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Stephen A. Newman

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A TALE OF TWO CASES: REFLECTIONS ON PSYCHOLOGICAL AND INSTITUTIONAL INFLUENCES ON CHILD CUSTODY DECISIONS

Stephen A. Newman*

I. INTRODUCTION

Narratives about family life, especially those about families in crisis, make compelling reading. Even judicial opinions can command a reader's full attention when they relate the dry bones of legal doctrine to the lives of real people involved in difficult personal relationships. In contested child custody cases, the legal system compels people to formally present details of their personal lives to a stranger, who must judge and impose crucial decisions on them. It is not surprising that judges do not relish the task of deciding custody cases. The decision is an awesome one with literally incalculable consequences for children. Yet, for all their significance, child custody cases are subject to routine handling, and frequently go unnoticed by the public and the legal community. There is, to be sure, the occasional spectacular case — Baby M.,¹ for example — but the mass of custody controversies among the more than one million annual divorces² in the United States are processed without fanfare by our trial courts. They generate few precedent-setting appeals, receive little attention in the law reviews, and create little stir in the community. Nevertheless, “the law” of custody resides in the ordinary case, where real meaning is given to the vague standard of the child’s “best interests,”³ and where fateful decisions for parents and children are made. It is in the flow of these routine cases that the law most concretely and indelibly touches the lives of real people.

In this essay, I will consider the handling of two ordinary custody cases, selected from recent decisions reported to the New York legal community by the daily legal newspaper, *The New York Law Journal*. The

* Professor of Law, New York Law School.

1. *In re Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988).

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 88 (1989) (information based on estimate made in 1987 which is the most recent year reported).

3. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982) (standard to be applied in custody proceeding remains the “best interests of the child when all applicable factors are considered”).

cases were decided by the same judge⁴ sitting in the Nassau County branch of the state supreme court. They focus on the disputed custody of three children, all girls.

In examining these opinions, I will try to explore the complex factors, both personal and institutional, that come into play in the deciding of custody cases. Important influences on decision making, often unacknowledged, emanate from the judges themselves: their own assumptions about families; their deeply felt family values; and their personal and unique experiences of family life. Other influences stem from the institutional structure: the relative isolation of the trial judge; the dependency upon court-affiliated experts; the ever-present caseloads and time constraints; the use of forensic evaluations; *in camera* child interviews; and the possibility of appellate reversal. The two opinions chosen help illuminate these matters in a concrete way, although much of what is said here about the deciding judge can only be speculative. In discussing the particular cases, I am relying only on the reported opinions; I have no knowledge of the personal beliefs and private thoughts of the judge.

One final word is necessary. My study of these two cases certainly confirms that deciding the fate of children in court is a hazardous undertaking. We ask judges to make decisions of primary importance without specialized training or expertise and under adverse conditions imposed by heavy caseloads and limited resources. The law itself offers only the most general guidance, leaving trial judges substantially on their own in making these arduous decisions. The criticisms and suggestions I offer with regard to these two opinions are made in the context of respect for the work of the judge who wrote them, and for the conscientious way in which he has approached the overwhelming responsibilities of custody decision making.

II. *Green v. Green*:⁵ IS THERE A FEMININE MYSTIQUE?

When the Greens divorced in 1984, custody of their two sons was awarded to the father.⁶ The court ordered joint custody for the daughter, Tara, who was to live with her father. After four years under this arrangement, the mother decided to ask for sole custody of Tara, then age eleven. She did not seek to disturb the custody arrangement for either of her sons, then ages fifteen and twenty.

At some time during the four year period, Mrs. Green remarried and moved from New York to Virginia. When she applied for a change in

4. Judge Winick presided over both cases.

5. N.Y.L.J., July 14, 1988, at 23, col. 5 (Sup. Ct. July 13, 1988).

6. *Id.*

Tara's custody, Mrs. Green's new family consisted of herself, her new husband, his two sons, ages twelve and twenty, and a two-year-old girl, born to her and her new husband.⁷

The judge reviewed the governing legal principles, which provide, *inter alia*, that custody modifications should be determined based upon the child's best interests,⁸ that custody, where possible, should be established on a long-term basis to afford stability and continuing nurturance to the child,⁹ and that geographic moves by one parent that interfere with the other parent's access to a child are disfavored by the courts.¹⁰ A shift in custody to the mother in Virginia would, of course, significantly curtail the father's access to his daughter.

To decide the case, the judge considered testimony at the hearing, an *in camera* interview with Tara, and a forensic report made by the county probation department.¹¹ The judge did not consider the prior forensic report made on the family by the department. He noted that "prior studies made by the [d]epartment . . . [had] not been considered since there was no agreement by the parties that the court could do so."¹²

The judge's opinion makes scant mention of the probation department's current report, except to acknowledge the fact that one was prepared, and that it, along with all of the other evidence in the case, supported the judge's conclusion that custody of Tara should be switched.¹³ It is impossible to know whether the judge strongly relied upon the statements in this report and whether the department's findings and recommendations were based upon adequate investigation. In custody cases, these non-partisan — though not necessarily adequate¹⁴ — reports may play an important role in the courts' decisions. It would seem to be good practice to have judges indicate the nature of the report's contents and the bases for their conclusions. Even if the report plays no role in a judge's decision, this fact should be known to the probation department, since it indicates a possible lack of confidence in the department's work.

7. *Id.*

8. See *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

9. *Id.*

10. See *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981); *Strahl v. Strahl*, 66 A.D.2d 571, 414 N.Y.S.2d 184 (1979), *aff'd*, 49 N.Y.2d 1036, 407 N.E.2d 479, 429 N.Y.S.2d 635 (1980).

11. *Green*, N.Y.L.J. at 23, col. 6.

12. *Id.* at 23, col. 5. For discussion and criticism of this omission, see *infra* note 40 and accompanying text.

13. *Green*, N.Y.L.J. at 23, col. 6.

14. For an excellent discussion, with numerous examples of deficiencies in these reports, see *Levy, Custody Investigations as Evidence in Divorce Cases*, 21 FAM. L.Q. 149 (1987).

Whether or not the judge was influenced by the probation report in *Green*, he certainly seemed to be influenced by the *in camera* interview with Tara. After noting that the court "is not bound by her desires, but they are of interest,"¹⁵ the judge wrote:

Tara is about to become a teenager. She is eleven years old but large for her age, being 5'4" tall and weighing about 130 pounds. She is far more advanced physically than the usual eleven year old. The *in camera* interview gave a startling impression of a person more mature than her age, also presenting an unequivocal view of what she wants and needs.

. . . .

In no uncertain terms and unhesitatingly she wants to live in Virginia with her mother, and the reasons recited are mature, understandable and consistent with her needs as a maturing female teenager. These needs cannot be satisfied under the present custodial arrangement wherein the household consists of the father, a twenty-year-old brother and a fifteen-year-old brother.¹⁶

It is at this point that the judge introduced the principal theme of his opinion. Tara, we are told, is about to embark upon the "critical" years, when she will pass from childhood to womanhood.¹⁷ As a "maturing female teenager," she will have needs that cannot be met in the home of her father and two brothers, for this is a home that, in the judge's words, is "male dominated."¹⁸ He wondered what would happen to Tara in this presumably inhospitable environment:

Who does she talk to about her feminine needs? Her brothers have no interest nor should they. Her father is loving, but what he provided the last four years is simply inadequate for the future. Except for his love and concern, and monetary support, he cannot begin to offer to his daughter what she will now need to maturity

She is right to feel that her mother is the more nurturing parent. There are so many things that require a female presence in the home.¹⁹

15. *Green*, N.Y.L.J. at 23, col. 6; see Levy, *Father Custody*, in CHILD PSYCHIATRY AND THE LAW 100-13 (D. Schetky & E. Benedek eds. 1985).

16. *Green*, N.Y.L.J. at 23, col. 6 (italics supplied).

17. *Id.*

18. *Id.* at 24, col. 2.

19. *Id.* at 24, col. 1.

The judge conceded that "under some circumstances [not specified] a father [can] provide guidance to a female child," but that

[i]t would be detrimental to her future development for Tara to reside in a home so dominated by males, without a mature female presence. . . . What advice will she receive from her father or brothers? What can she ask them that they are prepared to answer?²⁰

This adolescent will need advice, but her masculine relations will have to stand mute, powerless to help her. Her needs, often referred to but never specified, are mysterious feminine ones that only another female can comprehend and address. The father, stated the judge, simply "cannot function . . . as a mother to a growing daughter."²¹ The judge was convinced that Tara, in "her advance as a woman," must have the "mature female presence" of her mother.²² This underlying theme in the opinion reflects strongly felt assumptions about the roles mothers and fathers play in the lives and development of their children. Many people, experts included, have long relegated fathers to a minor familial role in child development.²³ Margaret Mead once referred to fathers as a "biological necessity but a social accident."²⁴ Recent psychological research, however, is beginning to demonstrate quite clearly that fathers contribute significantly to the social, sexual, intellectual, and emotional development of their children.²⁵ Professor Reed Adams, in a review of the literature on father/daughter custody, observed that the "father/daughter relationship has been assumed by some to be of less importance than has actually been the case. Although many persons have assumed that children's ties to their parents are based on the sex of the parent, recent studies have not supported such a position."²⁶ He concluded that social science research does not support the assumption that mothers are best suited for and should always be given custody of their daughters, and that this assumption can do more harm than good. In his view, in determining custody, the decision makers must consider the "total psychological and social condition" existing within the family framework.²⁷

20. *Id.* at 23, col. 6.

21. *Id.*

22. *Id.* at 24, col. 1.

23. *See Levy, supra* note 15, at 102-04.

24. *Id.* at 105 (quoting M. Mead).

25. *Id.* at 106-07.

26. Adams, *Father/Daughter Custody: A Growing Social and Judicial Dilemma*, TRIAL, Sept. 1981, at 52.

27. *Id.* at 54.

The image of the incompetent father is firmly entrenched within our culture. Professor Dennis Orthner and his colleagues interviewed twenty-four single parent fathers.²⁸ Contrary to the cultural stereotype, the interviews revealed fathers who felt confident in their primary parenting abilities and derived a great deal of satisfaction from the experiences of fatherhood.²⁹ Ironically, even these authors expected fathers to be poor at the job:

We had anticipated a significant problem with role strain and adjustment to being the primary parent but we found little evidence that this is a major handicap. All of the fathers experienced some problems but these were not unlike the difficulties experienced in most families. The sense of pride in being able to cope with the challenge of parenthood and seeing their children mature under their guidance is a major compensating force.³⁰

They reported that two fathers with daughters going through puberty

expressed considerable dismay about having to give them the "proper" sex education. This should not be taken to mean that these fathers felt less competent in rearing daughters. Many mothers, in fact, share the same concerns. The fathers in question considered problems such as this to be situational, not continual and, overall, they felt they were quite successful in rearing their daughters.³¹

The judge's assumption that fathers cannot help their daughters through the shoals of puberty suggests another, subtler danger judges face in custody decision making. It is possible, perhaps inevitable, that anyone contemplating the family situation of another is psychologically tempted to imagine himself or herself in the position of the family member with whom he or she most closely identifies. A male judge in his sixties, for example, might (consciously or not) place himself in the role of father to a pre-teen daughter and wonder: How would *I* cope with her questions

28. Orthner, Brown & Ferguson, *Single Parent Fatherhood: An Emerging Family Life Style*, 25 FAM. COORDINATOR 429, 436 (1976) [hereinafter *Single Parent Fatherhood*].

29. *Id.*

30. *Id.*

31. *Id.* at 433. This study is small and relies upon the self-reports of fathers. Yet, it clearly suggests caution in indulging in stereotypical thinking about the inability of men to act as parents. The study does not imply, of course, that the mother's role is less important. Rather, it is likely that each parent has a unique and valuable role to play. For a case that recognizes the importance of fathers as well as mothers in the development of daughters, see *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981).

about sex, menstruation, and similar matters? The judge's discomfort with these topics (a feeling probably common among men, particularly older men) might easily lead to the conclusion that *no* man could deal with these things. The greater the personal feeling of discomfort, the stronger the conviction that this issue ought to weigh heavily against, if not disqualify, the male litigant in the case.³²

I do not suggest that judges should try to eliminate such thoughts from their minds. All they would succeed in doing is driving these thoughts out of consciousness, into the unconscious realm where they would retain their power but remain unexamined. There is a role for personal reactions, thoughts, and feelings in the deciding of cases, but it is a role that must be carefully defined and monitored. A legitimate part of the art of judging is a sympathetic attempt to understand the participants and to get "the feel" of the case.³³ A judge inevitably draws upon his own reactions and emotional responses to help assess the demeanor of the witnesses, the truth of what they say, and the underlying motivations of the parties.

Child custody cases generate more substantial and complex emotions which may run deeper than those inspired by other litigation. One judge observed of these cases: "Every current of our lives runs through them. They engage our most deeply held beliefs, recall our most poignant experiences."³⁴ Innumerable beliefs—about the reliability and quality of mothers and fathers, the appropriate roles of family members, the nature of the bonds that exist between mothers and sons, mothers and daughters, fathers and sons, and fathers and daughters, to name a few—may play a role in determining how a judge reacts to the family before him. Resemblances to the judge's own family may have profound effects on his perceptions of this family. A judge may read his own family insecurities and anxieties into the character of the family before him in court. The judge may have particularly strong reactions to any family member who violates the judge's own deeply ingrained family values and norms.

In the face of these possible influences, a judge must carefully consider his own reactions to the people appearing before him. Has the judge accurately comprehended the reality of family life of these individuals, or are his own beliefs, recalled experiences, values, and emotions recasting that reality into a version of family life more familiar to the judge? Put another way, the judge's conclusions about these

32. Experts as well as judges need to guard against personal emotional responses that compromise fair evaluation of the family in court. See R. GARDNER, *FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION* 47 (1989).

33. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 851-60 (1987) (discussing the nature of judgment).

34. *In re Custody of Temos*, 304 Pa. Super. 82, 95, 450 A.2d 111, 117 (1982).

individuals may be a function of the judge's own experiences of family life, rather than a realistic appraisal of a *different* family's life.

The judge's own family experience can intrude into cases in different ways. First, cases are by their nature incomplete. In a custody case, for example, a judge will never have all the evidence about the father's personality, motivations, past history, and parental capacities. Nor will he have all the evidence about the mother, all possible evidence about the children, and all the details of their interrelationships and family life. When information is fragmentary, there is room for the decision maker to "fill in the blanks" with assumptions and inferences about matters not directly in evidence. The more incomplete the picture presented by the evidence, the more the judge's own mind must imagine and fill in the undrawn portion.³⁵

Even when evidence is presented there is room for the injection of personal values, beliefs, and experiences. A judge must decide what significance to attach to what he hears. What if the evidence shows, as it did in the *Green* case, that the custodial parent did not serve the child breakfast in the morning? To a judge with memories of mother lovingly preparing breakfast for the family, the absence of any family breakfast routine may signify a serious parental lapse. A judge with her own children and a working husband may attach no importance to the absence of family breakfasts labored over by a mother or father.

Avoiding the distorting effects of one's own life and beliefs on the faculties of perception and judgment is no easy task. This may be particularly true for trial judges, who exercise their power in relative isolation. For appellate judges, who act in groups, the process of discussion and exchange of views before decision may help to identify and limit the intrusion of idiosyncratic beliefs and values. The trial judge, under great pressure to make decisions promptly and with little opportunity to talk things out before deciding, seems peculiarly vulnerable to the influence of unconscious assumptions and biases produced by his own unique life experiences.

What can a judge do? If thoughts generated about the parties and their case can be articulated, judges can give themselves the opportunity to subject these thoughts to further scrutiny. This would seem to be particularly important when a judge's thoughts generate strong feelings about a central issue in the case. For example, the thought that "fathers are not likely to be able to handle adolescent teenage girls" can be articulated, and then recognized as being founded upon further ideas about the special needs of maturing girls, the overriding importance of a

35. This phenomenon, known as "filling," is described (in the context of lawyer-client interviewing) in D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 45-46 (1977).

parent's ability to deal with puberty-related issues, and the common deficiencies of fathers in this area. Many of these ideas, in turn, can be posed as questions and explored in the adversarial presentations of the parties. If the lawyers are advised that these questions represent matters of great concern to the judge, they can bring in pertinent evidence from experts and information from the psychological literature bearing on these issues.³⁶ Where necessary, judges can solicit further information on their own initiative, to ensure that they have more than their own intuitions and personal proclivities to draw upon. If the judge does not rely too heavily on the rightness of his own assumptions, this procedure might help limit the negative effects of personal bias.³⁷

In the *Green* case, it is worthwhile to ask whether the judge, perhaps influenced by personal beliefs about family life, overrated the mother's parenting capacity and underrated the father's. The mother in the case had not had custody of her three children for four years, since her divorce. We are never told, and cannot be sure the judge ever was informed, why this mother did not originally gain custody of her children. Did she lack interest, motivation, or parenting skills? Was there some temporary problem or situational factor which changed in the ensuing four years? A court should know the answers to these questions before it seriously entertains a request for a shift in custodial arrangements. It does not appear from the opinion, however, that the judge pursued these matters.³⁸ In fact, the judge disclosed that he ignored past county probation department reports on this family. He wrote that

prior studies made by the [d]epartment . . . have not been considered since there was no agreement by the parties that the court could do so. Obviously, the parties who prepared the reports were available to be called if there was anything in those reports bearing upon the issues before this court.³⁹

Thus, the judge did not insist on seeing evidence concerning the

36. For an excellent discussion of the problems a custody judge faces in dealing with the psychological literature, and a suggestion that judges articulate and seek out evidence about assumed but disputable facts about children, see Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

37. For two provocative and helpful discussions of the way that judges' assumptions are often thought of and presented in opinions as "ordinary common sense," see Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737-39, 755, 829-30 (1988); Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 67 NEB. L. REV. ____ (1990) (forthcoming).

38. See *supra* notes 11-14 and accompanying text.

39. *Green*, N.Y.L.J., July 14, 1988, at 23, col. 5.

original award of residential custody of the daughter and full custody of the two sons to the father.

As a general principle, trusting lawyers to present all relevant evidence may work well in ordinary civil cases. Custody cases, however, present special concerns. The most important interest at stake is not the litigants', but the unrepresented child's. It is possible that each lawyer may wish to keep a certain document from the court, based upon a judgment about the balance of positive and negative facts about his or her client in the document. For different reasons, *both* parties may choose not to present a piece of evidence to the judge. In custody modification cases, there may be pertinent information in prior evaluation reports.⁴⁰ It is incumbent on the judge to at least look at them, whether or not counsel for one parent or the other presents them, to insure that all evidence relevant to the *child's* interests is considered.

As for the father, the judge indicated that he was successful as a single parent. Indeed, the judge noted that Tara was an unusually mature and articulate eleven year old. But the judge's brief acknowledgement that "the father has done reasonably well to bring Tara to this point"⁴¹ seems to understate the father's parenting capacities. This father, like other fathers with custody, may have developed parental concerns, interests, and skills that he did not have before. Out of necessity, fathers may learn more about child care than they ever dreamed they would. Orthner, Brown, and Ferguson, in their study of single parent fathers, noted that fathers became

much more appreciative of the responsibilities of being the primary parent.

One case was particularly striking. A father of a preschool child was the president of a small textile firm. He had never been very concerned about the child care responsibilities of his female employees; he took it for granted that plenty of facilities were available. But when he became a single parent, he too faced the plight of finding adequate day care. Now he is thinking in terms of operating a professionally run day care center at his plant as a

40. This depends, of course, on the contents of the report and whether subsequent events have affected its validity. Some things, like personality defects or poor communication patterns, are not likely to change, and should certainly be known to the court.

In considering a judge's failure to insist upon all pertinent evidence in a case, Judge Joseph Colquitt makes the interesting observation that "a trial judge's attitude toward social facts may influence an attorney's decision to present or refrain from presenting certain types of evidence to that judge." Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 59 (1988).

41. *Green*, N.Y.L.J. at 24, col. 1.

benefit for his employees.⁴²

Did the father in *Green* improve his parenting skills over the past four years when he had residential custody of three children? The judge devoted little attention to the father's parenting skills, although this should be an important part of any custody determination. All we are told is that meals were inadequately prepared in his house ("meals are sporadic and meager, consisting mostly of nothing (breakfast) or "junk" food for lunch and dinner. Occasionally there may be a regular meal, but Tara's indications are that they are few and far between.").⁴³ Of course, Tara could make her own breakfasts and the father could easily show that preparing meals is difficult for any single parent. If there is a problem with general inattention by the father to many of Tara's needs, the judge did not demonstrate this. The judge may have carefully canvassed the father's assets and liabilities as a parent, but it is not evident from his opinion. Indeed, with respect to the parenting capacities of both mother and father in this case, it must be concluded that the judge's opinion has failed to adequately address the issues that are vital to any custody decision.

We can only speculate as to the judge's inner thoughts in this case. But it is fair to ask whether his preoccupation with the unarticulated needs of a teenage girl advancing into womanhood reflects the judge's own personal beliefs and anxieties about the situation, rather than his clear-minded analysis of the best interests of the child. It may well be that the judge made the right decision in this case, and that the child in question will flourish following the change in custody. But without more information about the parents and their parenting abilities, and about the child and her interactions with each parent, it is impossible to feel any firm degree of confidence in this decision. There is much more we need to know about this family before we can agree that the judge has made the best decision for Tara.

III. *L.H. v. R.H.*⁴⁴: THE CASE OF THE "REMOTE CONTROL" MOTHER

In *L.H. v. R.H.*, the same judge determined custody of twin daughters, aged seven. The parents were married for thirteen years. Mrs. H. worked part time as an investigator for a law firm and did weekend work as a registered nurse. Her husband, a successful pediatrician, provided the principal financial support for the family. When the children were born,

42. *Single Parent Fatherhood*, *supra* note 28, at 433.

43. *Green*, N.Y.L.J. at 23, col. 6.

44. N.Y.L.J., Oct. 6, 1989, at 26, col. 6 (Sup. Ct. Oct. 5, 1989). The vivid phrase "remote control mother" is Judge Winick's.

Mrs. H. stopped working, but returned to work within a year.

Over the course of the marriage, it appears that the mother in this family had virtually opted out of motherhood. She structured her daily activities in a way that left her with remarkably little contact with her children. "At 6:30 or 7:00 in the morning," the judge wrote, "she is off to the gym, then to work. She doesn't see the children until after their dinner and then sometimes not until late at night."⁴⁵ The father saw to it that the children got up, were fed, and went off to school. Much of the mother's time was taken up with seeing her lover, a fact which the judge noted not for purposes of condemning her sexual activity, but to further stress the tendency of the mother to put her own needs ahead of her children's. "[A]bsenting herself from her children at a time when they are in great stress from the impending breakup of the marriage" is evidence, the judge wrote, of her "misplaced priorities."⁴⁶ After hearing her testimony, the judge was persuaded that she really did not want responsibility for the daily care of the children. Instead, it appeared that she staged the custody fight in order to defeat her husband in his genuine desire to have custody. In this light, Mrs. H.'s new-found motherly interests, including a stint as a "Brownie" leader, did not impress the court as a sincere effort but as a transparent litigation tactic.⁴⁷

Early in his opinion, Judge Winick established his principal theme: parenthood involves a degree of sacrifice and selflessness not demonstrated by the mother in the case. The mother here, he declared, "though she can hardly be described as an abusive parent . . . is more motivated by her own interests than those of her children. . . . She loves her children, no doubt, but is not prepared to recognize her continuing obligations in terms of the children's needs."⁴⁸

The father, by contrast, is described as a selfless parent, one who recognizes the obligations and responsibilities that being a good parent entails:

[T]he court finds the father to be just the kind of selfless parent that the mother is not. It is he who bore the major share in the upbringing of these children. It is he who provided the guidance and care and comfort so needed, especially to fill the void left by the mother. It is he who understands that being a parent bears some sacrifice.⁴⁹

45. *L.H.*, N.Y.L.J. at 26, col. 6.

46. *Id.* at 27, col. 1.

47. *Id.*

48. *Id.*

49. *Id.*

The judge supported these conclusions with compelling details culled from the extensive testimony in the case. In addition to the testimony of the parties, the court also had the benefit of hearing from three mental-health experts. One witness, Dr. Linda Sandler, called by the father, was a psychotherapist who had previously seen both the mother and the father in therapy. Dr. Sandler testified to the mother's admitted difficulty in coping with her children, her stated need to have relationships with men other than her husband, and her desire to be on her own.⁵⁰ The therapist noted that the mother exhibited depression, compulsive behavior, and emotional disturbance which made her the less preferred custodial parent, particularly in light of the parental skill of the father.⁵¹ The father, in fact, had assumed the nurturing role in the family without much support from his wife and had managed very well. Since he was clearly the more nurturing, involved, and capable parent, Dr. Sandler felt he should be awarded custody.

Oddly enough, the forensic report of the county probation and mental health services departments recommended that the mother gain custody.⁵² The report claimed that the mother would be more available to the children than the father and that she was the more nurturing parent. The judge identified three convincing reasons to reject these conclusions. First, the forensic report was based upon an expert's one-hour interview with each parent.⁵³ Such brief interviews hardly afforded the time needed to develop a true understanding of the family's dynamics and actual functioning. Second, other persons who had important information were heard in court, but were not interviewed by the forensic examiners.⁵⁴ Third, the report was premised upon the truth of the statements made to the department's expert by the mother.⁵⁵ In court, the mother revealed herself to be an unreliable witness; her accounts of her own availability (both physically and emotionally) were unworthy of belief.

Despite the judge's rejection of the county's recommendation, his opinion treated the county's expert, Dr. Sundstrom, rather gingerly. Indeed, the judge appeared to be making a determined effort to find something to praise in her poorly-handled evaluation report. Saying he "respectfully disagree[d]" with her recommendation, the judge added that he "recognize[d] and value[d] the expertise of Dr. Sundstrom," calling her agency's report "an important tool in aiding the court" to reach its

50. *Id.* at 27, col. 2.

51. *Id.*

52. *Id.*

53. *Id.* at 26, col. 6.

54. *Id.*

55. *Id.*

(contrary) determination.⁵⁶ Fault is diverted from Dr. Sundstrom by the judge's observation that the expert was "misled in her factual findings by what the mother has told her, or . . . what the mother has not told her."⁵⁷

This, of course, will not do. Any mental-health expert must be aware that a parent being interviewed for a custody evaluation has every reason to make self-serving statements and to otherwise omit, color, and distort the facts. Dr. Sundstrom's attempt to decide from her brief parent interviews where the truth lay was doomed to fail. As psychiatrist Alan M. Levy has written,

it is tempting to see if you [the evaluator] can determine who is telling the "truth" and who is not. This can prove to be a fruitless and time consuming mission and is best left to the courts. The evaluator is urged rather to rely on his/her clinical skills which emphasize interviewing and observation of parents and children.⁵⁸

A mental-health professional who allows herself to be "taken in" by a self-interested litigant has poorly served the court and more importantly, poorly served the interests of the children whose future lives and well being are at stake.

In contrast to the judge's kid-glove handling of Dr. Sundstrom was his somewhat dismissive attitude toward the father's expert, Dr. Harold S. Koplewicz. The judge first stressed that there was a "flaw" in Dr. Koplewicz's evaluation, stemming from the fact that Mrs. H. declined to appear for an interview with him.⁵⁹ "[I]t is in the court's discretion," the judge declared, "to afford little weight to Dr. Koplewicz's opinion, in light of the fact that the recommendations were made without the benefit of an interview with the mother."⁶⁰ Of course it is true that this expert, not having seen both parents, cannot (and did not attempt to) make a recommendation as to which parent would be the better custodian. But if he has done a careful and thorough evaluation of the father and children, he might potentially contribute important information about the father's parenting abilities and the father's relationships with the children. Furthermore, since no other expert saw the children, if Dr. Koplewicz did so, he could offer unique information about them.

Unfortunately, the judge's opinion merely recites Dr. Koplewicz's

56. *Id.* at 27, col. 2.

57. *Id.*

58. Levy, *Major Pitfalls in Child Custody Evaluation*, 2 FAIR OAKS HOSP. PSYCH. LETTER 1, 3 (1984).

59. *L.H.*, N.Y.L.J. at 27, col. 2.

60. *Id.*

conclusion that the father would be a good custodial parent, without indicating either the psychiatrist's evaluative techniques or the specific observations, tests, or interview data that support his conclusion. The judge wrote of the effect of Dr. Koplewicz' testimony:

The court has given some weight to his findings to this extent, that the father is a fit custodial parent. But it should be quickly said that the court has not grounded its decision in that finding, but in its review of all the credible evidence of the parties and the other experts in the case. It has not arbitrarily accepted Dr. Koplewicz's findings nor arbitrarily rejected these findings.⁶¹

Thus ends the consideration of Dr. Koplewicz's testimony. It ambiguously resides in the twilight zone somewhere between arbitrary rejection and arbitrary acceptance. This is a strange fate for such a well versed expert as Dr. Koplewicz, who served as the director-in-chief of child and adolescent psychiatry at the Long Island Jewish Medical Center, trained child psychiatrists, supervised clinical services for children and adolescents, and taught at Columbia University's medical school.⁶² It is possible that the judge simply did not think much of Dr. Koplewicz's evaluation in this particular case. But it is also possible that the judge's concerns, having nothing to do with the quality of the doctor's testimony, contributed to the apparent devaluation of it in the judge's written opinion. In particular, the haste with which the judge assures us that he has "not grounded his decision" on the doctor's findings, together with his disclaimer of arbitrariness, suggests anxiety on the judge's part that the case not be seen as having been unduly influenced by this expert's testimony.⁶³ Since the doctor did not see the mother, deciding custody on the basis of his evidence might provide grounds for *reversal* should the case be appealed. We may reasonably expect judges, like other human beings, to be concerned about how their work appears to others, particularly others who are higher in the hierarchy in which they operate. Pride and professional reputation are involved. So is the understandable desire not to have to re-try a custody case that the judge believes has already been properly decided. I suspect that opinions are often crafted in such a way as to reduce the chances of appellate reversal,⁶⁴ with judges

61. *Id.*

62. The credentials of Dr. Koplewicz are set forth in trial testimony he furnished in *In re Baby M.*, published in 5 *BABY M. CASE: THE COMPLETE TRIAL TRANSCRIPTS* 120-23 (S. Robbins ed. 1988).

63. *L.H.*, N.Y.L.J. at 27, col. 2.

64. Dr. Andrew Watson agrees that the "inevitable narcissistic desire not to be

denying or de-emphasizing the true importance of matters that they feel, rightly or wrongly, will imperil the decision on appeal. By so doing, however, judges obscure the true bases of their decisions and sacrifice the judicial virtues of clarity, candor, and openness in the opinion-writing process.

Institutional and personal concerns may also explain the special attention Judge Winick paid to Dr. Sundstrom's problematic report. Judges and county probation and mental health departments have a necessary, ongoing relationship with one another. Both sides need each other to do their jobs. County officials preparing court-ordered evaluations perform an important function for judges, and judges, in turn, probably feel the need to preserve good working relationships. Hence criticism, even if justified, needs to be muted. The danger lies in the promotion of these working interests to the point where they undermine the basic mission of the system in which the various professionals operate. If the performance of one of the participants is not up to standard, it is vital that someone in the system point out the problem and insist on a higher quality of work in the future.

In this light, Judge Winick commendably did not avoid the issue of the forensic examiner's shortcomings. His message in rejecting the county department's report was delicately couched and perhaps a shade too indulgent, given the serious nature of the flaws that marred the report. But it was still a clear enough "veto message," one which caught the attention of the newspaper reporter (a story about the case made the front page of the daily law journal under the headline, "Court Ignores Recommendation in Custody Award")⁶⁵ and undoubtedly made an impression on the individuals involved. Whether the case will have a salutary effect in the future depends on many factors, including the ability of the individuals to accept criticism and to alter conduct, and perhaps just as important, the willingness of the county to allocate adequate resources to these departments, so that social service personnel are not under unremitting pressure to do too much work in too little time. An administrative structure that overvalues the productivity and efficiency of its staff risks sacrificing the less measurable values of accuracy and quality. When this happens in forensic evaluations, it is the children, above all, who suffer.

A final feature of this case is worthy of note. Despite the wealth of mental-health expertise brought to bear upon this case, the court's opinion makes no mention of any interview with the children, save one—

reversed will influence greatly the judge's writing process." Watson, *Some Psychological Aspects of the Trial Judge's Decision Making*, 39 MERCER L. REV. 937, 949 (1988).

65. Kohn, *Court Ignores Recommendation in Custody Award*, N.Y.L.J., Oct. 6, 1989, at 1, col. 5.

the judge's own. Information about this interview is prefaced by the judge's comment that he "has not placed great reliance on what these seven-year-old girls have said." Nevertheless, he wrote that "it is obvious to the court that these children are very comfortable with the father, depend upon him for their nurturing, and that he is the primary actor in their lives. On the other hand, they are somewhat uncomfortable with things the mother does."⁶⁶ These are important matters which the judge claims he has gleaned from his personal interview with the children. Although in this case what the judge learned was merely corroborative of the great weight of the testimony, in another case where the testimony was more evenly balanced, the statements of the children might have been of considerable influence. Judicial interviewing of children has inherent drawbacks, including the lack of time to develop the rapport necessary to draw the children out, and the difficulty in detecting the sorts of parental influences and psychic needs that may affect and distort their testimony. Mental-health professionals have an advantage in interviewing children — assuming they devote enough time to the task — because of their training in identifying psychological forces influencing the child and their experience in obtaining information from children through a variety of interviewing techniques.⁶⁷ While it is understandable for a judge not to credit the custody preferences of seven-year-old girls, it is apparent that even young children may have important information concerning the custody decision. Judges, inexpert as they may be in the delicate art of interviewing children, must be cautious about placing too much confidence in their own ability to elicit significant, accurate information from *in camera* interviews with children.⁶⁸

IV. CONCLUSION

Judges come to all cases with a complex set of beliefs, values, and life experiences. Custody cases, with their often evocative tableaux of family life, generate thoughts and emotional responses that may trace back to the judge's own experiences of and beliefs about family life. Sometimes a judge may identify with a particular family member, place himself in the situation presented by the family before him, and act upon the anxieties, fears, or insecurities that the situation inspires.

Judges need to deal with the personal and emotional responses these

66. *Id.* at 27, col. 3.

67. R. GARDNER, *supra* note 31, at 253-306.

68. *Id.* at 467-89; Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L.Q. 43, 67-91 (1984) (comprehensive discussion of problems and benefits of questioning by a judge, with recommendations based upon child development principles).

cases generate by identifying and articulating the specific thoughts they have about the parties and their family situation. When a judge reacts strongly to persons or events in a case, the reaction may be entirely appropriate (as in the case of the inattentive, "remote control" mother) or it may be an indication that the case is stimulating intensely felt but idiosyncratic thoughts and beliefs, ones which may cloud the judge's perceptions and judgments about the family in court. Where evidence is incomplete (true in all cases to varying degrees), a judge must be clear minded enough to make the appropriate inferences and draw the proper conclusions from the facts given. If unanalyzed thoughts and emotions interfere, his or her judgment will be unreliable.

The institutional structure of the law may also subtly influence the custody judge. The trial court's solitariness in decision making inhibits voicing and testing emotional responses, and precludes getting feedback from co-equal decision makers. The spectre of appellate review can direct opinion writing into legally acceptable channels without guaranteeing a candid exposition of the evidence relied upon or the values and assumptions underlying the decision. Dependence upon court affiliated mental-health experts may lead judges to "go along" too readily with the experts' recommendations (making Judge Winick's rejection of a probation department report newsworthy). Lack of judicial training in child interviewing techniques may occasionally render the hallowed *in camera* interview a useless, or worse, misleading source of support for a court's conclusions.

Correctives for the distorting effects of these psychological and institutional influences are not easy to find. Certainly these matters can not simply be "put out of mind." At least, their identification and articulation, as early as possible in the litigation process, will allow for conscious reflection and perhaps evidentiary exploration. Courts must commit themselves to the fullest production of evidence about the central questions surrounding the custody determination. If the judge is well informed about the parties' assets and liabilities as parents, their actual levels of child involvement and attachment, and the quality of their parent-child relationships and communication patterns, the force of the evidence may predominate over otherwise powerful extraneous factors.

Should the judge succeed in all this, of course, the formidable task of deciding the fate of children with wisdom, sensitivity, and care still remains. But it is a duty that can be discharged with greater fairness and truer justice.