PRACTICAL TIPS ON PREPARING AND TRYING CHILD CUSTODY CASES

By

ALEXANDRA LEICHTER, J.D., CFLS

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By

ALEXANDRA LEICHTER,[1] J.D., CFLS

I. INTRODUCTION

Child custody cases are far more dependent on unquantifiable variables than family law cases involving monetary issues. For example, personal prejudices or preferences of the trier of fact have much greater impact in custody cases than in other family law matters. Similarly, the psychological and personal history of the child custody evaluator has great bearing in such proceedings. And, in contrast to child support cases, wherein the court has minimal discretion, the court has the widest latitude in fashioning orders in child custody cases (**FC §3040**).

Furthermore, appellate courts rarely overturn custody and visitation orders because the test of "judicial discretion" is so very broad in custody cases. Much of the trial court's determination rests upon its interpretation of factual testimony. Thus, "abuse of discretion" is extremely difficult to prove on appeal. Additionally, many mistakes of the trial court (short of "abuse of discretion") are unlikely to obtain relief from the appellate court because of the "substantial evidence" rule. Thus, most custody cases are won or lost at the trial level—and, as a consequence, the greatest care must be given in strategizing and preparing a custody case.

Custody litigation is also a very highly "emotionally charged" type of litigation. The emotional volatility of the litigants, the children, the witnesses and sometimes even the experts, often reaches uncontrollable levels. Thus, in addition to dealing with legal precedents, procedural issues and evidentiary matters, the custody attorney must be psychologically attuned to the emotional undercurrents presented in each custody case.

It is also a "truism" that judicial officers, and even experts, have a tendency to want to "pigeon-hole" custody cases into set formulas. They often find it easier to simply choose a set of visitation or custodial schedules from a finite list of options, rather than delve into the intricate psychological interplay of the family's individual and collective needs. Failure to recognize that proclivity of the individual jurist or expert can doom the success of a custody litigant's case.

The only thing almost certainly predictable in custody cases is the unpredictability of the clients, the children, and the status of the case. Despite the fact that custody trials are required to be given preference in setting, it is a rare full-blown custody trial that occurs in less than several months, and may even last a year or two. In the interim, children age and their needs change. This requires constant adjustment of goals, tactics, and procedures. Courts are mandated to determine "best interest of the child" in making initial custody determinations (**FC §§3011**, **3023**), but when such "best interest" changes faster than the wind's direction, the trial attorney must also be ready to re-assess the positions taken ***and*** to determine how this position can be most effectively conveyed to the court. The only predictability in child custody cases is that it is a "moving target"—facts, circumstances, emotions, conditions, and just about everything one can possibly imagine may change daily, if not by the minute. The only thing that can be predictable in child custody cases is the unpredictability of child custody cases.

The purpose of this article is to provide some tips in the preparation and trial of a custody action, and to give the custody attorney a feel for what is involved, how best to adjust to not only the clients, but the opposition, the circumstances and the children, and how to tailor advocacy and settlement to meet the current needs of the client and the children. It is not intended to be an exhaustive discussion of pre-trial and trial techniques; nor is it meant to be a summation of prevailing custody law—its sole intent is to provide some practical guidelines for the custody litigator.

A. Interviewing the Potential Client and Deciding Whether to Take the Case

The difference between success and disaster in a custody trial is often determined by the initial interview. Unlike property division or support issues, the client's expectations ***and*** motives in custody cases play a crucial role in determining whether the litigation will be successful. It is the attorney's role to assess not only the veracity of the client's claims but to assure that the client's expectations are realistic, vis-à-vis, current judicial theory and practice. The query really is: "if what the client says is true, ***and*** it can be verified," will the case be a winnable one or even worthy of undertaking. Thus, the first task is to:

1. Determine the Client's True Motives

This is not as easy as it sounds because there are often ulterior motives that are difficult to discern at first blush. For example, while a potential client may describe claimed incidents of inappropriate child-rearing by the other parent, the true incentive for commencing a custody battle may be, instead, a monetary advantage, or leverage for other issues being fought in the divorce action. Or, some claims of child abuse may be masking subtle or overt attempts at vengeance or alienation of the child from the other parent. A thorough initial interview to ferret out true motives is absolutely imperative. The best way to interview the potential client is to ask the key "who, what, when, where, how and why" questions. Nowhere in family law cases is it more important to determine what the "lifestyle" of the parties was

before separation—who did what with the children, who was there for the children during the relationship, when did the complaints about the other parent's behavior surface and why, etc.

Before rushing to accept a retainer, it may also be imperative, in some cases, to interview key potential witnesses who may reveal far more about the family dynamics and the veracity of certain allegations than may the client. For example, pediatricians, therapists, school teachers, extracurricular coaches, or other similar witnesses may provide invaluable information, and shed clear light, not only on the client's veracity and motives, but they may also hold the key to success or failure of the client's claim. Although such advance research may not be available or may not be practicable before being retained, it is imperative to warn the client that allegations not borne out by other witnesses may doom the case, and what the attorney may advise at the outset may be tempered or completely changed once facts reveal differences between the client's perceptions or representations and those of the witnesses. It is also helpful to warn the client that you may withdraw from the case if you discover that he/she outright lied to you. In many cases, this advance warning may cause your client to be more truthful with you.

2. Ascertain Whether the Client's Expectations Are Reasonable

The custody attorney cannot simply plunge headlong into battle to do the client's bidding. It is the attorney's duty to assess and advise whether the client's expectations are reasonable. For example, the demand of a father of a three-month-old, breast-feeding infant for split, equal alternate week custody, is patently unreasonable; his insensitivity and ignorance of the infant's physical and psychological needs will likely harm even his future quest for increased custody. Similarly, a client insisting upon sole custody of a 14-year-old child merely because she disapproves of the child's choice of gymnastics as a career is likely to result in self-induced alienation from the child.

If the expectations of the client seem unreasonable, the client would be better served by advice on "parent education," rather than proceeding blindly into a costly and painful custody trial. It is the attorney's role to advise the potential client of more appropriate parenting plans; to render advice on the probabilities of the client prevailing on both the client's own proposed plans and the plans suggested by the attorney; and to provide the client with "straight-talk" about the parenting deficiencies the attorney perceives in his/her own client, and to provide that client with means and opportunities for parenting education courses, books, etc. Since the majority of child custody battles center upon the appropriate time-share by the parents, it is imperative that the custody attorney be familiar with the psychological literature regarding age appropriate behavior and development of children, as well as the currently accepted norms for age-appropriate time-share. (The Association of Family & Conciliation Courts, at **www.AFCCNET.org**, has numerous current literature available on these subjects.) A knowledgeable attorney should be able to advise a client on the appropriate time share arrangement the court is likely to award in the majority of cases. Similarly, a potential client should be advised that the other parent's involvement with the children can only rarely, and only under very special circumstances, be eliminated (indeed, it is the prevailing wisdom of the

courts that even axe-murderers are likely to be entitled to see their children, albeit under curtailed, monitored or very structured circumstances). Thus, an honest assessment of the likelihood of prevailing on a client's expectations will save both the attorney and the client inevitable grief.

3. Determine if There Is Sufficient Rapport Between Counsel and Client

Not every custody case has merit. Even those cases that do appear viable do not always justify the costs involved. Thus, it is imperative that both the client and attorney understand the basic goals; that the goals may shift; and that, ultimately, it is the attorney who must make key procedural decisions, and it is the client who must accept the consequences. The client who insists on total control of the case is not likely to be satisfied with the result even if 100% of his stated "wish list" is granted. A client who only pays lip service to the attorney's advice is best left to seek a different attorney. A client who has had multiple prior attorneys is likely to consider the new attorney as merely another disposable one in a line of many. The attorney who dislikes the client at the outset is only looking for trouble because custody cases require far more client contact and "hand-holding" than almost any other case—in fact, it is not unusual to have semi-weekly, if not daily contact with a client in custody cases. And these are not calls that can be often shunted off to secretaries or paralegals. It is the attorney who must be giving almost daily advice to the hapless litigant parent on varied issues ranging anywhere from the question of whether a child can be picked up by the non-custodial parent from an extracurricular activity during the other parent's time when the other parent is late, to whether the planned email text berating the other parent for true to imagined ills is an appropriate one to send, to a huge, unimaginable list of issues that are often daily faced by the parent litigant. An attorney who hates client contact, who is loathe to pick up the phone to console a parent, who is unable or unwilling to give advice he/she thinks is not a purely "legal" one, has no business taking the case. Most importantly, it is inadvisable to accept a custody case if the attorney emotionally identifies with the client's predicament. In these types of actions, the attorney must maintain a professional distance from the facts and the client. Nothing destroys the attorney's effectiveness and the success of the case more than an attorney's emotional involvement in a custody action because such emotional enmeshment will render him/her totally incapable of objectivity and perspective. Clients don't need another mother or father—they need a clear-headed advocate who can tell them whether they are going in the right or the wrong direction for the sake of their children.

4. Determine Whether the Client Has the Emotional and Financial Capacities to Withstand a Grueling Custody Action

All divorce cases are emotionally wrenching, but no issue is as wrenching and psychologically traumatic as a battle over children. Give the client realistic information of the entire process, explain the expected trauma, the extraordinary psychological toll, and the huge financial expense of a full-blown custody battle. Warn the client at the outset that your client's fantasies of the other side "caving in" is not likely to become a reality. Let the client know that every aspect of his/her psychological and behavioral history will be thoroughly scrutinized,

his/her 24/7 behavior placed under the microscope and completely analyzed, reinterpreted and second-guessed. Tell your client that their children are likely to act out in school, at home, and socially because they, too, will experience the pressure-cooker atmosphere in which the battling parents have plunged the entire family. Most importantly, inform the client that custody cases tend to be the most expensive type of family law litigation there is. It is not unusual for litigation fees and costs to be $200,000 to well over $500,000—depending on how often the trial is continued, the cost of a full private custody evaluation (which, itself can cost $30,000 to $50,000), the cost of a myriad experts such as consulting psychologists, expert witness psychologists, educational consultants, the cost of videotaped depositions, the cost of subpoenas for school, medical, and other records, etc.

5. ***Assess Alternatives to Litigation***

Custody litigation is not inevitable if parents don't agree on custodial arrangements. Sometimes a reference to a good psychological mediator, or a good parenting expert, or a communication specialist can be far more valuable than the gladiator approach. Explore these possibilities with your client and determine whether the client would profit more from a mediated approach than from a litigated approach to resolving the custody issues. (This article will not delve into the pros and cons of mediation or collaborative law. Suffice it to say that these are venues that may be more productive to some clients and to some of the children, especially with the increasing delays of trials in the public courtrooms.)

All this having been said, and assuming that the client retains you to fight this custody battle, here are some of the next steps to consider.

II. TAKING SOME IMMEDIATE STEPS TO PROTECT YOUR CLIENT

A. Taking Control of the Client

1. Review all correspondence your client sent to the spouse and/or others, and correspondence the spouse sent to your client. If your client's correspondence is abusive or harassing in tone or content, teach him/her to communicate in a detached manner, focusing on limiting correspondence to the specific issues at hand without editorializing. For example, educate the client to avoid discussing settlement offers, recriminations, accusations, etc. Correspondence by your client should be limited to factual matters only, i.e., visitation dates and times, school information, holiday schedules, medical appointments and procedures, etc. Remind your client that inappropriate correspondence between the parties may very well find itself as damaging evidence at trial, and is often submitted to the custody evaluator as evidence of your client's alienating communication or psychological abuse toward the other parent.

2. Interview the client carefully to determine the client's verbal and non-verbal communication skills. The client should be educated to take particular notice of tone and

content, to watch his/her own body language and facial expressions, and to omit any language which may be considered offensive or inappropriate. Warn the client that testimony in court will focus as much on mannerisms and non-verbal communication as on verbal responses. Retain a therapist, if your client can afford it, to help the client to understand and recognize his/her limitations and inability to appropriately express ideas, intentions and requests. (Remember to protect that expert from discovery procedures by invoking the work product privilege. See **Evidence Code section 950 et seq.** Protect the identity of this therapist by assuring that the client's credit cards, canceled checks or registers make no reference to such a therapist. Ideally, the payment of all experts and consultants should be made by the attorney [reimbursed by the client, of course] for ultimate protection against disclosure of such retained experts.)

3. Remind the client to maintain detailed records of various events, such as failure by the other party to exercise scheduled visitation and/or to abide by agreed changes in custodial schedules; inappropriate conduct by the other party; extraordinary events; comments related by the child, parent, a witness, etc. (again, be sure to protect this document as work product privilege, unless you are willing to have this become part of the record, and then warn the client that these notes are subject to dissection at deposition or at trial if they become part of the record—it is amazing what self-incriminating evidence clients think is a perfectly acceptable record of what they think. It is the attorney's job to prevent the clients from hanging themselves with their own words). Remember that memory of events tends to fade or be altered with time. Thus, a written record of events will also help the attorney prepare for hearing or trial that may not occur until months or years later. (Remember that in preparation for trial or deposition testimony, the client cannot re-read his/her own writing that was meant to be "work product," as that may subject that "work-product" to become evidence. This article is not meant to be a primer on rules of Evidence. However, a good refresher on the Evidence Code is mandatory for any custody litigator, especially in light of the new **Family Code section 217**, which allows for either party to request, or the court to hear, oral testimony at an OSC.

4. Instruct the client never to discuss custody issues, court orders or declarations with, or in the presence of, the minor child. Children should ***never*** be allowed access to the computer that is used by the parent to communicate with the custody lawyer or with the other parent and ***never*** allow the client to show the children any court pleadings. Nothing elicits a jurist's rancor more than hearing that the child has been privy to a parent's written or oral comments regarding the proceedings.

5. Warn the client that posting any information about him/her own self or about the opposing party or the children on social networks such as Facebook, LinkedIn, Twitter, etc. will be used by the opposition as evidence. Clients should be instructed to stop using this media except for necessary work-related communication.

It is the attorney's duty to guide the client throughout the entire custody process to prevent the client from fatally damaging his/her own custody action. The attorney must protect the client from the client's own mistakes by remaining aggressively active in the case,

controlling as much of the client's actions as possible, and guiding the client to seek the aid of professionals. It is not sufficient for a custody litigator to be a "killer trial lawyer." Subject to certain requirements, custody cases often can be re-litigated for as long as the child remains a minor. Thus, unless the attorney provides the appropriate counseling, addresses the client's emotional upheaval, guides the client to obtain appropriate parenting guidance, and continually reassesses the client's needs vis-à-vis parenting issues, no amount of litigation skills will ultimately save the case.

B. Ex Parte and Order to Show Cause (OSC's)

Custody cases are often thought to be won or lost well before the trial stage. That is because cases tend to drag on for many months or even years, while the "status quo" will have been established and the "best interests" of the children may well lie in leaving them where they have been during the litigation process. Thus, ex partes and OSC's are far more critical in custody cases than in almost any other type of litigation.

1. Ex Parte Relief

Family Code section 3064 prevents the court from issuing ex parte orders for custody/visitation matters unless there is a "showing of immediate harm to the child or immediate risk that the child will be removed from the State of California." The facts should, theoretically, be great to show need for such ex parte orders. In reality, however, many judicial officers will undertake to make ex parte orders for expediency to eliminate need for another court appearance. Thus, great care should be taken in the preparation of the ex parte requests and in the response to the ex parte requests.

(a) ***Never*** assume that the court will not grant the ex parte simply because there does not appear to be imminent danger to the child(ren). The issuance of ex parte orders may, indeed, have grave effects for your client.

(b) ***Always*** have your client be present in court for any ex parte appearance for custody matters. This is especially true if you're responding to an ex parte notice because you are not likely to see the supportive declarations until minutes before the hearing, and you need your client to respond orally in court (or at least to you), so that the court obtains the proper perspective. (As an example, if the ex parte proponent requests monitored visits because the opposition became hysterical and violent during the pickup of the child, you will need your client's presence to inform the court that your client became hysterical during the pickup because the father wouldn't release the two-month-old breastfeeding child when she had gone to pick her up after a two-hour visit with the father, and the father insisted he was going to keep the child overnight—even though he had no breast milk with which to feed the child.)

(c) When filing an ex parte requesting custody orders, almost always seek an Order Shortening Time for Hearing of the OSC as an ***alternative relief***. Regular hearing

dates for OSC's normally may be issued 6 to 8 weeks from the date of filing. If there is a compelling need for an earlier hearing, seek the order shortening time so that even if the ex parte is denied, an earlier hearing date will allow for faster determination of the issues. Be prepared, however, that the court may refuse to issue both, as an increasing number of judicial officers have become wise to attorneys' "tricks" to jump the queue of other litigants and try to get heard before other similar cases in the normal lineup. Thus, requests to have custody matters heard on a shortened time basis require very compelling reasons why the OSC couldn't wait for the 6-8 weeks it normally takes for a hearing to be held.

*2. **Orders to Show Cause***

Because the status quo in custody/visitation cases plays such an important part in the final outcome of the case, it is often imperative to seek interim relief, well before the trial date that may take a year or more to be set, via an Order to Show Cause (which is normally set between 6-8 weeks away) to obtain or prevent certain custodial/visitation rights. The particular facts of the case will determine whether this is advisable or necessary, but keep in mind that the hearing of an OSC on custody/visitation will also provide the court with advance notice of issues that occur during the litigation. It also gives the parties the opportunity to flesh out the other's position. This may be the time to request a custody or psychological evaluation; it may be the time to determine not only appropriate time-shares but also rights and responsibilities of each parent vis-à-vis the children. OSC's may be necessary when the parties can't agree on the child(ren)'s school, medical care, or involvement in religious or extracurricular activities; determination, or limitation, of types of communication that should be permitted; or requests for recordation of oral communications, etc. Of course, it's always advisable to work out settlement and stipulations pending evaluation or final trial, but some high conflict cases may require many interim OSC's for rulings on various issues.

All OSC's should be accompanied by the appropriate declarations. When preparing OSC's, keep in mind that the court may make its rulings based upon the declarations only (***Reifler v. Superior Court*** (1974) 39 Cal.App.3d 479), if the parties don't object. Although **Family Code section 217** now mandates oral testimony even at OSC hearings, the reality of the courtroom must be weighed in context of what is necessary for the client. More specifically, the current state of finances for the courthouse does not allow sufficient judicial officers to staff the family law departments. Thus, although **Family Code section 217** allows for oral testimony, indeed essentially mandates it if either party so requests, the matter may be continued for months if the courtroom is overwhelmed by cases that have even more priority than custody cases—such as Domestic Violence hearings. Therefore, it is highly likely that if either party requests oral testimony at a custody OSC, the matter may be continued for weeks, or even months, leaving the children in limbo. However, pursuant to **Family Code section 217**, the court is permitted to make appropriate temporary orders pending the continue hearing. The court can only render temporary orders, however, if it has sufficient evidence before it to do so. The evidence that should be before the court, therefore, should be the declarations of the client and key witnesses. Thus, even if the opposition is given advance notice of the testimony of the client and key witnesses, this disadvantage is outweighed by the need to obtain immediate

temporary orders in the event the OSC is going to be continued to another date to provide ample opportunity for oral testimony. Thus, the key to success or failure is often determined by the strength of the declarations filed in support of, or in opposition to, the Order to Show Cause. Much as many litigants heralded the end of ***Reifler***, *supra*, with **Family Code section 217**, it is this author's opinion that not only is it not dead, but it has become even more important, more time consuming, and more expensive to litigate custody cases than ever before—precisely because the case now has to be prepared both for a ***Reiflerized*** temporary-temporary Order with substantial restrictions on lengths of declarations (see **California Rules of Court**), and because oral testimony will have to be prepared for the ultimate "temporary" Order on OSC. (This, of course, is not talking about the ultimate trial, where declarations are not admissible testimony, except for impeachment purposes, or declarations of a party against his/her own interest).

C. Obtaining Declarations

Obtaining declarations from key witnesses is imperative for several reasons:

1. Many witnesses are reluctant to testify in court, or to be deposed, but may be willing to sign a declaration. While declarations are not sufficient for trial, they are sufficient (in fact, imperative) for ex parte matters or for the "temporary" temporary custody hearings at an Order to Show Cause (as discussed above). While oral testimony may not be avoidable at an OSC hearing, and certainly not at trial, the declaration of a key witness is invaluable for purpose of obtaining temporary-temporary orders pending a full hearing on the OSC, and may be key to settling the case in the first place.

2. The declaration preserves the witness' testimony—memories tend to fade. Memorializing events as early as possible preserves accuracy. Furthermore, declarations are imperative in the event the witness is subsequently pressured to modify his/her recollections or to recant some statements.

3. As discussed above, despite **Family Code section 217**, courts may still give limited opportunities for live testimony and there is still the tendency of the courts to rely, almost exclusively, on written declarations at ex parte appearances, temporary custody hearings, or modifications of custody, per ***Reifler v. Superior Court***, *supra*, 39 Cal.App.3d 479. Without corroborating testimony of independent witnesses, your case may just deteriorate into a "she said, he said" scenario with which few courts are happy.

4. Even when there is no OSC hearing at which testimony of the witnesses are heard, the witnesses' declarations may often be key evidence to be submitted to the psychological evaluator in support of your client's position. Some evaluators never contact witnesses whose declarations were submitted because they choose to rely on the declarations as testimony. However, if the psychologist subsequently does interview a declarant, the declaration itself will serve to refresh the witness' recollections of events and impressions.

[**NOTE**: Unless the children's declarations are imperative (e.g., in cases of physical or sexual abuse, or some other extraordinary circumstance), ***and*** the children are sufficiently mature (usually at least 10 years old) do ***not*** file the declarations of the children. In lieu of a child's declaration, it is best to obtain declarations of a psychotherapist who has interviewed the child directly. (Note, however, the problems relating to waiver of psychotherapist privilege, the issue of who holds the privilege, and the treating therapist's reluctance to testify—see below.)]

1. ***The "Do's" of Declarations***

1. Declarations of ***expert witnesses*** or ***treating physicians or therapists*** should focus on, and include, one or more of the following:

a. Identity and area of expertise of declarant;

b. Focus of therapy (including who brought in the child and for what reasons);

c. The course of therapy that has been undertaken;

d. Diagnosis;

e. Prognosis and recommendations for future therapy and/or for the roles each parent is to play in the child's therapy;

f. Description of each parent's involvement in the course of therapy or treatment; and

g. Other relevant information available to that declarant.

[NOTE: Do not be surprised if the child's treating therapist refuses to sign a declaration claiming that the treatment and therapist/patient relationship will be compromised if the child discovers that the confidentiality was breached. In such cases you can choose one of the following courses of action:

a. Have a "forensic" expert discuss the therapy, diagnosis, etc., with the child's therapist (but this, too, may need waiver by each parent);

b. Command the therapist to testify at a deposition and/or in court, pursuant to a subpoena. (Again, however, there are problems relating to waiver of psychotherapist/patient privilege. When obtaining declarations of a child's treating therapist, be aware that, although there are no specific cases exactly on point, it is the widely held opinion that the psychotherapist/patient privilege is held by both parents jointly, unless there is a sole legal custody award that has already been made. This may stymie your attempts to obtain

testimony from the child's therapist. Be very familiar with **Evidence Code sections 912**, **1014**, **1017**, and **1027**.)]

c. Have the treating therapist prepare a declaration that simply sets forth that the child has been treating with the therapist, and that the therapist cannot reveal information regarding the treatment, prognosis, diagnosis, etc. because there has been no waiver by both parents, but that the therapist strongly urges that there be an immediate custody/psychological evaluation for the protection or safety of the child.

2. The declarations of ***lay witnesses*** should focus on, and include, both paragraph (a) and one or more of paragraphs (b) through (f):

a. The identity of the witnesses and the source of his/her personal knowledge, i.e., if it's a neighbor, describe how often and under what circumstances he/she sees the parent or child about whom the declarant is testifying, or how that neighbor gained the direct personal knowledge that allowed them to observe, hear, or opine;

b. The client's parenting strengths and abilities;

c. The weaknesses, if any, in the other party's parenting abilities;

d. The child's behavior with each parent;

e. Any specific instances of observation that relate to either parent's ability or inability to appropriately care for the child's needs (physical, emotional, psychological); and

f. Any other relevant information or observation about the child or the interaction between the parent(s) and the child.

The declarations should be comprised of facts actually observed or directly heard by the declarant, as well as personal impressions the declarant justifiably obtained from actual evidence. (E.g., father and daughter appear to have a warm loving relationship ***because*** the declarant has witnessed the child jump into the father's arms, give him a big kiss and was heard to say "Daddy, I love you" on the specified occasion(s) observed by the witness.)

(**Warning:** If your opponent submits hearsay or other objectionable material in his/her declarations, be sure to file your objections/requests to strike ***immediately***. [See time limits and procedures set forth in **Super. Ct. L.A. County, Local Rules, rule 5.8**.] Failure to do so, and failure to insist upon the court ruling on those objections will allow the court to make rulings based upon objectionable material. Additionally, request a court order that only redacted declarations, in conformity with the court's ruling on the evidentiary objections, may be submitted to the custody evaluator. Otherwise, you will have let in through the back door what

you did not allow to be admitted through the front. Be prepared, however, for the court to deny your request to submit only non-objectionable declarations to the custody evaluator, as some judicial officers maintain that the evaluator can review and consider hearsay and other non-admissible material in his/her expert opinion. In that case, you must be prepared to submit declarations of your client that counter-act the objectionable material—custody/psychological evaluators are not as sensitive to legally inadmissible material as are the courts and counsel, as they receive no legal training in evidence. (It is often surprising to litigators how much evaluating psychologists rely upon pure, uncorroborated, hearsay or inadmissible testimony of lay witnesses. Nevertheless, this is a source of good cross-examination and destruction of the evaluator's ultimate conclusions and testimony at trial, in the event of an adverse conclusion.))

3. Make sure that the declaration format complies with **Calif. Code of Civil Procedure section 2015.5** (see ***Kulshrestha v. First Union Commercial Corp***. (2004) 33 Cal.4th 601, 612); otherwise, a perfectly gorgeous declaration may be thrown out as being inadmissible for failure to comply with statutory requirements for a declaration. (For example, where the declaration is not stated to be executed "pursuant to the laws of the State of California," etc.) Additionally, failure to limit declarations to the maximum allowed by state and local rules may mean that the excess pages of the declarations may be ignored by the court.

2. The "Don'ts" of Declarations

Declarations may make or break the case. Accordingly, bear in mind the following:

1. Do not allow a witness to submit a declaration without a careful review of the statement to make sure it contains only facts that are clearly within the witness' personal knowledge. Hearsay statements, or those without foundation, or which are otherwise objectionable, will likely be stricken, and can substantially weaken the case. If most of the declaration is subject to numerous sustainable objections, there may be nothing left of the declaration except "I declare" and the signature—and, you will have no opportunity to remedy the situation because rulings on the objections are normally made on the day of the hearing, with no time granted to revise or rephrase the stricken portions of the declarations. The best way to examine whether the declarations are objectionable is to pretend the witness is testifying in court, then pretend the adverse attorney is making objections to each sentence in open court. If the declaration passes that test, it will also survive the written objections. (Of course, litigators get "another bite of the apple" with the mandates of **Family Code section 217** for the court to consider oral testimony, but it is not advisable to rely on that code section when immediate orders need to be made, and the attorney has nothing but shredded declarations of witnesses to present for a temporary-temporary Order.)

2. Do not submit declarations that contradict prior declarations made by that witness or by anyone else on key points. While witnesses may observe the same incident differently, contradictory testimony of a key event from your own witnesses merely serves to discredit not only that witness but the client's position as well. Make sure you review all of the

declarations that witness has provided, as well as those of all other witnesses to assure that there are no conflicts between the views of each witness regarding the same incident.

3. Do not allow a witness to exaggerate an incident or to be vague or ambiguous. Specific names, dates and places or other identifying data and foundation for the evidence are paramount to a good declaration. Recitations of events very remote in time are probably irrelevant and will tend to undermine the witness' credibility (except where an incident is one in a succession of similar events supporting the veracity of the most current event). If the witness has seen the parent and/or child frequently and with regularity in the recent past, include that information in the declaration.

4. Do not allow a child's treating therapist to opine about parenting skills of the parent whom the therapist has never seen; do not allow a child's treating therapist to opine about custodial recommendations, unless that therapist has examined all parties and is able to make a valid recommendation. (In most cases, this is highly unlikely.) And, most importantly, do not allow a child's treating therapist to opine about the psychological diagnosis of a parent that therapist has never met.

D. Polygraphs, Private Investigators, Monitors, Drug-Testing, Parenting Classes, Parenting Coaches, and Therapy for Parents

1. Allegations of Sexual or Physical Abuse of the Children

a. If your client has been accused of sexual or physical abuse, or if your client claims the other parent sexually or physically abused the child, consider immediately submitting the client to a polygraph examination with a very reputable polygraph examiner. Although the results of the polygraph examination usually are inadmissible in court, the results may serve several purposes:

(1) diffuse the claims of the other parent or third-party accuser concerning the abuse allegations;

(2) diffuse the claims of the accused parent that the accuser is making knowingly false allegations;

(3) persuade a custody or psychological evaluator that the alleged abuse never occurred;

(4) persuade the custody or psychological evaluator that the accuser is acting out of a good faith belief in the allegation; and

(5) help the attorney determine whether and how to continue representing the client.

b. Where your client is the accuser in a child molestation case, be sure to carefully interview and investigate the psychologist(s) and/or physicians your client claims may verify the abuse. While your client's claims may be legitimate, many such sexual abuse cases have backfired because of inappropriate child interviews by inexperienced or overzealous therapists. Be prepared to find that the parent being accused of sexual abuse may claim not only that the sexual abuse never happened, but that the accusing parent is attempting to "alienate" the child from the accused by making false claims of abuse and instilling in the child's mind that the abuse really happened. You must unearth all prior claims of abuse your client has made against the other parent, interview all therapists with whom your client and the child have had contact, and carefully review all medical and psychological records of both the accusing parent and the child to diffuse the "parental alienation" accusation.

c. In cases where there is no current restriction on your client's access to the child or children, once allegations of sexual or physical abuse have surfaced against your client, urge the client to enlist a voluntary "monitor" (any responsible adult) to be in attendance at all times when the client is with the child, in order to disprove subsequent abuse allegations. If the other parent is unaware of the "monitor" and makes subsequent allegations of abuse, the testimony of the "monitor" will serve to prove that the accusations were deliberately false. Be aware that **Family Code section 3030** restricts, with some exceptions, custody or unsupervised visitation if any household resident is a sex offender. Make sure you investigate the background of household members of both your client and that of the opposing party. (Remember that **Family Code section 3027.1** provides for monetary sanctions for false accusation of child abuse or neglect, but more importantly, it provides that the remedies are ***in addition to*** any other remedy provided by law.)

d. If your client is accused of inappropriately disciplining a child, and your client admits to the particular acts but nevertheless insists that such discipline is appropriate, insist that the client enroll in a good parenting class. In some cases, the stress and trauma of the divorce proceedings may overwhelm an otherwise good parent, resulting in inappropriate discipline of the children, and/or the parent's inability to deal with the manner in which the children act out their own anger, frustration, fear, resentment, or unhappiness with the parents' divorce. Consider recommending a "parenting coach" to your client, to help bring a semblance of "sanity" and a good dose of reality to the household. (Be also cognizant that certain cultural differences may explain the "inappropriate disciplining" of the child. Many diverse cultures differ from the American ideal on what is appropriate parenting. "Spare the rod, spoil the child" may still be a very ingrained parenting maxim in a number of cultures around the world. You, as the attorney, must educate the parent that in this country such parenting tools are not only frowned upon, but may well lose him/her custody of the child.)

e. If your client is venting anger at the other parent by writing inappropriate notes or making derogatory or threatening comments, stress to your client that such communication will most certainly be admitted in evidence to prove attempted alienation. Demand that your client obtain therapy or enroll in an anger management course to deal with these emotions appropriately.

[**NOTE**: Become very familiar with the applicable psychotherapist-patient privilege statutes and case law, the circumstances under which such privileges will or may be waived, and the reporting requirements in the event of child sexual or physical abuse allegations. Also be aware of, and consider very carefully, any stipulations signed when engaging an evaluator, which may waive your client's psychotherapist-patient privilege. This is an important issue when you are referring a client to therapy in the course of a case. You want your client to obtain help with parenting, but you don't want your client's reaching out for help to result in a negative evaluation.]

f. Investigate the sexual abuse record of the accused. If your client is the accused, and you discover adverse information about him/her, use that record to make appropriate recommendations, rather than excusing or hiding the information. For example, if your client was accused and convicted of sexually abusing another child, don't ask for custody of the subject children. Instead, make appropriate recommendations to your client for therapy, and seek orders for monitored visits that protect both the children ***and*** your client from further allegations.[1]

*2. **Allegations of Substance Abuse***

If your client is accused of drug or alcohol abuse, consider having your client voluntarily submit to drug or alcohol testing on a regular basis—at least twice weekly (although daily or random testing is preferred for alcohol and other drugs which leave no trace in the body after a very short period of time)—until the custody action is completed, in order to disprove any such allegations. If your client is accused of, but denies, past drug abuse, consider "hair-testing" your client, without letting the opposition know. (Hair follicle testing is a laboratory analysis of a few strands of hair which will determine traces of drug use, sometimes as far back as two years, depending on the length of the hair.) If the results are negative, you can use the test to your advantage. Obtain records of all drug or alcohol related offenses. Obtain records from the Department of Motor Vehicles to prove or disprove alcohol/drug related driving violations.

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[1]There have been numerous unresolved discussions of ethical issues in custody cases, the most serious of which is whether the parent's custody attorney has an obligation to, or simply ought to, not advocate a course of action in custody litigation that may not be in the child's best interest, regardless of the parent's wishes. Again, this article is not intended to discuss these ethical considerations, but it is unavoidable that such custody cases will, eventually, lead to an assessment by the attorney whether his/her ethical obligations may be compromised as a result of inappropriate, or inconsiderate advocacy.

[**NOTE**: With regard to requesting court orders for drug testing, the effects of ***Wainwright v. Superior Court (Sinkler)*** (2000) 84 Cal.App.4th 262, have been somewhat negated by **Family Code section 3041.5**, but the code section is still quite limiting. See also ***Deborah M. v. Superior Court (Daryl W.)*** (2005) 128 Cal.App.4th 1181, where hair follicle testing was not permitted because such tests do not comply with federal standards required under **Family Code section 3041.5**. However, your client's willingness to submit to a hair test, coupled with negative results, make extremely powerful opposition to accusations of past drug abuse.] Incidentally, if your client denied any past drug use but the hair follicle test proved him/her wrong, consider whether you want to continue representing a client who has outright lied to you.

3. Other Allegations of Inappropriate Parenting or of the Child(ren)'s Unhappiness in the Other Parent's Care

Many custody cases involve allegations that the other parent is simply incompetent, psychologically abusive to the child, or is not capable of understanding or dealing with the needs of the child. Parents often complain that the child resists exchanges, complains about the other parent incessantly, expresses dislike for the other parent or the other parent's significant other, etc. It is important to determine whether these are true allegations, or whether they evidence alienating action on the part of the complaining parent, or whether the child is manipulating each parent. If the complaint is about the difficulty in exchanges, a private investigator may be helpful in videotaping the exchanges and having it available for the evaluator. This is, however, a very sensitive process because the hiring client may be accused of over-litigating or over-protectiveness, or suspected of being more interested in condemning the other parent than focusing on the child's best interest. In other words, videotaping the exchanges may create more harm than the worth of the testimony it may elicit. Similarly, audio taping the exchanges may incur the wrath of the jurist if it appears to have been done when the child sees the recording being made, or when the audio taping becomes so excessive that the taping seems to be the entire focus of the custodial relationship between parent and child. These types of allegations require ingenuity on the attorney's part in seeking ways to prove or disprove the allegations, or to deflect or prove accusations of parental alienation. There are no hard and fast rules, except that proof must be produced by some legitimate means and presented in admissible fashion; ***and*** such proof should not have the boomerang effect of showing your client to be overly litigious or needlessly obsessing about custody.

4. Allegations of Inappropriate Communication by One Parent to the Other or by One Parent to the Child

If one parent continually communicates in an abusive manner by telephone, request a court order for taping telephonic communications (*beware of state and federal wiretapping laws* and ***never*** advise the client to audiotape any telephone conversation without a court order). If one parent leaves abusive telephone messages on the answering machine, make sure that a copy of the tape is preserved and transcribe it. Both the written and audiotape version of the tape will become useful in either/both the evaluation and trial.

E. Depositions

All discovery procedures sanctioned by the Code of Civil Procedure are just as applicable in family law as they are in civil proceedings. However, interrogatories or requests for admissions in custody cases are rarely helpful. The search for the facts in custody actions does not lend itself to cut-and-dried factual responses. Depositions, however, are often invaluable, albeit somewhat costly. [**NOTE**: However, if an evaluation is ultimately ordered, be sure to forward a copy of the deposition transcripts to the evaluator, taking the time first to highlight the critical portions of the witness' testimony.]

If your client's financial resources permit, consider taking the following depositions very early in the case:

*1. **The Adverse Party***

The deposition is the time to find out the strengths and weaknesses of the other party as a parent. This is also the time to delve into issues of appropriate parenting education and skills. Do not limit cross-examination of the other parent to submitted declarations. A good deposition will not merely provide testimony that can be used to cross-examine at trial, it will also give insight into the psychological interactions, which are the key ingredients to successful settlement or successful trial of most custody actions. Although it is quite expensive, some custody cases do merit ***videotaping*** the depositions. Discuss this with your client—only your client can provide information about the other parent's personality traits that may lend themselves to better analysis if the deposition is videotaped. For example, if your client asserts that his/her spouse is subject to unrestrained rages, you may be advised to videotape the deposition in the hopes of eliciting such a response to show the evaluator or the court. A dry transcript cannot possibly convey such conduct.

(Keep in mind that if you do decide to videotape the deposition, your Notice must include a statement to that effect. Also, bear in mind that many jurists refuse to watch a videotaped deposition because of time limitations, and it is up to the attorney to convince the trier of fact to at least view the most important portions. Follow the code requirements in notifying opposing counsel of the deposition portions you wish to show the court. Additionally, if the videotaped deposition provides information that was not adequately conveyed by the dry transcript, make sure you request the custody evaluator to specifically review the videotape.)

[**NOTE**: In preparing for the deposition, ask your client to provide you with a list of possible areas of inquiry. Who better than your own client can provide key inside information to which you could not possibly be otherwise privy? Also, whenever possible, have your client be present at the deposition to suggest areas of inquiry, or to follow up on responses you may not otherwise consider. This, of course, is tricky if your client is an abused spouse, in which case you must weigh the advantage of obtaining any such information from your client versus the

psychological trauma the client may suffer by having to sit in the same room facing her/his abuser for hours.]

2. ***Key Witnesses Who May Become Unavailable in the Future***

For example, the "au pair" (foreign national) or nanny whose work permit or visa may expire before the case is heard, or the retiring pediatrician with vital information.

3. ***Key Witnesses You Expect Will Testify Against Your Client or Who Have Already Provided Adverse Declarations Against Your Client***

You may find, for example, that the French-speaking maid, who provided a damaging declaration in perfect English, does not speak English sufficiently to have read and understood that very same declaration. With the assistance of a translator at the deposition, you may discover that the declaration may not have been what she meant to state. Similarly, you may find that the stepparent who is so willing to testify against your client may not have personally witnessed the events described so vividly in a declaration, rendering the declaration inadmissible, and the witness disarmed. Moreover, key depositions in the proceedings prevent subsequent recantations, and may later be used for impeachment purposes, as well.

4. ***The Child's Therapist***

The child's therapist may be one of the most important witnesses. Many psychotherapists who have been retained as the therapist for the child (as opposed to an evaluator), are extremely reluctant to provide declarations to either parent because they feel that their effectiveness as the child's therapist will be diminished. You may often have no means, other than a deposition, of obtaining key information from that therapist. (Be aware, however, that many therapists treating the children will refuse to testify, unless both parents waive the patient/therapist privilege. In that case, you may need to obtain a court ruling before the deposition.)

F. Obtaining Physical Evidence

Photographs, videotaped or audio-taped evidence of specific problems speak far louder than any words. Gather such information immediately and retain copies to be presented to the court via attachments to declarations or via requests for listening or viewing. Photographs of child-centered activities in which your client participated are excellent evidence to refute accusations that your client is not child-focused, or that your client never does any child-centered activities with the children; however, accompanying such photographs, if attached to declarations, or if they are sought to be admitted in evidence, should be identification of when, where, and how such photographs were taken, and by whom. Similarly, videotaped or photographic evidence of injuries suffered as a result of physical abuse are often the key to credibility of a party.

If your client claims inappropriate behavior of the other parent, a private investigator armed with a video camera may be the best avenue to pursue. It is, however, difficult to obtain admissible evidence in this manner unless the claimed behavior is in public. Beware of potential ethical code violations when requesting surveillance of the other party by a private investigator—there are grave consequences if the surveillance was done in an unethical manner. The attorney may be tainted by the "sins" of the investigator. (**Rules Prof. Conduct, rule 2-100**—Re: communicating with adverse party.)

Determine, in advance, the evidence you will need to prove your client's claims. Require frequent reports by the investigator to determine whether this method is actually fruitful and cost-effective.

[**NOTE**: DO NOT RECORD telephonic conversations unless consent or court order was previously obtained for such recording. Tape recorded telephone conversations without the consent of the other party, and without court order, are inadmissible evidence per **Family Code section 2022**, and to do so is a crime pursuant to **Penal Code section 630 et seq.**]

It is usually not advisable for your own client to videotape his/her own visits with the child. To do so would subject your client to accusations of unduly influencing the child or forcing the child to testify. Furthermore, jurists and psychological evaluators are wary of parties who are more intent on "proving" the other party unfit, or to "prove" the exemplary nature of their interaction with the child, than they are of concentrating on their own time with the child. In certain circumstances, however, such videotaping may be necessary to disprove allegations of heinous conduct with the child of which your client may be accused by the other party.

Prior correspondence, emails, instant messages and other forms of electronic messages between parties may present key evidence of claims of parental alienation, verbal abuse, and harassment or may even evidence admissions of culpability. Do attach such documents to appropriate declarations, after laying proper foundation for their admissibility. Additionally, tape recorded messages left on answering machines sometimes become key evidence of "poisonous" communication from the other side. Transcribe and attach to appropriate declarations and offer to have the tape made available in open court. Consider, too, other forms of electronic evidence, such as comments, photos, etc. posted on Facebook, LinkedIn, Twitter and other social networks that can play a vital role in convincing the court of the opposing party's inappropriate parenting conduct or parenting skills.

G. Consider Requesting the Appointment of an Attorney for the Child

Family Code sections 3150-3153 provide for methods of requesting a court order for appointment of an attorney for the child, the duties and responsibilities of a minor's counsel, and compensation. (See also **California Rules of Court** ("**CRC**"), **rules 5.240-5.242**.) Either party may make a request for appointment of counsel for the children, as may a

guardian ad litem, a mediator or a custody evaluator, the child or any relative of the child; or the court may do so on its own motion. (**CRC, Standards of Judicial Administration, standard 5.11**.)

A request to appoint an attorney for the child, however, should not be automatic in every case. If you request such an appointment, you may be in conflict with your own client's interests unless you strongly advise your client of possible consequences. For example, the attorney appointed for the child may determine that the interests of the child do not coincide with those of your own client. Similarly, after an order is made for such an appointment, it is difficult to request a change of minor's counsel if any party is dissatisfied with the child's attorney. Finally, the courts, especially the less experienced judicial officers, are more likely to give greater weight to the recommendations or opinions of the child's attorney, often overriding other expert opinions in the process, and especially so if there are no other expert opinions being offered in the case. Note that minor's counsel ***cannot*** be cross-examined, thus if minor's counsel submits any of her/his own declaration to the court, you may want to move to strike that declaration as being without foundation, based upon hearsay, or some other evidentiary grounds (in fact, minor's counsel may well have waived his attorney-client privilege if his/her "testimony" is a representation of what his/her young client discussed with the attorney). Representations and recommendations of minor's counsel may adversely affect your client's interest, without your ability to cross-examine or confront minor counsel's claims. Beware that some minor's counsel believe they are qualified to render psychological opinions, while their training belies that belief. You must be alert to determine whether the opinions expressed by minor's counsel are that of the attorney for the child, or an attempt to impose the attorney's "psychological insights"—the latter of which are totally worthless, but often relied upon by the court. Remember, too, that minor's counsel are now required to present admissible testimony and evidence, not a mere opinion of counsel nor can they submit unsubstantiated statements of "Issues and Contentions" (**FC §**3151).

However, there are certain situations when the request for appointment of an attorney for the child is extremely helpful. For example, in a case where the evaluator may have exhibited bias or not developed the case appropriately, the parent's attorney may have great difficulty obtaining an order for re-evaluation, whereas the child's attorney would have a much easier time obtaining such an order (**FC §3151(c)(8)**). Similarly, in cases where subtle or overt parental alienation becomes the issue, the child's attorney is better able to focus the court on whether or not such alienation exists than is the beleaguered parent's attorney because the claim of self-interest is eliminated.

Research carefully the proclivities of the proposed minor's counsel. Too many minor's counsel believe their role is to make recommendations for custody/visitation, much as an evaluator does; too many jurists may simply accept and adopt the minor's counsel's recommendation to the exclusion of anyone else. Therein lies the danger of requesting the appointment of a minor's counsel. However, there are minor's counsel who validly see their role as fact-finders and fact-presenters, and see their obligation as being charged with giving

voice to their minor clients' wishes, where such wishes are expressed. It is these minor's counsel who can help steer the case on a more appropriate course.

H. Attorney Interviews of the Child

When the attorney for a parent has any doubts about interviewing the children, the answer is—***don't***!

Where there are allegations of sexual abuse of very young children, the attorney has no business interviewing the child, and may, in fact, harm the client's and the child's case by doing so. Attorneys are not qualified, in most cases, to appropriately interview children, especially if the children are quite young, and most certainly if allegations of sexual abuse exist. Such a role is best left to experts. If the attorney desires to ascertain whether the client's allegations are verified by the children, an expert psychotherapist should be hired to perform the interview. There is less danger in attorneys interviewing older children (8 years or older); however, attorneys must be careful not to coach such children while ostensibly interviewing them. It is a good practice to tape record any interview an attorney may have with the child, but beware that such recording may become subject to discovery, as the child is ***not*** the client. Also, notes an attorney takes while interviewing the child are not subject to the "attorney-client" privilege because the child is not the client; however, such notes are most probably protected as "work product privilege." (See ***Coito v. Superior Court*** (2012) 54 Cal.4th 480.)

I. Requesting the Child Custody Evaluation or Psychological Evaluation

1. Determining Whether an Evaluation Is Appropriate

Contrary to the impression of many practitioners, a child custody or psychological evaluation is not an automatic consequence of every custody dispute. Courts may order such evaluations, per **Evidence Code section 730**, or **Family Code section 3110** (or even pursuant to **Code of Civil Procedure section 2032**, at the request of a party), but there is no mandate that they do so. Unfortunately, many attorneys simply assume that the courts will automatically order such evaluations and make no effort at the outset to challenge such an appointment. Attorneys also misuse these statutes as an excuse to avoid dealing with custody issues because they are more comfortable focusing on the "easier" financial issues of the dissolution; they simply request an evaluation and leave the custody determination to the evaluator. Finally, many attorneys mistakenly assume that the appointment of an evaluator allows them to shirk their responsibilities for necessary custody trial preparation, and incorrectly presume that the evaluator's recommendation cannot be challenged.

Such abdication of control to a child custody or psychological evaluator is not only risky for the client, but may also subject the attorney to claims of malpractice. While it is true that many bench officers accord great (sometimes excessive) weight to the recommendations of a custody evaluator, the family law practitioner subjects himself to grave

criticism if such evaluation is not appropriately challenged by several methods. These methods of challenge can be placed in the following categories:

a. Is there a custody issue that a court alone cannot resolve without the assistance of an expert witness?

Not all cases require a child custody or psychological expert to aid the courts in determining child custody or visitation issues. In the case of a three-month-old breast-feeding infant, most family law jurists do not require an expert to determine that a custody order for alternating weeks is not appropriate. Similarly, where children are sufficiently mature (generally, over age 12), and an appropriate time sharing plan is clearly enunciated by them, there is little justification for the expense of a custody or psychological evaluation. [**NOTE**: Pursuant to **California Rules of Court, rule 5.220**, courts can order "partial" or "limited issue" evaluations for an examination of the health, safety, welfare, and best interests of the child that are limited in either time or scope. These evaluations are ideal for situations where there is only one issue (i.e., sleeping arrangements, choice of school, etc.), or where time is of the essence and the court and parties cannot wait until a full evaluation is completed.] However, in instances of abuse allegations, parental alienation, and in move-away cases, a full psychological evaluation is an absolute necessity. (***In re Marriage of McGinnis*** (1992) 7 Cal.App.4th 473 [9 Cal.Rptr.2d 182]; ***In re Marriage of Roe*** (1993) 18 Cal.App.4th 1483 [23 Cal.Rptr.2d 295]; ***In re Marriage of Battenburg*** (1994) 28 Cal.App.4th 1338 [33 Cal.Rptr.2d 871] and ***In re Marriage of Selzer*** (1994) 29 Cal.App.4th 637 [34 Cal.Rptr.2d 165]—see also cases under the "Move-Away" section, *infra*.)

In opposing a motion for custody or psychological evaluation, make certain to emphasize to the court the unnecessary financial burden placed upon your client, the lack of necessity for such an appointment given the particular issues presented, the substantial, prejudicial delay that such appointment would cause (often as long as six months, or more) and that the mental status of your client has not been placed at issue (see **CCP §2032**).

b. When opting for evaluation, should you choose to have it performed by the Child Custody Evaluation Office, or by independent psychological (or psychiatric) evaluators?

(1) In some cases, the attorney may be forced to submit to an evaluation through the superior court's Custody Evaluation Office by virtue of a specific court's order notwithstanding refusal of both parties to stipulate. These may be instances where the court orders such evaluation sua sponte, and no protestation of counsel will sway the jurist to reconsider. In such cases, the only alternative is for counsel to ***review the stipulation*** form issued by the Custody Evaluation Office ***very carefully***. ***DO NOT AGREE*** to waive rights granted to your client under the law. For example, do not waive the right to depose or examine the evaluator. Do not waive the right to strike portions of the report as being inadmissible testimony. Too many practitioners simply have their clients sign the form presented by the

Custody Evaluator's office without reviewing same and without modifying it to fit the needs of the case. (Be prepared that the Custody Evaluation Office may refuse to take the case unless you sign their stipulation forms without alteration. But stand your ground. The attorney's role is to protect the client. Be also aware that the lack of funding to the court system in California may prevent the court from sending the case to the Custody Evaluator's office. As of the writing of this article, virtually no full custody evaluations were being performed by many of the court Custody Evaluators Offices.)

Also note that jurists may send you to the Custody Evaluation Office for a "***mini-evaluation***," or a "***fast-track evaluation***" (also known as a "***limited focus evaluation***")where the evaluator spends an hour or two interviewing the parties and perhaps the children, and then will testify in court that afternoon or at some shortened court-specified time as to his/her findings. Usually these mini-evaluations have limited capacity for in-depth study. But they could prove to be valuable to the jurist in obtaining "instant input," especially where the jurist is reluctant to interview the children, and the evaluator may give the jurist the insight the children wish to put forth. Beware, however, that if parental conditioning of the children is being claimed, such a mini-evaluation may not get to the heart of the problem, and indeed, may cause more problems than it solves.

(**NOTE**: If you are forced to have your client undergo such a "mini-evaluation," make sure that key witnesses, such as treating psychologists, pediatricians, teachers, or other key witnesses are available for a telephone call with the evaluator during the appointed interview time, and make sure that the evaluator has a list of these key witnesses with their telephone numbers. Unlike full scale evaluations, the busy mini-evaluator does not have time to track down witnesses. If your witnesses are not available, the report will be concluded without the information, often to your client's and/or the children's detriment.)

(2) The Custody Evaluation Office generally does ***not*** perform a psychological or psychiatric examination, testing or evaluation. If the conflict between the parties revolves around a determination as to which home is physically better suited for the children, the Custody Evaluation Office may be a reasonable choice for evaluation, especially because it can do home visits,[2] and it is the least expensive alternative. However, if the psychological make-up of either party is at issue, the Child Custody Evaluation Office will not be the appropriate evaluator since there will be no psychological testing done by that office, nor, generally, will the clinical evaluation be performed by an experienced licensed psychologist or psychiatrist. Most members of the Custody Evaluation panel are MFT's (Marriage and Family Therapists), MSW's (masters in social work), or LCSW's (licensed

[2]Check to make sure that current procedures and court finances allow the evaluators to make such home visits.

clinical social workers). The occasional psychologist or psychiatrist on the panel is relatively inexperienced in the evaluation process and hopes to gain such experience by being on the Custody Evaluation panel.

(3) Where an evaluation of the psychodynamics of the family is necessary, the choice should be an individual psychological/psychiatric evaluation. As with the case of the Custody Evaluation Office, form stipulations provided by the evaluator must be modified to preserve your client's rights. If the chosen evaluator refuses to accept the altered stipulations, ***do not sign*** unless your client is specifically advised of the rights that are being waived thereunder. (Incidentally, some of the forms request that your client waive "all privileges." Be sure to modify the form to assure that your client does not waive the "attorney-client" or the "work product" privilege. Additionally, you may not even want to waive psychotherapist-patient privilege, especially where your client may have been attending counseling for a psychological problem totally unrelated to the custody issue, which your client may not want divulged to the other spouse. Once the psychotherapist-patient privilege is waived, all information obtained from the psychotherapist by the evaluator will be an "open book" to the other spouse, regardless of its relevance in the custody battle. Finally, it is not advisable, in most circumstances, to agree that the report of the evaluator is "admissible, subject to cross-examination." This is a trap for the unwary. First, no attorney should agree, in advance, to the admissibility of a report that hasn't even been written or researched yet. Second, the report may be subject to all sorts of objections once it is written, and waiver of these objections, in advance would be gross error. In fact, the report may be so full of bias and inappropriate reporting as to be totally inadmissible, but the waiver of the objection to inadmissibility may well doom the client's objection.) In the event your client claims to have nothing to hide about his/her psychotherapist's opinion or notes, it is well-advised to review the entirety of the therapist's notes and to interview the therapist before allowing the release of such documentation. Some information contained in the psychotherapist's notes may be shocking, may contain information about what the attorney told the client, as reported to the therapist by the client, and may contain highly prejudicial information the other party should never see.

(4) The ideal evaluation should be done by qualified, experienced psychologists or psychiatrists who do not have the bureaucratic time and monetary limitations that are placed upon them by a busy court system. The benefits of a thorough investigation and evaluation cannot be underestimated. The Superior Court in Los Angeles maintains a list of Psychologists/Psychiatrists who have performed a number of evaluations and are willing to abide by the requirements of the court to remain on the list. Be sure to check with your colleagues whether the panel member you are being offered is really qualified, does not have specific biases that would be detrimental to your client—in other words, do your homework! (Read **California Rules of Court, rules 5.220-5.230** and **Superior Court of Los Angeles County, Local Rules, Chapter 5, Family Law, rule 5.20** regarding appointment, qualification, requirements, challenges, etc. of custody evaluators.)

2. Which Evaluator Do You Choose: Psychiatrist, Psychologist, Licensed Social Worker, or Licensed Marriage and Family Therapist?

There are no hard and fast rules on which expert is best suited for a given case. Keep in mind that psychiatrists (M.D.'s), and those holding Marriage and Family Therapist (MFT), Masters in Social Work (MSW), or Licensed Clinical Social Work (LCSW) licenses do not perform their own psychological tests. They rely upon psychologists (PhD's) to do so, and often accept the psychologist's written report on the results of these tests. Thus, the choice of the "testing" psychologist may be important (as is the choice of tests given to the clients) in determining your choice of evaluators. In selecting an evaluator, ascertain whether that expert does "home visits," and whether that expert sees the children with the parents in a more "natural" environment than the interior of the expert's office. Sometimes these minor differences may result in major differences in the final evaluation.

Be cognizant of any special expertise required for your particular case. For example, not all forensic psychotherapists are qualified experts in sexual abuse cases. Similarly, claims of very subtle parental alienation cases require experts who have dealt with many such forms of alienation and can recognize the symptoms. Your client's comfort level with a proposed evaluator must also be one of the key factors in choosing the evaluator. For example, if your client is a mother who was sexually abused by a male family member during her childhood, you must assess whether this experience militates against the choice of a male evaluator. Similarly, if your client is a father whose cultural background prevents him from disclosing information to women, a female evaluator may not be your best choice for him. If you do not feel qualified to assess the expertise of the joint evaluator, or to determine the psychological needs for a special comfort zone for your client, use your own expert to determine the qualifications of the jointly chosen expert.

3. What to Do When the Evaluator Is Appointed?

a. Prepare your client for the evaluation. Do not simply send the client in to be evaluated. Review with the client the procedures that will be taken in the evaluation, including the psychological tests, the interview process, the interaction between the client and the other parent, and the interaction between the client and the child that will be observed by the evaluator, the collection of collateral material, and the interviews that will be conducted. There is no reason for a client to be shocked, for example, when an evaluator places the MMPI before him and requests that he complete the test, right then and there. Similarly, there is no excuse for surprise to the client that the evaluator may want to watch her play or draw with the child. (If you do not know what happens during an evaluation, ask an evaluator to give you this information. If you do not know how to prepare a client for the evaluator, do not hesitate to enlist the aid of an expert evaluator to help prepare the client.)

b. If you have not already obtained key declarations and depositions, it must be done immediately, and the evaluator must be provided with these documents (ascertain

whether the evaluator wishes to see these documents ***before*** the client's first meeting with the evaluator, or at a different time), as well as with a list of names, addresses and telephone numbers of key witnesses. Make sure that copies of all such communications are submitted to opposing counsel, so that the evaluation will not be nullified as a result of "ex parte" communications.

c. Periodically, contact the evaluator to determine whether additional information may be helpful or necessary. But note that all communication with the evaluator must be copied to opposing counsel or, if telephonic, must be done together with opposing counsel. (Beware that **Family Code section 216** prohibits ex parte communication with the evaluator.) Do not rely on your client's ability to transmit such information to the evaluator. Most clients are in shock and too nervous to be able to convey the facts or key evidence as necessary. That's why they hired you.

d. If your client has special needs or disabilities, make sure you advise the evaluator in advance, so that such issues can be addressed when the evaluation is performed. For example, if an individual's language is not American-English, be sure to advise the evaluator before your client is administered certain psychological tests, such as the MMPI or MCMI, which rely quite heavily on American idioms and which are not always understood by individuals whose language of origin/use is not American-English. (The MMPI is now available in Spanish and may, by the time of this publication, also be available in other languages; however, even the Spanish language version has limited use for someone with an unusual dialect that is not considered in the MMPI. The easiest way to understand the language differences between the King's English and American English usage, for example, is to remember that an American "apartment" is a British "flat," an American "bathroom" is a British "toilet" or "loo" in the vernacular, etc.)

e. Submit a packet of documents to the evaluator, including deposition transcripts, relevant pleadings, videotapes, audiotapes, correspondence between parties, medical and school records, declarations of witnesses that have not been submitted to the court, etc., together with a list of collateral witnesses, i.e., treating physicians, treating therapists, teachers, sports coaches, key witnesses. The packet of documents is sometimes accompanied with a letter by the attorney outlining salient points and focusing the evaluator on what is important for the client. However, not all evaluators welcome such a letter, so it is prudent to ask the evaluator whether he/she welcomes such a summary. If you do submit such a letter, do not overstate your case, and do not argue your legal points—this is not the time to submit a 35-page argument to the evaluator.

f. As additional documents or information become available, make sure they are transmitted to the evaluator, with a copy sent to opposing counsel, of course. (The best way to ascertain what an evaluator needs is to mentally place yourself in the position of the evaluator, assume you know nothing about the litigants and the children. Now, ask yourself what information would you want to have so that you know all the necessary facts about the family, their interactions, their conflicts, etc.)

g. If the parties, or one of them, comes from a culture, or has religious issues, that are different from that with which the evaluator is likely to be familiar, it is incumbent upon the attorney to provide information to the evaluator on these relevant cultural or religious issues and differences so that the evaluator can take those into consideration when studying the parties and the children. For example, a Muslim father's insistence that he must be awarded custody of the children of a certain age because such is the mandate of Shari'a law, should be bolstered by the attorney providing the evaluator with "context" to understand what Shari'a custody laws imply—this is especially true when there may be inherent bias by the psychological evaluator against all religious issues. It is up to the attorney to provide the "education" necessary to allow the psychologist to appropriately address and debunk myths or prejudices about the cultural or religious issues that may be presented in the case.

4. What Do You Do Once the Evaluation is Completed and the Report Is Received?

a. If report is *favorable* to the client:

Attorneys often assume that if the recommendation of the evaluator is favorable to the client, they need do nothing more, and that the submission of the report in evidence will conclude their involvement in the case. An attorney who rests on his/her laurels in this fashion will often be outmaneuvered by a clever opponent. Remember that the evaluator's recommendations are just that—recommendations! They are not judgments. Only the court can make specific orders. The jurist is not mandated to accept the recommendations of an evaluator. Furthermore, if the recommendation is not bolstered by specific facts and valid reasoning, it is not particularly helpful to the trier of fact.

[**NOTE**: An easy test to determine whether the facts presented in the report bolster the conclusion reached by the evaluator is to read the entire report first, without reading the recommendation, and attempt to determine what the evaluator concluded; then match your conclusions with those of the report. If they differ substantially, there may be a major problem with the report. Also, beware whether the evaluator's report hinges on the existence or non-existence of specific facts, and make sure those facts are accurate or will not be contradicted by the opposition.]

Even if the report is favorable to your client, be prepared to discover whether your opponent has information that has not been uncovered by the evaluator, whether your opponent has experts who will make contrary recommendations, or whether you have key evidence available to you in court to strengthen the evaluator's conclusion. Review the evaluator's notes to determine whether the evaluator exhibited bias that may be unearthed by your opposition.

b. If report is *unfavorable* to the client:

If the evaluator's report is not favorable to your client, consider doing any one or all of the following:

i. Review the report point by point with your client and determine if there were facts that were omitted, facts that were misinterpreted, or facts to which the evaluator was not privy but which would help support your client's position. Then get busy marshaling the necessary facts to counteract the evaluator's position.

ii. Obtain the evaluator's entire file (by subpoena if no stipulation is forthcoming) and review it carefully to determine what documents or information may have been supplied to the evaluator that were unknown to you. Review the evaluator's notes to determine what additional information the evaluator obtained through witness contacts, or what key information was neglected or omitted by the evaluator. Look for evidence of "confirmatory bias" which is a "conscious or unconscious tendency to assign weight and importance to information that supports our biased outlooks, perceptions and opinions."[3] Additionally, make sure to obtain the psychological test results, and the specific raw test data and raw test scores. This is imperative if you intend to have your own expert examine the results of the tests and the conclusions reached in the reports.

iii. Retain your own expert to review the evaluator's report and file to determine if there were inappropriate conclusions reached that were based on wrong facts, wrong interpretations of test data, or simple bias on the part of the evaluator. (See notes on **unilateral evaluations** below.)

iv. Depose the expert to ascertain the bases upon which the conclusions were reached, to determine whether all necessary steps were taken to reach the appropriate conclusions, and what avenues of information may not have been appropriately explored. This is also the time when certain biases may be brought to the forefront to give you the ammunition with which to attack the report in court. However, before choosing to depose the evaluators, consider carefully whether you want to alert the evaluators on areas where you would want to cross-examine them at trial. Beware of "preparing" the evaluator to better testify at trial. Among other considerations, the decision to depose the evaluator will also depend on whether you expect to elicit sufficient testimony at the deposition to neutralize subsequent trial testimony or choose to use the deposition to seek a new evaluator.

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[3]**Sidney J. Brown**, Ph.D., "*To Challenge or Not to Challenge? That is the Question. Spotting Bias in a Child Custody Evaluation*," (2006) 28:3 Family Law News, State Bar of California.

v. Consider requesting a new evaluation by stipulation or file a motion to obtain same. (See **EvC §733** and **CCP §2032.310**.)

vi. File a motion to strike portions or all of the evaluator's report on the particular applicable grounds (i.e., bias, inadmissibility of underlying testimony, speculation, etc.) if the evaluator's report was admitted into evidence.

J. Choosing a Unilateral vs. a Joint Evaluator

Attorneys are often faced with dilemmas on issues that range anywhere from allowing the client to be interviewed by the evaluator selected by the other party, agreeing to a joint evaluation, or submitting the evaluation report of a unilateral evaluation (i.e., an evaluation wherein only one of the two parents was observed and evaluated by the expert psychotherapist). The choices are often dependent upon the particular circumstances; however, there are some guidelines that should be followed:

If the psychotherapist does not have the opportunity to interview both parents, a unilateral evaluation will never be as effective in court as a bilateral evaluation. This is self-evident—it is impossible for the court to obtain a true picture if the psychotherapist has observed only one party.

Do not stipulate to a bilateral evaluation by an expert chosen by the adverse party, unless you know that the expert is fair, thorough, and not likely to be biased. If you don't have experience with the evaluator, enlist input from your colleagues.

If you select your own expert and request the other side to submit to the bilateral evaluation, the adverse party will generally request another expert as well to perform a similar bilateral evaluation. Do not blithely agree to this request. Be sure you have first evaluated the qualifications and biases of the opposition's proposed expert.

If it is impossible for the parties to agree upon the evaluation by either party's chosen expert, it is best to request a court order for same rather than rely solely on a unilateral evaluation.

Unilateral evaluations *are* valuable in some instances:

1. Where there have been allegations of sexual or physical abuse (especially in young children), the therapist who initially discovered and exposed the abuse may not have the opportunity to examine the allegedly abusive parent before his/her declaration or testimony is submitted. In such cases, however, the unilateral evaluation may be the most expedient and ***only*** method to appropriately place this issue before the court, especially if temporary restraining orders are sought.

[**NOTE**: Beware that in such circumstances the therapist should be very careful to avoid rendering a psychological assessment of the parent that was not seen. There is nothing more damaging to a therapist's credibility than diagnosing pathology in a party who was never examined by that therapist. The therapist may only testify to a conclusion of harm that the child, who was interviewed, may have suffered or may be suffering, and a description of what occurred during the therapy session. Such therapist may make recommendations that an evaluation of ***all*** parties concerned should be done, or that the child is so traumatized that safeguards such as monitored visits or temporary termination of contact, should be imposed pending a future ***complete evaluation***, but such therapist should not recommend a permanent parenting plan without seeing the other parent.]

2. If a bilateral evaluation was performed and it appears that there was some bias or inappropriate application of the facts or misinterpretation of clinical data (as opposed to test data), a unilateral evaluation of your client may be valuable, but only as to the findings regarding that party, ***not*** as to the findings regarding the other party.

3. If psychological testing was performed by a unilateral review, an analysis of the specific test data and conclusions reached by the psychologists may be, and in some cases ***should*** be, used. This is simply because the analysis of the psychological tests standing alone is presumably an objective determinant totally independent from the clinical evaluation of the parties. Theoretically, therefore, any expert qualified to administer and interpret these specific tests (i.e., MMPI, MCMI, etc.) should be able to review the test data and analysis and be able to comment upon the validity of the interpretation, the reliability of the test, etc. (Be aware, however, that certain psychological tests are "subjective" and not "objective." In such cases, your unilateral expert will be invaluable in explaining to the court how test results of a "subjective" test may differ depending on the evaluator, the requirements for validity and reliability of tests that are used in custody cases, etc.)

4. A unilateral evaluation may be the only testimony available to give the court reasons why a second bilateral evaluation should be ordered. If the unilateral evaluator finds that the initial bilateral evaluation was seriously flawed clinically, diagnostically, or in other ways, such testimony of the unilateral evaluator may be invaluable to win a request for a subsequent evaluation by another expert. In such cases, obtain a thorough declaration from the unilateral evaluator to be submitted to the court together with the motion for a new evaluation.

K. Other Experts to Be Used in Custody Cases

Certain cases demand the engagement of special experts. For example, if the dispute involves issues relating to the choice of a particular school, an expert in school evaluations may be desirable.

If the issues revolve around religious conflicts, a member of the clergy may be necessary to testify on the specific religious issue that is being raised before the court.

If one or both parties are immigrants or members of a foreign culture, it may be imperative to hire an expert to explain the special cultural differences that may affect the evaluation.

[**NOTE**: Do not assume that the courts will automatically refuse to address religious issues in custody cases because of the "church-state separation" mandate of the United States and California Constitutions. There are several court decisions in California and in other states where the courts have considered and ruled upon religious issues in custody cases, most notably where the particular religious conflict may be harmful to the child. Similarly, a court can be convinced that there is no violation of the "church-state separation" doctrine where the court is being asked to consider religious practices of the parties and the child in fashioning times for custodial exchanges and custodial timeshare. For example, Orthodox Jews are forbidden to travel in a vehicle from sundown on Friday night to an hour after sunset on Saturday night. The court's issuing an order for exchange on Saturday mornings where the parties are required to use a vehicle to exchange the child is an unviable custody/exchange order. Often, an expert in religious law may be necessary to point out the conflict and proffer possible resolutions that do not require the court to interfere with the religious beliefs or practices of either party; it is merely part of the court's necessary consideration of what is "in the best interests" and in the "welfare" of the child.]

L. Move-Away Cases – Special Preparation

Move-away cases have developed into an almost sub-specialty within the field of child custody cases. As proof, one need only look at the plethora of legislative bills introduced during the past few years dealing with the issue of move-away cases, as well as the Supreme Court's decision to tackle this thorny problem in ***Burgess***, *infra*, and ***LaMusga***, *infra*; ***Brown v. Yana***, *infra*; and **Family Code section 7501(b)**. A disproportionately great number of the appellate and California Supreme Court custody cases deal with the extremely volatile and troubling area of move-away cases. Most such actions arise where parents have some form of custodial arrangement (whether as a result of litigated action or pursuant to stipulation), one of the parties wishes to move out of the county, state or the U.S., so that the existing custodial arrangement must be substantially modified, and the remaining parent claims deprivation of the continual contact, love, affection and caring of the children, as well as a complete change in the dynamics of the remaining parent/child relationship.

Interestingly, the Supreme Court's seminal decision in the ***Burgess*** case has not stemmed the flow of these cases, simply because these cases are often so unique that it is impossible to develop hard and fast rules, despite numerous attempts to do so. In fact, the California Supreme Court in 2004, in ***LaMusga***, upheld the ***Burgess*** decision, but made pronouncements on what factors are to be considered in such move-away case that were not evident in ***Burgess***. The noteworthy point about these move-away cases is that most of the appellate and Supreme Court decisions uphold the trial court ruling. Thus, good pre-trial and trial skills are most essential even in these move-away cases, despite the fact that there appears

to be more guidance from appellate decisions on move-away cases than exists in ordinary custody/visitation cases.

[**NOTE**: The following key cases are a must read, and often re-read in move-away cases: The California Supreme Court's decision in ***In re Marriage of Burgess*** (1996) 13 Cal.4th 25 [51 Cal.Rptr.2d 444] and the subsequent appellate court decisions in ***Cassady & Signorelli*** (1996) 56 Cal.Rptr.2d 545; ***Brady v. Kroll*** (1996) 45 Cal.App.4th 1732; ***In re Marriage of Whealon*** (1997) 53 Cal.App.4th 132; ***In re Marriage of Condon*** (1998) 62 Cal.App.4th 533 [73 Cal.Rptr.2d 33]; ***In re Marriage of Edlund and Hales*** (1998) 66 Cal.App.4th 1454 [78 Cal.Rptr.2d 671]; ***Ruisi v. Thieriot*** (1997) 53 Cal.App.4th 1197 [62 Cal.Rptr.2d 766]; ***Biallas v. Biallas*** (1998) 65 Cal.App.4th 755 [76 Cal.Rptr.2d 717]; ***In re Marriage of Williams*** (2001) 88 Cal.App.4th 808; ***Montenegro v. Diaz*** (2001) 26 Cal.4th 2429; ***In re Marriage of Bryant*** (2001) 91 Cal.App.4th 789; ***In re Marriage of Lasich*** (2002) 99 Cal.App.4th 702 [121 Cal.Rptr.2d 356]; ***In re Marriage of Rose & Richardson*** (2002) 102 Cal.App.4th 941 [126 Cal.Rptr.2d 45]; ***In re Marriage of Abrams*** (2003) 105 Cal.App.4th 979 [130 Cal.Rptr.2d 16]; ***In re Marriage of Campos*** (2003) 108 Cal.4th 839; ***In re Marriage of LaMusga*** (2004) 32 Cal.4th 1072 [12 Cal.Rptr.3d 356]; the California Supreme Court decision of ***In re Marriage of Brown and Yana*** (2006) 38 Cal.Rptr.3d 610; ***Niko v. Foreman*** (2006) 144 Cal.App.4th 344; ***In re Marriage of Seagondollar*** (2006) 139 Cal.App.4th 1116, and ***Mark T. v. Jamie Z.*** (2011) 194 Cal.App.4th 1115.]

Additionally, while most of these cases are primarily fact-driven, there are certain ground rules that should be followed to prevent a "crapshoot" result:

1. If you represent the moving parent, do not allow the client simply to pick up and move away if there is a court order mandating notice or prohibiting the move. Such conduct may only lead to contempt actions for violation of existing custody orders, and possible imprisonment or fine for Penal Code violations. NOTICE SHOULD BE GIVEN OF THE PROPOSED MOVE-AWAY, even if the court order does not mandate such notice if the move will be to a distance sufficient to interfere with the other parent's custodial time. Furthermore, the notice should request a written stipulation to allow the child to move. (Remember, the court ***cannot prevent either parent from moving***—that is a right protected by the Constitution. The court can merely ***prevent the child from being moved*** and can order a change of custody to the other parent.) The NOTICE and request for stipulation to the move should be done well in advance of the planned move (whenever possible) to allow court relief to be obtained if the stipulation is not forthcoming. Do not be caught in a situation where the other parent serves your client at the airport with ex parte orders restraining the removal of the child. It is not likely that a court will make a decision on a move-away case in less than six months.

2. If you represent the non-moving parent, you have three options upon being served with a Notice of Intent to Move by the other parent:

a. You may stipulate to the move upon certain conditions, setting forth proposed new custodial arrangements, including specified extended periods of custodial time in lieu of the frequent but shorter periods previously enjoyed (for example, request most of the school vacations, a much larger portion of the summer, and the long weekends in every school year). Specify the modes and conditions of transportation of the child, specify the person who will pay transportation costs, and be sure to include provisions for extended custodial times when the non-moving parent may be visiting the area of the other parent. Request video conferencing ability to allow daily visual interaction between the remaining parent and the child.

b. You may oppose the move-away and simply wait for the other parent to file a court action to request the court's authorization for the move if the existing court order specifies that court consent must be obtained for a move.

c. You may file your own action to prevent the move-away. This option is generally used only where the planned move is imminent and it does not appear as if the other parent will request the court's permission for the move. You may have to obtain an Ex Parte Restraining Order to prevent the move.

3. If you represent the moving parent and you have not obtained a written stipulation allowing the move with the child, file an immediate OSC re: modification of Custody. Be aware that per ***In re Marriage of Campos***, *supra*, 108 Cal.4th 839, the non-moving parent can request a psychological evaluation.[4] However, the focus of the inquiry will be far more limited. Thus, there is far less room for innocent error. The custody evaluator's opinion is likely to have greater impact because the report will often recommend either the removal of the child from a non-moving capable parent (and by necessity interfere with the existing parent/child relationship), or force the equally capable move-away parent to choose between leaving the child with the other parent or relinquishing his/her own ultimate goals (whether social, financial, physical, or emotional). It is in these cases where the biases of the psychologists have the greatest impact upon their recommendations. (Note that some psychologists and some jurists have adopted very strong opinions regarding move-away cases. It would behoove you to discover in advance whether such opinions have reached the level of a "bias" that may impact your client's case.)

4. Although ***Burgess*** technically prevents the court from basing its decision on whether the move is "absolutely" necessary, language in ***LaMusga*** makes it prudent to proactively indicate the necessity of such a move (e.g., remarriage, better opportunity

[4]But see ***Brown & Yana*** for limitations to that right, especially where the moving parent has sole custody.

financially, specific health problems, etc.). ***Mark T. v. Jamie Z.***, *supra*, 194 Cal.App.4th 1115 is instructive on this issue. In the event health is an issue, you should also have a strong supporting declaration/testimony from a doctor or other health practitioner. If you represent the non-moving parent, be sure to set forth in the declarations/testimony the close, loving relationship between the parent and child, and specify their particular activities during the custodial times, as well as the impossibility of maintaining these ties and activities if the child were allowed to move away. The stronger the declarations/testimony are to show the detriment to the non-moving parent/child bond, the more closely the court is likely to examine the effects of such a move on the relationship between the remaining parent and the child. The declarations should also be written, with outside support, to impress the judicial officer that the non-moving parent is as equally capable of caring for the child as is the moving parent. (This allows the court a better opportunity to change custody to the non-custodial parent.) Strong supporting declarations from others are imperative in these cases. Beware the impact of the new **Family Code section 217**, in which the court must allow oral testimony, especially in an area as vital to the interest of the child as the decision of one party to move away and request that the child move with that parent.

5. If you represent the non-moving parent and suspect that the move-away is done for purposes of alienating the child from the other parent, be sure to investigate and bring to the court's attention, via subpoenaed documents and supporting declarations, past conduct that bolsters this contention. For example, if the moving parent has been cited on various occasions for failing to abide by the existing custody orders, or has made false allegations of abuse or neglect against the other parent, has attempted to exclude the other parent from the child's school or extra-curricular activities, has made prior attempts to move to different locations, etc., this is the time to bring this conduct to the court's attention.

[**NOTE**: If you represent the moving parent, and your client alleges, for the very first time at a request for move-away, that the other parent may have molested the child, proceed cautiously and suspiciously. If these allegations are recent, they may have validity. However, if the alleged abuse is claimed to have occurred over a period of time and has not been reported until the client is getting ready to move away, beware! Your client may be exhibiting a tendency to allow or promote "alienation," or the client is simply prevaricating. In any case, it will raise tremendous suspicion in the court's mind. Similarly, if your client has a history of raising unfounded claims of abuse against the other parent, the attempts to remove the child from the jurisdiction of the court may be viewed as simply another in a long line of attempts to prevent the other parent from developing an appropriate relationship with the child. In such cases, the attorney should warn the client that by virtue of requesting the move-away, the court may take that opportunity to examine the complete parent/child relationship between both parties, and may order a change of custody even if the moving parent ultimately decides to stay.]

6. Review carefully "footnote 12" of the ***Burgess*** case to determine whether the case fits within that definition. The proof necessary to determine whether the child will be allowed to move is totally different if the case falls within the "footnote 12" exception. (Cf. ***Montenegro***, ***In re Marriage of Rose & Richardson***, that have whittled away at the

importance of "footnote 12" of the ***Burgess*** decision, but see **FC §7501(b)**. See also ***LaMusga*** for factors to be considered by the court in rendering decisions in move-away cases.)

M. Modifications of Custody/Visitation Orders

Pending trial and final decision, custody/visitation orders are always modifiable. It is not unusual for parties to undergo numerous OSC's for modification of custody orders. No showing of changed circumstances is necessary for such interim modifications, because they are not "final orders" (***Montenegro v. Diaz***, *supra*, 26 Cal.4th 249), only a showing of what's in the child's best interest. Nevertheless, courts tend to frown on too frequent requests for modification of custody because they deem it to be in the best interest of the child to remain in the status quo position without frequent changes of custody. But even when the final court order or judgment specifies that a custody order is "final," the living arrangements need not be so. Clearly, as children age, a differing timeshare arrangement may be warranted despite the fact that there may not be present a "changed circumstance" that would warrant the court making a different custodial order from the "final" one. Nevertheless, neither party is precluded from filing an OSC for modification of "timeshare" or parenting/visitation schedules, which, in the infinite wisdom of our courts, are not the equivalent of custody change, and thus do not require a proof of "changed circumstance." (See ***In re Marriage of Lucio*** (2008) 161 Cal.App.4th 1068, following the dictates of ***In re Marriage of Birnbaum*** (1989) 211 Cal.App.3d 1508, and ***Enrique M. v. Angelina V.*** (2004) 121 Cal.App.4th 1371.) However, when seeking changes in timeshare, keep in mind the court's strong desire to maintain the status quo for children as that is deemed to be in their best interests. It is also inherently foolish to make these demands too frequently, as this simply evidences the requesting parent's inability to understand the children's need for stability.

III. TRIAL

A. Choice of Forum: Public Courts or Private Trials

Because custody cases are so time-sensitive and often need swift resolution, consider the time that the public courts will have available to hear the case. In a one- or two-day trial, if the trial court has the time to hear the case sufficiently early, it is cost-effective and time-effective to remain in the public court system. However, in custody cases where trial time is estimated to be lengthy, consider that the client's interests may not be best served by remaining in the public court system, unless the court can provide consecutive trial dates relatively shortly after the evaluation has been completed. Otherwise, not only will the momentum of trying the case be lost as a result of truncated hearing dates, but the evaluation may become stale and irrelevant when trial occurs months after the report is filed. This is especially true when the children are of a young age. Children's needs and interests change so rapidly when they are young, that what the recommendations or facts may have been at the time of the evaluation may have completely changed six to ten months later when the court is

ready to conclude trial in the case (in fact, the evaluator may often testify that he/she cannot opine on what may be the appropriate timeshare for the children if the evaluation concluded several months earlier, as it is impossible to be aware of what facts may have changed in the interim). Additionally, consider whether the public court trial judge has sufficient experience in trying custody cases, especially when testimony is highly dependent upon technical psychological data and findings. It, thus, may behoove trial counsel to explore the possibility of stipulating to a **privately compensated temporary judge** to hear the case.

The requirements are set forth in **California Rules of Court, rules 2.830-2.834**, which provide, essentially, that a privately compensated temporary judge must be a California State Bar licensed attorney, and the Stipulation, Order, Oath and Certification must be signed and filed with the court before such an attorney can proceed to act as a privately compensated temporary judge. Thereafter, all proceedings are identical to that of a public trial, even though trial takes place usually in an office. Rights to a court reporter, transcript, comportment to evidentiary rules, and rights to appeal are similarly preserved.

Consideration for choice of the attorney to act as a privately compensated temporary judge should be: experience in litigating or hearing such complex custody trials and the attorney's availability to try the case on short notice and in a relatively consecutive fashion. **Note** that while "Private Judging" of a child custody case is as binding and effective as is a public trial, "Arbitration" of child custody cases results in a non-binding award, and is therefore not recommended as an alternative to public court trials. (Arbitration may be an ideal way to try property and spousal support issues, especially when privacy of issues and financial facts are desired, but the non-binding nature of child custody arbitrations makes that type of procedure not optimum for that issue.)

B. Necessary Preparation for Trial

1. All documentary evidence should be appropriately subpoenaed, and all subpoenaed business records should have the appropriate declaration attached, or assure that the custodian has been subpoenaed to court to testify personally.

2. Be sure that all witnesses have been subpoenaed to court. Do not assume that the court will "***Reiflerize***" the hearing, even if it is merely the initial Order to Show Cause, as **Family Code section 217** requires the court to hear oral testimony unless there are circumstances under which the court refuses to do so (and those circumstances must be set forth in the court's order). (Note, the court has no authority to "***Reiflerize***" a ***trial***, it can only do so, if at all, at an OSC (***Elkins v. Superior Court (Elkins)*** (2007) 41 Cal.4th 1337).)

3. If you have not reviewed the files of all psychologists, evaluators and experts during discovery, it is imperative that you subpoena these records to court, and that you ask to review them when such witness is called to testify. (Beware that you may not be allotted sufficient time to do a thorough review of the file if you first laid eyes on it at trial; thus, a prior

subpoena of these documents to your office will be far more helpful in your ability to prepare appropriately for the expert's testimony.)

4. All exhibits should be pre-marked (except impeachment evidence), and placed into notebooks to be provided—one to the judge, one to the clerk, one to opposing counsel, one for you, and one to be used by the witnesses on the stand. Consult the Los Angeles Superior Court trial rules in the use of numbering of exhibits.

5. The expert's notes should be "Bates-stamped," copied, and marked as an Exhibit. (Even if you don't intend to offer them into evidence, you will likely need to refer to various pages during your examination or cross-examination of the expert, and may need to offer certain pages into evidence.)

C. Cross-Examination of the Expert

1. In cross-examining the evaluator or the other party's expert, do not automatically assume that the expert is qualified—**delve into that person's history, background and expertise (with the help of your own expert who should have previously reviewed the curriculum vitae of that evaluator or expert)**. You may seek to voir-dire the opposition's expert before you allow that expert to testify. If the court rules that expert is not qualified, you have just succeeded in eliminating a key opposition witness.

2. Focus on the facts and conclusions reached. It is not necessary for an attorney to become a psychologist to effectively cross-examine an expert in the field; however, it is imperative that the attorney understand the terminology being used in the evaluation report. What passes as ordinary English language to the layperson, may have substantially different, and often significant, psychological meaning to psychotherapists.

3. Similarly, while no one expects attorneys to be able to interpret the varying test data, the trial attorney should have at least a working knowledge of the types of objective and subjective tests administered in the custody case, the reasons for such tests, and the applicability of such tests to the resolution or evaluation of custody cases.

4. Consult your own expert on key areas of cross-examination. Your own consulting expert should be the one who is well versed in both psychological tests and clinical evaluation. Your consulting expert should give you the tools necessary to effectively cross-examine the expert in both the testing and the clinical conclusions.

5. If you have evidence that disputes the factual basis upon which the expert reached conclusions, now is the time to reveal and cross-examine the expert on such evidence.

6. Although it may be difficult to do so, it is sometimes possible to obtain prior evaluation reports of the expert in other cases. Such reports may be invaluable to prove gender-based, religion-based or other biases. Use these reports to cross-examine the expert.

7. Remember that psychological evaluation is not an exact science. In fact, even empirical psychological tests are not infallible and have their own limitations. If the psychological test results are not favorable to your client, focus on the fallibility of the test, the circumstances under which it was taken, and the necessary clinical correlation that must be made to make the test results applicable to the conclusions reached by the expert. A quick summary of evaluating psychological tests is provided by the article *"What Judicial Officers and Attorneys Should Know About Psychological Testing in Child Custody Matters,"* by **Gottfried, Bathurst & Gottfried** (2003) Los Angeles County Bar Family Law News.

8. Clinical evaluation by the expert is more subjective than many psychological tests. Be sure to cross-examine the expert on the clinical basis upon which he/she reached the conclusions. Determine if clinical observation of each parent with the child was made under substantially similar circumstances, and if not, whether the differences may have impacted the conclusions reached or observations made by the evaluator. Be sure to delve into any possible biases the expert may have had in reaching conclusions, and whether there are any alternative reasons to the clinical observations and the conclusions reached. It is not impossible for the expert to have taken a dislike to your client for personal reasons totally independent of the evaluation process. It is the attorney's task to ferret out, and bring to the court's attention, any such biases.

9. Cross-examine the expert on the expert's own publications if they contradict some of the basis for the conclusions reached in the report.

10. Cross-examine the expert on any publication upon which the expert relied in reaching his conclusions.

11. Do not be abusive toward the expert. This tactic serves merely to elicit sympathy of the court for the witness.

12. Focus on key issues and avoid wasting time on minutiae that the court is not likely to consider in its decision.

D. Examination of Your Own Expert or Favorable Evaluators

1. Lay the appropriate foundations, including as much of his/her expertise in the specific area as possible. Do not simply introduce into evidence, without further examination, the curriculum vitae of the expert unless you are sure that the court is familiar with and recognizes your key witness as an expert in the specific area upon which you expect testimony to be elicited.

2. Introduce the factual basis upon which the expert relies for his/her conclusions. Proceed with a carefully structured and tight-knit elicitation of testimony regarding the specific findings, recommendations and the reasons the expert drew the particular conclusions.

3. Do not seek to elicit information from your expert to which your expert is not qualified or is not prepared to testify. (Not only would this be embarrassing to your expert, but it would also diminish his value as an expert in your case.)

4. Know when to quit your examination. Do not repeat questions that seek to elicit testimony already in evidence. Do not ask questions in a manner that is easily attacked by objections. Do not ask leading questions. Make sure that any psychological terminology to which your expert testifies is very clearly explained in lay terms. (Keep in mind that by the time you reach the trial phase, you are likely to be so familiar with the expert's report or your expert's testimony you could almost testify to it yourself, but the court may be hearing this for the first time—it takes time to make the court understand the testimony, especially if it involves complex psychological issues and terminology.)

5. If the evaluation report was admitted into evidence before your direct examination of the favorable evaluator, do not waste the court's time in eliciting the identical testimony. Have the expert identify and elaborate on the key reasons or findings that may clarify or strengthen what has already been written in the report. If your expert's testimony discredits or disagrees with the evaluator's report, focus simply on the areas you wish to discredit and the specific reasons. Focus on key areas, not minutiae.

E. Examination of Your Own Client

1. Your client is one of the key people at trial. The litigants' dress and demeanor are as important as their testimony. Your client should be advised on what to wear at trial and how to behave, both on the witness stand and at the counsel table. (Many counsel would be shocked to learn that their client's behavior at the counsel table often reveals more to the jurist than their actual testimony under oath. Similarly, your client's behavior in the courtroom when the court is not even in session may also be reported by court personnel to the jurist. Admonish your client that all eyes are upon him/her throughout the entire time the client is in the courtroom, and sometimes even in the hallway.)

2. Train your client to respond to questions directly and without guile. Explain to your client the difference between direct examination and cross-examination. Warn your client to respond to opposing counsel's questions directly, and without animosity. Sparring with opposing counsel never inures to the client's benefit. Instead, make sure you protect your client from obnoxious, harassing or inappropriate questions by making timely and appropriate objections immediately upon the question being asked.

3. Practice direct and cross-examination with your client prior to trial. To the extent you are familiar with your opponent's cross-examination technique, utilize that knowledge when preparing your client for testimony.

4. It may be necessary to obtain the assistance of an expert to train your client in effective testimony. Recognize that the result of the custody action is of utmost importance to your client, and even the most capable client may become overly distraught and thereby ineffective. It is very helpful to suggest that your client bring a friend or family member for emotional support to court. But warn the client that in custody cases, at the request of either side, the trial court has the authority to exclude everyone but the litigants and attorneys during trial.

5. Give your client an active role in the preparation for trial. During the trial, allow the client to participate by taking notes and suggesting the direction of certain areas of your examination which may actually be of great assistance to you. However, always remind your client that you are in control; that you are not to be interrupted during any examination; and to be aware that their non-verbal communication with you is equally subject to scrutiny by the jurist.

F. Cross-Examination of the Other Parent

1. Focus on the key issues and the facts. Do ***not*** digress into immaterial allegations because these will only serve to reduce the effectiveness of the serious allegations.

2. Remember that the other parent may also have been well prepared for your cross-examination. Try to vary your method to catch him/her off guard.

3. If the focus of your case is the inappropriate temper of the other parent, ask questions in a manner that may elicit that particular behavior.

4. An abusive stance in cross-examining the other parent is generally counter-productive. Remember that only in extremely rare cases will the parent be completely prevented from seeing the child. Thus, denigration of that parent on the witness stand will only serve to elicit questions from the court concerning the motives, sincerity, and claimed cooperation of your own client.

5. It is rarely helpful to write out your questions in advance, because you will then have a tendency to fail to ask some key follow-up questions that may not have been pre-planned. It is far more helpful to outline the specific area of inquiry you wish to pursue and, perhaps, write out the few key questions you do need to ask to comport to the requirements of the law, or to prove your case. (Note that on this issue reasonable and seasoned attorneys often disagree.)

G. Other Witnesses

1. Choose your witnesses well. A parade of neighbors and friends who testify to similar facts or opinions will not be as effective (if allowed at all) as a select few who can testify to having personal knowledge of a variety of key issues in the case. The most important witnesses, of course, are:

a. Those who contradict the factual basis of the expert's conclusions, if the expert's report is not favorable to your client;

b. Those who can specifically pinpoint key areas of fact, i.e., the doctor who found the physical signs of abuse; the neighbor who heard or saw the parent's inappropriate behavior; the teacher or school official who is in contact with both parents and can testify as to the more effective parent, vis-à-vis school attendance, homework, classroom participation, etc.

2. Rank the importance of witnesses, especially since most jurists are very time conscious. For example, experts, doctors, teachers and independent witnesses are more important than friends and relatives. In most instances, relatives and close friends are inherently biased, and their testimony should, therefore, be limited.

3. Make certain you prepare each witness for trial. Do not try to elicit hearsay or incompetent testimony from your witness. Focus on specific instances of action or non-action rather than generalities.

4. The same preparation for direct and cross-examination should be done for a witness as was done for the client, but keep in mind that the witness does not have the attorney-client privilege, and thus may be asked what the attorney told him/her to say on the witness stand. Prepare the witness for this eventuality. Never compromise your integrity (or your Bar license) by asking the witness to lie.

H. Children as Witnesses

This is one of the most difficult areas of custody trials. The attorney is often caught in a "no-win" situation, especially when the client claims the children have been coached by the other parent and there was no expert to determine the validity of the claim. Pursuant to **Family Code section 3042**, as of January 1, 2012, the court ***must*** allow a child that is 14 years or older to testify on custody or visitation if the child wishes, unless the court finds that it is not in the child's best interest, in which case the court must state its reasons for that finding on the record. Additionally, that code section will also permit a child under 14 years of age to testify, "if the court determines that it is appropriate pursuant to the child's best interest." However, what the law permits, and what that request implies to the judge, are two different things. Insisting on having the children testify in open court may often lead to the jurist's conclusion

that your client is not child-centered, or child-focused. On the other hand, if the attorney allows the jurist to question the children in chambers, the opportunity to ask key cross-examination questions may be lost. Unless the parties and attorneys stipulate, the court cannot interview children in chambers outside the presence of the attorneys (however, the court reporter must be present at all times). When faced with a request to interview children in chambers, the attorney has equally poor alternatives:

1. Allow the jurist to interview the children in chambers without the attorneys or a court reporter, but the result cannot be appealed because there is no record, and the attorney loses control of the case.

2. Allow the jurist to interview the children in chambers with the attorneys and with the court reporter. This risks incurring the jurist's conclusion that your client is not sufficiently concerned about the children being traumatized by having to talk to the jurist in the presence of attorneys who, the children may conclude, would report to the parents what they said to the jurist. (In allowing this choice, consider that the alternative may be even more risky—you may have to allow opposing counsel to abusively cross-examine the child, hazarding the intimidation of the child into recanting his testimony, or "clamming up" on the witness stand.)

Probably the best method of resolving the dilemma is to try to convince the jurist to allow each attorney the opportunity to propound questions which they can request the jurist to ask the child, and have the court reporter present during the jurist's interview in chambers with the child. Become familiar with **Family Code sections 3042**, **7890 through 7892** and **Evidence Code section 700**. To preserve your client's rights, under any circumstances, you may want to insist that a court reporter be present in chambers, keeping in mind that if your client or opposing side is being accused of unduly influencing the child, the child may not be candid with the judicial officer because the child will be aware that the influencing parent will have access to the transcript.

Be cognizant of the fact that children over 14 years of age, and many times even younger, often "insist" on wanting to testify in court, especially if they have strong opinions about the custodial arrangement they want or don't want. If there is minor's counsel in the case, requests to have the child testify takes the onus off the parent requesting that the child be allowed to do so. But, children's testimony is often fraught with surprises. As long as counsel and the client are aware of the pitfalls, it is often simply best to let the children testify. Incidentally, just because the 14-year-old insists on testifying as to his/her wishes on custody/visitation, the court will not necessarily rule in favor of the child's wishes, and in fact, such wishes may be contradicted by strong psychological testimony that despite the child's strong opinions, it may not be in the child's best interests to make such an award of custody/visitation.

I. Other Evidence

1. If your client is requesting physical custody on specific dates because of religious requirements (for example, on Rosh Hashanah, Ramadan, Good Friday, Easter, etc.), be sure to provide the court with a ten- to fifteen-year calendar of the specific religious holidays to allow the court to make well-reasoned decisions.

2. Similarly, if cultural or religious requirements prohibit certain conduct or require certain observances (i.e., Orthodox Jews do not travel on Saturdays and on certain religious holidays, so physical custody exchanges cannot be made on those specific days), be certain to have appropriate testimony prepared to allow the court to consider the issues properly.

3. If you have video or audio evidence to present, make certain to arrange for the proper equipment in the courtroom. In most instances, you will probably have to provide your own television, recording equipment, extension cords, etc.

J. Argument

Although most judicial officers claim that by the time of the argument they've already "heard enough," ***do not*** waive oral argument. This is your opportunity to weave all of the facts and testimony into a cogent, persuasive position. If the jurist wants you to focus on a particular area, be certain you do so, but do not assume that the jurist automatically understands your position on all the other issues.

Use your argument to offer solutions that are ***viable*** and ***reasonable*** in light of the testimony that was adduced. Do not request orders that may be good in abstract theory but are not practicable in your case. For example, it is ludicrous to request an equal custodial plan for the mother of a four-year-old who had no contact with the child for the prior two years. This proposed plan of action will almost always end in disaster because such a ludicrous request may cause the jurist to discount all of your other requests, no matter how valid.

Arguments in custody actions are more effective if emphasis is placed on your client's positive characteristics. Unnecessary mudslinging at the other parent is often counterproductive, especially if the "dirt" is only a "speck." The court will view with more empathy the parent who refrains from denigrating the other party. This does not mean that you forego argument about opposing party's parenting shortcomings, but those should be clear and specific, and your proposal for custodial arrangements should be tailored to minimize the effect of these shortcomings on the child. Emphasis should also be placed on the positives your client can offer the children, and why the children would most benefit by spending the requested amount of time with your client.

Whenever possible, weave in your proposals for custody with the reasons why it is in the child's best interests. Bring forth relevant testimony to show why the proposals of your opponent are not beneficial for the child or are likely to result in a disaster based upon the history of the parents' interactions or parenting skills (or lack thereof).

Most jurists are loathe to, and are highly unlikely to, terminate one parent's custodial or visitation rights altogether. If such is your proposal, make sure you remind the court that prior psycho-therapeutical intervention was totally ineffective or that the excluded parent has so abused the system or the child that the child would be more traumatized by having to see that parent than by not allowing any interaction between that parent and child.

Whenever possible, provide the court with a written proposal for physical custody as part of your argument so that the court can follow your suggestions and make notations for any changes. With the California Supreme Court's decision in ***In re Marriage of Brown and Yana***, *supra*, 38 Cal.Rptr.3d 610, labels of "sole custody" and "joint custody" have taken on added importance for a subsequent possible "move away." Keep that in mind when arguing for a particular "custody label" even if your client or the opposition has not expressed a current intent to move away with the children.

K. Request a Statement of Decision

No matter what the court decides, it is imperative to request the basis therefor. There will be no way to prove, on appeal, that the court relied upon incorrect data, or abused its discretion in making its award, if a clear record is not made of the court's reasoning. Furthermore, even in cases that are not appealed, a Statement of Decision may often be the only way to prove the existence, or lack, of changed circumstances when a subsequent need for modification arises.

REMEMBER, the request for a Statement of Decision must be made no later than the court's pronouncement of its order, only if the trial or hearing lasted less than eight hours (and can be made orally or in writing). Otherwise, the request must be made within ten (10) calendar days after the court made its oral ruling or issued its Intended Decision. You may also want to enlist the help of an appellate attorney when requesting and preparing Proposed Statements of Decisions if the possibility of an appeal may be looming.

FINALLY, be aware of, and carefully observe, the Code of Civil Procedure requirements and time limits on Motions to Reconsider, Motions for New Trial, and Notices to Appeal. These time limits are jurisdictional and may not be extended by stipulation or court order. Additionally, review **Code of Civil Procedure section 917.7** regarding permissive and mandatory "stay of Judgment" provisions in custody and move-away cases.

ENDNOTE

1 Alexandra Leichter is a Certified Family Law Specialist (certified by the State Bar of California Board of Legal Specialization); she is also Certified Family Law Arbitrator (certified by the American Academy of Matrimonial Lawyers. She is a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and of the International Academy of Matrimonial Lawyers (IAML), and is the author of numerous articles and frequent lecturer on child custody, Islamic & Jewish family laws affecting civil family law issues, and other family law matters. She has litigated and assisted in resolving high conflict family law cases for over 40 years; and maintains her office in Beverly Hills where she continues her practice in the litigation and consultation of family law cases, in private judging and arbitrations. (A few earlier incarnations of this article were co-authored with Deanna K. Straugh.)

JEWISH HOLIDAY GUIDE FOR CUSTODY/VISITATION SCHEDULES

By: Alexandra Leichter*

Most family law attorneys shy away from religious holiday scheduling because they incorrectly assume that the courts are constitutionally prohibited from allocating religious holidays. But the case law often cited[1] ***does not*** prevent the court from considering religious practices and observances in devising appropriate time-share arrangements. Those cases merely preclude, absent a showing of "harm," the court from restraining either party from allowing their children's participation in various religious activities or observances.[2]

Indeed, most appropriately crafted custody and visitation orders apportion Christian and legal holidays in a manner that best suits the parties and the children. There is no reason the same cannot be done with Jewish (or other religious) holidays. However, Jewish holidays are not easily ascertainable from the Gregorian calendar. The Jewish calendar is a lunar one, with the Jewish New Year corresponding to a day in September or October on the Gregorian calendar, the months have 28 or 29 days, and during leap years,[3] an entire month is added to the

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[1] ***In re Marriage of Murga*** (1980) 103 Cal.App.3d 49; ***In re Marriage of Mentry*** (1983) 142 Cal.App.3d 260; ***In re Marriage of Weiss*** (1996) 42 Cal.App.4th 106.

[2] The court in ***In re Marriage of Weiss***, *supra*, 42 Cal.App.4th 106, quoted approvingly and extensively from the Pennsylvania case of ***Zummo v. Zummo*** (1990) 394 Pa.Super. 30 [574 A.2d 1130]. In ***Zummo***, the court held: "*Both* parents have rights to inculcate religious beliefs in their children. Accordingly, the trial court may constitutionally accommodate the mother's rights with a directive of the type imposed here, which essentially carves out a time period each Sunday during which the mother has the right to custody and control of the children"; and further approved of ***In re Marriage of Tisckos*** ((1987) 161 Ill.App.3d 302) "characterizing a similar order as an accommodation to the custodial parent rather than a limitation upon visitation." 394 Pa.Super.at 83. The court in ***Zummo*** further went on to state: "...we emphasize the constitutional prerequisite of 'benign neutrality' towards *both* parent's religious viewpoints. If, for example, the court entered an order which granted a Christian parent custody or visitation on all Christian holy days, but denied similar custody or visitation to the other parent on his or her Jewish holy days (without an adequate basis to encroach on the parent's right to expose the child to that parent's religious viewpoint as described *supra*), such a provision might constitute an impermissible restriction on religious and parental rights, and a violation of the Establishment Clause, albeit an indirect one." *Id.* at 84.

[3] Leap years occur every 2-3 years, or 7 times, during a 19-year cycle, to assure that Passover is in the spring, Rosh Hashana is in the fall, and that certain holidays celebrating harvests, etc. occur during appropriate times during the year.

calendar. Additionally, there are a number of Jewish holidays, which, varying with the degree of religious observance, may or may not be important to the parties. Conflicts in the "level" of holiday observance between parents, or conflicts of Jewish holiday observance between inter-faith couples, makes it imperative to learn some basic Jewish holiday issues.

Religiously affiliated Jews in the United States are generally members of one of four branches of Judaism: Orthodox, Conservative, Reform, and Reconstructionist. The Orthodox, being most traditional, observe every holiday to the maximum extent prescribed by Jewish law. The Conservative and Reconstructionist branches have more liberal observance practices, while the Reform branch tends to observe the holidays in a less traditional manner, often adjusting observance to particular secular lifestyles.

Nevertheless, there is unanimous concurrence, among all four branches, of the ***existence*** of each of the holidays. By way of example, Rosh Hashana, the Jewish New Year, always occurs on the first day of the first Jewish calendar month (corresponding to either September or October on the Gregorian calendar). However, while Orthodox and Conservative Jews celebrate two days of Rosh Hashana, many (though not all) Reform and Reconstructionist celebrate only the first day.

Further, on the Sabbath and on most major holidays, Orthodox Jews refrain from engaging in most daily activities, such as working, traveling in a vehicle, turning on lights, answering the telephone, handling money, carrying objects outside the home, etc. Many Conservative Jews interpret the "no work" on the Sabbath in a more liberal manner, and they may answer the telephone, turn on lights, drive a car, etc. While Reform Jews attend synagogue, and may have celebratory meals on the Sabbath and the holidays, they observe very few of the other restrictions on the Sabbath and on most major holidays.

One of the key issues in assigning appropriate holiday schedules in custody/visitation matters is to learn each parent's mode of holiday observance. For example, Orthodox parents not living within walking distance of each other cannot split a two-day major Jewish holiday because the children cannot "travel" during those two days. Similarly, assigning each parent one of the two Seder evenings on Passover is meaningless if both parents are Reform Jews because they celebrate only one Seder night.

Another important consideration is the fact that a major two-day Jewish holiday occurring on a Thursday/Friday, or on a Sunday/Monday, extends that weekend for Orthodox Jews into three days because travel and work is prohibited on Saturday as well.

In interfaith marriages, consider that Christmas and Hannukah often conflict, as do Passover and Easter. To alleviate this possible problem, and provide a guideline to the holidays, I have set forth below a description and importance of the major Jewish holidays, as well as a ten-year Jewish calendar, corresponding to the Gregorian calendar. The dates for the other, less important, Jewish holidays can be extrapolated from the information provided.

With some limited exceptions, Jewish holidays, as well as the Sabbath, begin at sunset the evening before the holiday, and end one hour after sunset on the last day of the holiday or Sabbath. In addition, many Jewish holidays are "fast days" which require abstention from all food and liquid. Jewish females over the age of 12 and Jewish males over the age of 13 are considered "adults" and are required to fast. With the exception of Yom Kippur, if a fast day is on Sabbath, the fasting will take place on the Sunday following it.

LIST OF HOLIDAYS:

(1) **Rosh Hashana**—This is the Jewish New Year. The holiday normally occurs during the month of September, but may occasionally occur in October. Rosh Hashana is celebrated by attendance at evening and morning synagogue services, and celebratory meals that include eating new fruit, as well as eating apple and *challah* (special bread) dipped in honey. The holiday requires abstention from all work and other normal activities. Rosh Hashana is celebrated as a two-day holiday, although Reform Jews generally celebrate only the first day.

(2) **Fast of Gedaliah**—This is a fast day occurring on the day following the second day of Rosh Hashana. Fasting begins at sunrise and ends one hour after sunset. The fast day does not require abstention from work or other normal activities.

(3) **Yom Kippur**—This is considered the most important and holiest day of the year. It normally occurs during the month of September or October, exactly ten days after Rosh Hashana Eve. Yom Kippur celebration consists of fasting from sunset on the eve before Yom Kippur and ends an hour after sunset on Yom Kippur. It lasts one day, and requires the abstention from all work and other normal activities.

(4) **Succoth & Simchat Torah**—This is a nine day holiday which begins five days after Yom Kippur. Commencement is on the eve before the first day of Sukkoth and ends nine days later, an hour after sunset. Celebration involves the building and decorating an outdoor hut (a "*sukkah*") which is used during the first seven days of the holiday for all meals. Additionally, a "*lulav*" (palm branch) and an "*etrog*" (a special citrus fruit) are used during morning prayers on the first eight days except Saturdays. The first two days and last two days of the holiday are "special days" in which the observance of the holiday requires abstention from work and other normal activities. The "interim days" of Succoth are considered "half holidays" during which time the observances of eating in the *sukkah*, making prayers over the *lulav* and *etrog* are observed, but work and normal daily activities are generally allowed (except on the Sabbath). Orthodox and most Conservative Jews observe the nine days as outlined above. Reform Jews (and those Orthodox Jews whose domicile is in Israel) observe only the first day and the 8th day of the holiday as "special days," and their observance of the entire holiday period ends on the eighth day.

(5) **Hannukah**—This is an eight day holiday that normally occurs in December, but could occur in late November. The celebration consists of eight days of lighting candles, starting with one candle on the first night, and adding an additional candle each evening, so that on the eighth evening, eight candles are lit in an eight-branch candelabra, called a "*menorah.*" The first night of lighting occurs at sunset on the evening before the first day of Hannukah. Additional celebration takes the form of special card and "*dreidel*" (a spinning top) games for the children, and special foods such as "*latkes*" (potato pancakes). Gift giving is ***not*** a necessary part of the holiday, although it has become customary among many Jews to give gifts to the children (this practice developed in recent history, especially in the U.S., to reduce Christmas-envy: Jewish children can boast of eight night of gifts, versus only one night for the Christian children). The holiday does not require abstention from work or other normal activities.

(6) **Asarah B'Tevet**—The Fast of the tenth day of Tevet is a fast day that begins at sunrise on the day of the fast and ends an hour after sunset. The fast occurs seven days after the last day of Hannukah, thus it would normally occur in December or January. This fast day does not require abstention from work or other normal activities, except abstention from food and drink.

(7) **Tu B'shvat**—This minor holiday celebrates the first fruits of the year. It normally occurs in January or early February. Synagogues and Hebrew schools have special celebrations for the children, involving the new fruits. No abstention from work or other normal activities is required.

(8) **Fast of Esther**—This is a fast day occurring the day before Purim, normally in late February or March, begins at sunrise and ends an hour after sunset. Before the fast ends, special synagogue services require the chanting of the "*Megillah*" (the Scroll containing the Book of Esther). No abstention from work or other normal activities, other than abstention from food and drink, is required.

(9) **Purim**—This is a very joyous holiday usually occurring in late February or March, thirty days before Passover. It is normally celebrated with a costume party, a special meal in the afternoon, and the delivery of baskets of food to friends, to relatives and to the poor. Most synagogues and Hebrew schools have Purim carnivals for children during this period of time.

(10) **Passover**—This holiday is also known as the holiday of the "*Matzah*" (unleavened bread). It is an eight-day holiday that occurs in late March or in April, and often coincides with Easter. (For those who have forgotten their Bible, the "Last Supper" was the *Seder* on the first night of Passover—and yes, Jesus was Jewish.) The holiday begins at sunset on the eve before the first day of Passover. For Orthodox Jews, the first two evenings are celebrated with a "*Seder*" (a special ritualized meal, involving drinking four cups of wine, eating a requisite amount of *matzah*, bitter herbs, a walnut/fruit/wine concoction symbolizing mortar used by Jewish slaves in Egypt, and eating other special foods. In the realm of holiday food

consumption, Passover definitely wins the prize for most varied, most symbolic, and most interesting food consumption). Reform Jews, and Jews whose domicile is in Israel, celebrate only one "*Seder*." For Orthodox Jews, the first two days and the last two days of Passover (first day and seventh day for Reform and Israeli Jews) are considered major holidays that require abstention from work and other normal activities. The interim days do not require abstention from work. However, all eight days require the abstention from leavened bread and other grains.

(11) **Yom Hashoah**—This is the Holocaust Remembrance day; it usually occurs in April or May, 12 days after the first day of Passover. Memorial services are conducted by various synagogues. The holiday does not require abstention from work or other normal activities.

(12) **Yom Ha'atzmaut**—Israel Independence Day, occurs eight days after Yom Hashoah, normally in May, but sometimes in April. The holiday involves festive activities throughout various Jewish centers but does not require abstention from work or other normal activities.

(13) **Lag B'Omer**—The 34th day following the first day of Passover, usually occurs in May, but sometimes in June. While it is a joyous holiday, it does not require abstention from work or other normal activities.

(14) **Shavuot**—occurs usually in May or June, and on the 50th day following the first day of Passover. It is a two-day holiday for Orthodox Jews and one-day holiday for Reform Jews and for Jews whose domicile is Israel. Shavuot celebrates the giving of the Torah; the holiday requires abstention from work and other normal activities.

(15) **Shiv'Asar B'Tammuz**—is a fast day of the l7th day of the Jewish month of Tammuz, and it usually occurs in July or August, 41 days following the first days of Shavuot. It begins at sunrise and ends an hour after sunset. This fast day does not require abstention from work or other normal activities except food and drink.

(16) **Tisha B'Av**—is a major fast day occurring in either July or August, exactly three weeks after Shiv'Asar B'Tammuz and begins at sunset on the eve before the Fast day and ends an hour after sunset on the day of the Fast. It does not require abstention from work or other normal activities except food and drink.

TWELVE YEAR CALENDAR OF THE MORE IMPORTANT JEWISH HOLIDAYS:
(Note: All of these holidays begin at sundown the prior evening)

2013

Purim	Sunday	February 24
Passover (First Two Days)	Tuesday/Wednesday	March 26-27
Passover (Last Two Days)	Monday/Tuesday	April 1-2
Shavuot	Wednesday/Thursday	May 15-16
Rosh Hashana	Thursday/Friday	September 5-6
Yom Kippur	Saturday	September 14
Sukkot (First Two Days)	Thursday/Friday	September 19-20
Sukkot (Last Two Days)	Thursday/Friday	September 26-27
Hannukah	Thursday-Thursday	November 28 - December 5

2014

Purim	Sunday	March 16
Passover (First Two Days)	Tuesday/Wednesday	April 15-16
Passover (Last Two Days)	Monday/Tuesday	April 21-22
Shavuot	Wednesday/Thursday	May 4-5
Rosh Hashana	Thursday/Friday	September 25-26
Yom Kippur	Saturday	October 4
Sukkot (First Two Days)	Thursday/Friday	October 9-10
Sukkot (Last Two Days)	Thursday/Friday	October 16-17
Hannukah	Wednesday-Wednesday	December 17-24

2015

Purim	Thursday	March 5
Passover (First Two Days)	Saturday/Sunday	April 4-5
Passover (Last Two Days)	Friday/Saturday	April 10-11
Shavuot	Sunday/Monday	May 24-25
Rosh Hashana	Monday/Tuesday	September 14-15
Yom Kippur	Wednesday	September 23
Sukkot (First Two Days)	Monday/Tuesday	September 28-29
Sukkot (Last Two Days)	Monday/Tuesday	October 5-6
Hannukah	Monday	December 7-14

2016

Purim	Thursday	March 24
Passover (First Two Days)	Saturday/Sunday	April 23-24
Passover (Last Two Days)	Friday/Saturday	April 29-30
Shavuot	Sunday/Monday	June 12-13
Rosh Hashana	Monday/Tuesday	October 3-4
Yom Kippur	Wednesday	October 12
Sukkot (First Two Days)	Monday/Tuesday	October 17-18
Sukkot (Last Two Days)	Monday/Tuesday	October 24-25
Hannukah	Sunday-Sunday	December 25 - January 1

2017

Purim	Sunday	March 12
Passover (First Two Days)	Tuesday/Wednesday	April 11-12
Passover (Last Two Days)	Monday/Tuesday	April 17-18
Shavuot	Wednesday/Thursday	May 31 - June 1
Rosh Hashana	Thursday/Friday	September 21-22
Yom Kippur	Saturday	September 30
Sukkot (First Two Days)	Thursday/Friday	October 5-6
Sukkot (Last Two Days)	Thursday/Friday	October 22-23
Hannukah	Wednesday-Wednesday	December 13-20

2018

Purim	Thursday	March 1
Passover (First Two Days)	Saturday/Sunday	March 31 - April 1
Passover (Last Two Days)	Friday/Saturday	April 6-7
Shavuot	Sunday/Monday	May 20-21
Rosh Hashana	Monday/Tuesday	September 10-11
Yom Kippur	Wednesday	September 19
Sukkot (First Two Days)	Monday/Tuesday	September 24-25
Sukkot (Last Two Days)	Monday/Tuesday	October 1-2
Hannukah	Monday	December 3-10

2019

Purim	Thursday	March 21
Passover (First Two Days)	Saturday/Sunday	April 20-21
Passover (Last Two Days)	Friday/Saturday	April 26-27
Shavuot	Sunday/Monday	June 9-10
Rosh Hashana	Monday/Tuesday	September 30 - October 1
Yom Kippur	Wednesday	October 9
Sukkot (First Two Days)	Sunday/Monday	October 14-15
Sukkot (Last Two Days)	Sunday/Monday	October 21-22
Hannukah	Monday-Monday	December 23-30

2020

Purim	Tuesday	March 10
Passover (First Two Days)	Thursday/Friday	April 9-10
Passover (Last Two Days)	Wednesday/Thursday	April 15-16
Shavuot	Friday/Saturday	May 29-30
Rosh Hashana	Saturday/Sunday	September 19-20
Yom Kippur	Monday	September 28
Sukkot (First Two Days)	Saturday/Sunday	October 3-4
Sukkot (Last Two Days)	Saturday/Sunday	October 10-11
Hannukah	Friday-Friday	December 11-18

2021

Purim	Friday	February 26
Passover (First Two Days)	Sunday/Monday	March 28-29
Passover (Last Two Days)	Saturday/Sunday	April 3-4
Shavuot	Monday/Tuesday	May 17-18
Rosh Hashana	Tuesday/Wednesday	September 7-8
Yom Kippur	Thursday	September 16
Sukkoth (First Two Days)	Tuesday/Wednesday	September 21-22
Sukkoth (Last Two Days)	Tuesday/Wednesday	September 28-29
Hannukah	Monday-Monday	November 29 - December 6

2022

Purim	Thursday	March 17
Passover (First Two Days)	Saturday/Sunday	April 16-17
Passover (Last Two Days)	Friday/Saturday	April 22-23
Shavuot	Sunday/Monday	June 5-6
Rosh Hashana	Monday/Tuesday	September 26-27
Yom Kippur	Wednesday	October 5
Sukkoth (First Two Days)	Monday/Tuesday	October 10-11
Sukkoth (Last Two Days)	Monday/Tuesday	October 22-23
Hannukah	Monday-Monday	December 19-26

2023

Purim	Tuesday	March 7
Passover (First Two Days)	Thursday/Friday	April 6-7
Passover (Last Two Days)	Wednesday/Thursday	April 12-13
Shavuot	Friday/Saturday	May 26-27
Rosh Hashana	Saturday/Sunday	September 16-17
Yom Kippur	Monday	September 25
Sukkoth (First Two Days)	Saturday/Sunday	September 30 - October 1
Sukkoth (Last Two Days)	Saturday/Sunday	October 7-8
Hannukah	Friday-Friday	December 8-15

2024

Purim	Sunday	March 24
Passover (First Two Days)	Tuesday/Wednesday	April 23-24
Passover (Last Two Days)	Monday/Tuesday	April 29-30
Shavuot	Wednesday/Thursday	June 12-13
Rosh Hashana	Thursday/Friday	October 3-4
Yom Kippur	Saturday	October 12
Sukkoth (First Two Days)	Thursday/Friday	October 17-18
Sukkoth (Last Two Days)	Thursday/Friday	October 24-25
Hannukah	Thursday-Thursday	December 26 - January 2

2025

Purim	Friday	March 14
Passover (First Two Days)	Sunday/Monday	April 13-14
Passover (Last Two Days)	Saturday/Sunday	April 19-20
Shavuot	Monday/Tuesday	June 2-3
Rosh Hashana	Tuesday/Wednesday	September 23-24
Yom Kippur	Thursday	October 2
Sukkoth (First Two Days)	Tuesday/Wednesday	October 7-8
Sukkoth (Last Two Days)	Tuesday/Wednesday	October 14-15
Hannukah	Monday-Monday	December 15-22

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* ALEXANDRA LEICHTER is a California Bar Certified Family Law Specialist; she is a Certified Family Law Arbitrator, certified by the American Academy of Matrimonial Lawyers; she is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Matrimonial Lawyers. She has been a practicing family law attorney for over 40 years, representing clients in complex marital dissolutions and high conflict custody matters. She also acts as a Private Judge, Arbitrator, mediator in Voluntary Settlement conferences as well as a consultant to other attorneys and an expert witness. Her practice is in Beverly Hills, CA.