

**CONTEMPORARY ISSUES IN FAMILY
LAW AND MENTAL HEALTH**

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CONTEMPORARY ISSUES IN FAMILY LAW AND MENTAL HEALTH

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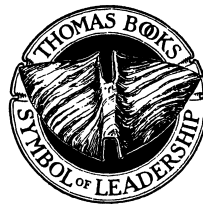
and

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With a Foreword by

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Samuel Saks would like to thank his parents, Herschel and Judy, and his siblings, Shani, Brian, and Ben, for their constant support. He would also like to thank his teachers, Judge Sheldon Weisberg, David Cantelme, Aaron Brown, Professor Ralph Slovenko, Professor Brad Roth, and Edward Codish.

FOREWORD

Over the years I have read the biweekly column in the *Detroit Legal News* by Michael G. Brock on family law and mental health. Brock is steeped in counseling and forensic work dealing with family relations. Reading his columns, I was prompted to invite him to do a book on the topic for the American Series in Behavioral Science and Law. He agreed, and with the collaboration of Samuel Saks, a graduate of the Wayne State University Law School, they have produced this book, *Contemporary Issues in Family Law and Mental Health*. It is an original and practical discussion of cutting-edge issues in family relations and the law. It sets out the proper use of mental health evidence in litigation.

Marriage is now a promise easily made and compared to past years, easily broken. The results are everywhere—increase in cohabitation, proliferation of single and teenage parents, and a high divorce rate. Children of divorce and single parenthood have higher rates of school dropout and teenage pregnancy, as well as a greater propensity for emotional problems, drug use, and criminal activity. A growing number of adults are spending more of their lives single or living unmarried with partners.

Once seen as the province of married couples in distress, an increasing number of cohabiting couples in their 20s and 30s seek counseling to work through their relationship problems. Therapy is sought as a remedy for a fraying romance. Then too, people who live together and choose not to be married nonetheless will find themselves caught in legal entanglements.

One-third of all women, or 37 percent, now becoming mothers are not married. In 1960, the out-of-wedlock birth rate was five percent. An informed estimate is that at least a quarter of Americans who have married have already been divorced, and the proportion is likely to be

considerably higher among the coming generation. While marriage is declining, homosexuals seek to seal their relationship by marriage.

The Census Bureau estimates that half of current marriages will end in divorce. There are those divorces in which the couple has children and others where only the two adults are involved. It is estimated that children are present in 53 percent of divorces.

Divorce cases are generally uncontested and raise no custody problem, a fact that is remarkable given that a petition must be filed to obtain a divorce, thereby putting the parties in the judicial system. By and large, businesses negotiate or mediate a dispute without filing a lawsuit, but for marital conflicts it is necessary to enter the judicial process. The system would collapse, however, if most cases were not disposed of through some form of alternate dispute resolution, such as negotiation, mediation, or mandatory settlement conferences, prior to trial. Those cases that are contested are often bitter.

In this book of 20 chapters, Michael G. Brock and Samuel Saks discuss: (1) mental health roles in family court; (2) facilitative and evaluative mediation; (3) case preparation versus expert witnesses; (4) forensic practice: privilege and ethics; (5) therapy court; (6) treatment professionals beware; (7) valid and invalid scientific evidence; (8) the criminalization of being human; (9) the effect of the amendment to Michigan Rule of Evidence 703 on expert testimony in family court; (10) science, technology, and the search for truth; (11) to tell the truth: the use of the polygraph test; (12) false allegations of abuse; (13) parental alienation; (14) forensic interviewing protocol in child abuse cases; (15) the need for all mental health professionals to adopt a forensic interviewing protocol; (16) justice for everyone?; (17) child advocacy: elements of child custody evaluations; (18) let the children have a voice; (19) mental health forensics and child therapy; and (20) when does child abuse therapy constitute malpractice?

In the 1980s and 1990s, a number of psychotherapists engaged in “recovered memory” therapy, based on the idea that most survivors of childhood sexual abuse have repressed their memory of the trauma but can be helped, in therapy, to remember what their conscious minds have forgotten. That practice brought about false accusations of abuse and resulted in the breakup of families. The authors of this book bring to task those therapists engaged in what can best be described as wild therapy. Likewise, Professor Frederick Crews and Doctor Paul R. McHugh, leading debunkers of repressed memory theory, have noted

that one of the worst aspects of this type of practice is its capacity to cast a shadow on essential and honest efforts to deal with underreported sexual abuse of children. The False Memory Syndrome Foundation was organized to report false allegations of child abuse and to provide support for parents who were traumatized by the allegations (full disclosure: I am a member of its Scientific and Professional Advisory Board).

A number of organizations have been founded to protect children from abuse. They include:

Jessica Marie Lunsford Foundation. This foundation was established after the horrific kidnapping and subsequent murder of nine-year-old Jessica by a repeat offender. The Foundation's mission is to seek tougher legislation against child predators; provide a grassroots awareness and continuous support base; and to search, locate, and help law enforcement apprehend absconder pedophiles. As a result of its efforts, 33 states have enacted some form of "Jessie's Law."

Justice for Children. JFC is a 501(c)(3) non-profit, dedicated to the advocacy of abused and neglected children. It was created in Houston by former Harris County Prosecutor Randy Harris. It has been a leader in identifying and advocating for children who fall through the cracks in the criminal justice system. It has chapters in Texas, Arizona, Washington, D.C., and Michigan. Its legal-aid programs aim to keep child predators behind bars.

KlaasKids Foundation. In the aftermath of the 1993 kidnap and murder of his 12-year-old daughter Polly, Marc Klaas gave up his rental car franchise to dedicate his life to preventing future tragedies. In 1994, he founded the Sausalito, California-based non-profit KlaasKids Foundation with the singular mission of stopping crimes against children. It has promoted prevention programs for at-risk youth, stronger sentencing for violent criminals, and governmental accountability and responsibility.

Protect. This is a national pro-child, anti-crime membership association for the protection of children from abuse, exploitation, and neglect.

St. Clair Butterfly Foundation. Founded by Chip and Lisa St. Clair, its mission is to inspire C.H.A.N.G.E.: Creating Harmony and Nurturing Growth Everywhere. In his memoir,

The Butterfly Garden (2007), Chip St. Clair tells of his tortured childhood at the hands of a sadistic father.

Michael G. Brock and Samuel Saks in several chapters describe the problems involved in establishing child abuse in the courts.

Michael G. Brock, MA, LLP, CSW, is a forensic mental health professional in private practice at Counseling and Evaluation Services in Wyandotte, Michigan. He has worked in the mental health field since 1974, and has been in full-time private practice since 1985. The majority of his practice in recent years has related to custody issues and allegations of child abuse.

Samuel Saks was an outstanding student at the Wayne State University Law School. He graduated *magna cum laude* and served as executive articles editor of the Wayne Law Review. He was the recipient of the Ford Motor Company Leadership Award. He enriched my classes. His seminar term paper on the Emergency Medical Treatment and Active Labor Act (EMTALA) was published in the *Journal of Psychiatry & Law*. Also, while in law school, he wrote scholarly articles in the *Wayne Law Review* and the *Michigan International Lawyer*. Upon graduation, he served as a Judicial Law Clerk for Judge Sheldon Weisberg of the Arizona Court of appeals and is now an associate at the Phoenix law firm of Cantelone & Brown, where his practice focuses on municipal law and commercial litigation.

This is an engaging book that enriches the literature on family law and mental health.

Ralph Slovenko, J.D., Ph.D.
Editor, American Series in Behavioral Science and Law

INTRODUCTION

This book grew out of a series of articles dealing with issues surrounding the use of mental health evidence in court.¹ Many of the problems with the use of such evidence can be traced to a mental health professional (MHP)—a psychiatrist, psychologist, social worker, or counselor²—who has strayed into the unfamiliar forum of a judicial proceeding. The MHP suddenly finds himself outside the control and comfort of his office, entangled in an intricate web of statutes, procedures, and public policy. The MHP, who has been trained to analyze and treat mental health problems, is placed at center of an adversarial process that tends to favor those who fight hardest. The consequences of improper mental health evidence are most severe in hotly contested child custody disputes, especially when they involve allegations of child abuse.

The simple fact is that the legal process is profoundly different from the therapeutic process. The purpose of litigation, especially civil litigation, is to determine the equitable rights of the parties, not to heal them. While the law must be examined in light of the particular circumstances of each case, the purpose of the law is to maintain an orderly society, not to further the agenda of any particular party.

The goal of mental health treatment is fundamentally different. Whereas the law aims to be fair and impartial, mental health treatment must focus on the subjective, emotional needs of the patient. Justice is blind, but an MHP's eyes must be attentive to every detail. However farfetched, it is the individual's beliefs, motives, and world view that are the keys to successful mental health treatment. Rigorously seeking objective validation of a patient's subjective experience would be a futile exercise and would often undermine effective treatment: In the therapist's court, the patient's mind is the only relevant witness.

Of course, MHPs are no strangers to adversarial situations. The

average MHP has far more experience with interpersonal dispute resolution than any attorney. Yet an MHP's experience with investigating and resolving disputes in a therapeutic setting is no preparation for the technical aspects of litigation. Indeed, as discussed throughout this book, an MHP's treatment experience can easily lead him to collect and present mental health evidence that is of highly questionable forensic validity and that ultimately undermines the administration of justice.

However, it is not only MHPs who are responsible for the use of unreliable mental health evidence in court. It is not unusual for legal professionals—judges and attorneys—to request, or in some cases demand, evidence that an MHP cannot ethically provide or that would be misleading in the context of litigation. Too many legal professionals fail to appreciate the ethical constraints on MHPs who are called upon to provide mental health evidence in court. Even when they know better, some attorneys may still ask an MHP to cross the lines, either because they think it will benefit their client or because they simply want “probative” information from an expert.

Through the prism of family law, and custody disputes in particular, this book discusses the basic principles that underlie the proper use of mental health evidence in court. The first and most important principal is that forensic mental health practice and procedures must track the legal process, not the other way around. Outside of the forensic setting, mental health treatment need not concern itself with procedural or substantive due process rights.³ Hence, a process that is completely appropriate with respect to treatment might be, and usually is, inappropriate when used to gather forensic evidence.

One problem that we explore arises repeatedly and revolves around the presumptions that an MHP adopts in order to treat a patient—presumptions that are not subjected to much, if any, scrutiny. Statements, beliefs, and unverified assertions are often taken to be true, at least for the purposes of treatment. Another major problem is that an MHP with no forensic training often employs inappropriate methods when conducting interviews of a child suspected of being abused. As discussed throughout the book, these and other problems produce a deadly potion: “evidence” that is fundamentally flawed, but irresistibly probative.⁴

There are also the questionable presumptions of legal professionals (and society) that factor into the legal process. For example, most

states require that custody determinations be in the “best interest” of the child. This is as it should be, but there is often an implicit presumption that the mother is necessarily the best custodian during a child’s “tender years.” This presumption is still very much alive, despite statutes that seek to eliminate it from best interest determinations. In determining the best interest of a child, MHPs and legal professionals need to be keenly aware of their biases. They must always keep in mind that the best interest of a child is not synonymous with the best interest of a particular parent. It is our hope that this book sheds light on the challenges and pitfalls that surround the use of mental health evidence in court, particularly with respect to family law and child custody disputes.

Notes

1. Such evidence is often referred to as “forensic” mental health evidence. The term “forensic” means “belonging [or relating] to courts of justice.” *Black’s Law Dictionary* (Abridged 6th ed., 1991).

2. Practitioners of one of the four main branches of the mental health sciences.

3. There are two components of the constitutional guarantee of due process, “substantive” and “procedural.” See *United States v. Salerno*, 481 U.S. 739, 744-46 (1987) (discussing the rights inherent in U.S. Const. Amend. XIV, § 1). Substantive due process rights relate to the level of justifiable governmental interference with fundamental liberty rights. *Id.* Examples include the government’s right to require licenses for certain activities or its right to spy on citizens. Procedural due process rights, on the other hand, relate to whether permissible governmental interference is fairly achieved. *Id.* Thus, even where the government is able to regulate an activity, it must do so in a fair and reasonable manner.

4. Federal Rule of Evidence 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” However, the rules do not allow any and all relevant evidence to be presented to the trier of fact. Federal Rule of Evidence 402, for example, provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

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**CONTEMPORARY ISSUES IN FAMILY
LAW AND MENTAL HEALTH**

Chapter 1

MENTAL HEALTH ROLES IN FAMILY COURT¹

Traditionally, an MHP could assume one of the following three roles in family court: a psychotherapist, an individual mental health or substance abuse evaluator, or a custody/parenting time evaluator. Today, there are many additional roles that an MHP can assume in court. The following is a brief overview of the most common roles and the situations in which they are useful.

Psychotherapist

Psychotherapy involves the treatment of specific, individual problems, such as depression, adjustment problems, and substance abuse; or specific, identified family problems, such as coping with the stress of divorce or the difficulty of adjusting to problems faced by a reconstructed family. It is *not* the role of treatment therapists to conduct investigations.

Historically, insurance companies did not like to pay for court-ordered therapy and often refused to do so. Today, insurance companies tend to be more accommodating, especially when the client requests therapy. Most people request coverage when it is explained that they will have to pay for it themselves otherwise.

On the other hand, there is a very real concern about the value of court-ordered therapy, especially in family court. People forced into therapy because of drunk driving arrests are usually not happy about it, but will participate to satisfy the terms of their probation and to get their driver's license back. In contrast, a parent ordered into therapy because the other parent is denying parenting time/visitation often

correctly senses that there will be few, if any consequences, for failing to participate. Or, as often happens, the court in effect dooms the therapy to failure when it is ordered in response to a request for a resumption of parenting time/visitation and when that parenting time is conditional on the child's positive response to therapy. In such cases, the court has unwittingly abdicated its power to decide a parenting time issue to the child, who is often influenced by—and subjected to a great deal of pressure from—one parent, who is usually the custodial parent.

Thus, therapy is of the greatest value when the client wants it and needs it for the treatment of a specific, identified problem. It is also of value when the client needs therapy for a specific, identified problem and faces dire consequences if he does not submit to treatment.

Mental Health/Substance Abuse Evaluator

The court may appoint an MHP to evaluate a parent whose mental stability has been called into question, especially when there is some objective evidence that the parent is unstable, such as evidence of prior suicide attempts or a history of domestic violence. Unlike a custody evaluation, a mental health evaluation is not a comparative study and therefore is of limited value. For example, the fact that one parent may have a mental health problem does not necessarily mean that he or she is the least stable parent, since the other parent may suffer from a more serious condition. In conducting the evaluation, the MHP may utilize historical data, psychometric tests, mental status assessments, collateral contacts with police officers, teachers, therapists, and/or drug and alcohol testing. The MHP may also assess the child for signs of mental health trauma or reduced functional capacity.

Custody Evaluator

Legal professionals sometimes confuse the role of a therapist with the role of a custody evaluator. The methods—interviewing, testing, and observation—are similar, but the purposes are very different. A therapist is essentially an advocate for the client he is treating. As such, the therapist's role is similar to that of an attorney, because objective truth is not the central concern. A therapist need only be concerned with what his client perceives to be the truth, although a good therapist, especially in a case that may have an impact on a legal proceed-

ing, should always keep in mind that he is hearing only one side of the story.

A custody evaluator, on the other hand, is more like a judge, referee, or arbitrator in that he is expected to be objective. Yet unlike a judge, the custody evaluator is unable to make a decision; he can only offer a recommendation. But if the evaluator is linked to one side or another through a treatment relationship, his opinion will be biased. It makes no more sense to have a treatment MHP serve as a custody evaluator than it does to have one of the contesting parties' attorneys don a robe after closing arguments and render a decision. The result would be a forgone, and biased, conclusion.

What about the child's therapist? Isn't he able to give an impartial opinion? The answer is no. The child's therapist is almost always allied with the presenting parent. Few make any real effort to involve the non-presenting parent, who is usually the noncustodial parent. Even when they do, the child's therapist spends a lot more time with the custodial parent, and if that parent is presenting his or her case every time they take the child to therapy, the therapist cannot help but be prejudiced by such presentations. Even the most experienced judge cannot render a fair decision without hearing both sides of a case; how is a treatment professional to do so?

It is important to note that the American Psychological Association (APA) Guidelines for Conducting Evaluations in Child Custody Cases provide that it is improper to give an opinion about someone who has not been interviewed in the course of a child custody evaluation.² On this issue at least, the legal and mental health professions are in agreement.

Parenting Coordinator/Facilitator³

The concept of a parenting coordinator/facilitator is relatively new. Parenting coordinator/facilitators are generally appointed after a judgment has been rendered. The role is essentially that of mediator, but not one who facilitates agreement on the major issues of custody and parenting time. Rather, a parenting coordinator/facilitator's job is to manage the detailed, day-to-day issues that are often the cause of the revolving-door syndrome that plagues many family law cases. A parenting coordinator/facilitator can keep revolving-door cases out of the courts by decreasing the acrimony between the parties. There is some

debate about who can perform these duties more effectively, attorneys or MHPs, but the kinds of skills involved are usually more suited to MHPs. The relatively limited amount of authority delegated to the parenting coordinator/facilitator is sufficient to allow a skilled negotiator to be effective in this role.

Mediator

A mediator, like a parenting coordinator/facilitator, uses counseling skills rather than advocacy skills. A mediator may be appointed by the court, usually by stipulation of counsel, in an effort to seek an agreement that both parties can live with. The scope of a mediator's authority may include property dispute resolution as well as custody issues, or it may be restricted to custody and parenting time.

While attorneys are generally better equipped to handle the mediation of property disputes, MHPs may be more effective at helping the parties resolve custody or parenting time issues, given their psychological training and expertise. Mediators may be viewed as more objective than the parties' attorneys, which can help bring otherwise recalcitrant parties to the bargaining table.

Forensic Interviewer

To properly understand the role of a forensic interviewer, it is important to understand what "forensic" really means in the context of family court. By definition, any mental health procedure or evidence intended for use in court falls under the rubric of "forensic." However, the term "forensic interview" is also used as shorthand for the process of obtaining evidence from a child in a criminal or civil matter:

The goal of a forensic interview is to obtain a statement from a child, in a developmentally-sensitive, unbiased and truthseeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems.⁴

While there is usually physical evidence in cases alleging physical abuse, such evidence is often lacking in cases alleging the sexual abuse of children. This is why it is often so difficult to discern between valid allegations of sexual abuse and those that may be exaggerated or contrived in the midst of a hotly contested custody dispute. Much research