No. 19-577

In The
Supreme Court of the United States

TAMRA L. LAMPRELL,

Petitioner,

v.

REX E. STUCKEY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of New Mexico

BRIEF OF BATTERED WOMEN'S JUSTICE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF *AMICUS CURIAE*[1]

STATEMENT OF *AMICUS* BATTERED WOMEN'S JUSTICE PROJECT

Pursuant to Supreme Court Rule 37.3, the Battered Women's Justice Project ("BWJP"), as *amicus curiae*, respectfully submits this brief in support of the Petitioner.

The BWJP serves as a national resource center on the civil and criminal legal responses to intimate partner violence ("IPV") and promotes systemic change within these systems to create an effective and just response to victims and perpetrators of IPV, as well as the children exposed to this violence. BWJP provides resources and training to advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence (IPV). The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support since 1993. The BWJP also serves as a designated technical assistance provider for the Office on

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Violence Against Women of the U.S. Department of Justice.

SUMMARY OF ARGUMENT

This case represents a gross infringement upon basic due process rights of parents in family courts across the nation: judicial reliance upon behind-the-scenes investigations into the most private aspects of family life without adequate notice or opportunity for the parties to make or correct the record. Specifically, family courts across the country appoint third parties to gather information, report findings, and make recommendations to the court and then the court takes action on those reports and recommendations without first: (i) providing the parties with a copy of the findings and recommendations; (ii) entering the findings into evidence; and/or (iii) providing the parties an opportunity to question the third party investigator about the quality or source of the information upon which those findings and recommendations are based.

In this case, as has occurred in similarly-situated cases all over the country, the court took extreme action based solely on the undisclosed—and unsupportable—report of a third party against a parent who posed no direct or imminent threat to the minor child. In doing so, the court violated the parent's fundamental liberty interest to care for and have custody of her child.[2] To make matters worse, for fifteen months, the

[2] *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

court refused the parent the opportunity to challenge the basis of the report that resulted in the court's decision to place the child in the custody of the other parent who was, at the time, under investigation for sexually abusing the child. This is a violation of the parent's due process rights that happens throughout this country on a regular basis.

BWJP urges the Court to accept jurisdiction of this case and require minimum due process guarantees to be satisfied before a court can rely on a third-party report to deprive a parent of custody of her or his child, even on an interim basis, in the absence of a cognizable emergency.

ARGUMENT

I. Family Courts Across the Country Rely on Largely Impressionistic Evaluations Prepared by Outside Investigators, who Render Opinions on the Ultimate Issues of the Case, Without Affording Parties Adequate Due Process of Law.

A. Evaluations are Inconsistent, Unregulated and Highly Impressionistic.

Courts frequently rely on outside investigators to gather information and report their findings to the court in contested child custody cases.[3] These investigators

[3] *Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, National Council of Juvenile

go by many names, including "custody evaluators,"[4] "court counselors,"[5] "custody investigators,"[6] "guardians ad litem,"[7] "friends of the court,"[8] "court-appointed-special-advocates,"[9] or—as in this case—"priority or advisory consultants."[10] In addition to their many different titles, these investigators come from many different professional backgrounds, including: social workers, psychologists, psychiatrists, lawyers, retired judges, or simply volunteers.[11] In most courtrooms across the county, no standard education or formal training is required of these investigators, apart from the general continuing education demands of their professional licensing boards.[12] In the few locations where

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and Family Court Judges, Reno, NV 16 (2006) [hereinafter *Navigating Custody*].

[4] *Model Standards of Practice for Child Custody Evaluation ("Model Standards")*, Association of Family & Conciliation Courts ("AFCC") (2006), Standard P-1 of the preamble, p. 6.

[5] *See, e.g.*, California Family and Juvenile Court Rule 5.210; Local Court Rule 15, Court of Common Pleas, Domestic Relations Division, Lucas County, OH; Local Court Rule 407(4), Circuit Court, Dane County, WI.

[6] *See, e.g.*, Colorado Rev. Stat. §14-10-116.5(1); Alaska R.Civ.P. 90.6(a).

[7] Cynthia Grover Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child Custody Disputes*, 24 B.C. THIRD WORLD L.J. 283 (2004).

[8] MCL 552.505(1)(g).

[9] CASA/GAL Association, https://casaforchildren.org/our-work/the-casa-gal-model/ (last visited Nov. 21, 2019).

[10] N.M. R. Civ. P. Dist. Ct. 1-125.

[11] *Navigating Custody*, *supra* note 3, at 16.

[12] State-by-State Survey Related to Forensic Evaluators, Fordham Law School, Feerick Center for Social Justice, March

training mandates do exist, they typically call on investigators to complete a certain number of continuing education hours on a range of topics instead of expecting them to master a standard curriculum designed to ensure a base level of professional competence.[13]

A national survey of custody evaluators found that the vast majority learned their trade by attending conferences rather than through education:[14]

> Ninety-five percent of the sample had received their training through seminars and workshops. Only 13.3% received their training through internships, and 12.8% through graduate courses. Only 4.3% had more than 300 hours of practicum experience in custody evaluation work. As a result, *we still have a population of custody evaluators who were largely self-trained, did not have formal course work regarding custody evaluations, and are male Ph.D.s.*[15]

2012; *accord* James N. Bow & Paul Boxer, *Assessing Allegations of Domestic Violence in Child Custody Evaluations*, 18 J. INTERPERSONAL VIOLENCE 1394, 1400 (2003).

[13] Bow & Boxer, *supra* note 11, at 1400; *accord* Raven Lidman & Betty Hollingsworth, *The Guardian ad Litem in Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 276 (1998).

[14] Marc J. Ackerman and Tracy Brey Pritzl*, Child Custody Evaluation Practices: A 20-Year Follow*-Up. 49 FAM. CT. REV. 618 (2011).

[15] *Id*. at 619 (emphasis added).

The same can be said of guardians ad litem, who perform a similar function:

> [m]ost courts and voluntary programs require some type of training in order to qualify for appointment as a guardian ad litem, but such training could be as little as seven hours . . . Even if the training is for up to forty hours . . . very little time is spent on child development, family dynamics during stress, and the other substantive knowledge that one would expect from an expert.[16]

These findings raise significant concerns "about the adequacy and quality of the training in an extremely complex area, along with the level of competency attained by evaluators."[17]

Given the diverse backgrounds and vague educational demands, professional practice in this field is wildly inconsistent. This problem is compounded by the fact that few standards exist to govern investigators' work.[18] Those that do are aspirational and unenforceable.[19] Section 1.2 of the Model Standards,

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[16] Lidman & Hollingsworth, *supra* note 13, at 276.

[17] James Bow, *Review of Empirical Research on Child Custody Practice*, 3 J. Child Custody 23, 46 (2006).

[18] State-by-State Survey Related to Forensic Evaluators, Fordham Law School, Feerick Center for Social Justice, March 2012.

[19] *E.g.*, American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings* (2010); AFCC, *Model Standards* (2007); American Academy of Matrimonial Lawyers, *Child Custody Evaluation Standards* (2011); *Custody and Parenting Time Investigation Manual*, Michigan State

promulgated by the AFCC, is instructive. It provides that:

> **AFCC believes it to be advisable that our members conform their practices to these *Model Standards*; however, AFCC does not have an enforcement mechanism.**[20]

Some states, like New Mexico, provide general guidance to court-appointed investigators:

> "advisory consultation" means a brief assessment about the parenting situation and a written report summarizing the information for the attorneys and the court, including an assessment by the counselor of the positions, situations and relationships of family members and suggestions regarding specific plans, general issues or requested action;
>
> * * *
>
> "evaluation" means a complete assessment that may include multiple interviews with parents and children, psychological testing, home visits and conferences with other appropriate professionals.[21]

Court Administrative Office, Friend of the Court Bureau (2018); AFCC, *Guidelines for Brief Focused Assessment* (2009).

[20] AFCC Model Standards §1.2.

[21] NMSA 1978 §40-12-3.

So, not only are there different kinds of investigations—ranging from very brief to relatively comprehensive[22]—but most of the actual work of investigators, whatever the scope, is left to their own individual discretion.[23] In addition, the work is often conducted in a manner that is inconsistent with recommended practice. For example, a survey of 84 custody evaluators from 28 states in cases involving child sexual abuse allegations found that:

> Only about one-third of the respondents reported using sexual abuse or sex offender protocols during the evaluation process. Of those who used such protocols, one-third developed their own rather than using a well-established sexual abuse protocol. Further, less than a third of the respondents reported audiotaping or videotaping the interviews with the alleged victims. In addition, during the interviews with alleged victims 67.5% of respondents reported using projective drawings and 47.5% of them used play therapy as part of the

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[22] AFCC Guidelines for Brief Focused Assessment §1.2 provides that brief focused assessments "differ from comprehensive child custody evaluations in their narrower scope, more descriptive reporting of data and, consequently, more limited inference making. Comprehensive evaluations, by contrast, are designed to provide data on more broadly based questions about general family functioning and parenting capacity that are not appropriate to the BFA model."

[23] *E.g.*, APA Guidelines, AFCC Model Standards, and AAML Standards; *accord* Timothy M. Tippins, *The Bar Won't Raise Itself: The Case for Evaluation Standards*, New York Law Journal, July 8, 2013.

> diagnostic process, which is contrary to recommended practice.[24]

This survey confirms what those experienced in family court know—that in the absence of standards and protocols, many investigators just "wing it," and they "wing it" alone, without supervision or accountability.

Finally, notwithstanding these variations in procedures, experience and training, these court appointees all do roughly the same thing: they investigate the parties' situation and make a report to the court.[25] In most cases, they make a recommendation on the ultimate issue in the case,[26] as the advisory consultant did in the case below. This is done despite that fact that "*there is no evidence in the empirical literature that current interview protocols, traditional psychological tests, or custody-specific tests are in any way able to reliably predict child adjustment to different access plans*. . . ."[27] Many court observers, scholars, and experts in the field condemn the practice of allowing non-judicial

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[24] Bow, *supra* note 17, at 23, 34-35 (citing Kuehnle, K. (1996)); *Assessing Allegations of Child Sexual Abuse*, Sarasota, FL: Professional Resource and Poole, D.A. & Lamb, M.E. (1998).

[25] *Navigating Custody*, *supra* note 3, at 16.

[26] Bow, *supra* note 17, at 29.

[27] Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 204 (2005) (citations excluded, emphasis added); *see also* Bow, *supra* note 17.

investigators to make recommendations on the ultimate issue of the case.[28]

In sum, family courts across the country utilize a variety of consultants, from a range of professional backgrounds, with varying degrees of training, to conduct free-wheeling investigations and render opinions on the ultimate issue of the case, with few standards or systems of accountability in place, and with broad protection from liability when something goes wrong. Court-appointed investigators, therefore, are endowed with tremendous power and discretion to determine the fate of people's lives. As one former family court judge stated, "With some exceptions, I didn't try a contested custody case without a forensic assessment. . . . They were extremely helpful, even critical."[29]

B. These Investigations and Reports Are Fraught with Due Process Concerns.

These court appointees always conduct some sort of assessment or investigation.[30] According to the National

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[28] Tippins & Wittman, *supra* note 27; Lidman & Hollingsworth, *supra* note 13; Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 Am. Psych. Soc. 1 (2005).

[29] Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Scrutiny*, New York Times, May 23, 2004 (quoting Philip C. Segal, retired Kings County family court judge, Brooklyn, NY).

[30] *Navigating Custody*, *supra* note 3, at 16; Emery, Otto & O'Donohue, *supra* note 28.

Council of Juvenile & Family Court Judges, "[t]he core function of investigators is to gather and interpret information and report their findings to the court."[31] Thus, these investigators serve both a "fact-finding" function and an "interpretive" function.

While some states provide guidance and direction for court-appointed investigators,[32] each investigator typically decides individually how the investigation will go. They determine which documents to review, who to interview, what questions to ask, what leads to pursue, what information to credit or disregard, what other sources to consider, and how much time to devote to the case.[33] As is the case in New Mexico, parties are normally required to sign a release allowing investigators to gain access to otherwise privileged information.[34]

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[31] *Navigating Custody*, *supra* note 3, at 16.

[32] *See, e.g.*, Colorado Supreme Court Chief Justice Directive 04-08, *Directive Concerning Court Appointments of Child & Family Investigators to C.R.S. 14-10-116.5* (amended April 2011); *Custody and Parenting Time Investigation Manual*, *supra* note 19; 2019 California Rules of Court, Rule 5.220, *Court-Ordered Child Custody Evaluations*; New Jersey Rules of Court, Rule 5:8-1, *Investigation Before Award*; Ohio Sup. R. 48 (2009); Utah R. 4-903 (2016); Commonwealth of Massachusetts Trial Court, Probate and Family Court Department, *Standards for Category F Guardian ad Litem Investigators* (2005).

[33] *See, e.g.*, TK Logan & Robert Walker, *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOL. & VICTIMS 719, 726-729 (2002).

[34] *See, e.g.*, *Family Court Services & Mediation*, New Mexico Courts, https://firstdistrictcourt.nmcourts.gov/family-court-services-mediation.aspx (last visited Nov. 21, 2019).

Along with information-gathering authority, investigators often have the power to mandate that parties undergo specialized assessments, such as psychological evaluations or substance abuse testing.[35] Often, no court order or showing of cause is required.[36] Investigators often rely on the results of such assessments—or their own interpretation of the results of somebody else's assessment—in rendering their opinions.[37] Parties can be penalized for refusing to submit to or fully cooperate with these mandates—if not by outright contempt, then through the negative inferences an investigator might draw from the party's "noncompliance."[38]

Leading experts in law and psychology have questioned these practices on both scientific and ethical grounds:

> We are in agreement . . . that there are profound definitional, assessment, reliability, and validity problems associated with the interview protocols and psychological tests used in custody matters that mean that . . . many erroneous inferences are likely presented to courts on a regular basis.[39]

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[35] *Id*.

[36] *Id*.

[37] Tippins & Wittmann, *supra* note 27.

[38] *Id*.

[39] *Id*. at 198 (internal references omitted).

Many others point to the flawed science commonly used to support such evaluations,[40] including use of some of the very psychological tests and personality inventories that the advisory consultant relied upon in this case:

> There is a large body of literature that debates the virtues of psychological testing, particularly as it applies to custody evaluations, and nearly every jurisdiction has implemented standards that impose substantial scrutiny of the underlying data. Much of the controversy centers on the fact that most standard psychological testing instruments were not specifically created for custody evaluations. In particular, the Minnesota Multiphasic Personality Inventory (MMPI, versions 1 and 2) and the Rorschach Inkblot Technique have been widely criticized.[41]

While these evaluative reports may appear to be "scientific" and "evidence-based," the reality is that the "scientific foundation" upon which investigators commonly rely are highly questionable, especially where, as here, the tests are not administered by the investigator himself.

In many cases, the parties do not know what sources of information an investigator has considered, relied upon, or overlooked. For this reason, certain

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[40] Emery, Otto & O'Donohue, *supra* note 28, at 1.

[41] Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J.L. & FAM. STUD. 44, 60 (2011) (citations omitted).

courts have established some minimum safeguards designed to provide the parties an opportunity to review the investigator's report, correct any misinformation, and challenge its conclusions.[42] But even when such safeguards are in place, they are often not followed. New Mexico has a court rule requiring the advisory consultant to: (1) prepare a report; (2) serve the report upon the parties; and (3) prepare and file written recommendations with the court.[43] The rule further allows the parties to: (1) file objections to the recommendations; (2) reply to the opposing party's objections; (3) interview the consultant; and (4) attend a hearing on the objections.[44] None of that happened in this case. Instead, the court acted on the advisory consultant's report *before* it had been served upon the parties, *before* the consultant's recommendations had been filed with the court and entered into the record, *before* the parties had any opportunity to read, or even raise objections to, the consultant's recommendations, and without allowing the parties to question the consultant about the basis for his recommendations.

Unfortunately, it is not uncommon for parties to learn about the substance and content of an investigator's

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[42] *See, e.g.*, Ohio Rev. Code Ann. §3109.04(C) ("The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report.").

[43] N.M. R. Civ. P. Dist. Ct. 1-125(E).

[44] *Id.*

report and recommendations for the first time when they arrive at court for a hearing.[45] In the case below, neither the parties nor their lawyers saw a copy of the report until the court had issued its interim order, notwithstanding the fact that a rule was in place to prevent that very thing from happening. What makes this case especially egregious is that neither the parties *nor the evaluator* described an emergency that might, under certain circumstances, warrant relaxation of ordinary due process guarantees.

Instead, parties frequently confront a system that permits an investigator to do things outside the courtroom that would never pass muster inside the courtroom, such as:

- Considering "evidence" behind closed doors, off the record, and without notice or an opportunity to challenge the source;
- Relying on psychological test results conducted by others that are sometimes improperly administered, misinterpreted, and misapplied to the circumstances and not scientifically-relevant to custody determinations—again, without any opportunity to challenge the source; and
- Basing conclusions and recommendations on unsworn, sometimes privileged, hearsay information that has not been offered or accepted into evidence.

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[45] Lidman & Hollingsworth, *supra* note 13, at 278.

To make matters worse, principles of qualified immunity often apply, resulting in a system in which investigators enjoy all the protections, but none of the constitutional or procedural constraints, that govern state actors who perform in-court functions.

This entire framework leaves parties without due process. First, unregulated investigators conduct secret inquisitions into the most private aspects of their lives. Second, those investigators rely upon unsworn, ex parte, largely hearsay information that would never withstand objection in a court of law to draw conclusions about parenting and custody, which are the ultimate issues in the case. And third, investigative reports—*which are themselves hearsay*—often never make it into the record, nor are investigators consistently subjected to cross-examination, before the court acts on their reports. Parties, therefore, are routinely left with no way to challenge or correct the quality or completeness of the information that forms the basis for the investigator's opinions. In this way, compounded *procedural* due process violations are institutionalized in cases involving fundamental *substantive* due process rights protected under the Fifth and Fourteenth Amendments of the U.S. Constitution.[46] Minimum due process guarantees—procedural and substantive—should be satisfied before a court can rely on an investigator's report to deprive a parent of custody of her or his child, even on an interim basis,

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[46] *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

especially in the absence of a true emergency, which is what occurred in the case below.

II. These Due Process Concerns Are Exacerbated In Cases Involving Allegations of Intimate Partner Violence or Child Sexual Abuse.

Virtually every state requires family courts to take domestic violence, child abuse, and child sexual abuse into account in determining the best interests of the child.[47] It is one of several statutory factors courts must consider in developing parenting arrangements.[48] The reason for this requirement is obvious: research shows that domestic violence, child abuse, and child sexual abuse (hereinafter, collectively referred to as "abuse") are detrimental to children.[49]

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[47] Domestic Violence as a Factor to be Considered in Custody/Visitation Determinations (Nov. 13, 2013), http://www.ncjfcj.org/sites/default/files/chart-custody-dv-as-a-factor.pdf.

[48] *Id.*

[49] Sherry Hamby, David Finkelhor, Heather Turner, and Richard Ormrod, *Children's Exposure to Intimate Partner Violence and Other Family Violence*, U.S. Department of Justice, Office of Justice Programs, *Office of Juvenile Justice and Delinquency Prevention*, Washington, DC (2011); *accord* George W. Holden, *Children Exposed to Domestic Violence and Child Abuse: Terminology and Taxonomy*, 6 CLINICAL CHILD & FAM. PSYCH. REV. 151, 156-158 (2003); Mary A. Kernic, Daphne J. Monary-Ernsdorff, Jennifer K. Koepsell, & Victoria L. Holt, *Children Caught in the Crossfire: Child Custody Determinations Among Couples With a History of Intimate Partner Violence*, 11 VIOL. AGAINST WOMEN 991, 993 (2005); Penelope K. Trickett, Jennie G. Noll & Frank W. Putnam, *The Impact of Sexual Abuse on Female Development: Lessons from*

Despite its significance in child custody cases, court-appointed investigators frequently fail to consider or properly account for abuse in evaluations, even when such abuse is well-documented.[50] In a meta-analysis of empirical research on child custody practice, it was observed that, "[c]hild abuse and DV were often documented in the court record but not addressed in the evaluation report."[51] Many explanations for this troubling phenomenon were discussed in the previous section, including: poor training on the topic of abuse;[52] few standardized investigation and assessment protocols;[53] and lack of validated and reliable screening and

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a Multigenerational, Longitudinal Research Study, 23 DEV. & PSYCH. 453 (2011).

[50] Bow, *supra* note 17, at 23; Colleen Varcoe & Lori G. Irwin, *"If I Killed You, I'd Get the Kids": Women's Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse*, 27 Qualitative Soc. 77 (2004) ("The dynamics of violence and the relationship and safety needs of women and children were not taken into account in the provision of services and judgments of parenting.").

[51] Bow, *supra* note 17, at 39.

[52] Daniel G. Saunders, Ph.D., Kathleen C. Faller, Ph.D., Richard M. Tolman, Ph.D., *Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody Visitation Recommendations*, National Criminal Justice Reference Service (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf.

[53] Bow, *supra* note 17, at 23, 45 ("Child custody evaluations involving DV and/or sexual abuse allegations generally require increased interview time, testing time, record review, and report length. Of major concern was the lack of use of specialized assessment instruments or protocols in these evaluations."); Jeffrey L. Edleson, Lyungai F. Mbilinyi & Sudha Shetty, *Parenting in the*

assessment tools.[54] However, the problem is far greater and more complex.

Rather than elucidating for the court the full nature, context, and effects of abuse on families, consultants frequently do the opposite—they obscure the abuse.[55] This is most apparent when investigators: (1) adopt a narrow, incident-specific focus on abuse; (2) restrict their reporting to physical abuse alone; (3) subjectively decide what information is important and what is not; (4) subsume abuse under alternative

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Context of Domestic Violence, Judicial Council of California, Administrative Office of the Courts (2003) ("Assessing the impact of violence on children and on parenting behaviors is a complex process for which few guidelines or protocols currently exist.") p. 17.

[54] Barbara J. Fidler, Nicholas Bala & Michael A. Saini, *CHILDREN WHO RESIST POSTSEPARATION PARENTAL CONTACT* 77 (Oxford University Press 2013) ("Currently, there is a lack of reliable or valid assessment protocols and measures for alienation . . . there are some measures of alienation in current use that have some utility, but none have been demonstrated in research studies to have reliability or validity."); Erica M. Woodin, Alina Sotskova & K. Daniel O'Leary, *Intimate Partner Violence Assessment in an Historical Context: Divergent Approaches and Opportunities for Progress*, 69 SEX ROLES 120 (2013) ("No scale is sufficient for evaluating all aspects of IPV."); Andrea Flynn & Kathryn Graham, *Why Did It Happen? A Review and Conceptual Framework for Research on Perpetrators' and Victims' Explanations for Intimate Partner Violence*, 15 AGGRESSION & VIOL. BEHAVIOR 239 (2010) ("Lack of a comprehensive and psychometrically-sound instrument for measuring motivations of partner violence has resulted in a body of literature characterized by inconsistencies and wide gaps in knowledge.").

[55] Ellen Pence et al., *Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations* (2012); *accord* Patrizia Romito, A DEAFENING SILENCE: HIDDEN VIOLENCE AGAINST WOMEN AND CHILDREN, Bristol UK: The Policy Press, 2008.

frameworks, such as "mental illness," "parental alienation," "restrictive gatekeeping," and "high conflict"; and (5) substitute their own personal assumptions, values, and beliefs for "facts" in a case.[56] These common shortcomings occur in evaluations every day, all across the country—and, they are precisely the shortcomings that occurred in the advisory consultation in this case. The alarming frequency with which these problems occur demand that minimum standards of due process be satisfied before courts act on investigators' reports.

A. Investigators' Focus on Isolated Incidents Disguises Abuse and its Effects on Parties and Children.

Investigators describe abuse in the most cursory way, limiting their consideration to one or two incidents and yet failing to describe for the court what happened during those incidents. Rather, the reports often refer to "an allegation of abuse," or "an incident of abuse," or they might say that "an incident occurred," or "abuse was disclosed." Reporting abuse as an isolated event, without explaining what is alleged to have happened or considering whether it is part of a larger pattern or history of abuse, fails to identify for the court how abuse might affect: (1) the current and future health, safety and wellbeing of children; (2) the parenting capacities of the parties; or (3) the ability of the parents to successfully share parenting responsibilities.

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[56] Pence et al., *supra* note 55.

Without an opportunity to review the investigator's report prior to court action, the parties have no way of explaining or contextualizing their lived experience for the court. In many cases, courts take extreme action based on inaccurate, incomplete, and untested information.[57] Minimum standards of due process should ensure that things like this do not happen in a court of law especially where no true emergency is alleged.

B. Investigators' Concentration on Physical Violence Alone Presents an Incomplete and Inaccurate Account of the Parties' and Children's Experience of Abuse.

Not uncommonly, investigation reports focus exclusively on physical abuse, without regard to other non-physical forms of abuse, such as coercive control, psychological or emotional abuse, or—when it comes to children in particular—exposure to (or actual use of a child in the production or consumption of) pornography.[58] When investigators concentrate exclusively on physical abuse, they often miss other critical information about the parties and their relationships. In

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[57] Claire V. Crooks, Peter G. Jaffe & Nicholas Bala, *Factoring in the Effects of Children's Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans*, in DOMESTIC VIOLENCE, ABUSE & CHILD CUSTODY (Hannah & Goldstein eds.) Kingston, NJ: Civic Research Institute, 2010 (p. 22-1, et seq.).

[58] Pence et al., *supra* note 55.

addition, investigators tend to spend more time discussing the nature and timing of disclosures of abuse than on the nature and context of the abuse itself.[59] As a result, investigators often gloss over abusive behaviors in ways that make a protective parent's responses seem unjustified or incomprehensible.

Without an opportunity to review the investigator's report prior to court action, especially in the absence of a true emergency, the parties cannot know whether the facts are complete and accurate. Minimum standards of due process are necessary to ensure that court decisions are based on a reasonably reliable record.[60]

C. Investigators Subjectively Select and Weigh Information During the Evaluation Process.

A fundamental component of the investigator's work is deciding what information concerning alleged abuse should be gathered and what information related to abuse "counts." This work often disregards research on the full range of behaviors, as well as

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[59] *Id.*; *see also* William G. Austin, *Assessing Credibility in Allegations of Marital Violence in the High Conflict Custody Case*, 38 FAM. CT. REV. 462 (2000).

[60] *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires notices and an opportunity to be heard at a meaningful time and in a meaningful manner).

risk and lethality factors, associated with abuse.[61] Inevitably, investigators must decide what information to include in their reports and how much weight to accord conflicting information. The process by which they perform this task, however, is often hidden from the parties and even the court. Too often, neither the parties nor the court can tell from reading a report what information the investigator considered, what information the investigator credited or rejected, what weight the investigator gave to conflicting information (and why), and what information was missing altogether.[62]

The Model Standards instruct evaluators to "explain how different sources and different types of information were considered and weighted in the formulation of their opinions."[63] The Model Standards further direct evaluators to:

> . . . explain the relationship between information gathered, their data interpretations,

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[61] Jacquelyn C. Campbell, *Prediction of Homicide of and by Battered Women*, in Assessing Dangerousness: Violence by Batterers and Child Abusers 92-98, 93 fig. 5.2 (Jacquelyn C. Campbell ed., 2d ed. 2007). *See also* The Danger Assessment at http://www.dangerassessment.org/about.aspx (last visited Nov. 21, 2019); Peter Jaffe, Katreena Scott, Angelique Jenney, Myrna Dawson, Anna-Lee Straatman, and Marcie Campbell, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce*, Department of Justice Canada (2015).

[62] Pence et al., *supra* note 55, at 10.

[63] AFCC Model Standards §11.4 (2006).

> and opinions expressed concerning the issues in dispute. There shall be a clear correspondence between opinions offered and the data contained in both the forensic report and the case file.[64]

In addition, the Model Standards encourage evaluators to "disclose incomplete, unreliable or missing" information.[65] However, these standards apply only to evaluators who are AFCC members, and even then, the standards are aspirational and unenforceable.[66] The only way to adequately guard against investigators' tendency to make arbitrary, subjective decisions is to extend and enforce minimum due process protections to parties in child custody cases.

D. Investigators Often Mistakenly Consider Abuse Through the Lens of Other Concepts.

Court-appointed investigators frequently consider abuse through the lens of some alternative framework, such as high conflict, mental illness, parental alienation, or restrictive gatekeeping. When this happens, the presence of abuse can become obscured and distorted.[67]

Notwithstanding the paucity of evidence to support investigators' reliance upon such alternative

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[64] *Id.* at §12.2.

[65] *Id.* at §5.12.

[66] *Id.* at §1.2

[67] Pence et al., *supra* note 55, at 11-18.

frameworks like parental alienation and gatekeeping, courts frequently find these theories not only plausible, but persuasive. A recent national study of custody decisions found that courts discredited allegations of child sexual abuse 82% to 98% of the time when parental alienation was alleged.[68] While there are many possible explanations for this phenomenon, including the widespread practice of discounting women's accounts of abuse,[69] one thing is certain: minimum standards of due process can provide an important check on judicial over-reliance upon misused or scientifically-unsound concepts, theories, and frameworks that obscure abuse.

E. Investigators' Assumptions and Untested Observations Are Often Described and Treated as Facts to Support Their Custody Conclusions.

Another common way that the nature and context of abuse is masked in evaluative reports is when the investigator's assumptions and isolated observations stand in for the actual facts. Investigators often treat

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[68] Joan S. Meier, Sean Dickson, Chris O'Sullivan, Leora Rosen & Jeffrey Hayes, *Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations*, GWU Law School Public Law Research Paper No. 2019-56 (2019), GWU Legal Studies Research Paper No. 2019-56. Available at SSRN: https://ssrn.com/abstract=3448062 or http://dx.doi.org/10.2139/3448062.

[69] Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women*, 167 U. PENN. L. REV. 399 (2019).

an inference, observation or opinion as a factual finding and then draw a conclusion that does not represent what is actually going on within a family.[70] Many times, investigators form a false impression that a "protective" parent has a serious mental health problem and then, when that parent denies the problem or refuses to seek treatment, the investigator concludes that the parent lacks insight into their own mental health,[71] which appears to have happened in the case below. Current practices throughout the country's family courts see an undue reliance on evaluative reports that inadequately account for abuse in rendering decisions that go to the fundamental question of child safety and wellbeing, without due process of law.

III. Notwithstanding These Common Infirmities, Evaluations Are Highly Influential and Often Conclusive of Custody Cases.

Despite the absence of competent evidence that evaluations are reliable predictors of a child's adjustment to a specific parenting arrangement,[72] courts tend to adopt evaluators' recommendations wholesale. A recent New York study found "no statistical difference between the evaluator's recommendations and the

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[70] Pence et al., *supra* note 55, at 19-20.

[71] *Id*. at 20.

[72] Tippins & Wittmann, *supra* note 27; Bow, *supra* note 17.

court outcome with regard to the safety of the parenting plan for the victimized parent and for the child."[73]

Concerns about the court's deference to an evaluator's recommendation increases the chance of a less formal and more incomplete process. That the court took extreme action on the basis of a *brief and incomplete* assessment, in the absence of a true emergency and without affording the parties the most basic due process of law, makes this case all the more disturbing. But, again, what happened in New Mexico happens all the time in family courts across the country. Study after study shows that evaluations have a decisive influence on court outcomes.[74] They can literally make or break a case, which is precisely what happened below.

[73] Michael S. Davis, Chris S. O'Sullivan, Kim Susser & Marjory D. Fields, *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs and Recommendations of Professional Evaluators* 79 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf.

[74] See Michael Davis, Kim Susser, Chris S. O'Sullivan, & Marjory D. Fields, *Custody Evaluations When There Are Allegations of Domestic Violence: Practices, Beliefs and Recommendations of Professional Evaluators*, https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf; Lidman & Hollingsworth, *supra* note 13.

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction.

Respectfully submitted,

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