

Should There Be Immunity For Custody Evaluators?

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Presented at the Annual Meeting of the American Psychological Association

Washington, DC, August 2005

Increasingly, individuals unhappy with the outcome of their evaluation are intimidating custody evaluators by filing lawsuits and complaints with licensing boards. Should there be immunity for individuals conducting these evaluations? Should this immunity be limited to only those psychologists appointed by the courts? This presentation will examine immunity laws passed in Florida and West Virginia and propose language aimed at protecting evaluators from irresponsibly filed charges while also giving consumers recourse for incompetent reports.

The risk to psychologists who function as child custody experts

In most states the courts have relied on mental health experts to make custody decision when parents cannot agree upon the living arrangement for their children. These mental health experts are court appointed and are often giving immunity from civil suits for the opinions they render. At times, a parent, unhappy with the original court decision, will revisit the custody arrangement necessitating another evaluation. In Illinois, a parent, unhappy with the custody recommendations made by the psychologist, may request a 604 (5) evaluation, which is essentially asking for a second opinion.

Psychologists who conduct custody evaluations are participating in a high-risk activity and often find themselves confronting malpractice suits, ethical, and licensing board complaints. In some situations, psychologists must defend themselves against all three actions. The American Psychological Association (APA) has published "Guidelines for Child Custody Evaluations in Divorce Proceedings" (1994) but these guidelines are not intended to be "mandatory or exhaustive." In spite of this disclaimer, these "Guidelines" have been used to claim misconduct on the part of a psychologist and, in some states, the "Guidelines" are written into law in an attempt to protect psychologists who follow them. A number of state and regional psychological associations and licensing boards have written their own guidelines for child custody evaluations (e.g., Georgia, 1990; Metropolitan Denver, Colorado, 1989; Nebraska, 1986; New Jersey, 1993; North Carolina, 1993; Oklahoma, 1998). The APA *Ethical Principles of Psychologists and Code of Conduct* (2002) has also been used to file complaints against psychologists.

While all psychologists support ethical practice and agree that consumers of their services must be protected, the very standards they endorse are now being used against them in an attempt to manipulate the legal system. In Illinois complaints are being filed not only against the originally appointed custody evaluator but also against 604(5) evaluators who are appointed by the court but requested by one side. The parent requesting the evaluation pays for the evaluation. The court enters the order that the parents must comply with the evaluation with that particular evaluator. In some cases it has been a number of years since the original evaluation but the parent, unhappy with the original decision, files a complaint in hopes of disqualifying the psychologist from updating the evaluation. These

parents are being supported in filing complaints by organizations of other unhappy parents (father's and mother's rights groups) as well as by their own attorneys. They frequently know that the complaint will eventually be unfounded but use it to essentially tie up the psychologist in a protracted defense. They believe that intimidating expert witnesses is the best way to keep them out of the courtroom. This is because the psychologist withdraws after a complaint is made because s/he feels that s/he can no longer be objective. Some individuals who are subject to psychological evaluations as part of the custody evaluation process go on record as stating the evaluations are "99% bogus garbage" and see these evaluations as ways to enable attorneys to make more money and create more litigation.

In Illinois, groups have been formed to instruct individuals about ways they can intimidate psychologists who are conducting custody evaluations. These groups have sponsored presentations by attorneys to describe ways of writing complaints. The Illinois Psychological Association Ethics Committee was besieged by complaints from certain Illinois counties where these groups were formed. The individuals filing complaints did not call the IPA to see whether the psychologist was a member of the association and thus a large number of complaints were filed against non-member psychologists. We've also been told that individuals who have gone through the custody evaluation process call others who are in the process of being evaluated by the psychologist they saw and telling these individuals that the psychologist is not objective and in cahoots with the lawyers.

The Florida Psychological Association reported that prior to their state's limited immunity law, nearly 80 percent of all complaints filed with the Florida Board of Psychology were for custody evaluations (Greer, 2004). An attorney for the Illinois Department of Financial and Professional Regulation told this author that the Department is overwhelmed with custody complaints and does not know how to discharge those that may be unwarranted. The Department believes its role is being used as a court of appeals.

Consequences of filing frivolous complaints

Psychologists are increasingly shying away from conducting court-appointed custody evaluations. For example, psychologists in the more rural areas of Illinois are refusing to conduct these evaluations for fear of the damage it can cause their careers. As a result, these rural areas are suffering shortages of expert witness psychologists in the same manner as they are experiencing shortages of physicians in certain high-risk specialty areas like OB-GYN. Those psychologists who continue to perform these court-appointed evaluations do so knowing that charges are "part of the cost of doing business." It is possible that some add this expense to the total evaluation fee thus driving up costs. These complaints also clog the legal system and the already burdened and under funded licensing boards.

Consumer Protection

Any law aimed at protecting psychologists from frivolous complaints should not preclude consumers from filing complaints for legitimate reasons.. Psychologists, as a profession,

are particularly devoted to protecting consumers. Therefore psychologists who behave in an unethical manner during the custody evaluation process, such as billing for services not rendered or engaging in a dual relationship, must be subject to an appropriate investigation.

Laws aimed at protecting good-faith evaluators

While a majority of complaints against psychologists are discharged as unfounded, just having a complaint made can be damaging to the psychologist and have an impact on his/her malpractice insurance and ability to join or remain on some managed care panels. It should be noted custody evaluations do have a built-in safeguard in that both parties in a custody battle do have their day in court and can question the evaluation performed by the psychologist through cross examination. The courts also provide for an appeal process should the parent feel that the custody hearing was unfair.

Many state psychological associations have begun to consider legislation to give immunity to psychologists who perform good faith custody evaluations. Even smaller regional associations are discussing this type of legislation. In the December 2004/January 2005 issue of *The Monterey Bay Psychologist* the Government Affairs Committee of this California-based association wrote about legislation providing full immunity for court-appointed psychologists as a benefit to the public so that the “psychologist would be free to determine the best interests of a child without fear of retaliation in the form of a lawsuit.” So far no legislation of this kind has been introduced in California.

Florida, Georgia and West Virginia

In an attempt to protect their psychologists, a number of states have written laws to give psychologists limited immunity from complaints. Florida (2003) and West Virginia (2004) have passed almost identical laws giving limited immunity for court appointed licensed psychologists conducting child custody evaluations.

Both laws essentially state:

1. A psychologist who has been appointed by the court to conduct a child custody evaluation in a judicial proceeding is presumed to be acting in good faith if the evaluation has been conducted pursuant to standards that a reasonable psychologist would have used as recommended by the American Psychological Association’s Guidelines for Child Custody Evaluations in Divorce Proceedings.
2. An administrative complaint against a court-appointed psychologist, which relates to a child custody evaluation conducted by the psychologist, may not be filed anonymously. The individual who files such an administrative complaint must include in the complaint his or her name, address, and telephone number.

3. A parent who wishes to file a legal action against a court-appointed psychologist who has acted in good faith in conducting a child custody evaluation must petition the judge who presided over the child custody proceeding to appoint another psychologist. Upon the parent's showing of good cause, the court shall appoint another psychologist. The court shall make a determination as to who is responsible for all court costs and attorneys' fees associated with making such an appointment.

4. If a legal action, whether it be a civil action, a criminal action, or an administrative proceeding, is filed against a court-appointed psychologist in a child custody proceeding, the claimant is responsible for all reasonable costs and reasonable attorneys' fees associated with the action for both parties if the psychologist is held not liable. If the psychologist is held liable in civil court, the psychologist must pay all reasonable costs and reasonable attorney's fees for the claimant.

These laws remove anonymity from the ability to file a suit or complaint and require the payment of attorney's fees to the loser of the suit or complaint. More importantly, the law assumes that a psychologist is acting in good faith if he or she follows the APA child custody guidelines.

These laws begin to move in the direction of separating an opinion derived from a custody evaluation that a parent disagrees with from unethical behavior. Thus a psychologist practicing according to the APA Guidelines is deemed to have made a good-faith evaluation. However, the door is left open for the consumer to file an ethics charge should the psychologist engage in allegedly unethical behavior such as participating in a dual-relationship with one of the parents being evaluated.

Georgia passed a law two years ago amending Code Section 19-9-3-(a) (6) that states: "The court is authorized to order a psychological custody evaluation of the family or an independent medical evaluation. In addition to the privilege afforded a witness, a court appointed custody evaluator shall not be subject to civil liability resulting from any act or failure to act in the performance of the evaluation unless such act or failure to act was in bad faith." Like Florida and West Virginia, immunity is given for good faith evaluations but the law does not define good faith.

Introduced legislation in Pennsylvania

Pennsylvania introduced legislation (HB 1055) that attempted to take immunity one step further by stating:

"No contestant in any child custody proceeding in which the court appointed a licensed health care practitioner to assist the court in determining or implementing a child custody agreement shall be permitted to file a complaint against the licensed health care practitioner with the practitioner's state licensing board without first petitioning for and obtaining the approval of the appointing court. The appointing court shall approve a contestant's petition to file a complaint if the court finds that the licensed health care practitioner failed to act in good faith." The presumption of good faith is made if "in

conducting the evaluation, therapy, mediation, education or other service, the licensed health care practitioner has reasonably complied with the ethical standards adopted by the health care practitioner's profession."

Thus this law places the court between the consumer and psychologist and requires the court to decide whether a good faith evaluation has been conducted. If the judge believes that the evaluation was performed in good faith and that no ethical standards were violated, the individual cannot file a complaint against the psychologist with the licensing board. This law is written specifically to deal with licensing board complaints and not lawsuits.

However, the judges objected to this legislation because it required them to be experts in psychological ethics and to essentially adjudicate yet another issue during the divorce proceedings. Therefore, the Pennsylvania Psychological Association amended the bill to read:

"No party to a child custody matter in which the court appointed a licensed health care practitioner to assist the court in determining or implementing a child custody agreement may be permitted to file a complaint against the licensed health care practitioner with the practitioner's state licensing board during the pendency of the matter and for 60 days thereafter."

This bill therefore gives immunity to psychologists who are in the process of conducting an evaluation and for a period thereafter but does not protect the psychologist from later licensing board complaints. The bill has passed the Pennsylvania House and it is hoped the bill will pass the Senate in the fall.

While these laws are written to help good-faith custody evaluators avoid frivolous lawsuits and complaints to licensing boards, they do not help psychologists when a complaint is filed against him or her with his state psychological association or with the APA Ethics Committee. These complaints create considerable stress. The financial burden is only a portion of the strain a psychologist must endure to defend against a frivolous charge. Many state psychological association ethic's committees have been overburdened with hearing child-custody based complaints. As the numbers of these complaints have increased, many state associations had no choice but to stop adjudication by their ethic's committees and effectively turn over the process to licensing boards and the APA Ethic's Committee.

Action by other states

A survey was posted to the listserv of executive directors of state, provincial, and territorial psychological associations in an attempt to discover whether other states had introduced, or plan to introduce immunity legislation for custody evaluators. The following states replied that they intend to introduce legislation in the future:

<u>State</u>	<u>Year of Possible Introduction</u>
Kentucky:	2006
Ohio:	2006
Texas:	2007

Montana attempted to pass a bill (SB 241) allowing for good faith protection for psychologists in 2005 but the bill died in the Senate Judiciary Committee on a 4 to 8 vote. This bill presumes good faith on the part of psychological evaluators but requires leave of court before filing of administrative complaints.

A number of other states are examining the issue to decide whether to introduce a bill. They include:

New Jersey
New York

Proposed solutions

States should begin to pass laws like those in Florida and West Virginia to protect psychologists from frivolous lawsuits while providing a quid pro quo for consumer and psychologist for payment of fees depending upon the outcome of the action. The language should be written to protect good faith evaluations and define good faith as those evaluations performed according to the APA “Guidelines for Child Custody Evaluations in Divorce Proceedings” or some other code of conduct that can be cited as evidence of a good-faith evaluation. While immunity laws should also include language like that originally proposed by Pennsylvania in order to develop an oversight system that looks at complaints before they enter the adjudication process with licensing boards, these laws are not passing through the legislature. These proposed laws protect consumers because they still allow consumers the ability to press charges against psychologists who act in an unethical manner independent of the outcome of the court appointed evaluation. However, judges do not want to be placed in the position of further adjudications in the divorce case and they do not feel they have the expertise to make decisions about the ethical practice of psychology. In Illinois, one judge told us that he knows about the risks to psychologists who perform custody evaluations but that psychologists are in the same vulnerable position as family court judges and attorneys who also rank at the top of professionals in the legal field who are vulnerable to complaints.

Georgia had good success in passing their law by getting the support of the Georgia Trial Lawyers Association. The attorneys and custody evaluators wrote the language in a way that they felt would adequately limit the immunity. State associations should partner with the Trial Lawyers Association in their state to collaborate on acceptable language. An ideal additional partner would be the state’s department of professional regulation. If the regulatory board agrees with and contributes to immunity language its members are more likely to be educated about the problems psychologists face when they review the complaints.

Where possible, state associations should provide consultation and education about the ethical practice of psychology in custody evaluations. Investigators need help in knowing when to discharge frivolous cases and when to send unethical ones for consideration. Consumers still must be protected from those that practice unethically.

Finally state associations should educate psychologists about the need to be well trained before agreeing to complete a custody evaluation. Custody evaluators need consultation from expert peers who have hands-on experience if the consultation is to be helpful. This consultation should include information about the conduct of ethically based evaluations. State ethics committees should include forensic psychologists who are experts in custody evaluations.

Given the abuses being reported around the country, court appointed custody evaluators must be given some protection if they are expected to conduct non-biased evaluations that serve the best interests of the child. As lawsuits and licensing board complaints are increasingly being used to intimidate these expert witnesses, more and more psychologists are refusing to become involved in the custody process. Psychologists are the most extensively trained of mental health professionals. If they refuse to become expert evaluators in custody disputes, children will ultimately suffer by having decisions made by lesser-trained mental health professionals. Immunity for custody evaluators does not mean absolute immunity for their actions. It means immunity from complaints for the decision they make when conducting appropriate evaluations. It does not mean immunity from ethics charges for violating the standard of ethical behavior to which all psychologists are held.

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