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Shepherding you safely through difficult family transitions!

DIVORCE IN NEW YORK – CUSTODY

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NOTE: *This monograph is intended as an educational guide and not as legal advice. Legal advice should only be obtained from a qualified lawyer who is familiar with all of the facts and circumstances of your matter.*

CUSTODY

There is perhaps no issue that is more meaningful and terrifying to parents than the thought of losing their children completely or losing their ability to maintain an ongoing, strong, steady, reliable relationship with their children. Courts generally recognize that children need and deserve the love, affection, and guidance of both of their parents. So long as a parent's behavior is not harmful to the children, the courts should be firm in protecting that parent's relationship with them.

Because Mr. Steinberger chairs the custody committee of the American Bar Association's Family Law Section, he is the ideal lawyer to guide you through the custody process and help you obtain the result you deserve.

Several discrete terms and concepts should be understood to make sense of the relevant legal issues.

"Legal custody" is the designation of the legal decision-maker(s) of the child (but not where the child spends time). The person(s) with legal custody of a child can make decisions on behalf of the child ranging from medical treatment, to which school the child attends, to which religion the child is raised in. Legal custody can be awarded to one parent (called "sole legal custody"), the other parent, or to the both of them jointly (called, appropriately, "joint legal custody"). By decision of the Court of Appeals–New York's highest court–if the parents cannot get along well or agree on who should have custody, the court may not award them both joint legal custody. If they can't agree on who has custody, how will they ever agree if little Jimmy needs his tonsils removed? The court must, in those instances, select one of the parents to be the legal custodial parent. *Braiman v. Braiman*, 44 NY2d 584, 587 (1978) ("Entrusting the custody of young children to their parents jointly . . . is insupportable when parents are severely antagonistic and embattled."). A relatively new phenomena is that courts sometimes separate "spheres of influence" and award legal custody of different issues (health, education, etc.) to one of the different parents. This is done to recognize the parentage and importance of each and to keep them both involved in the child's life. Courts may also designate one parent to make the ultimate decision, but require that parent to consult and discuss it with the other before making the final decision. (This is too often breached, and is only as strong as the recognition each has of the other's importance. Yet another reason to explore mediation or one of the other non-destructive, dispute resolution processes.)

"Physical" or "Residential custody" refers to where the child will live. Aside from who will make the legal decisions concerning the child, where the child will live is a separate question that must be separately decided.

The counterpoint to residential custody is visitation. "Visitation" is the ability of the non-residential custodial parent to spend time with the child. Many find the term "visitation" objectionable, evoking images of prison inmates who are permitted visitation, preferring instead the term "parenting time."

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The questions of residence and parenting time are crucial to several important issues. They determine which parent spends how much time with the child, affecting (and perhaps determining) the relationship between the parent and the child. They also affect the degree and ability of the non-residential parent to remain involved in the child's life.

Residential setup and parenting time also drive, and are determined by, the parents' ability to maintain an appropriate residence for the child. If the child is to live with both parents for extended periods of time, they must both have suitable living arrangements (bedrooms, living, and playing space) for the child. They must both be within reasonable travel distance (*i.e.*, time) to the child's school so that they can both transport the child to and from school. In areas like New York City where living space is expensive, many parents do not have the financial wherewithal to pay child support and maintain a residence that is appropriate for long-term child-stays. [Some parents have tried a "nesting" arrangement where the children always remain in their primary home and the parents alternate, shuffling in and out of it. This arrangement carries many challenges of its own and frequently does not remain successful for extended periods of time unless the parties don't want to remain married but can still get along well together.] If, after paying child support, a non-custodial parent cannot afford to maintain sufficient bedrooms for the child, then that parent is limited to dinners and daytime parenting with the child, and will be unable to have frequent or extended overnight parenting time. It will then be a greater challenge for such a non-custodial parent to remain knowledgeable and involved in the detailed goings-on of the child's day-to-day life.

Custody's Effect on child support: The parent with whom the child will reside for more than one-half the nights of the year (=> 183 nights) will be the [primary] residential custodial parent. That parent will then entitled to receive child support from the other.

In some states (like Florida, for example), the non-custodial parent's child support is reduced by the amount of time that parent cares for the child. So a non-custodial parent who has a child for 40% of the time, must only pay 60% of the guideline child support. Not so in New York. The New York Court of Appeals has decided, as a matter of public policy, that it did not want parents sitting with stop watches in their cars holding the children back from going to the other parent in order to ensure a certain amount of child support. In essence the court said that parents should have their children for whatever time they wanted to have them, and that it should not effect the child support paid or received. Thus, in New York, a parent who has the children with them for 45% of the overnights, must still pay 100% of the child support. Needless to say this can work a financial hardship on non-custodial parents who want to maintain a strong presence in their children's lives and who want the children for many overnights, but cannot afford to maintain sufficient bedrooms on top of the expense of paying the full measure of child support.

Because parents and their lawyers are wily, courts have had to deal with circumstances in which parents arranged to share exactly the same number of overnights with their children (perhaps packing up the children in middle of the night to transfer them to the other), then

claiming that because residential custody was exactly even, no child support should be paid by one to the other. The Appellate Division, Third Department, in the seminal and widely followed case *Baraby vs. Baraby*, 250 AD2d 201, 681 NYS2d 826 (3rd Dept., 1998), held that where parents share exactly equal parenting time, the parent who earns more money is to be deemed the non-custodial parent for child support purposes and must, therefore, pay the full measure of child support. In anything other than a high-income or high-asset divorces, this works a hardship on a parent who wants to maintain a proper home for the children but cannot afford to pay 100% of the child support and also duplicate the children's home. [There may be some movement on the *Baraby* rule, though it has been pretty much adopted throughout the state. Some courts are demonstrating a willingness to adjust the child support to consider the non-custodial parent's 50% of the overnights. A literal reading of New York's child support law, the CSSA (Child Support Standards Act), however would not permit that. The CSSA permits an adjustment to the formulaic child support only for either "extraordinary expenses incurred by the non-custodial parent in exercising visitation" (such as airfare or hotel costs) or for expenses incurred in "extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof." DRL § 240(1-b)(f)(9). Because maintaining a second home and bedroom for the child does not reduce the custodial parent's expenses, it won't usually qualify for an adjustment under the (f)(9) factor.]

The Legal Standards for Determining Custody in New York: As you can imagine, determining as between two parents which of them is the "better" one, is usually not a task anyone relishes. However, when two parents disagree over who should have legal custody of their child, someone must do so. The person designated by our society to do so is an impartial judge in black robes.

Relating to children, the touchstone factor the courts use to make decisions is "the *best interests of the child*." The court, as the *parens patriæ* (parent of the nation), is duty bound to protect vulnerable charges incapable of protecting themselves. The courts' duty to protect children, however, must be tempered by society's strong countervailing policy of allowing parents to raise children without government interference. Obviously there is great tension between freedom to parent and the government's obligation to step in and protect vulnerable children, and the legal system works hard to honor both sides of that equation. Thus, generally, the government cannot step into family matters unless a child is abused or neglected, or a danger is created for the child's immediate safety and long-term health. In the custody context, however, when two parents cannot agree on what is best for their children, an impartial judge must be brought in to decide.

New York has not codified the factors to be considered in determining "best interests," in part because some were afraid that listing them in any particular order would appear to rank them in order of importance, and no one can agree on the order of their importance. By decisions and resulting case law, however, courts have enumerated many factors that are considered. Any list, though, cannot be comprehensive and, indeed, anything that affects the child's health and welfare is a proper consideration in making a custody determination. As the Court of Appeals has said, "[T]here are no absolutes in making [custody] determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the

child." *Eschbach v. Eschbach*, 56 NY2d 167, 171, 451 NYS2d 658 (1982) (*citing Friederwitzer v. Friederwitzer*, 55 NY2d 89, 93–95, 447 NYS2d 893 (1982)).

There is no *prima facie* legal right for either parent to be awarded custody over the other, DRL §§ 70[a] & 240[1][a] (though, as a practical matter, mothers still seem to get a preference for custody). The court must decide "best interests" by looking at the "totality of the circumstances." That means that everything is potentially relevant in a custody battle. Moreover, as stated above, if the parties cannot make joint decisions and cannot agree to share "joint legal custody," the courts cannot order it. *Braiman v. Braiman*, 44 NY2d 584, 587 (1978) ("Entrusting the custody of young children to their parents jointly . . . is insupportable when parents are severely antagonistic and embattled.").

Courts will typically look to see which parent has been the historical caretaker of the child. Which one usually woke the child up in the morning, gave the child breakfast, took the child to school, picked the child up after school, ensured that homework was done, took the child to doctors, gave the child dinner, baths, and put the child to bed. Which parent woke up and comforted and cared for the child when sick or scared. Obviously, maintaining stability, continuity, and consistency in the child's life can be important and the historical caretaker starts off with an advantage. The advantage, however, can be tempered by the fact that now that the family is being reconstituted, parents take on different roles. A parent who was the primary bread-earner may, now that the family lives in two separate units instead of the one, want to take a greater role in the parenting tasks to ensure a continuing, meaningful role in the child's life.

Any instances of domestic violence ("DV") or intimate partner violence ("IPV") is an issue that the statute requires a judge to consider.[1] Thus, if there are allegations of DV or IPV, a party must consult a skilled lawyer to deal with that issue in a careful, strategic manner.

Parental alienation (when one parent turns the children against the other parent), is another complicated issue that requires skill and dexterity to deal with. *See* the Alienation page on this website for more information.

Among the many other factors a court might consider are:

- the quality of each parent's home environment;[2]
- each parent's hours of employment (and, therefore, the parent's ability to care for and spend time with the child);
- the parent's and child's relationship with others in the home;

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[1] *C.M. v. C.M.*, 47 Misc.3d 1210(A), 15 NYS3d 710 (Sup. Ct., Richmond Cty., 2015)(Catherine M. DiDomenico, J.), *citing Bressler v. Bressler*, 122 AD3d 659 (2nd Dept., 2014).

[2] *C.M. v. C.M.*, *supra*, *quoting Matter of Blanc v. Larcher*, 11 AD3d 458 (2nd Dept., 2004).

- the extended family available at one parent or the other;
- one parent's desire to move away to a different location;[3]
- each parent's relative fitness as a parent;
- the parent's age, physical & mental health and stability;
- a parent's alcohol or substance abuse;
- a parent's use of cigarettes and how it affects the child;
- a parent's psychiatric or anti-social conditions;
- any physical, emotional or sexual abuse;
- any false accusations of abuse;
- a parent's exposing the child to inappropriate material;
- a parent's exposing the child to prejudices and bigotry;
- the guidance provided to the child by each parent and each's ability to guide and provide for the child's overall well-being, including educational, emotional, social and intellectual development;
- the child's emotional and psychological profile and which parent suits it better;
- issues surrounding culture, ethnicity & religion;
- any attempts to manipulate the child;
- each parent's ability to provide for the child financially;
- a parent's financial stability & responsibility;
- the effect an award of custody to one parent might have on the child's relationship with the other parent;[4]
- the ability and willingness of one parent to foster the child's relationship with the other;
- any interference by one parent with the child's relationship to the other;[5]

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[3] *Gadsden v. Gadsden*, 144 AD3d 1035, 1036, 42 NYS3d 58, 59 (2nd Dept., 2016).

[4] *Minjin Lee v. Jianchuang Xu*, 16 NYS3d 300 (2nd Dept., 2015) *quoting Matter of Maraj v. Gordon,* 102 AD3d 698, 698, 957 NYS2d 717, *itself quoting Matter of Berrouet v. Greaves,* 35 AD3d 460, 461, 825 NYS2d 719, *and* M.M. v. L.M., 42 Misc.3d 1235(A), 986 NYS2d 866 (Sup. Ct., NY Cty., 2014) (Lori S. Sattler, J.), *citing Eschbach v. Eschbach*, 56 NY2d 167, 172 (1982), *and Craig v. Williams-Craig*, 61 AD3d 712 (2nd Dept., 2009).

[5] "Parental alienation of a child from the other parent is an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as custodial parent."*Vargas v. Gutierrez*, 155 AD3d 751, 753, 64 NYS3d 76, 78 (2nd Dept., 2017)(internal quotations & citations omitted).

- the empathy, attachment, judgment and flexibility that each parent exhibits with respect to the children and the other parent;
- the compatibility of a parent's strengths to the child's needs;
- the child's own preference[6] with the amount of consideration given to it dependent on the child's age and maturity;
- a parent's prior failure to comply with Court orders;[7]
- the stability and continuity afforded the child by continuing existing custodial arrangements;[8]
- whether prior custodial arrangements were by voluntary agreement or court order;
- where the child's other siblings are living with preference given to keeping siblings together for their mutual emotional support;[9]
- the recommendations of a neutral forensic evaluator;[10]
- the recommendations of the attorney for the child;[11] and, of course, the catchall . . .
- ANY OTHER FACTOR the court deems relevant.

What weight should be accorded to any particular factor is left to the "sound discretion" of the trial court.[12] Obviously, if a parent has one or more of the above conditions mitigating against an award of custody to them, they should consult with a skilled, experienced lawyer to attempt to find a way of ameliorating any negatives and highlighting positives so that the parent can obtain the best possible result.

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[6] *C.M. v. C.M., supra, citing Granata v. Granata*, 289 AD2d 527 (2nd Dept., 2001).

[7] *C.M. v. C.M.*, *citing Matter of Morissey v. Morrissey*, 124 AD3d 1367 (4th Dept., 2015); *Radford v. Propper*, 190 AD2d 93 (2nd Dept., 1993).

[8] *C.M. v. C.M.*, *supra*, *citing Cervera v. Bressler*, 90 AD3d 803 (2nd Dept., 2011).

[9] *C.M. v. C.M., supra, citing Matter of Ivory B. v. Shameccka D.B.*, 121 AD3d 674 (2nd Dept., 2014; *Matter of Stramezzi v. Scozzari*, 106 AD3d 748 (2nd Dept., 2013).

[10] *C.M. v. C.M., supra, citing Matter of Doyle v. Doyle*, 120 AD3d 676 (2nd Dept., 2014).

[11] *C.M. v. C.M., supra, citing Matter of Guiracocha v. Amaro*, 122 AD3d 632 (2nd Dept., 2014); *Matter of Conway v. Gartmond*, 108 AD3d 667 (2nd Dept., 2013).

[12] *C.M. v. C.M., supra, citing Bourne v. Bristowe*, 66 AD3d 621 (2nd Dept., 2009).

THE PROCEDURE FOR DETERMINING CUSTODY IN NEW YORK

Appointment of an Attorney for the Child ("AFC"): When custody is disputed between the parents, courts will often appoint an attorney for the child ("AFC") to give voice to the child's wishes in the courtroom. People often mistakenly believe that the AFC will do what is best for the child. The AFC, however, is not a psychologist or social worker, only a lawyer. The AFC's client is the child, and like every lawyer, the AFC is duty-bound to make the best case possible for the outcome the child wishes, even if the AFC knows that that outcome is not in the child's best interest. [Unfortunately courts still imbue AFCs with an aura of being impartial and acting as a court investigator (though that's not true) and therefore will often (wrongfully) give them great deference. While that was not true even when courts appointed guardians *ad litem* ("GAL") for children, it is certainly not true for AFCs who are no more impartial than any other lawyer in the case. This poses particular challenges for the advocate representing a parent disfavored by the AFC and particular skill is required to overcome it.] The AFC, like every other lawyer in the case, must be present at each court hearing and has the right to call, examine and cross-examine witnesses. A good AFC will try to help the parents reach an understanding to avoid a forensic evaluation or a full-blown custody battle, if such a deal is appropriate. Generally the court directs how the AFC is paid, typically apportioned between the parents, subject to reallocation at the end of the trial once the court has decided the financial issues (or paid by the State, dependant on the parents' finances).

If a child does not have sufficient maturity to make informed decisions or the child's judgment is otherwise impaired, an AFC may notify the court that the AFC is using "substituted judgment." The court is thereby informed that the position the AFC is advocating for is <u>not</u> the child's positions, but only the AFC's own personal opinions about what the right result should be. Unless the children are really young where, perhaps, no AFC should have been appointed to begin with, it is unusual and infrequent for an AFC to use substituted judgment.

Appointment of a neutral forensic evaluator: To further help the court and provide the court with the science concerning the psychological issues implicated in the case, the court might appoint a neutral forensic evaluator, usually a psychologist or, at least, a clinical social worker.. [There is great controversy among the authorities about the proper role and methodologies of psychological custody evaluators. Here, we will outline the best practices. Be aware, though, that actual practice varies widely.] There are several functions that a court may want the forensic evaluator to perform:

- Data gathering - interview the parents and get from each their side of the story; interview collateral sources and obtain independent verification of the parties' stories; confront each parent with the claims of the other, catalogue inconsistent accounts and seek the parents' explanations and/or admissions about them;
- Identify the psychological issues affecting the parents and children and educate the court on the effects of those psychological conditions;
- Identify the strengths and weaknesses of each parent and the current and likely future

emotional, psychological, and developmental needs of each child; consider and relate each parent's strengths and weaknesses to the aforementioned needs of each child; and

- Perhaps, if the parents wish, help them broker a custodial/parenting-time arrangement that is agreeable to them both;

Specifically, and though many judges request it, forensic evaluations are not authorized or supposed to opine about the ultimate issue--which parent should have custody--because that decision belongs to the judge alone after the judge has heard all of the evidence. Similarly, it is not the function of the forensic evaluator to determine which witnesses are being truthful and which not. It is the judge that has the role of ascertaining the truth-teller. Rather the forensic evaluator's role is to assemble the evidence and provide the science and knowledge developed within the psychological field so that the court has it all when it determines what is in the best interests of the child.

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Preparing for the Forensic Examination: Skilled lawyers prepare their clients for forensic evaluations in an ethical manner, so that the client is not surprised by either the process or the types of questions asked, and is well-prepared to put the best-foot-forward and present appropriately to the evaluator.

A well-prepared client always bears in mind the "theory of the case" that was developed together with the skilled counsel, that takes into account all of the relevant law and facts, woven into a compelling, winning argument. The client has a refreshed knowledge of the facts, knows the mitigating circumstances of unfavorable facts, and is ready and prepared to outline the client's strengths and weaknesses as well as the strengths and weaknesses of the client's spouse. The client is prepared to field the forensic evaluator's hard questions in an even-keeled, emotionally-neutral, factual manner. The prepared client understands that a good forensic evaluator will not believe nor disbelieve the client, but will assemble all of the facts and look for multiple points of verification to determine which hypothesis is more likely than the others. The prepared client has a clear, succinct and compelling reason why the children will fare better in the client's custody than in the client's spouse's.

Unethical coaching of clients would violate both the Rules of Professional Conduct (governing lawyers' behavior) and the psychological rules of practice. While it is ethical to give clients an understanding of the forensic evaluation process and an opportunity to practice telling the story so that the client feels comfortable saying it, it is unethical to coach a client on what to say or how to say it. It is unethical to give the client a practice MMPI psychological test, for example, so that the client can "game"
+ the test or game the evaluation process. It is ethical, however, to help the client speak the client's truth clearly, succinctly, and powerfully.

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Here is just one Excerpt from our Clients' Guide to the Forensic Interview:

How to Testify / Respond to the Evaluator's Questions

- Try to be relaxed, conversational and genuine with the evaluator;
- Do not "bash" your [future ex-] spouse. Emphasize your own strengths (not the other's weaknesses). Focus on yourself and how you benefit your children;
- Be ready to answer hard questions like, "What are your spouse's parenting strengths?" "What do you like about the other parent?"
- To the extent you can, stay child-centered and child-focused. What the child(ren) need is more important than what you want. Frame your answers from the children's viewpoint. "The children will be better of if . . . because . . . .";
- Be prepared to show how involved you are in your children's lives and how much you know about them and their activities. What grades are they in? Who are their teachers? How does each feel about each of their different teachers? Who are their best friends? What subject(s) does each child like and which do they not? What activities do they enjoy? How does each child's personality differ from the other children's? How will that personality characteristic, and the child's present and future physical, emotional, and developmental needs be better served if you are awarded custody?
- What is your proposed parenting plan and what is your spouse's? Why is your proposed parenting plan in your child's best interests and better for your child than your spouse's?
- Always answer the question asked of you: not the one you wished was asked, not the one you know they wanted to ask you, not the one you think the questioner means, and not the one you think they should have asked you. Use the "Sheldon" technique (of The Big Bang Theory-fame), and be precisely literal (though this rule should be less-rigidly applied when being questioned by a forensic evaluator);
- If you've gotta' give it up, give it up quickly and cleanly. There is nothing more painful than watching someone struggle and convolute themselves trying to avoid admitting something that they will eventually have to admit. If you are going to have to admit something, do it with dignity and class, and don't sound like you are willing to lie and deny the truth to avoid admitting something everyone knows is true. But prepare the least-harmful way of admitting the harmful truths;
- Always be truthful . . . but . . .
- Don't be simple about it. Being truthful doesn't mean that you have to give the worst-possible-answer at the first possible opportunity. It doesn't mean you should be so self-conscious of your case's weakness that you imagine every question is about that. And it doesn't mean you should blurt out the harmful answers when they are not necessary. Of course be honest and truthful. And when you're asked about something that's unhelpful to your case, you'll need to be honest. But don't rush to gush out the worst parts of your case

only because it's weighing so heavily on you. Give it up when you're required to, but not a moment before. Recognize that distinction and become comfortable with it. And, if you're asked a softball question, be ready to . . .

- Knock it out of the park, whenever you're given an opportunity to do so. Every once in a while opposing counsel asks a question that gives you the opportunity to knock the ball out of the park; to give an answer that establishes your theory of the case; that lets you hit the equivalent of a home run. If you're ever given that opportunity, don't let it pass you by. Take the swing. Hit it out of the park. Always give your best answer! To do so, you need to . . .
- Be intimately familiar with, not only the facts and controlling law, but also the "theory of your case," the storyline that weaves all the relevant facts and controlling law into a cohesive theme that makes a compelling reason for you to win your case. Understand all of the elements and facts that are required for your theory to succeed and be ready to spout it out whenever you're given, and however many times you are afforded, an opportunity to do so. (I tell clients to imagine a cash register bell, and every time you hit your theory, imagine the "*che ching; che ching*" of the register registering your win!);
- Don't ever lie or try to obfuscate, you'll likely be found out and you'll have made your situation a lot worse. Instead, work with your skilled lawyer to determine the best way of dealing with bad facts. (In a technique known as legal *jiu jitsu*, bad facts can often be cleverly converted to be favorable, good facts. Cultivating that requires skill, dexterity, creativity, and a strategic view, all qualities of a superior lawyer. *See*, Qualities of a Superior Lawyer.) Invariably, there will be bad facts that you won't be able to color and it may just be easier to take your lumps than to start spinning tales seeming to be a liar with the lack of credibility hurting you even worse than the bad facts ever could have;
- Within every question there is: (a) the literal meaning of the words used (*see*, the Sheldon rule, above); (b) the tone of the question; and (c) the meaning of the question in the greater context of the lawsuit. Consider all of them before you begin answering your question;
- Perhaps the most important rule: Always wait five seconds after the questioner has completed the question before you begin to answer. Too many mistakes occur because the person answering misunderstood the question or missed the last few words that flipped the entire question into its exact opposite. Moreover a small (not excessive) delay means that you have time to consider the question and all its implications before answering. A considered answer is safer for you and more valuable to the person answering, then a knee-jerk, instinctive, imprecise, reaction to the question;
- Do not try to control the interview. The evaluator or questioner has a plan about how to go about the evaluation or deposition. As the examinee, you have no choice but to go with the flow they set. It's easier for you if you reconcile yourself to that reality and don't try to buck it.

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Challenging an Unfavorable Forensic Report:

A forensic report works as a heavy thumb on the scales of justice. The party favored by the now has the wind at their backs and is riding downhill. Conversely, the party disfavored by the report now has to "storm the castle." It is a costly, uphill battle, and without a clever, skilled, determined lawyer, will usually not succeed.

Effectively challenging a neutral forensic report begins with an evaluation of the report itself. What was the basis for the report's conclusions, the process the forensic evaluator used in assembling the facts that formed the basis for the conclusions, the data points the evaluator assembled, the inferences made from the data, the hypotheses the evaluator considered, the process by which the evaluator confirmed or rejected each hypothesis, the scientific research consulted, assembled, and relied on, and the logic and inferences through which the evaluator drew the conclusions from all of the foregoing? The report and the process the evaluator used should be evaluated for indications of heuristics or other biases on the part of the evaluator (any, or any combination, of the anchoring heuristic, availability heuristic, confirmatory bias, hindsight bias, stereotyping, affiliative/disaffiliative bias, or any one of the professional biases such as pathology bias, data gathering bias, research bias, "the truth [always] lies somewhere in the middle" bias with its variant the "Attila the Hun doesn't marry Mother Theresa" bias, a "for the move" or "against the move" bias in relocation cases).

Among the questions to be considered are:

Did the evaluator:

- Use a multi-method, semiformal, structured process?
- Conduct multiple interviews with each parent?
- Conduct multiple interviews and observations with the children and parents in an age-appropriate manner?
- Use psychological testing to generate hypothesis and areas of inquiry?
- Administer the psychological tests according to their individual protocols?
- Attempt multiple, appropriate contacts with collateral sources, those who have a range of understanding of the family and its issues?
- Obtain each parent's parenting strengths and weaknesses?
- Obtain each parent's view of the co-parenting issues including the ways in which they do, or do not, communicate well, share information about the children; and make joint decisions

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on behalf of the children?

- Obtain each parent's views of the other parent's attitudes and behaviors re gatekeeping?
- Learn whether there has been DV in the relationship and, if yes, what type of violence?
- Learn, if there's been no DV, how has the couple historically handled conflict and has that changed since the separation?
- Learn about each parent's view of each child's psychological, emotional, academic, social and developmental functioning?
- Learn about the presence or absence of unique or special issues for every child?
- Learn about each parent's perception of each child's needs?
- Integrate all the above data?
- Include all the above data in the formulation of the analysis and conclusions?
- Ask questions, and follow-up question, *in sufficient depth* to fully understand each parent's positions and concerns?
- Provide each parent an opportunity to respond to the claims of the other?
- Maintain, throughout, a proper "evaluative mindset" during the gathering of the data?
- Use appropriate psychological instruments, and use their results properly?
- Consider the data that did not support, or might even contradict, the report's conclusions or did the evaluator only use, or report, supporting data?
- Consider, and list in the report, multiple hypothesis? Were any discarded hypothesis rejected for valid reasons?
- Recognize, announce and discuss the limitation(s) of the evaluation process and the data assembled?
- Consider and report the risks and benefits of various custodial options?
- Demonstrate awareness, knowledge, and application of the relevant legal standards for custody and visitation in New York?
- Remain within the scope of the appointment order?
- Consider all of the relevant factors?
- Spend roughly equal time with each parent and, if not, was there a good reason why not?
- Give one parent a pass for negative behaviors?
- Emphasize one data source over others?
- Ignore some data, and look for other data to support theories?

- Use psychological test-results inappropriately?
- Use a clinical (rather than forensic) methodology?
- View their role as helping or fixing the family rather than reporting to the Court?
- Have preconceived notions of the research findings (which frequently occurs about issues such as overnight parenting of young children, domestic violence, and relocation)?
- Utilize a balanced, neutral, and deep (in its questions) interview process, and allow each parent to fully explain all concerns and relevant information and to respond to the other's?
- In the report, provide an appropriate understanding of each child, with enough depth to understand each in a multi-dimensional way (*e.g.*, psychologically, developmentally, academically, emotionally, and socially) and each's relationship to each parent and each child's typical mood(s)?
- Properly explain the use of tests?
- Use proper tests/instruments?
- Administer the instruments properly?
- Correctly score the instruments?
- Correctly interpret the scores of those instruments?
- Correctly use the data derived from those instruments?
- Properly integrate the psychological test data with the other data gathered in the process?
- Review the case records provided by the attorneys and litigants?
- Properly integrate the case records into the evaluation process?
- Consider the collateral witnesses suggested by the parties?
- Contact those collateral witnesses that had information relevant to the issues in this case?
- Report how long the evaluator met with or spoke to the collateral witness?
- Report when during the evaluation process, such contact was made?
- Consider multiple hypothesis that could explain the relevant issues?
- Consider the relevant research that either supports, or counters, the conclusions?
- Make recommendations consistent with the data he collected?
- [Extra credit:] Did the evaluator explain the logical nexus between the data and the recommendations?
- Avoid making conclusions based on only limited information?
- Get any *significant* facts wrong?

NOTE: *This monograph is intended as an educational guide and not as legal advice. Legal advice should only be obtained from a qualified lawyer who is familiar with all of the facts and circumstances of your matter.*

- Display any signs of bias and, if so, what evidence is there that such bias affected the evaluator's objectivity and analysis of the case? "Bias is perhaps the *greatest threat to the integrity and probative usefulness of forensic work* products." Philip Stahl & Robert Simon, Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation & Expert Testimony at 63 (ABA 2013).

Because divorce is so stressful and evokes so many different harmful emotions, some people can present as if they have personality problems when they do not actually have them. Because of the stress and fear of divorce, a person may appear to be narcissistic and extremely self-focused when, with a bit of therapy, that may resolve. Others might appear to be histrionic or over-reactive (sometimes characterized as "overshooting the runway"). A skilled lawyer can help the client obtain the help they need so that they don't present these symptoms at a forensic evaluation and suffer a harmful result.

Because Mr. Steinberger chairs the custody committee of the American Bar Association's Family Law Section, he is the ideal lawyer to guide you through the custody process and help you obtain the result you desire.
