The Current State of Psychiatric Diagnosis*, 37 ANN. REV. PSYCHOL. 409, 424 (1986).

288. Campbell, *supra* note 245, at 68; J. Gillis & T. Moran, *An Analysis of Drug Decisions in a State Psychiatric Hospital*, 37 J. CLINICAL PSYCHOL. 32, 39-41 (1981).

sometimes in as quickly as thirty seconds.²⁸⁹ Additionally, there is no correlation between mental-health experts' level of confidence that they express in their conclusions and how accurate their conclusions are in fact.²⁹⁰ For example, errors in predicting dangerousness by psychologists and psychiatrists range from fifty-four percent to ninety-four percent, with an average of eighty percent.²⁹¹ Mental-health experts may also engage in impulsive questioning that biases the collected data rather than adhering to a well-prepared set of questions that would allow them to obtain the most relevant and comprehensive information possible.²⁹²

Mental-health experts may overlook their patients' strengths and resources that would enable them to deal with their psychopathological issues and assume that certain symptoms manifest in most other circumstances of their patients' lives.²⁹³ However, people tend to adjust well to certain life situations despite the fact that they may struggle with other situations.²⁹⁴

C. *The Direct Effect on the Custody Decision*

The use of court-appointed mental-health experts in child-custody proceedings without any guidelines for their methods and procedures has altered expert authority and their role in custody cases.²⁹⁵ The recommendations that 604(b) evaluators give have a considerable amount of influence on the course of the custody litigation.²⁹⁶ Many courts accord a significant amount of weight to the opinions of these evaluators, and this often results in acceptance of the recommendations without challenge.²⁹⁷

289. Campbell, *supra* note 245, at 68; J. Yager, *Psychiatric Eclecticism: A Cognitive View*, 134 AM. J. PSYCHIATRY 736, 736–41 (1977).

290. Campbell, *supra* note 245, at 68; Robyn M. Dawes, *Representative Thinking in Clinical Judgment*, 6 CLINICAL PSYCHOL. REV., 425, 425–41 (1986); Danny Wedding, *Clinical and Statistical Prediction in Neuropsychology*, 5 CLINICAL NEUROPSYCHOLOGY 49, 49–55 (1983).

291. Campbell, *supra* note 245, at 68; John Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus in Deterrence and Incapacitations: Estimating the Effects of Criminal Sanctions on Crime Rates*, in NATIONAL CRIMINAL JUSTICE REFERENCE SYSTEM 244, 246 (1978).

292. Campbell, *supra* note 277, at 69; Robins & Helzer, *supra* note 287.

293. Campbell, *supra* note 245, at 69.

294. *Id.*; C. Wilkinson & W. O'Connor, *Human Ecology and Mental Illness*, 139 AM. J. PSYCHIATRY 985, 986 (1982).

295. Shuman, *supra* note 65, at 159.

296. Baerger et al., *supra* note 104, at 35; Erickson et al., *supra* note 64, at 157.

297. Baerger et al., *supra* note 104, at 35; see Peter Ash & Melvin Guyer, *The Function of Psychiatric Evaluations in Contested Child Custody and Visitation Cases*, 25 AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 554, 557 (1986) (finding an eighty-five percent concordance rate between the expert's recommendation and the judge's decision).

A study that examined 282 contested child-custody cases found that an evaluator recommendation was the primary factor that directly affected the judges' decisions.²⁹⁸ Later, a study examining judges' perspectives regarding child-custody evaluations conducted by mental-health professionals found that most judges believed child-custody evaluations had a significant impact on their decision making, and judges' rulings were generally consistent with evaluator recommendations.²⁹⁹

As analyzed above, these recommendations are not necessarily reliable or founded on good methods, and this poses a great threat to the outcome of the child-custody decision when the evaluators' recommendations have such a significant role in the evaluation process.³⁰⁰ Because section 604(b) lacks clear guidelines for courts to follow in their evaluation processes, evaluators are free to employ any method in conducting their evaluations, and this can lead to choosing questionable methods. These methods have been proven invalid and unreliable in the context of child-custody proceedings. Moreover, judges tend to let evaluators' recommendations influence their ultimate custody decision, and this is problematic when the recommendations are based upon faulty psychological testing. The end result is a custody decision based upon the results of testing that has been proven incapable of ascertaining what courts seek to determine in child-custody proceedings: the best interest of the child.

IV. PROPOSAL

Illinois courts should enact strict statutory guidelines for the appointment of 604(b) evaluators in order to reduce the risk of evaluator bias and gain more control over the evaluation process in general.³⁰¹ Furthermore, CAIs³⁰² should not be used in child-custody proceedings because they were designed for use in therapeutic assessment rather than forensic assessment and their validity and reliability have been

298. Carla C. Kunin et al., *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564, 564 (1992). The study found that judges were influenced by recommendations sixty percent of the time, and were influenced fifteen percent of the time by an inferred measure of child preference.

299. Erika M. Waller & A. E. Daniel, *Purpose and Utility of Child Custody Evaluations: From the Perspective of Judges*, 32 J. PSYCHIATRY & L. 5, 24 (2004).

300. See *supra* Part III.B.1–2 (analyzing the flawed validity, reliability, and administration of CAIs in child-custody proceedings).

301. See *infra* Part IV.A (examining the need for structured guidelines in appointing evaluators).

302. Psychological tests that were initially developed to be used in assessment, diagnosis, and treatment planning in therapeutic contexts.

severely questioned in the context of child-custody proceedings.³⁰³

A. Necessary Guidelines

Illinois courts should use their power³⁰⁴ to enact local rules: (1) requiring all child-custody evaluations to narrowly define the scope of their evaluation; (2) setting minimum education and experience requirements for evaluators; and (3) barring the evaluator from giving an opinion regarding the ultimate legal issue before the court.³⁰⁵ An ideal solution would be to adopt a rule similar to that of California Rule of Court 5.225, because it has proven effective.³⁰⁶ For example, in *In re Marriage of Seagondollar*, a mother and father were given shared custody of their four minor children.³⁰⁷ The father appealed from a post-judgment order changing the arrangement and giving his ex-wife sole custody and allowing her to move away with her children.³⁰⁸ During trial, the court appointed a doctor to conduct an evaluation, who ultimately recommended that the children be allowed to relocate with their mother.³⁰⁹ The court of appeals found that the order appointing the child-custody evaluator was “woefully inadequate” because even though it specified that an evaluator would be appointed, it failed to define the purpose and scope of the evaluation, and the evaluator could have corrected the trial court’s error by supplying a written protocol describing the purpose of the evaluation and explaining the procedures he intended to follow.³¹⁰ As a result, the court reversed the post-judgment custody modification and remanded the matter to the lower court.³¹¹

Another case that further illustrates the effectiveness of the California statute is *In re Marriage of Adams & Jack A.*, in which the parties, including the child, agreed to submit to a full psychological examination by a doctor so he could make a recommendation regarding custody.³¹² The court of appeals found that because the lower court awarded the mother sole custody based on the evaluator’s biased report and on a statement made by the child that may have been influenced by the

303. See *infra* Part IV.B (arguing that the use of CAIs should be limited).

304. Illinois Supreme Court Rule 22(h) gives local circuits the power to enact certain local rules. ILL. S. CT. R. 22(h).

305. Grund & Kestnbaum, *supra* note 4, at 22.

306. *Id.* at 23.

307. *In re Marriage of Seagondollar*, 43 Cal. Rptr. 3d 575, 576 (Ct. App. 2006).

308. *Id.*

309. *Id.* at 579.

310. *Id.* at 586.

311. *Id.* at 587.

312. *In re Marriage of Adams & Jack A.*, 148 Cal. Rptr. 3d 83, 87 (Ct. App. 2012).

evaluator's bias, the custody order denying the father's motion to remove the evaluator was reversed.³¹³ The court stressed that impartial objectivity is a critical requirement for a section 730 child-custody evaluator.³¹⁴ Additionally, the court acknowledged that one of the reasons the Judicial Council adopted the California Rules of Court establishing uniform standards of practice for court-ordered child-custody evaluations is because the results of child-custody evaluations are generally given great weight by the judge in deciding contested custody issues.³¹⁵

These cases illustrate the effectiveness that strict statutory guidelines have on the outcome of child-custody cases.³¹⁶ In both cases, the Court found that the guidelines were not adhered to and properly remanded the cases to the lower court so the errors could be remedied.³¹⁷ This kind of appellate remediation is not possible with the current status of Illinois' statute because there is nothing preventing Illinois courts from conducting evaluations a certain way.³¹⁸ California has crafted its statute such that strict requirements are in place, and California appellate courts are prepared to identify when and where these requirements are not followed.³¹⁹

Illinois should also draw from the Pennsylvania statute because it provides that if a party refuses to obey an order of the court, the court is allowed to make an order disallowing "the disobedient party to support or oppose any designated claims or defenses" and prohibit the party from introducing into evidence certain testimony or documents.³²⁰ Also, under the Pennsylvania Rule, willful failure or refusal to comply with an order may give rise to a finding of contempt, and the court is allowed to impose sanctions as it deems appropriate.³²¹

Illinois would benefit from adopting highly structured and detailed

313. *Id.* at 85.

314. *Id.* at 99.

315. *Id.*

316. See *infra* notes 307–12 (examining the cases *In re Marriage of Seagondollar* and *In re Marriage of Adams and Jack A.*).

317. *In re Marriage of Adams & Jack A.*, 148 Cal. Rptr. 3d at 85; *In re Marriage of Seagondollar*, 43 Cal. Rptr. 3d 575, 587 (Ct. App. 2006).

318. California's statute explicitly states that the order for an evaluation must state the purpose and scope of the evaluation. CAL. R. CT. 5.220. Therefore, if the order does not include the requisite information, it will be inadequate until it is remedied.

319. California Rule 5.220 breaks down the rules for court-ordered evaluations, ranging from section (a) through (j). CAL. R. CT. 5.220(a)–(j). California Rule 5.225 sets forth the appointment requirements for child-custody evaluators, ranging from section (a) through (o). CAL. R. CT. 5.225(a)–(o).

320. PA. R. CIV. P. 1915.8(c).

321. *Id.*

rules such as California's, and the threat of sanctions and disallowing a party from introducing certain evidence would provide an incentive for parties to be as cooperative as possible.³²² If Illinois courts adopted child-custody rules that had a similar level of detail to the California Rule and sanctioning requirements in the case of willful failure to comply like those in the Pennsylvania statute, child-custody evaluations would be better controlled and less susceptible to invalidity caused by unqualified evaluators and lenient standards of protocol.³²³

*B. Abolishing the Use of Clinical Assessment Instruments
In Favor of Forensic Assessment Instruments
in Child-Custody Proceedings*

Given the threats to the validity and reliability of CAIs in child-custody contexts, it seems most obvious that these tests should not be allowed in child-custody proceedings.³²⁴ In a situation where the child has a learning disability or serious mental disorder, use of a CAI such as the MMPI-2 or Rorschach should be permitted, as these CAIs were designed to measure such issues.³²⁵

Proponents of using CAIs in child-custody evaluations believe it can provide useful information in determining parental fitness, revealing the emotional makeup of the parents and child and providing information about maturity, antisocial tendencies, anxiety, depression, and dangerousness.³²⁶ More importantly, proponents believe that it may provide important information regarding which parent is better able to raise the child.³²⁷ While CAIs can provide information about traditional psychological constructs such as anxiety and depression, no test directly measures functional parenting abilities.³²⁸ There are some CAIs that test for certain parental attitudes and belief, but there is not enough

322. It is important that the Illinois Rules are structurally organized and comprehensible like the California Rules because detailed rules that are structurally disorganized and laden with legal jargon would not do any good for the courts or the evaluators subject to them.

323. See Grund & Kestnbaum, *supra* note 4, at 23 ("The California Rule is detailed enough to steer the child custody evaluation process in the right direction, yet flexible enough to comport with the realities of the justice system.").

324. Erickson et al., *supra* note 64, at 170–71. But see Robert P. Archer et al., *Introduction to Forensic Uses of Clinical Assessment Instruments*, in FORENSIC USES OF CLINICAL ASSESSMENT INSTRUMENTS 14 (Robert P. Archer ed., 1st ed. 2006) (stating that CAIs may be used for forensic purposes when they appropriate and relevant to the specific legal question).

325. MELTON ET AL., *supra* note 7, at 560.

326. STANLEY KISSEL & NELSON W. FREELING, EVALUATING CHILDREN FOR COURTS USING PSYCHOLOGICAL TESTS 5 (1990); MELTON ET AL., *supra* note 7, at 558.

327. KISSEL & FREELING, *supra* note 326, at 5; MELTON ET AL., *supra* note 7, at 558.

328. MELTON ET AL., *supra* note 7, at 558; SCHUTZ ET AL., *supra* note 256, at 69; Roseby, *supra* note 252, at 105.

evidence to link these attitudes with actual behavior.³²⁹ Additionally, projective measures such as the Rorschach have not been proven valid or reliable for predicting custodial functioning.³³⁰

Therefore, while proponents of CAIs in child-custody proceedings are correct in identifying the psychological constructs they can identify, it is an unwarranted extrapolation to suggest that the results of traditional psychological tests designed to test for something other than parenting ability can shed light on that legal competency.³³¹ Tests that measure psychopathologies are relevant in the context of therapy and diagnosing mental illness, however they have no place in a forensic setting when its purpose is to determine what custodial situation is best for a child.³³²

In the place of CAIs, FAIs are more favorable psychological instruments because they are specifically designed for use in the legal system to determine what the data says about psychological constructs and how they relate to the relevant legal competency at issue in the litigation.³³³ Rather than having CAIs provide data about an examinee's personality and have an evaluator make an inference as to what that means about what situation is in the child's best interest, the evaluator will have data that were directly obtained through a test "designed to conceptualize the relationship between legal definitions of abilities and psychological constructs associated with human capacities."³³⁴

In addition to using FAIs, evaluators should conduct comprehensive observation and interviewing of the parents, children, extended family, teachers, and babysitters, as such people are in the best position to discuss custodial preferences and any special needs of the children.³³⁵ Special attention should be given to the parents' ability to cooperate, the nature and intensity of disagreements about the children, and potential areas of compromise.³³⁶ Further, the parent-child relationship should be observed in the child's principal home, as this will provide the most

329. MELTON ET AL., *supra* note 7, at 558; SCHUTZ ET AL., *supra* note 256, at 69.

330. MELTON ET AL., *supra* note 7, at 558; Weithorn & Grisso, *supra* note 259, at 165.

331. See MELTON ET AL., *supra* note 7, at 559 ("Tests of intellectual capacity, achievement, personality style, and psychopathology assess constructs that are linked only indirectly, at best, to the key issues concerning custody and visitation.").

332. *Id.*

333. GRISSO, *supra* note 87, at 34-35.

334. See GRISSO, *supra* note 87, at 33 (discussing the conceptual objective of FAIs).

335. MELTON ET AL., *supra* note 7, at 558.

336. *Id.*; see Bow & Quinnell, *supra* note 10, at 164 (opining that it is imperative for evaluators to consider developmental issues, strengths, and weaknesses of the parents and current custody research in the evaluation process).

realistic idea of the family dynamic.³³⁷

Ensuring high quality child-custody evaluations is important because the focus of the evaluation is to ascertain what is in the child's best interest; therefore, these evaluations should be neutral, valid, and conducted consistently in order to fulfill the evaluator's legal obligation to protect these interests.³³⁸

CONCLUSION

The lack of common-law and statutory guidelines for section 604(b) evaluations leaves evaluators free to employ any method whatsoever in coming to a conclusion about child-custody determinations, and this often leads to the use of invalid clinical psychological tests that judges tend to cling to in the courtroom. Judges, who can validate their decisions by the use of "expert" opinion, tend to lean in favor of 604(b) evaluators' opinions and often let their ultimate custody decisions stem from the potentially invalid and biased findings of these tests. This ultimately may lead to placing children in a less-than-ideal situation, which goes against one of the main objectives of the IMDMA: mitigating the potential harm to spouses *and their children* caused by the process of legally dissolving the marriage. Without clear guidelines for 604(b) evaluators to follow in the course of their evaluations and the abolishment of CAIs in these proceedings, Illinois courts run the risk of making custody decisions based on an inaccurate picture of the child's environment, parents' psychological capabilities, and the child's psychological capabilities. While preventing divorce and its negative effects is impossible, Illinois can ensure, by way of airtight guidelines and the non-use of CAIs, that children involved custody disputes do not needlessly suffer at the hands of a legal system devoid of a comprehensive way of ensuring that their best interests are protected.

337. MELTON ET AL., *supra* note 7, at 558.

338. Bow & Quinnell, *supra* note 10, at 164.