

NRS 125C.200 Consent required from noncustodial parent to remove child from State; permission from court; change of custody. If custody has been established and the custodial parent intends to move his or her residence to a place outside of this State and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

(Added to NRS by 1987, 1444; A 1999, 737)—(Substituted in revision for NRS 125A.350)

MEASUREMENTS OF CUSTODIAL TIME

As detailed in the *Rivero Amicus Brief*, no single measurement of "time" is probably adequate for all cases, because the purpose of the measurement is to approximate direct expenditures made on a child, and a great number of possible facts can disconnect time-share from actual expenditures relating to a child.

The reader is cautioned that the approximations can be altered to some degree by such random events of which parent has the starting week, or whether the schedule starts on January 1 or somewhere in the middle of a year. Even a leap year can alter the math.

Nevertheless, for many cases, a short-hand "translation" of various custodial schedules to percentage of time share might be useful, and the following approximations are provided for that purpose.

STANDARD SCHEDULES¹

Every other weekend: 14%.

First, third and alternate fifth weekends: 14%.

Second, fourth and alternate fifth weekends: 14%.

First, third and fifth weekends: 15%.

Second, fourth and fifth weekends: 15%.

Every other weekend, plus one evening per week: 16%.

Every other weekend (52 days), plus two weeks in summer (14 days), plus Mother's Day or Father's Day (1 day), plus Thanksgiving or Christmas (2 days), plus birthdays (2 days), plus a miscellaneous day (1 day): 20% (73 days) overnights.²

Alternating extended weekends: 21%.

Alternating extended weekends plus one evening per week: 23%.

¹ Presumes 6:00 p.m. exchanges.

² See Karen Czapanskiy, "Child Support, Visitation, Shared Custody and Split Custody," in *Child Support Guidelines: The Next Generation* 43, 44 (U.S. Dep't Health & Human Services, Office of Child Support Enforcement, 1994); Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connection*, 20 Rut.-Cam. L.J. 619 (1989).

EXHIBIT 5

Every other weekend, plus one overnight per week: 29%.

Every weekend: 29%.

Alternating extended weekends plus one overnight per week: 36%.

4/3 custody split: 43%.

Alternating weeks: 50%.

OVERNIGHTS³

10% = 37.

15% = 55.

20% = 73.

25% = 91.

30% = 110.

35% = 128.

40% = 146.

45% = 164.

50% = 183.

³ Requires rounding. Any percentages .5 or above, rounded up.

Schwartz Factors Worksheet:

This Worksheet allows you to insert the relevant data in the format the Court indicated was most relevant, so that it can be gone over with counsel in assessing the strength of any relocation proposal.

The legal test is whether the custodial parent has demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the noncustodial parent is virtually precluded.

If the custodial parent satisfies the threshold requirement set forth above, then the court must weigh the following additional factors and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated: (1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.

MOVE CASES AFTER *SCHWARTZ*

The Legal Standard

The first "major" relocation case of the modern era in Nevada was *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991), in which a father's request to move to Pennsylvania with kids was allowed. In *Schwartz*, the father was the primary physical custodian. An extended family was present in Pennsylvania to assist with custody and child-rearing. The court held that the purpose of NRS 125A.350 was to preserve rights and familial relationship of the noncustodial parent, and that it was in the best interest of the child to have a healthy and close relationship with both parents, as well as other family members.

The court found that the court needs to balance the "custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best

interest of the child, and the competing interests of the noncustodial parent.” The court noted that removal is “separate and distinct” from custody, but that the facts and policies of the two analyses overlap – in both, the best interest of the child is paramount.

In setting out guidelines, the court held that these cases are necessarily fact-specific, with no bright-line determinations possible, but the court generally found the *D’Onofrio*¹ criteria sound. Under that standard, the court must first find whether custodial parent has demonstrated an actual advantage for both the child and parent in moving. If there is such an advantage, then the court must weigh: (1) the extent to which move likely to improve quality of life for the child and parent; (2) whether the motive for the move is “honorable” and not designed to frustrate or defeat visitation rights to the non-custodian; (3) whether, if the move is allowed, the parent will comply with substitute visitation orders; (4) whether non-custodian’s motives are honorable in resisting motion to move, or if it is simply intended to secure a financial advantage as to support or otherwise; (5) whether, if the move is allowed, there is realistic opportunity for a visitation schedule that will adequately foster and preserve the relation with the non-custodian.

The court went further and set out sub-factors for determining quality of life improvement; in *Schwartz*, the court found a financial advantage to the move (lower costs), and concluded that a reduction in visitation was “not necessarily determinative” and could be offset by expanded summer visits. The court found the fact that the parent had no job waiting not critical.

¹ *D’Onofrio v. D’Onofrio*, 144 N.J.Super. 200, 365 A.2d 27, 29 (Ch.Div.1976)

Application to the Facts of A Particular Case

Some background facts are helpful in this analysis. The parties are from _____. Their extended family and close friends primarily live in _____. Almost all members of _____ family also live in _____.

The parties met and were married in _____, and are present in Nevada because of _____. Had Party 1 had ever before left _____? Had the parties intended to return there as soon as they could?

Can the threshold question, whether the custodial parent has demonstrated an actual advantage for both the child and parent in moving, be clearly answered yes on economic, familial, and other bases?

1. The extent to which move likely to improve quality of life for the child and parent.

Comparison with existing situation here. Currently, Party 1 is working as a _____, and must work _____ (schedule). Impact on time primary custodian can spend with the children.

Whether Party 1 is able to attend weekend school functions, and whether work schedule interferes with holidays as a family unit. Whether a large portion of Party 1's wages are consumed by baby sitters and day-care centers. Same questions for Party 2.

Whether the move will lead to a different work schedule in a different city. Whether extended families (Party 1's, Party 2's, or other relevant persons) would give the children an opportunity for extended family interaction of which they have been deprived during their stay in Las Vegas.

2. **Whether the motive for the move is “honorable” and not designed to frustrate or defeat visitation rights to the non-custodian.**

Is there a clear answer to this question, in light of the information above and below?

Whether relocation or return to _____ has previously been intended by the parties; what changed, and for whom?

3. **Whether, if the move is allowed, the parent will comply with substitute visitation orders.**

Does the history of visitation lend any substantial question to an expectation of facilitating contact with the non-custodian?

4. **Whether non-custodian’s motives are honorable in resisting motion to move, or if it is simply intended to secure a financial advantage as to support or otherwise.**

Are the opposing party’s motives clear. Whether previous consent to the move has been given. Financial impact on Party 2 of the move going forward or not? Whether Party 2 has expressly demanded lower child support or other concessions in exchange for written consent to the move.

5. **Whether, if the move is allowed, there is realistic opportunity for a visitation schedule that will adequately foster and preserve the relation with the non-custodian.**

What steps Party 1 will take to maintain a strong relationship between child and Party 2.

6. **The court’s sub-factors.**

Whether the sub-factors set out by the court militate toward permitting the move in question.

Whether positive family care and support, including that of the extended family, would be enhanced. How? What commitments made?

Whether housing and environmental living conditions will be improved. Comparison with current conditions. Long-range plans for these factors.

Whether there are educational advantages for the children likely to result from the move (Party 1's greater availability to assist them, other direct or indirect factors, such as cultural events and programs in the proposed relocation area).

Whether gains would likely occur for Party 1's long-term employment and income. How? Free rent? Support of family?

The court's last specified sub-factor, whether the children believe that their circumstances and relationships will be improved, must be approached child-by-child, depending on ages and ability to state reasoned opinions.

Bottom line is whether the Party 1 should be allowed to relocate from the State of Nevada and whether written consent should be included in the Decree (divorce cases; or Order, if post-divorce). Whether the actual best interests of the children, as well as Party 1, outweigh any inconvenience that might accrue to Party 2's visitation with them.

"Where Relocation of Primary Custodian Would Substantially Obliterate the Possibility of Traditional Alternative Visitation, Move Should Normally be Granted Anyway, but Justifies Reexamination of Custody." *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999). Parties were married in 1987, and had three children. Father filed for divorce in 1995, and four months later the parties were divorced, with joint legal custody and primary physical custody to Mother. In 1997, Mother remarried, to USAF officer. The Air Force sought to transfer him to Japan, Mother petitioned court for permission, and Father counter-moved for change of custody in the event she did move.

The district court (Redmon), without an evidentiary hearing, denied Mother's motion and granted Father's motion to change custody if Mother moved. The court made written findings that both parties' motives were honorable, but it was in the children's best interest to remain in Las Vegas, Mother had not "justified" the move under the standard of *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1992), there were "concerns" about Japan, where the kids would not speak the local language, contact with extended family would be lost, the medical facilities were not believed adequate, housing and environmental conditions were "unknown," and Mother's overall financial condition would be reduced. The court also found that round trip travel for the kids would cost \$6,000, and such a move would by itself meet the test set out in *Murphy v. Murphy*, 84 Nev. 710, 447 P.2d 608 (1974) as a "change of circumstances."

The Supreme Court repeated its usual standard, noting the "broad discretionary power" regarding custody, citing *Primm v. Lopes*, 109 Nev. 502, 853 P.2d 103 (1993), as well as its holding that the appellate court "must be satisfied that the court's determination was made for appropriate reasons." *Sims v. Sims*, 109 Nev. 1146, 865 P.2d 328 (1993).

Here, the Court noted the *Schwartz* line of authorities interpreting NRS 125A.350, noting the requirement of first asking whether the parent seeking to move had made the threshold showing of a sensible, good faith reason for the move. If so, then the lower court should go through the *Schwartz* factors, focusing on the availability of adequate, alternative visitation.

The Court termed this case "difficult" because the distance would not allow any "adequate alternative visitation." The Court found to be in conflict the following "important interests and policies": the right of the children to have frequent associations and a continuing relationship with both parents after a divorce, citing NRS 125.460(1); the right of a parent to change his or her residence; and the right of a parent to have access to his or her children. The Court noted the impossibility of not causing at least one parent to be negatively impacted.

The Court therefore announced a new rule to apply "where relocation of the primary custodian would substantially obliterate the possibility of a traditional alternative visitation," adopting Section 2.20 of the American Law Institute's Principles of the Law of Family Dissolution (Tentative Draft No. 3, Mar. 20, 1998), which essentially states that if a move makes it "impractical to maintain the same proportion of residential responsibilities," the move should be granted anyway if it is made because of one of a number of listed reasons (including to be with a new spouse), and there is no reasonable closer alternative. Since the move here "significantly impairs" the Father's abilities to exercise the responsibilities set out in the prior plan, it "justif[ies] a reexamination of custody based on the best interest of the children, taking into account all relevant factors, including the effects of the relocation."

Noting the absence of an evidentiary hearing before the ruling, and that the lower court's findings were "contrary to the unrefuted evidence in the record regarding the quality of life at a military base in Japan," the Court further criticized the district court's failure to address NRS 125.480(4), which requires consideration of domestic violence, given the Mother's obtaining of a Temporary Protective Order against the Father. The Court therefore reversed and remanded for "consideration of the relevant evidence."

Cleaning up, the Court criticized the order below (that would grant a change of custody upon relocation) as "designed to punish the primary custodian for relocating, which is prohibited by *Sims*. The Court held it "particularly unacceptable" to force the Mother to choose between her husband and her children, and stated that such conditional orders should only be made when the best interest of the child are served by such a change, taking into consideration all factors, not just the move. Even if a move is for "an illegitimate reason" or to "an unreasonable location," the move with the child should be allowed if that parent can show that the relocation would be better for the child than a change of custody would be.

A legal note from Marshal Willick about ensuring that the input of psychologists is restricted to a correct – and quite limited – place in making child custody and relocation decisions.

A recent case has re-emphasized the vigilance necessary by lawyers – and especially judges – to ensuring that the legal process is not distorted by, or surrendered to, mental health professionals who are not qualified to make legal determinations relating to child custody.

I. THE LEGAL BACKGROUND

A. CUSTODY GENERALLY

For many decades, Nevada has proclaimed by statute and case law that a child's best interests are paramount when considering issues of custody and visitation. NRS 125.480(1); *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768 (1975). As stated by the Nevada Supreme Court, "[i]n custody matters, the polestar for judicial decision is the best interest of the child." *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1270-71 (1991).

The Nevada Legislature has set out a specific list of factors in NRS 125.480(4) that a trial court **must** consider in any case involving determination of the best interest of a child:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.
- (b) Any nomination by a parent of a guardian for the child.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

In any given case, factors can militate in different directions. It is the task of the trial court to properly weigh all of them – and any other relevant information presented in the case – in order to fulfill the mandate of issuing an order intended to serve the best interest of the child.

B. RELOCATIONS

The Nevada Supreme Court has long recognized the multi-faceted balancing of rights and responsibilities in play in every case where a parent seeks to relocate with a child to another jurisdiction:

The proper calculus involves a balancing between “the custodial parent’s interest in freedom of movement as qualified by his or her custodial obligation, the State’s interest in protecting the best interests of the child, and the competing interests of the noncustodial parent.”

Davis v. Davis, 114 Nev. 1461, 1465, 970 P.2d 1084, 1087 (1998) (quoting from *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991)).

Such cases are not a simple pick between parents’ conflicting desires, but require a much more subtle balancing of multiple viewpoints and interests, some of which are of Constitutional dimension (e.g., freedom of movement and right to parent).

II. THE PROPER ROLE OF PSYCHOLOGISTS AND RELATED PROFESSIONALS

In the polarized and contentious world of custody and relocation cases, judges are often faced with allegations of lousy parental behavior and its impact on children. Judges are quite appropriately reluctant to put children on the stand or otherwise involve them in the legal proceedings any more than necessary.

This often leads to utilizing mental health professionals in an array of possible tasks, from child interviews on contested questions of fact, to full-blown custody evaluations involving subjective observation and objective testing of some or all of those involved in a case. This input can enter the litigation in a variety of ways, from a background report to testimony at an evidentiary hearing.

The February, 2009, “Guidelines for Child Custody Evaluations in Family Law Proceedings” approved by the American Psychological Association (“APA”) Council of Representatives correctly notes that “Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the ‘psychological best interests’ of the child.” See 65 American Psychologist No. 9 at 863-67 (Dec. 2010).

An informed opinion as to such “psychological best interest,” accompanied by any objective data uncovered by a mental health professional as to the ability of the parents to function as care-givers, provides a trial court with *one* piece of the information the court must weigh in making either a custodial or relocation decision, along with others.

Or, as the APA Guidelines put it:

The extensive clinical training of psychologists equips them to investigate a substantial array of conditions, statuses, and capacities. When conducting child custody evaluations, psychologists are expected to focus on factors that pertain specifically to the psychological best interests of the child, because the court will draw upon these considerations in order to reach its own conclusions and render a decision.

Given the emotional intensity of the proceedings and the importance one or both sides tend to put on outsourced evaluations, etc., it is no great wonder that some mental health professionals get a little carried away with their importance in family law matters. Shrinkers are hardly immune from human nature, and the impact of fearful, anxious people putting great stock in one's opinions cannot help but have an influence on those whose opinions are solicited.

Unfortunately, it has led some mental health practitioners to misconstrue their role in legal proceedings, ceasing to see themselves as contributing a piece to a puzzle, and instead seeing themselves in the role of decision-makers.

III. AN ARROGANT ASSERTION OF SELF IMPORTANCE, AND (PARTIAL) RETREAT

A. NATIONALLY

A couple of years ago, the APA issued proposed new guidelines, quietly dropping the word "psychological" from their task in evaluating families – from "best psychological interest" to "best interest."

Changing a single word can mean a great deal, and the use of the identical term to what courts try to determine was not accidental. The purpose was to put psychologists in the role of directly informing courts what to do, altering and elevating their position from that of "expert" to that of "arbiter."

Some of those interested in the field – both psychologists and legal scholars – noticed, and complained. Among attorneys, Lynne Z. Gold-Bikin of Pennsylvania was among the most vocal in opposition to the proposed change. She spoke eloquently about the foolhardiness of having mental health professionals address a legal standard. Many mental health professionals – among them the well-respected Jonathan W. Gould, David Martindale, and Jay Flens – also provided feedback to the committee drafting the guidelines, either formally or informally.

The APA committee changed course. The ultimate 2009 Guidelines acknowledge that a psychological recommendation is not appropriate at all in some cases, and:

If a recommendation is provided, the court will expect it to be supportable on the basis of the evaluations conducted. . . . If psychologists choose to make child custody recommendations, these are derived from sound psychological data and address the psychological best interests of the child. When making recommendations, psychologists

seek to avoid relying upon personal biases or unsupported beliefs.

Emphasizing the direction for psychologists to do such work with a humble concept of place rather than an arrogant presumption of knowledge they in fact lack, the Guidelines also add the sage advice that “Psychologists are encouraged to monitor their own values, perceptions, and reactions actively, and to seek peer consultation in the face of a potential loss of impartiality.”

The Guidelines reflect on their face the back-and-forth debate recounted above, citing commentary critical of the proposed arrogation of directly commenting on legal standards, and noting that:

The specific nature of psychologists’ involvement and the potential for misuse of their influence has been the subject of ongoing debate (Grisso, 1990, 2005; Krauss & Sales, 1999, 2000; Melton, Petrila, Poythress, & Slobogin, 2007).

See Tippins, T.M., & Wittman, J.P. Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance (Family Court Review, 43, 193-222, 2005).

But the 2009 Guidelines were a committee project, and those striving to elevate the position of psychologists in evaluations peppered the final work product with some foretastes that they might try again:

Although the profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (i.e., “ultimate opinion” testimony), psychologists seek to remain aware of the arguments on both sides of this issue (Bala, 2006; Erard, 2006; Grisso, 2003; Heilbrun, 2001; Tippins and Wittman, 2006) and are able to articulate the logic of their positions on this issue.

B. LOCALLY

The fallout from this conceptual struggle is definitely being seen in Nevada family courts. It is not universal, of course – several local psychologists display a keen grasp of the legal process and their appropriate place in it. However, I have cross-examined a number of psychologists hired by counsel – or appointed by the court – to perform custody evaluations in this State whose testimony indicates that some of them don’t get it.

In my experience, most psychologists (with some notable exceptions) have no clue what the legal factors for a “best interest” custody determination might be – and they don’t care. The problematic ones perceive no conflict between that ignorance and making a best interest custody recommendation anyway, based entirely on their *own* standards and factors, and generally not even acknowledging the difference between “psychological best interest” and *legal* “best interest” determinations.

Similarly, psychologists have readily admitted on cross-examination that they have no idea what the legal standards for granting or disallowing relocation requests might be – and again, they don’t care. A recent case of mine involved an outsourced evaluation that attempted to arrogate judicial responsibilities at least three separate ways.

First, the psychologist proposed an entirely new and original test for when a relocation is “appropriate” – which was primarily notable for having nothing to do with the Nevada Supreme Court’s holdings on that subject.

While it is an aside, the danger of a psychologist purporting to apply a legal test was immediately apparent from the report having screwed up its own analysis: after confirming a history of domestic violence, the report concluded that the history was a “risk factor [militating against] relocation.” The Nevada Legislature, of course, has found as a matter of public policy that a history of domestic violence should disqualify a parent as a primary or joint custodian, and the Nevada Supreme Court has opined that domestic violence by the left-behind parent is a factor *favoring* a relocation request. NRS 125.480; *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999).

The psychologist went even further, however, explaining in some detail “disagreeing with” current relocation law, and stating that in the psychologist’s opinion, “a high standard should be established for [relocation] in custody dispute situations.”

So instead of the balancing test set out by the Nevada Supreme Court (see above), the psychologist apparently sought to directly tell the judge what to order based on a variation of the “Relocation Risk Assessment” (“RRA”), allegedly used by some in the psychological community for determining “long term behavioral outcomes of a child” after relocations, but which grew out of a limited sample group that should not be relied upon for much. The conclusion of such an analysis uses the same *language* as the legal determination (“relocation should be . . .”) but has essentially nothing to do with the factors in the legal analysis.

If anything, the RRA analysis could be *part* of the process of crystal-balling the “long term psychological best interest of the child” – providing *one* component of the legal analysis. In the real world, however, application of the factors to the facts tends to be distorted and biased (as here), and because its results are phrased the same way as the legal determination, it is more likely that the inclusion of an RRA analysis in a report could cause a judge to improperly confuse it with the final determination the court is supposed to make in making the ultimate (and mandatory) *legal* best interest and interest-balancing relocation decisions.

The facts made it clear that the mother had always been the children’s primary caretaker, so it was not terribly surprising that the psychologist suggested that a schedule leaving the children with the mother most of the time was appropriate, “given her bonds with the children and her historic primary caretaker role.” What *was* surprising – in fact, astonishing – was the statement in the report that the court should only do what was best for the children “if it does not present an advantage to [the mother] in seeking relocation.”

Virtually every aspect of the parts of the report recounted above was improper, bordering on the edge of unethical. First, the psychologist’s personal “feelings” about Nevada law – like that of any *other* unqualified layman – had no place in any document placed before the court. If anything, the psychologist, under the APA guidelines, should have self-reported the existence of a personal bias on that issue, and said nothing further about it, or self-disqualified from involvement entirely.

Second, that the psychologist did not confine remarks to “psychological best interest,” but purported to instruct the court as to the ultimate issue of best interest, was an unwarranted and remarkably arrogant attempted usurpation of the core judicial function.

Finally, the offhand urging of the court to *subordinate* the best interest of the child to indulge the psychologist’s disfavor of relocations was absolutely breathtaking in its wrong-headedness, from any conceivable legal perception.

The report in this case was not a fluke, and not an exception. Several psychologists issuing child custody evaluations in Nevada’s family courts seem to have no proper conception of the limitations of their role, and the acceptable bounds of their reports. But I have yet to see a Nevada judge act on – or even *note* – this pervasively corrosive influence on the integrity of child custody and relocation proceedings, and on the legitimacy of the resulting orders. It is past time for that to change.

C. QUALIFICATIONS AND THE ABUSE OF PSYCHOBABBLE

Misuse of psychological tools and terms is not limited to psychologists.

There is a tendency in family court to use Marriage and Family Therapists (“MFTs”) or other counselors wherever possible, instead of psychologists, because they are cheaper. That, in and of itself, is okay, but such practitioners cannot properly administer objective test instruments or make diagnoses, and they should *not* be asked (or permitted) to perform tasks outside their professional training and expertise.

Some such practitioners, however, cannot seem to resist the urge to do so anyway – and their attempts endanger the legitimacy of every legal determination based on their reports. “Half-priced shrinks” can no more be expected to perform all the tasks required for full outsourced custody evaluations than “half-priced lawyers” could be expected to have the experience and skill of certified specialists. One may, or may not, get what is paid for, but certainly no more, and it does a disservice to everyone involved to pretend otherwise.

One jurist, possessing a bare minimum of training in psychologically-related matters, has purported – both on and off the record – to make unsubstantiated and uninformed snap “diagnoses” of “personality disorders” on the part of litigants, and even of various members of the Bar.

Such cloaking of subjective bias, prejudice, and personal opinion under a veneer of psychological labeling fools no one, but it is problematic when indulged in by a person in a position of authority, since such pronouncements, no matter how outrageous, are unlikely to be contradicted by those dependent on pending rulings. There is the real risk that such a person can come to believe their own propaganda, and cease doing the actual work of judging in favor of the arrogant – if not irrational – belief in some inherent personal ability to perceive “the truth.” This defect will lead, sooner or later, to disaster of smaller or larger proportion.

The point here, however, is the rampant misuse of “psychological” labels and conclusions in our

family courts to disguise mere personal bias. Trial courts of this State are bound to apply statutes, case law, and the rules of evidence to reach **legal** conclusions in the cases brought before them. The irresponsible – and lazy – substitution of psychologists’ personal opinions and arm-chair diagnoses by the unqualified, in place of solid legal reasoning and results, reveals poor performance by lawyers, and especially judges, who should be far more jealously safeguarding the legitimacy of the processes by which legal decisions are reached.

IV. RECOMMENDATIONS

Shakespeare wrote that “All the world’s a stage / And all the men and women merely players.” If so, in the adversary system, we all have our parts to play. Mental health professionals, brought in to objectively evaluate psychological dysfunction in individuals by use of instruments they are qualified to apply, and divine the psychological best interest of children, should do so – and keep their remaining opinions to themselves.

The gross and pervasive failure of various mental health professionals to perceive and fill their proper place in the legal process is lamentable, but understandable. The true fault lies with lawyers too lazy to learn the relevant guidelines and standards, and insist that they be adhered to – and with judges, who have ceded their authority on ultimate issues to laymen with no legal expertise, and thus endangered the legitimacy of every custody and relocation decision unduly influenced by such reports.

Lawyers should be much more willing to object and move to strike “expert” reports going beyond the legitimate role and knowledge of the experts submitting them. And judges should sustain those objections and **grant** those requests to strike.

Much can be smoothed at the outset by judges more properly giving direction to mental health professionals when evaluations are commissioned – expressly confining them to appropriate tasks, and reports. And the reports should be strictly required, as the APA itself dictates, to contain conclusions firmly supported by the facts, as opposed to being vehicles for expression of what mental health professionals “feel” is true, or best.

Judges should require these things as if the legitimacy of their rulings is at stake. It is.

V. QUOTES OF THE ISSUE

“The difference between the right word and the almost right word is the difference between lightning and a lightning bug.”

– Mark Twain.

“No psychologist should pretend to understand what he does not understand.... Only fools and charlatans know everything and understand nothing.”

– Anton Chekhov (1860-1904).

"You're readin' my mind you won't look in my eyes
You say I do things that I don't realize
But I don't care it's all psychobabble rap to me."

— Alan Parsons Project, *Psychobabble* (EYE IN THE SKY, Arista Records 1982).

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Relocation: What Does Social Science Tell Us

Ex. 6

General Issues

- Relocation is an extraordinarily complex issue
- Child development, social policy and scientific research are all considered
- No Bright line for families
- Psychologist's role in relocation cases is to:
 - Maintain a balanced approach
 - Individualized assessment
 - Careful investigation of the facts
 - Identify variables, assess risk, and make clear the limitations of the predictions

What does the research tell us generally?

- Relocation represents general change and loss and change within family relationships
- Peer group issue, especially for teens
- Academic impact for teens
- 3 or more move doubles the likelihood of academic/behavioral issues in children.
- Braver, et.al, rendered a number of conclusions from their 2003 article. Some reasons for relocation are more compelling than other reasons.

Limitations to the research

- Most of the data is gathered from surveys as is the Braver, et.al study
- Does not create favor for or against relocation
- Risk Predictive Model utilized is predictive in nature (Austin, Stahl, Kelly)
- Literature provides little direction for families that have a successful equal timesharing schedule.
- What about parents who move without their children?

Pros for relocation

- Mobile society: changes happen with families such as remarriage and employment opportunities
- Economic improvement
- Extended family closer for support
- Stability results from the support system
- Relocation literature and attachment theory have not concluded relocation creates harm to children.
- Relocation can be beneficial to children.

Cons of relocation

- Frequent moves associated with adjustment problems for children: different impact based on age of the child
- Causes disruption to familiar routines, requires school changes, loss of peer relationships
- Loss of regular contact with parent
- Strain of frequent travel
- Some people have ulterior motives that are not evident
- 3 or more relocations associated with increased risk for behavioral and emotional problems in children

Risk Assessment Model

William Austin, Ph.D.

- Age of the Child
- Geographic Distance and Travel Time.
- Psychological stability of the relocating parent and the parenting effectiveness of both parents
- Individual resources / differences in the child's temperament / special needs

- History of parental conflict or domestic violence and continued....
- Interpersonal conflict and Domestic Violence
- Recentness of the Marital Separation
- Gate keeping behavior
- Involvement of the non-relocating parent

Jan C. Grossman, :
 Petitioner :
 v. :
 State Board of Psychology, : No. 3023 C.D. 2001
 Respondent : Submitted: January 17, 2003

OPINION BY JUDGE MCGINLEY

The "M" family is composed of B.P., mother, D.M., father, and L.M., a daughter. B.P. and D.M. separated and ultimately divorced in 1994. At the time of the separation, B.P. and D.M. shared legal custody of L.M. who was approximately four years old. The Court of Common Pleas of Montgomery County (common pleas court) appointed Margaret Cook, Ph.D. (Dr. Cook), to perform a custody evaluation of the M family and to make a recommendation with respect to L.M.'s custody. Dr. Cook recommended that joint legal custody continue.

Ex. 7

Shemtob attempted to obtain D.M.'s consent through correspondence with his attorney. Because D.M.'s attorney was in the process of ending their attorney-client relationship, D.M. did not receive the letters for some time.

During the first week of July, Dr. Grossman met with B.P. and her then husband, Michael (M.P.), for approximately one hour. On July 9, 1996, Dr. Grossman met with L.M., B.P. and M.P. After a brief introduction, Dr. Grossman met with L.M. alone for approximately one hour. Dr. Grossman's initial meeting with L.M. was to determine whether L.M. could verbally assess her needs, communicate realistically, describe her two home environments and to ultimately evaluate Dr. Cook's determination that L.M. was not a reliable witness. B.P. expressed her concern to Dr. Grossman that D.M. was not bathing L.M. when she stayed with him. B.P. arranged with Dr. Grossman to meet in a restaurant after B.P. picked up L.M. on July 14, 1996.

Though Dr. Grossman had requested Attorney Shemtob to obtain D.M.'s consent before he met with L.M., he did not confirm with Attorney Shemtob whether D.M. consented. He also did not contact D.M. prior to the July 9, 1996, meeting. On July 10, 1996, D.M. learned from his daughter of her meeting with Dr. Grossman the previous day. On July 12, 1996, D.M. telephoned Dr. Grossman and told him not to meet with L.M. again. D.M. sent a letter by fax and by certified mail to Dr. Grossman and reiterated his objection to Dr. Grossman. During the telephone conversation, Dr. Grossman failed to inform D.M. that he was scheduled to meet with L.M. on July 14, 1996. Dr. Grossman did not receive the fax until Monday, July 15, 1996, when he returned to his office.

On July 14, 1996, Dr. Grossman met L.M., B.P., and M.P. at a restaurant. After first meeting together, B.P. and M.P. moved to another table as far away from Dr. Grossman and L.M. as possible. To determine whether D.M. had cared for L.M. properly, Dr. Grossman picked up some of L.M.'s hair and also lifted her arms to smell L.M.'s hair and armpits.

After the common pleas court became aware that Dr. Grossman met with L.M. without D.M.'s consent, the common pleas court ordered that neither parent could take L.M. to another professional unless the other parent consented. Dr. Grossman did not prepare a formal report but provided "feedback" to Attorney Shemtob.

Dr. Grossman testified at the custody trial. Dr. Grossman testified that he asked Attorney Shemtob to obtain the cooperation of all parties. Notes of Testimony, January 28, 1997, (N.T. 1/28/97) at 451¹. Dr. Grossman also testified that in his telephone conversation with D.M., D.M. "did not forbid or, in any way, stop me from seeing his daughter." N.T. 1/28/97 at 468-469. Dr. Grossman described L.M.'s condition when he met her at the restaurant as having matted hair with a slight smell about her. N.T. 1/28/97 at 470. Dr. Grossman criticized Dr. Cooke's evaluation because there was no meeting with the parents together and no interview of L.M. N.T. 1/28/97 at 478-481. Dr. Grossman stated that the fact that D.M. sold insurance could present a child care problem because he might have to contact customers at night. N.T. 1/29/97 at 505-506; Reproduced Record (R.R.) at 372a-373a. Dr. Grossman concluded that Dr. Cook did not collect sufficient data

¹ The Reproduced Record does not contain the complete notes of testimony.

to draw the conclusions in her report. N.T. 1/29/97 at 515. On cross-examination, Dr. Grossman admitted that while meeting with B.P. and M.P., he made a note that D.M. consumed 750 milligrams per day of caffeine. N.T. 1/29/97 at 550; R.R. at 386a.

On or about February 14, 2000, the Commonwealth of Pennsylvania Bureau of Professional and Occupational Affairs (Commonwealth) filed a Notice and Order to Show Cause why the State Board of Psychology (Board) should not suspend, revoke or otherwise restrict Dr. Grossman's license, certificate, registration or permit, or impose a civil penalty. Count One of the Order to Show Cause alleged:

9. On or about July 9, 1996, Respondent [Dr. Grossman] met with L.M., then approximately 5½ years old, for approximately one hour in his office at the request of L.M.'s mother, B.P. and without the knowledge or consent of D.M.

10. By letter dated July 12, 1996, D.M. demanded that Respondent [Dr. Grossman] discontinue any meetings or evaluations with his daughter without his consent and advised Respondent [Dr. Grossman] that he did not have consent to evaluate his daughter, L.M.

11. On or about July 14, 1996, which was a Sunday evening, Respondent [Dr. Grossman] again met with L.M. in a Chinese restaurant at the request of B.P. without the knowledge or consent of D.M.

12. At the time B.P. requested that Respondent [Dr. Grossman] see her daughter, she was in the midst of a custody battle with L.M.'s father, D.M.

13. During the course of the meetings on July 9 and 14, 1996, Respondent [Dr. Grossman] not only spoke to

L.M. but also viewed her physical appearance by holding her hands and smelling her because B.P. had alleged that D.M. failed to bathe L.M. and/or engage in appropriate hygiene care with respect to L.M.

14. On July 16, 1996 in the Court of Common Pleas of Montgomery County, Respondent [Dr. Grossman] provided expert testimony on behalf of B.P. in the custody matter of L.M.

15. Respondent [Dr. Grossman], who is also a licensed practicing attorney, never consulted with D.M. or his attorney with respect to consent to meet with, treat and/or evaluate L.M.

16. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. §1208(a)(9)^[2] as well as the Board's Regulations at 49 Pa.Code §41.61, Ethical Principle 3(e)^[3], because Respondent [Dr. Grossman] has

² Section 8(a)(9) of the Professional Psychologists Practice Act (Act), Act of March 23, 1972, P.L. 136, *as amended*, 63 P.S. §1208(a)(9), provides:

(a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of the following reasons:

....

(9) Violating a lawful regulation promulgated by the board, including, but not limited to, ethical regulations, or violating a lawful order of the board previously entered in a disciplinary proceeding.

³ Principle 3(e) of the Board's Code of Ethics (Principle 3(e)), 49 Pa.Code §41.61(3)(e), provides:

As practitioners and researchers, psychologists act in accord with American Psychological Association standards and guidelines related to practice and to the conduct of research with human beings and animals. In the ordinary course of events, psychologists adhere to relevant governmental laws and institutional regulations. Whenever the laws, regulations or standards are in conflict, psychologists make known their

(Footnote continued on next page...)

deviated from the American Psychological Association standards and guidelines when he conducted a psychological evaluation and/or met with L.M. without the knowledge or consent of her father, D.M.

Notice and Order to Show Cause, February 14, 2000, Paragraphs 9-16 at 2-3; R.R. at 3a-4a. In Count II, the Commonwealth alleged that Dr. Grossman violated Section 8(a)(11) of the Act, 63 P.S. §1208(a)(11)⁴, because his psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of D.M., constituted unprofessional conduct.

On March 17, 2000, Dr. Grossman moved to dismiss the order to show cause because the order failed to set forth the material facts and/or statute upon which the cause of action was based, failed to set forth with specificity the grounds on which it is alleged that Dr. Grossman violated the Act and Principle 3(e). The Pennsylvania Psychological Association (PPA) filed a brief for amicus curiae in support of Dr. Grossman's motion to dismiss. On July 25, 2000, the Board denied the motion to dismiss.

(continued...)

commitment to a resolution of the conflict. Both practitioners and researchers are concerned with the development of laws and regulations which best serve the public interest.

⁴ Section 8(a)(11) of the Act, 63 P.S. §1208(a)(11), provides:

(a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a licensee or reprimand a licensee for any of the following reasons:

....
(11) Committing immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing psychological practice. Actual injury to a client need not be established.

On October 6, 2000, the Commonwealth presented a motion in limine in the nature of a motion to limit expert testimony because Dr. Grossman indicated in his prehearing statement that he planned to call three expert witnesses: Alvin I. Gerstein, Ph.D. (Dr. Gerstein), Sam Knapp, Ed.D. (Dr. Knapp), and Barry Bricklin, Ph.D. (Dr. Bricklin) and that the experts were scheduled to testify with respect to the same issues. The Commonwealth requested that the Board prohibit Dr. Grossman from calling all three expert witnesses. On October 19, 2000, the Board granted the motion in part and excluded the testimony of Dr. Gerstein.

On October 23, 2000, the Board conducted a formal hearing. D.M. testified that he spoke to Dr. Grossman on July 12, 1996, after Dr. Grossman met with L.M. on July 9, 1996. D.M. testified that he read a letter to Dr. Grossman over the telephone that advised him not to see L.M. again. Notes of Testimony, October 23, 2000, (N.T. 10/23/00) at 28, 34-35; R.R. at 75a. D.M. further testified that he was never asked to participate in a custody evaluation of L.M. with Dr. Grossman. N.T. 10/23/00 at 36; R.R. at 76a.

The Commonwealth called Dr. Grossman as a witness. Dr. Grossman admitted that he never obtained the written or verbal consent of D.M. to become involved in the custody case. N.T. 10/23/00 at 116; R.R. at 79a. Dr. Grossman testified that he never accused D.M. of having a caffeine addiction but that Dr. Cook had an obligation to investigate this issue because B.P. raised it and it was not included in Dr. Cook's report. N.T. 10/23/00 at 139; R.R. at 101a. Dr. Grossman explained that he did not perform a comprehensive custody evaluation of L.M. but instead performed a limited review of Dr. Cook's procedures. N.T.

10/23/00 at 147; R.R. at 109a. Dr. Grossman explained that he informed Attorney Shemtob “the only way I’ll undertake this case is if you tell the other side what I’m doing and she agreed to do it. As it turns out from later correspondence, it turns out she didn’t.” N.T. 10/23/00 at 151; R.R. at 112a. On cross-examination, Dr. Grossman denied that D.M. read anything to him over the telephone or that he was told not to see L.M. N.T. 10/23/00 at 164; R.R. at 115a.

Kirk Heilbrun, Ph.D. (Dr. Heilbrun), a professor of psychology and chair of the Department of Clinical and Health Psychology at MCP Hahnemann University, testified as the Commonwealth’s expert. Dr. Heilbrun reviewed the records and documents in the case. Dr. Heilbrun testified that Dr. Grossman played the role of evaluator in that he did more than just critique Dr. Cook’s evaluations. Dr. Heilbrun reported:

When he moved to evaluating LM, meeting with LM herself, then he moved from evaluating existing data to creating to his own data. And in my mind, that was what made the difference between his critiquing the evaluation of another mental health professional, and performing a version of his own evaluation.

N.T. 10/23/00 at 220; R.R. at 141a. Dr. Heilbrun determined that Dr. Grossman functioned as an evaluator because he saw L.M. twice and developed some of his own data and because he testified about custodial aspects of the father-child relationship. N.T. 10/23/00 at 231. Dr. Heilbrun testified that the standard of conduct in July 1996 and January 1997 for a custody evaluator required the permission and consent of both parents. N.T. 10/23/00 at 238; R.R. at 148a. Dr. Heilbrun also testified that it is not appropriate for a psychologist to delegate the responsibility of obtaining consent to attorneys. N.T. 10/23/00 at 241.

After the Commonwealth rested, Dr. Grossman's attorney moved to dismiss as the Commonwealth admitted that the Board had no written policy regarding consent in a custody evaluation. The Board denied the motion. Dr. Bricklin, a clinical psychologist and a professor at the Institute for Graduate Clinical Psychology at Widener University and an expert in custody, testified that there is no standard with respect to obtaining consent from both parents where there is shared legal custody. N.T. 10/23/00 at 365; R.R. at 180a. Dr. Bricklin testified that there was nothing in the Guidelines for Child Custody Evaluations in Divorce Proceedings (Guidelines) that would prevent a psychologist from critiquing the assessment methodology of someone else or conducting a limited evaluation of a child alone. N.T. 10/23/00 at 374; R.R. at 189a.

Dr. Grossman explained his conduct with respect to L.M.:

And I thought, up until I got my Prosecution letter, that as a psychologist based on the guidelines and the APA ethical principles, I had discretion. The discretion I used in this case was I felt it was very important, given what I had read in Dr. Cooke's report, for the Court to be informed that this child either did or did not have the ability to contribute to her own evaluation and express her own needs. And because I felt that it was important, because I made that clinical decision, I went forward notifying the father in the way that I felt was the best and most efficient way.

Notes of Testimony, October 24, 2000, (N.T. 10/24/00) at 424; R.R. at 217a.

Dr. Knapp, deputy executive officer and director of professional affairs with the PPA, testified that in 1996, there was no requirement that Dr. Grossman obtain D.M.'s consent for the review of Dr. Cook's report and there was

no requirement that he notify or obtain consent from D.M. prior to meeting with L.M. N.T. 10/24/00 at 537; R.R. at 246a.

On December 3, 2001, the Board determined that Dr. Grossman violated Principle 3(e) and Section 8(a)(9) of the Act and issued a reprimand. The Board also determined that Dr. Grossman violated Section 8(a)(11) of the Act and assessed a \$1,000 civil penalty. The Board sustained both Count 1 and Count 2 in the Order to Show Cause. The Board made the following relevant findings of fact:

17. The father called Respondent [Dr. Grossman] in the afternoon of July 12, 1996, instructed him not to meet with his daughter again and informed him that he would be sending the Respondent a fax following the conversation.

18. Respondent [Dr. Grossman] learned for the first time that the father did not give his consent to Respondent's evaluation of L.M.

19. Respondent [Dr. Grossman] did not advise the father at any time during that conversation that he was scheduled to meet with L.M. again two days later.

20. During the conversation, Respondent [Dr. Grossman] did not attempt to obtain the father's consent to meet with L.M. on July 14, 1996.

21. The father followed up his telephone call by sending the Respondent a letter by fax and certified mail reiterating his prohibition against the Respondent seeing L.M. again.

22. Respondent did not receive the fax until July 15, 1996. (NT 165, 480)

23. As was previously arranged, Respondent met L.M. at a Chinese restaurant on July 14, 1996, to see if the

mother's claim that L.M. returned from visits with her [sic] the father in a 'dirty and slovenly condition' were accurate.

....
28. Respondent testified at the custody proceeding the father had a caffeine addiction and as an insurance salesman would be required to work at night, both of which would affect his ability to care for L.M.

....
31. Respondent conducted a custody evaluation.

State Board of Psychology, Adjudication and Order, December 3, 2001, (Adjudication) Findings of Fact Nos. 17-23, 28, 31 at 6-8; R.R. at 346a-348a.

The Board concluded that Dr. Grossman conducted a psychological evaluation of, and met with, L.M. without the knowledge or consent of D.M., in violation of Sections 8(a)(9) of the Act and Principle 3(e) and raised questions about D.M.'s parenting ability without having talked to D.M. in violation of Section 8(a)(11) of the Act. The Board also determined that Dr. Grossman had sufficient notice that he was required to obtain consent because the Board amended its Code of Ethics on June 17, 1989. Included in the amendment was Principle 3(e) which required adherence to the standards and guidelines of the American Psychological Association [APA] related to practice. In July 1994, the APA published Guideline #9 of the Guidelines which provided:

The psychologist obtains informed consent from all adult participants and, as appropriate, informs child participants. In undertaking child custody evaluations, the psychologist ensures that each adult participant is aware of (a) the purpose, nature, and method of the evaluation; (b) who has requested the psychologist's services; and (c) who will be paying the fees. The psychologist informs adult participants about the nature of the assessment instruments and techniques and informs those participants about the possible disposition

of data collected. The psychologist provides this information, as appropriate to children, to the extent that they are able to understand.

Guidelines for Child Custody Evaluations in Divorce Proceedings, American Psychologist, July 1994, at 679; R.R. at 413a.

Dr. Grossman contends that the Board failed to give proper notice to him of its use, enforcement and interpretation of the Guidelines and its standards for notice and consent in child custody situations, that the Board committed errors of law, that the Board committed a gross abuse of discretion when it did not allow him to present a witness, and that the Board's finding that the Commonwealth had met its burden of proof was a gross abuse of discretion and against the weight of the evidence presented. Dr. Grossman also contends that he did not violate Section 8(a)(9) of the Act because the Commonwealth did not meet its burden of proof, or because Principle 3(e) is defective, and/or because the Board misapplied one of its own cases. Dr. Grossman also contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of the section constitutes a result so excessively punitive so as to constitute a gross abuse of discretion on the part of the Board.⁵

Dr. Grossman asserts that he did not need to obtain D.M.'s consent before either of his meetings with L.M. He also asserts that even if the Board

⁵ An adjudication made by the Board must be affirmed on appeal unless constitutional rights have been violated, an error of law has been made, rules of administrative procedure have been violated or a finding of fact necessary to support the adjudication is not supported by substantial evidence. Batoff v. State Board of Psychology, 561 Pa. 419, 750 A.2d 835 (2000).

required him to obtain consent, the Board failed to provide him with adequate notice of the requirement. Dr. Grossman also argues that the Board failed to inform him in the Notice and Order to Show Cause that he could be cited for immoral and unprofessional conduct under Section 8(a)(11) of the Act for his testimony at the custody trial rather than for his evaluation of L.M. without D.M.'s consent. As a consequence, Dr. Grossman could not adequately prepare a defense because he did not know that his testimony at the custody trial was at issue.

I. COUNT I.

A. Notice.

Dr. Grossman contends that the Board failed to provide proper notice of its use, enforcement, and interpretation of the Guidelines and its standards for notice and consent in child custody situations. Dr. Grossman notes that he was found guilty of violating Principle 3(e) because he did not follow Guideline #9 which was published in 1994.

First, Dr. Grossman asserts that Principle 3(e) fails to delineate what a "standard or guideline" is. However, Guideline #9 is clearly identified as a "guideline" of the APA. On this basis, this Court does not believe that Dr. Grossman could not ascertain that Guideline #9 was a "guideline".

Second, Dr. Grossman asserts that Principle 3(e) did not provide any notice or clarification as to what would happen if an APA guideline or standard was updated, such that the Board did not inform Dr. Grossman or other psychologists between July 1994, when the APA published the Guidelines that

they applied to Principle 3(e). This Court does not accept Dr. Grossman's argument. If the Board's principle states that it will adhere to the Standards and Guidelines of the APA and the APA issues a new set of guidelines, it stands to reason that the new guidelines apply to psychologists licensed in the Commonwealth of Pennsylvania. Although Dr. Grossman argues that Principle 3(e) is unconstitutionally vague and fails to contain reasonable standards to guide conduct to satisfy the requirements of due process, See Watkins v. State Board of Dentistry, 740 A.2d 760 (Pa. Cmwlth. 1999), this Court does not agree. Principle 3(e) requires adherence to the standards and guidelines of the APA. Guideline #9 of the Guidelines is a guideline of the APA. The principle is clear.

Next, Dr. Grossman asserts that the Board improperly delegated its rulemaking authority to the APA. Section 3.2(2) of the Act, 63 P.S. §1203.2(2), requires the Board to establish standards of practice and a code of ethics. The Board complied with the General Assembly's statutory directive.

Dr. Grossman also asserts that a reliance on APA standards and guidelines could result in some guidelines or standards that are in conflict with Pennsylvania law. However, he does not indicate that was the case here.

Dr. Grossman next asserts that even if he concedes that the Board legally incorporated the Guidelines into Principle 3(e) that the Guidelines are inapplicable because they are merely aspirational. The introduction to the Guidelines provides:

These Guidelines build upon the American Psychological Association's Ethical Principles of Psychologists and

Code of Conduct (APA, 1992) and are aspirational in intent. As guidelines, they are not intended to be either mandatory or exhaustive. The goal of the guidelines is to promote proficiency in using psychological expertise in conducting child custody evaluations.

Guidelines at 677; R.R. at 411a. Dr. Grossman argues that because the Guidelines are aspirational and not mandatory, they cannot be applied to regulate conduct of psychologists in Pennsylvania. While Dr. Grossman is correct that the APA describes the Guidelines as aspirational and not mandatory, the Board made the Guidelines mandatory when it required compliance with the standards and guidelines of the APA.

As part of this same argument, Dr. Grossman asserts that the Board applied an unconstitutionally vague term, “higher standard”, in reaching its decision. The Board stated:

Regardless of whether the APA intended their Guidelines to be aspirational for association members, the inclusion of APA standards and guidelines in Principle 3(e) of the Board’s Code of Ethics, 49 Pa. Code §41.61, Principle 3(e), established a mandatory requirement for licensees in this Commonwealth. As the Board explained in its Preamble to the amended regulations, ‘[t]he primary objective of this amendment is to hold licensed psychologists to a higher standard of ethical practice . . . in their relationships with their clients, their colleagues, their research subjects and the general public.’ 19 Pa. B. 2555 (Emphasis in original).

Adjudication at 15; R.R. at 355a.

Dr. Grossman asserts that the term “higher standard” is unconstitutionally vague because it is unclear as to what or whom the standard is higher. Dr. Grossman believes that it is unclear whether the standard is higher than

that for licensed physicians, chiropractors, podiatrists, cosmetologists or whether the standard is higher than the APA's standard or the standard of psychology boards in other states. However, Dr. Grossman answered his own question in his brief when he acknowledged that the preamble to the proposed 1989 Ethical Code explained that the new Code had a higher standard than the previous Code.⁶

Dr. Grossman next argues that convicting him of "immoral and unprofessional" conduct was a gross abuse of discretion because Principle 3(e) must be strictly construed and any ambiguities resolved in his favor. See Commonwealth v. Lassiter, 554 Pa. 586, 722 A.2d 657 (1998). This argument, however, goes to the underlying merits of Dr. Grossman's case and not to the issue of whether he received notice. Arguments raised in the argument section of a brief but not in the Statement of Questions Involved are waived. See Pa.R.A.P. 2116(a).⁷

⁶ With respect to this same issue, Dr. Grossman argues that it was improper for the Board to cite him for "immoral and unprofessional" conduct because he was compelled to adhere to a higher standard, the aspirational APA Guideline. Dr. Grossman was cited for "immoral and unprofessional" conduct in Count II which will be discussed below.

⁷ Dr. Grossman further argues that a brief summary of one of the Board's decisions in the State Board of Psychology Spring 1993 Newsletter was insufficient to apprise him of the necessity to obtain the consent of both parents before a custody evaluation. The summary of Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenblum, Docket No. 436-MISC-91, File No. 86-63-01749, in the State Board of Psychology Spring 1993 Newsletter stated: "The Board's action against Rosenblum was based upon his admission to having failed to value objectivity, engaged in a dual relationship, and committed unprofessional conduct in five child-custody cases." State Board of Psychology Newsletter, Spring 1993, at 8; R.R. at 580a.

The Board referred to Rosenblum in Footnote #17 of the Adjudication at the conclusion of its discussion of Hill and Wesley and its determination that in light of Guideline #9, dual consent of both parents must be provided:
(Footnote continued on next page...)

B. Errors of Law.

Dr. Grossman contends that the Board committed errors of law. First, Dr. Grossman contends that the Board erred when it referred to two cases, In re: Wesley J.K., 445 A.2d 1243 (Pa. Super. 1982)⁸ and Hill v. Hill, 619 A.2d 1086 (Pa. Super. 1993)⁹. The Board stated:

(continued...)

Applying these principles regarding dual consent, as early as 1991, the Board reprimanded and assessed a civil penalty against a psychologist for, amongst other violations, violating Principle 3 for failing to obtain the consent of both parents who had shared legal custody. Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs v. Rosenbloom [sic], Docket No. 436-MISC-91, File No. 86-63-01749, p.6. Notice of the Rosenbloom [sic] Consent Agreement was published in the Board's Spring 1993 newsletter which was mailed to all licensees.

Adjudication, n.17 at 16-17; R.R. at 357a-358a.

This Court agrees with Dr. Grossman that this squib in a newsletter did not constitute sufficient notice to Dr. Grossman. Further, neither the Board in its opinion nor the Commonwealth in its brief to this Court cites any case law, rule, or regulation that a brief summary constitutes notice. Even though the Board's reliance on the mention of this case in the newsletter is misplaced, this Court agrees with the Board that Principle 3(e) and the Guidelines constituted sufficient notice.

⁸ In Wesley, our Pennsylvania Superior Court set forth the basis under which parents may be awarded shared custody of a child. The Superior Court referred to Section 3 of the Custody and Grandparents Visitation Act, Act of November 5, 1981, P.L. 115, 23 P.S. §1003, which defined Legal Custody as the "legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions." Under a shared custody arrangement, legal and/or physical custody of a child is shared.

⁹ In Hill, our Pennsylvania Superior Court reversed the order of the Court of Common Pleas of Philadelphia County that awarded parents shared legal custody but allowed the mother to make the decision if a conflict arose. The Superior Court determined that the trial court's order effectively granted the mother sole legal custody and reasoned, "[i]t is abundantly clear . . . that the concept of shared legal custody does not contain the principle of giving one parent final authority in the case of a dispute." Hill, 619 A.2d at 1089.

Respondent's [Dr. Grossman] actions should also have been guided by the decisions of the Superior Court in Hill and Wesley involving shared or joint custody. 'Legal custody' is defined by statute as the legal right to make decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions.' 23 Pa.C.S.A. §5302. In the Board's opinion, decisions involving psychological evaluations are encompassed within this definition. . . . Unlike sole custody, in shared or joint custody, legal custody is shared while physical custody is alternated by the agreement of the parties. Wesley, 445 A.2d at 1247. 'The philosophic premise of shared custody is the awarding to both parents of *responsibility* for decisions and care of the child Shared custody allows both parents input into major decisions in the child's life.' Hill, 619 A.2d at 1088 (emphasis added [by the Board] and Wesley, 445 A.2d at 1247). Given that both parents' input is required, and in light of Guideline #9, dual consent of both parents must be provided. (Footnote omitted).

Adjudication at 16; R.R. at 356a.

Dr. Grossman attacks the Board's reliance on Hill and Wesley from different angles. First, he asserts that the Board did not find his intervention or evaluation of L.M. to be a major decision¹⁰ therefore dual consent was not required. Second, he asserts that because neither Hill nor Wesley mentions health professionals of any sort there is no affirmative duty for a psychologist to legally interpret a joint custody order and abide by the order by withholding professional service absent joint consent.

¹⁰ Section 5302 of the Domestic Relations Code, 23 Pa.C.S. §5302, gave legal custodians the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions. This section was the same as the section cited in Wesley. Since Wesley, the domestic relations statutes have been consolidated.

Although the Board did not explicitly make a finding that the decision to pursue a second evaluation of L.M. was “major”, this Court infers that the Board in the promulgation of its regulations and Code of Ethics regarded a custody evaluation to be a major decision, and, second, while Hill and Wesley do not mention health care professionals or psychologists, that was not the thrust of the opinions. Hill and Wesley addressed the concept of shared legal custody in Pennsylvania. The result is that when both parents share legal custody of a child, then the consent of both parents is needed with respect to major decisions.

Dr. Grossman also alleges that he met with L.M. a second time to investigate B.P.’s allegation that D.M. did not properly care for L.M. because she returned to B.P. in a “slovenly and unkempt” condition. Dr. Grossman argues that he was investigating possible child abuse and, consequently, did not have to obtain the consent of D.M. before he met with L.M. on July 14, 1996. The Board noted that where there is a “bona fide emergency” a psychologist need not obtain the consent of both parents in the performance of a custody evaluation. The Board cited allegations of sexual abuse or a child’s threat of suicide as examples. Adjudication at 13, n.11; R.R. at 353a. This Court agrees with the Board that Dr. Grossman was not excused from obtaining D.M.’s consent because L.M. was returned to B.P. not freshly bathed and coiffured.

C. Refusal to Allow Dr. Gerstein to Testify.

Dr. Grossman next contends that the Board committed an abuse of discretion when it did not permit the testimony of Dr. Gerstein. Dr. Grossman asserts that Dr. Gerstein, a member of the Board from 1992-1997 when Dr.

Grossman's alleged offenses occurred, would in his testimony address whether Dr. Grossman's conduct was in any way forbidden by a Board policy, rule, and/or adjudication. Prior to the commencement of the hearing, the Board granted the Commonwealth's motion in limine to exclude Dr. Gerstein's testimony. The Board determined that Dr. Gerstein was not permitted to testify because Dr. Grossman informed the Board that Dr. Gerstein would have testified that while he was a member of the Board Dr. Grossman's actions in conducting a custody evaluation would not have been a violation of the Act or the regulations. The Board determined that Dr. Gerstein's view of how the Board would have interpreted the Act or the regulations were not relevant or probative. Dr. Grossman argues that the Board committed an abuse of discretion because Dr. Gerstein would not have testified with respect to his interpretation of the Guidelines but would have discussed whether the Guidelines served as rules for the Board in 1996.

In Allegheny County Institution District v. Department of Public Welfare, 668 A.2d 252 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 547 Pa. 757, 692 A.2d 567 (1997), this Court affirmed a decision of a hearing examiner of the Department of Public Welfare that refused permission to allow Allegheny County Institution District to introduce the testimony of Speaker of the Pennsylvania House of Representatives, K. Leroy Irvis, with respect to the General Assembly's intent when it passed a certain act. This Court stated that it "is not bound by the arguments of a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator." Allegheny County Institution District, 668 A.2d at 257 n.13.

Similarly, the Board would not be bound by the opinion of a single Board member of the Board's intentions regarding the Board's rules and policies in 1996. The rules and policies speak for themselves and the underlying intent was subject to administrative review by the Board. This Court agrees with the Board that Dr. Gerstein's opinion as a former Board member was not relevant or probative, and the Board did not abuse its discretion when it chose not to permit the testimony of Dr. Gerstein.

D. Burden of Proof.

Dr. Grossman next contends that the Board's finding that the Commonwealth met its burden of proof was a gross abuse of discretion and was against the weight of the evidence. Dr. Grossman asserts that he along with Dr. Knapp, Dr. Bricklin, and the PPA, believed that dual parental consent was unnecessary. Further, Dr. Grossman asserts that he did not perform a custody evaluation but that upon the request of B.P. he evaluated L.M. and critiqued the assumptions and methodology of Dr. Cooke's assessment.

With respect to this issue, the Board determined:

Lastly, Respondent [Dr. Grossman] asserted that he was not required to obtain the father's consent because he did not perform a custody evaluation. Respondent [Dr. Grossman] maintained that he was simply providing a custody related evaluation, which does not require the consent of both parents. . . . He insists that within the gamut of this review he was permitted to review Dr. Cook's report and also conduct a brief assessment of the child. . . . Conversely, the Commonwealth insisted that Respondent served as a custody evaluator, thereby requiring dual consent.

Drs. Bricklin, Knapp and Heilbrun all testified that a 'records review' is limited to a review of the documents of record including the custody report, raw testing data, and background information. It does not involve any personal contact with the parties. . . . Dr. Knapp further testified that *any* direct evaluation of the child or the parent may be construed as a custody evaluation. . . . Again, all three experts agreed that in this type of evaluation dual consent is required. . . .

Specifically, in this case, Dr. Heilbrun opined that the Respondent [Dr. Grossman] exceeded the scope of a records review and acted more like a custody evaluator because he met with L.M. on two occasions. The Board agrees. (Citations and footnote omitted).

Adjudication at 17-18; R.R. at 357a-358a. This Court finds that the Board had the authority to make such findings of fact and conclusions of law.

Dr. Grossman also asserts that he did not violate Guideline #9 because he was not required to obtain consent from D.M. because D.M. was a litigant. Dr. Grossman argues that D.M. was not a participant because he was not going to be examined.

The Board disagreed with Dr. Grossman:

Respondent [Dr. Grossman] argues that even if Guideline #9 is mandatory it did not require him to obtain the father's consent because it uses the language 'adult participants' rather than 'litigants.' . . . In Respondent's [Dr. Grossman] opinion, the father was a 'litigant' and therefore, was not required to provide consent. . . . Reading the Guideline as a whole, the Board simply cannot interpret it as requiring anything less than the consent of both the mother and the father. The Guideline requires that 'each' participant understand who has requested the services and who is paying the fee. Given this specific language, it would be illogical to suggest

that the adult participants are limited to the parties hiring the psychologist since they are well aware of the scope of the engagement and the fee. (Footnote and citations omitted).

Adjudication at 15-16; R.R. at 356a-357a. Again, this Court must conclude that the Board had the authority to make these findings and conclusions and committed no error.

Essentially, Dr. Grossman next asks this Court to reweigh the testimony of his witnesses, Dr. Bricklin and Dr. Knapp, that Dr. Grossman did not have a duty to obtain D.M.'s consent. Dr. Grossman also asserts that the Commonwealth's expert, Dr. Heilbrun, came to the same conclusion. A review of Dr. Heilbrun's testimony does not support Dr. Grossman's assertion. Dr. Heilbrun testified that, in his opinion, Dr. Grossman conducted a custody evaluation which required the consent of both parents. The Board accepted Dr. Heilbrun's testimony over the testimony of Dr. Knapp and Dr. Bricklin. It is not this Court's function to judge the weight and credibility of evidence before an administrative agency. Makris v. State Bureau of Professional and Occupational Affairs, State Board of Psychology, 599 A.2d 279 (Pa. Cmwlth. 1991). Dr. Grossman's argument must fail.¹¹

¹¹ Dr. Grossman next contends that the Commonwealth did not meet its burden of proof and/or Principle 3(e) was defective and/or the Board misapplied Rosenblum and he was not in violation of Section 8(a)(9) of the Act. This Court has already determined that the Commonwealth met its burden of proof with respect to Principle 3(e) and that Principle 3(e) was not defective. With respect to Rosenblum, Dr. Grossman argues that he did not violate Rosenblum. Dr. Grossman mischaracterizes the Board's discussion. The Board did not refer to Rosenblum to indicate that it served as a basis upon which to cite Dr. Grossman. Rather, the Board cited its decision to show that it required dual parental consent in certain cases since 1991 well before the conduct at issue here. This Court reiterates that the Board did not err when it determined that Dr. Grossman violated Section 8(a)(9) of the Act.

II. COUNT II – SECTION 8(a)(11) OF THE ACT.

Finally, Dr. Grossman contends that Section 8(a)(11) of the Act is unconstitutionally vague and/or the application of this statute constituted a result so excessively punitive as to constitute a gross abuse of discretion by the Board. Dr. Grossman believes that the Order to Show Cause was so vague that he was prevented from ascertaining that he was accused of a violation of Section 1208(a)(11) based on his testimony in the child custody hearing.

With respect to a violation as a result of Dr. Grossman's testimony, the Order to Show Cause provided:

COUNT TWO

17. Paragraphs 1 through 15 are incorporated by reference.

18. Based upon the foregoing Factual Allegations, the Board is authorized to suspend or revoke, or otherwise restrict Respondent's [Dr. Grossman] license, or impose a civil penalty under 63 P.S. §1208(a)(11) because Respondent's [Dr. Grossman] conduct of conducting a psychological evaluation and/or meeting with L.M. with respect to a custody proceeding without the knowledge or consent of her father, D.M., constituted unprofessional conduct in the practice of psychology.

Order to Show Cause, February 14, 2000, Paragraphs 17-18 at 3; R.R. at 4a.

In the "Violations and Sanctions" section of the Adjudication, the Board stated:

The Respondent [Dr. Grossman] also engaged in unprofessional or immoral conduct, under Section 8(a)(11) of the Act, 63 P.S. §1208. Even though

Respondent [Dr. Grossman] did not meet with the father, the Respondent [Dr. Grossman] cast aspersions about the father's ability to parent L.M. Specifically, Respondent [Dr. Grossman] suggested that the father may have a caffeine addiction. (NT 139-142, 144, 272) While Respondent [Dr. Grossman] suggested that the mother also drinks coffee, Respondent [Dr. Grossman] only offered specific calculations about the father's consumption. Respondent [Dr. Grossman] also raised the issue of whether the father was able to care for L.M. because insurance salesmen often have to work at night. (N.T. 139-142, 144, 272) Both statements were specifically intended to call the father's fitness to parent into question. In that Respondent [Dr. Grossman] did not speak with the father about these issues, his speculation constitutes unprofessional conduct. The Board believes that a \$1,000 civil penalty is appropriate for this violation.

Adjudication at 20; R.R. at 360a.

In an administrative proceeding, the essential elements of due process are notice and an opportunity to be heard. Wills v. State Board of Vehicle Manufacturers, Dealers and Salespersons, 588 A.2d 572 (Pa. Cmwlth. 1991). "Notice, the most basic requirement of due process, must 'be reasonably calculated to inform interested parties of the pending action, and the information necessary to provide an opportunity to present objections. . . .'" Noetzel v. Glasgow, Inc., 487 A.2d 1372, 1377 (Pa. Super. 1985) *cert. denied*, 475 U.S. 1109 (1986), quoting Pennsylvania Coal Mining Association v. Insurance Department, 471 Pa. 437, 452-453, 370 A.2d 685, 692-693 (1977).

Here, Count II of the Notice and Order to Show Cause incorporated all of the previous paragraphs. Count II stated that Dr. Grossman violated Section 8(a)(11) of the Act because he conducted a custody evaluation and/or met with

L.M. without D.M.'s consent. The Notice and Order to Show Cause did not mention Dr. Grossman's testimony at the custody trial. This Court agrees with Dr. Grossman that the Notice and Order to Show Cause failed to afford Dr. Grossman adequate notice and the opportunity to sufficiently prepare a defense to the challenge to his testimony at the custody trial. Although the Board's conclusions of law referenced Dr. Grossman's failure to obtain consent from D.M. before the custody evaluation with respect to Count II, it is apparent from the Violations and Sanctions section of the Adjudication that the Board found that Dr. Grossman *violated Count II as a result of his testimony at the custody trial, not just the custody evaluation itself*. This Court concludes Dr. Grossman did not receive adequate notice of this specific charge against him. As a result, this Court sustains Dr. Grossman's appeal as to Count II.

Accordingly, this Court affirms in part and reverses in part. This Court affirms the Board as to the reprimand for Count I. This Court reverses the Board as to the \$1,000 fine for Count II.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jan C. Grossman,	:
	:
Petitioner	:
	:
v.	:
	:
State Board of Psychology,	:
Respondent	:
	:

No. 3023 C.D. 2001

ORDER

AND NOW, this 2nd day of June, 2003, the order of the State Board of Psychology in the above-captioned matter is affirmed in part and reversed in part. This Court affirms the State Board of Psychology's reprimand for Count I. This Court reverses the State Board of Psychology as to the \$1,000 fine for Count II.

BERNARD L. MCGINLEY, Judge