Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub?

by
Dana E. Prescott* and Tim Fadgen**

Abstract: Child protection and child custody cases involve the testimony of experts in the form of forensic mental health evaluators [FMHEs]. The current use of expert opinion occurs within a traditional adversarial system in which forensic psychologists, psychiatrists, or social workers offer an expert opinion through direct examination with the assumption that the accuracy of the opinion and its explicit and implicit biases will be challenged on cross-examination. The adversarial system relies much too heavily on the skill of attorneys to cross-examine outside their field of expertise and permits experts to opine on research and literature without the benefit of direct challenge from other experts in the same or similar fields. An ever-growing body of research suggests that experts are susceptible to a host of implicit and explicit biases that may distort or influence the application of complex scientific or research-based theories to a family and upon which FMHEs may not agree. One plausible solution in family court litigation, and which has gained traction in other countries in business and tort cases, is so-called "hot tubbing" which is the colloquial name for a process of adducing and testing expert evidence. Known more legalistically as "concurrent evidence," this format, from pretrial procedures to trial, enables experts from similar or closely related fields to testify together during a joint session during the trial. The experts are presented with an opportunity to make extended statements, comment on the evidence of the other experts, and encouraged to ask each other questions

* Dana E. Prescott JD, MSW, PhD is licensed to practice law in Maine and Massachusetts and a partner with Prescott, Jamieson, & Murphy Law Group LLC, Saco, Maine. The opinions expressed by the author may not reflect the opinions of the editorial board of the AAML Journal or the AAML.

** Timothy Fadgen MA, JD, PhD is a lecturer in Public Policy at the University of Aukland and may be contacted at timothy.fadgen@auckland.ac.nz.

and test opinions. The authors argue that concurrent evidence may have promise for improving judicial decision making when FMHEs are designated as experts in family court.

A Hypothetical Pattern?

X and Y are unmarried parents of a three-year-old son and five-year-old daughter. They lived together for five years but then separated after the birth of their son. Y went to court and obtained a domestic violence order claiming X does drugs in front of the children and shoved Y during an argument over some text messages and emails to a co-worker. X responded by claiming that Y has a medical marijuana card but falls asleep when caring for the children and is often impaired while driving. Both parents claim the other is narcissistic, overly anxious, and trying to alienate the children. Mediation and other interventions have not curbed the conflict. The guardian ad litem has been attacked as biased by both parents. The judge has motions and cross-motions on the docket. The lawyers have advised that trial will require five days. Each party has hired national forensic psychologists as experts to interpret the results of their psychological evaluations and risk assessments, previously performed by a local forensic psychologist. All the experts will testify concerning the competency of the neutral evaluator, fitness of each parent, various "syndromes," and research on joint or primary physical custody. The judge read an article about a different approach to managing testimony by forensic experts and has decided to impose that procedure on the parties. He called the lawyers into court and announced that they were going to put the experts in a "hot tub" together and hold the trial accordingly. The lawyers looked puzzled. The clients thought the hot tub was on their personal property lists but not yet to be divided.[1]

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[1] *See, e.g.,* Sharp v. Keeler, 256 S.W.3d 528, 529 (Ark. Ct. App. 2007) ("Briefly stated, we affirm the trial court's decision regarding the change of custody and reverse and remand with regard to visitation. However, 'brevity' is not the watchword in this matter-there was a detailed initial order of custody, a detailed petition seeking a change of custody, detailed testimony at the hearing, and a detailed ruling from the bench, all captured in detail in the opinion of this court."); Buxton v. Storm, 238 P.3d 30, 32 (Or. Ct. App. 2010) ("The parties have been in litigation since mother's pregnancy with child. Before litigating custody, they filed several restraining orders against each other, which were

I. Introduction

Decades of research reflects the consequences to children and family systems of chronic conflict in litigated custody cases.[2] Even when the cause of the conflict in a child custody case may vary, the hypothetical above is common enough in family court. The current opiate epidemic, more fragile families with increasing poverty and earnings gaps, and the duration and intensity of litigation between the state, parents, grandparents, foster care parents, adoptive parents, and de facto parents makes litigation more likely. What is also manifest is that these stakes are more consequential to this next generation of children and, of no small matter, the stability and long-term viability of a society which requires stable communities, as well as the intellectual and emotional capacity for self-governance.[3]

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vacated soon after filing."); McClain v. McClain, 539 S.W.3d 170, 174 (Tenn. Ct. App. 2017) ("This is a post-divorce child custody action involving two children, who were sixteen and seventeen years of age at the time of the most recent trial. The parties were divorced by order of the Sullivan County Law Court (divorce court) in July 2001.").

[2] A discussion about the operational definitions of "high" or "chronic" parental conflict are beyond the scope of this article. *See* Shely Polak & Michael Saini, *The Complexity of Families Involved in High-Conflict Disputes: A Post-separation Ecological Transactional Framework*, 59 J. DIV. & REMARRIAGE 1, 1 (2018) ("Notwithstanding the widespread focus high-conflict families in the literature, there remains no consensus on the conceptual basis for its application to the field of separation and divorce."). From a public health perspective, see generally, Arin M. Connell & Sherryl H. Goodman, *The Association Between Psychopathology in Fathers Versus Mothers and Children's Internalizing and Externalizing Behavior Problems: A Meta-Analysis*, 128 PSYCHOL. BULL. 746 (2002); William V. Fabricius & Linda J. Luecken, *Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce*, 21 J. FAM. PSYCHOL. 195 (2007); Bryce D. McLeod, Jeffrey J. Wood, & John R. Weisz, *Examining the Association Between Parenting and Childhood Anxiety: A Meta-Analysis*, 27 CLINICAL PSYCHOL. REV. 155 (2007); Matthew R. Sanders, et al., *The Triple P-Positive Parenting Program: A Systematic Review and Meta-Analysis of a Multi-level System of Parenting Support*, 34 CLINICAL PSYCHOL. REV. 337 (2014); David A. Wolfe, et al., *The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, 6 CLINICAL CHILD & FAM. PSYCHOL. REV. 171 (2003).

[3] *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 90 (2014) ("It is time to recognize that family scripts have been rewritten, and they have been rewritten along the diverging lines of gender, class, and culture. Marriage is thriving among

Although there is always legal variation in practice from state-to-state, judicial outcomes rely upon the capacity of lawyers and judges (and self-represented litigants) to organize and present testimony in a short span of time and under the compression of limited family and judicial resources. In this context, child protection brought by the state or child custody litigation between private parties (and third parties such as guardians and kinship these days as well) employ expert investigators and witnesses in the form of forensic mental health evaluators [FMHE].[4] When FMHEs are employed the expert may offer reliable and valid opinion evidence concerning the probability of future risk, clinical diagnosis and its influence on child safety and stability, and testing data for purposes of creating a profile of family systems' conflict and functional parenting capacity.[5]

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higher-income, well-educated men and women who have become more likely to stay together; marriage is dying among lower-income, less-educated men and women, and the marriages they do enter into are more likely to end in divorce."); Andrew J. Cherlin*, Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403 (2010); CHILD WELFARE GATEWAY (2016), https://www.childwelfare.gov/pubPDFs/foster.pdf#page=3&view=Children; U.S.DEPARTMENT OF HEALTH & HUMAN SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, CHILD MALTREATMENT DATA (2015), https://www.acf.hhs.gov/cb/resource/child-maltreatment-2015.

[4] For purposes of this article, FMHE is shorthand for licensed mental health professionals qualified to provide forensic opinions. Although the scope of state licensure may define legal duties and ethical obligations, the acronym applies to psychologists, social workers, psychiatrists, or other professionals who rely upon cognitive and personality testing, diagnostic labeling, clinical evaluations, and third-party data collection. *See* William T. O'Donohue, Kendra Beitz & Lauren Tolle, *Controversies in Child Custody Evaluations*, *in* PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY 290 (Jennifer L. Skeem, Kevin S. Douglas, & Scott O. Lilienfeld, eds., 2009) ("Custody evaluations often include multiple constructs (e.g., attachment, abuse potential, parenting skills) that are discussed across different time periods (past, present, future); an assessment instrument might be adequate for one of these tasks or time periods but poor at another."); Benjamin D. Garber, *The Chameleon Child: Children as Actors in the High Conflict Divorce Drama*, 11 J. CHILD CUSTODY 25, 34 (2014) ("Custody evaluation and associated judicial decisions require a comprehensive analysis of all levels of the family system.").

[5] *See* Robert P. Archer & Dustin Wygant, *Child Custody Evaluations: Ethical, Scientific, and Practice Considerations,* 17 J. PSYCHOL. PRAC. 1, 21 (2012) ("Scientific reliability and validity is established, in turn, by research findings that have been subjected to peer-reviews in professional journals, tech-

Over several hundred years of evolved tradition, each "side" locates experts who may offer admissible evidence on many of these issues in a child custody case.[6] The trial court plays a presumptively neutral role except when acting as gatekeeper and umpire.[7] In those roles, judges may then reject or accept expert

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niques that have quantifiable error rates, as well as having gained general acceptance in the field.")*;* Lewis H. Larue & David S. Caudill, *A Non-Romantic View of Expert Testimony,* 35 SETON HALL L. REV. 1, 43-44 (2004) ("Reliability, nevertheless, is not so vague as to be useless. We reject both the idealization of science (or scientific methodology) as a source of uncontroversial knowledge (or standards), as well as idealizations of law that seem to render scientific standards superfluous.").

[6] It would be unusual for a family court to appoint its own expert. *See, e.g.,* Walker v. Am. Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999) ("It was 'an appropriate occasion' to appoint an expert 'to assist the court in evaluating contradictory evidence'"); Carranza v. Fraas, 471 F. Supp. 2d 8, 11 (D.D.C. 2007) ("Rule 706 allows the court to appoint an expert witness to assist the court, not to assist a party."); Peterka v. Dennis, 764 N.W.2d 829, 833 (Minn. 2009) (In a divorce case, "We conclude, on the record presented, that, although the district court did not specifically indicate that it was appointing Dennis [as valuation expert] under Rule 706, the practical effect of the court's order, as well as the conduct of the parties and Dennis, was such an appointment."). For an interesting research study, see Andrew W. Jurs, *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47, 48 (2012) ("Specifically, the Study focuses on the two evidentiary methods suggested by Justice Breyer––judicial questioning under Rule 614 and appointment of independent experts under Rule 706––to evaluate their use by judges.").

[7] Many years before Chief Justice Roberts invoked the "judge as umpire" metaphor at his confirmation hearings, international law had considered the role as hybrid. *See* Hugh W. Silverman, *The Trial Judge: Pilot, Participant, or Umpire*, 11 ALBERTA L. REV. 11, 63-64 (1973) ("The trial judge can be a pilot who guides the trial along sedate, orderly lines within the confines of the rules of evidence and the applicable law. He is certainly more than an umpire, watching the sporting-theory of litigation in action; and he is less than a participant in that he should not enter into the fray of combat nor take on the mantle of counsel. The interests of justice may best be served if the trial judge can call a witness, of his own motion, who would not become the witness of either side - if this had been done in the famous Tichborne Case it might have been helpful in resolving the case more quickly."). In his inimitable way with words, Judge Richard Posner summed up the Chief Justice's testimony, as follows:

> It was expressed, I assume tongue-in-cheek, in an especially unconvincing form by that skilled advocate John Roberts at his triumphal confirmation hearing. He said that the judge, even if he is a Justice of the U.S. Supreme Court, is merely an umpire, calling balls and strikes.

testimony in whole or part.[8] The problem, inherent in each side hiring competing experts, and the trial courts weeding through that testimony, is that the adversarial nature of court proceedings likely creates "partisan bias in experts through unconscious affiliation with the side that hires them (i.e., adversarial allegiance) and by attorneys who select and pressure experts to make extreme claims."[9] Thus, an ever-growing body of interdisciplinary research suggests that experts are susceptible to a host of implicit and explicit biases that may distort or influence complex scientific matters and forensic testimony.[10]

By observation and common sense, it is fair to assert that experts play a powerful role in judicial outcomes even if empirical data as to whether expert opinion improves judicial decision

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> Roberts was updating, for a sports-crazed century, Alexander Hamilton's view of the judge as one who exercises judgment but not will, and Blackstone's view of judges as the oracles of the law.

Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U.L. REV. 1049, 1051 (2006).

[8] *See, e.g.,* Clement v. State, 458 A.2d 69, 72 (Me. 1983) ("In general, a fact finder is not bound to accept the opinion of an expert, especially in the field of psychology which may not be the most exact of sciences."). For an important article which critically examines similar issues in the business valuation arena of divorce, see Andrew Z. Soshnick, *Challenging Expert Valuation Opinions in Divorce Cases: An Oasis or Mirage in the Trial Desert*, 30 J. AM. ACAD. MATRIM. LAW. 455, 455 (2018) ("Challenges to the admissibility of reports, testimony, and opinions of valuation experts in divorce cases occur infrequently.").

[9] John Kellerman, et al., *Expert Opinion: Hot Tubbing as an Alternative to Adversarial Expert Testimony* (2018), http://ap-ls.wildapricot.org/resources/EmailTemplates/2018_04%20April%20AP-LS%20Newsletter/ExpertOpinion April.pdf.

[10] *See* Daniel C. Murrie & Marcus T. Boccaccini, *Adversarial Allegiance Among Expert Witnesses*, 11 ANN. REV. L. & SOC. SCI. 55, 58 (2015) ("Questions about adversarial allegiance are long-standing and widespread. Expert witnesses—particularly those from medicine and the behavioral sciences—have long been tolerated with skepticism and sometimes characterized as hired guns who can reach any conclusion to support the party that retained them."); Tess Neal & Thomas Grisso, *The Cognitive Underpinnings of Bias in Forensic Mental Health Evaluations*, 20 PSYCHOL., PUB. POL'Y & L. 200, 206 (2014) ("We think there are good reasons to be concerned. Scientific and clinical expertise in the courtroom is dependent on the expectancy that the expert seeks accuracy and avoids anything that may lead to bias in the collection or interpretation of data. Challenging that expectancy is a growing body of research suggesting that forensic examiners differ in the data they collect and the opinions they reach, depending on the social contexts in which they are involved in forensic cases.").

making or reduces re-litigation rates is still in the preliminary stages.[11] Existing conventions of cross-examination and competing expert opinions may not only fail to remediate the risk of confusion and distortion during the transfer of expert opinion to decisionmakers but may dilute the effectiveness of expert opinions related to treatment and interventions for families. Despite decades of conceptual and policy discussion concerning the limitations of adversarial fact finding in family courts, however, little of structural significance has changed for lawyers and families navigating those court systems.[12] This article avoids that larger discussion in favor of a more limited suggestion gathering attention in other parts of the world and which has been applied by trial courts and lawyers in business and tort cases:

> "Hot tubbing" is the colloquial name for a process of adducing and testing expert evidence, which is more formally known as concurrent expert evidence. The model has been championed in Australia and is now used in other common law jurisdictions and in international arbi-

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11 *See* Birte Englich, Thomas Mussweiler, & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 198 (2006) ("Even though judges typically do not throw dice before making sentencing decisions, they are still constantly exposed to potential sentences and anchors during sentencing decisions. The mass media, visitors to the court hearings, the private opinion of the judge's partner, family, or neighbors are all possible sources of sentencing demands that should not influence a given sentencing decision."); Margaret Bull Kovera, Melissa B. Russano, & Bradley D. McAuliff, *Assessment of the Commonsense Psychology Underlying* Daubert: *Legal Decision Makers' Abilities to Evaluate Expert Evidence in Hostile Work Environment Cases*, 8 PSYCHOL., PUB. POL'Y & L. 180, 185 (2002) (emphasis added) ("Based on the results of basic social psychological research on scientific reasoning ability, it is logical to expect that judges may not be able to identify flaws in expert evidence proffered in their courtrooms. It is possible, though, that judges' extensive experience in evaluating the admissibility of expert evidence will have provided them with knowledge about scientific methodology that laypeople do not possess. *However, judges report relying on experts' credentials and experience rather than the content of their testimony when judging the credibility of expert testimony*.").

12 The literature is vast but an early article which clearly addressed theory and policy is Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 475 (1997) ("Grappling with the subject of court reform in family law presents complex and daunting challenges. The traditional adversarial nature of court systems is inappropriate for the resolution of family legal matters.").

> trations. Its interest and controversy principally lies in the fact that it requires party-appointed experts to engage in cooperative and interactive pre-trial and/or trial endeavors, in order to enhance the efficiency, accuracy and ideally collegiality of the expert evidence process.[13]

Known more legalistically as "concurrent evidence,"[14] this approach, from pretrial procedures to trial, enables experts from similar or closely related fields to testify together during a joint session. "Hot tubbing" as a process still retains certain inquisitorial features by maintaining adversarial techniques such as cross-examination, albeit in a non-traditional structure and setting. The experts are "presented with an opportunity to make extended statements, comment on the evidence of the other experts, and are sometimes encouraged to ask each other questions and even test opposing opinions."[15] The experts present their viewpoints concurrently instead of sequentially, and there is interaction among the experts as to foundation and methodology. The judge may also intervene as appropriate with questions in order to enhance the fact-finding process.

The authors suggest that the use of concurrent evidence with FMHEs may distill a more probable, or less random, matrix of expert opinions; thereby reducing judicial guesswork and yielding more efficient and effective decision making. What remains to be explored is the implementation of this trial method in the United States within the purview of child custody litigation.[16] We will dispense early with the criticism of cost. From the hypothetical above, and common enough in the high-stakes world of child custody and child protection, forensic experts are already hired

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13 Adam Elliott, *Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for Hot Tubbing*, 40 HOUS. J. INT'L L. 1, 3-4 (2017). This article contains an appendix and examples of testimony.

14 Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROBS. 159, 162 (2009).

15 *Id*. at 162-63 (footnotes omitted).

16 *See generally* Elizabeth Reifert, *Getting into the Hot Tub: How the United States Could Benefit from Australia's Concept of Hot Tubbing Expert Witnesses*, 89 U. DET. MERCY L. REV. 103 (2011); Scott Welch, *From Witness Box to the Hot Tub: How the Hot Tub Approach to Expert Witnesses Might Relax an American Finder of Fact*, 5 J. INT'L COM. L. & TECH. 154 (2010); Megan A. Yarnall, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary*, 88 OR. L. REV. 311 (2009).

and testify—even when not specifically designated as such but are therapists for a parent or child or case workers for state agencies.[17] The question is not whether there is expert evidence proffered, but how an "expert" qualifies to give a forensic opinion and how such evidence, if properly established subsequently as to foundation and reliability, may improve the reliability and efficacy of judicial fact finding?

The first section of this article, therefore, discusses the basic foundations of family court fact finding. Part II reviews the literature related to expert or forensic opinion evidence in the United States. Part III explores the possible use of "hot tubbing" in child custody cases involving competing (or concurrent) psychological expert opinion. Part IV describes the research and experiences in New Zealand and Australia. The conclusion argues that this method of expert fact finding has merit because, for forensic experts, the lack of agreement about methodology and generalizability creates an environment that may increase the probability of more effective or predictable outcomes for children.[18]

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17 Mixing of therapeutic and forensic roles as an ethical and legal matter is beyond the scope of this article but does account for some of the chaos when experts testify beyond their lane and judges may not understand the differences. *See* Stuart A. Greenberg & Daniel W. Shuman, *When Worlds Collide: Therapeutic and Forensic Roles*, 38 PROF. PSYCHOL.: RES. & PRAC. 129, 130 (2007) ("When a therapist also serves as a forensic expert, the therapist is part of the fabric of the case, in part evaluating the impact of his or her own participation. Only by not being a person whose actions influence the mental status or condition of the litigant can the forensic expert offer an independent opinion regarding the litigant's mental status or condition."); *see also* Diestel v. Hines, 506 F.3d 1249, 1261 (10th Cir. 2007) ("He acknowledged that it would ordinarily be unethical to be both the treating psychiatrist and the forensic psychiatrist for the same person.").

18 This discussion is not limited to psychological testimony but applies in other forensic fields. *See, e.g.,* Kaplan v. First Hartford Corp., 603 F. Supp. 2d 195, 198 (D. Me. 2009) ("According to one commentator, in disputes like these: [T]he expert retained by the dissenting shareholder invariably concludes that the corporation has a very high fair value, while the corporation's expert determines that the fair value of the corporation is much lower. It is not unusual for the opinions of the experts to differ by a factor of ten. It is, therefore, not surprising that courts have evidenced frustration with this process." Accordingly, perhaps I should consider myself fortunate, since the experts in this case vary by a factor of only about five ($9 million at bottom; $48 million at top).").

II. Adversarial-Imposed Expert Conduct

The case management problem in child custody litigation involving experts begins with a problem inherent in the social and psychological sciences. Psychological or mental health expert opinions derived from qualitative and quantitative research (rather than conceptual theories or hypotheses disguised as science) should result in some consistency regarding the application of research to predictive opinions about a family system and the nebulous and frequently challenged "best interests of the child" test.[19] Yet lawyers and judges can read multiple reports from imminently qualified forensic experts and find little uniformity of interpretation drawn from the same data points. Sampling methods, cultural and demographic norms, generalizability of cognitive and personality testing, valid and reliable survey/data collection methods, explanations for moderating, mediating, confounding variables, and statistical analysis and error rates, among many other factors, are too often in dispute.[20]

Thus, one of the most consequential policy problems, fought over in the peculiar randomness of the modern courtroom, is that the psychological professions do not agree amongst themselves as to a particular matrix of methodologies (e.g., testing, clinical, collateral sources) let alone its *scientifically* reliable application to a particular family. Unlike the physics of sub-atomic particles as yet unseen beyond predictive mathematical formulae and shadows which allows for application to cell phones, missile gui-

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19 References to parent and child are intended as a shorthand. The authors recognize that family systems today may include many biological, legal, and third-party rights. For an alternative discussion of the best interests' paradigm, see Dana E. Prescott, *The AAML and a New Paradigm for Thinking about Child Custody Litigation: The Next Half Century*, 24 J. Am. Acad. Matrim. Law. 107, 137-38 (2011) ("As applied to child custody litigation, the functional/contextual approach, as a means to evaluate knowledge and policy implications in practice, integrates the aggregate of parental choices within an evolving family system and adaptive time horizons.").

20 For a recent example, compare Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. Am. Acad. Matrim. Law. 325 (2017), with Sol R. Rappaport, Jonathon Gould, & Milfred D. Dale, 30 *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 J. Am. Acad. Matrim. Law. 405 (2017).

dance systems, and exportation of ocean or space scientists may refine physical tools for deeper and more accurate measurement but accept the efficacy and validity of mathematical proofs.[21]

One premise of this article is that bias in the selection and behavior of FMHEs may improperly influence expert opinion in the field of child custody because adversarial conduct by lawyers is very unlikely to reduce error rates like a market economy.[22] Often unspoken but equally disconcerting is that lawyers (and judges) rarely possess the skills and knowledge required to effectively cross-examine the expert, much less process the evidence given the "need for speed" and limited economic resources that govern most family law cases.[23]

The adversarial system, by intentional design, is where child custody cases live, with disclosure of intimate detail in a public forum, as "scorpions in a bottle."[24] As one author described in historical detail, "adversarial legalism is deeply rooted in the po-

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21 For example, see Sencer Ayas, et al., *Counting Molecules with a Mobile Phone Camera Using Plasmonic Enhancement*, 1 ACS PHOTONICS 17, 24 (2013) ("The remarkable sensitivity of the smart phone camera combined with high plasmonic enhancement of the optical signal as demonstrated in this article, may pave the way for low cost hand-held systems which can be used in the analytical study of samples at a single molecule level.").

22 *See* Bradley D. McAuliff & Jeana L. Arter, *Adversarial Allegiance: The Devil Is in the Evidence Details, not just on the Witness Stand*, 40 LAW & HUM. BEHAV. 524, 533 (2016) ("Tentatively we can suggest to judges and attorneys that adversarial allegiance exists, that it can (but not always) influence how experts process evidence, and that it may be more likely in cases involving evidence that is not blatantly flawed. What is striking about this conclusion is that from a statistical standpoint, experts are more likely to encounter evidence that rests at the middle of the quality distribution than either extreme end.").

23 *See, e.g.,* Bell v. Cone, 535 U.S. 685, 697 (2002) (noting that in death penalty cases, for example, the Supreme Court purports to apply "meaningful adversarial testing.").

24 *See* Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & (and) Desires of Litigious Parents*, 7 PEPP. DISP. RESOL. L.J. 501, 505 (2007) ("The legal system, with the unique pressures it puts upon litigants, can create new tensions and aggravate those that are preexisting. As one scholar vividly elucidated, "[t]he formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.'"); *see also* Dana E. Prescott, *The Act of Lawyering and the Art of Communication: An Essay on Families-in-Crisis, the Adversarial Tradition, and the Social Work Model*, 10 LEGAL ETHICS 176, 176 (2007).

litical institutions and values of the United States."[25] The alternative argument is that family courts represent an example of how politicians, elites, and stakeholders, including the judicial system, may try, in good faith, to devise less adversarial and less costly alternatives to "adversarial litigation."[26] But implementing and sustaining positive policy solutions in an adversarial system which must decide cases creates complex challenges.

In the United States, the quality of expert evidence in civil and criminal cases is tested by cross-examination and pretrial motions. With little difference beyond the administrative need to process volume with speed in family court and the absence of shareholder largesse, each side in a custody case may hire its own expert, feed the expert self-selected data, work with the expert on the report to be offered in court, and then prepare the expert to help the client.[27] There are many forensic experts who remain neutral and ethical even when pressured, but those reports may

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25 Robert A. Kagan. Adversarial Legalism: The American Way of Law 4 (2009).

26 *Id*. at 13. As a leading scholar optimistically wrote years ago, "The child custody court has been transformed in what is, for the legal system, a comparatively short period of time-approximately forty years. The child custody court has moved permanently beyond the stage where its sole function is to award sole custody to the better parent. Today's child custody court is a conflict manager, not a fault finder." Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. Little Rock L. Rev. 395, 428 (1999).

27 Family courts, and lawyers, tend to ignore the reality that much of child custody research is a form of case studies or anecdotal evidence. *See, e.g., In re* Abilify (Aripiprazole) Prod. Liability Litig., 299 F. Supp. 3d 1291, 1309 (N.D. Fla. 2018) ("Case studies document medical observations occurring coincident with the use of a prescription drug either by a single patient (a case report) or a small number of patients (a case series). They tend to be brief recitals of clinical events and do not address prior medical history, use of other medications or drugs, risk factors, or the myriad of other issues necessary to scientifically evaluate whether the drug actually produced the observed adverse effect. Moreover, case reports have no controls, are susceptible to inherent reporting biases, lack statistical context, and are not verifiable through meaningful peer review. The difficulty with case reports is distinguishing between association and causation. For this reason, while case reports may supplement other evidence of causation, they cannot, standing alone, prove causation."). As the court noted in a footnote, "Inherent biases may include selection bias, conceptual bias, referral bias, or over-reporting of symptoms." *Id*. at 1309 n.20.

never see the light of day if privilege is exercised.[28] This is as it has been and will be in an adversarial system designed for case-by-case truth-detecting in which lawyers and judges test evidence not science. As scholars have noted quite thoroughly, even if experts are qualified, the reliability of expert opinions should still adhere to rules of scientific methodology:

> Using a Daubert analysis should likewise result in the exclusion of the expert's testimony on "best interests." A decision on the ultimate issue requires legal analysis and consideration of many factors, some of which may not be known to the expert. Because the best interest standard is admittedly indeterminate, it is not possible to critically assess the expert's predictions on which outcome would serve the child's best interests. In other words, the expert's opinion would not have scientific validity and should not be allowed under Daubert.[29]

There is, however, a fiction that all lawyers and judges are equally skilled, that experts apply a uniform understanding of child custody science, and that a judge can discern the truth about a family system based upon adversarial efforts. Yet despite reams of research, social science and legal literature, and judicial reform encouraging non-adversarial legalism in child custody remains startlingly immutable to significant and sustained institutional change.[30] With that said openly, the challenge for family law lawyers who are trained to behave in accordance with legal ethics *intentionally* and *precisely* designed to guide and encourage adversarial behaviors is that these good faith efforts at

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[28] Jonathon Gould, et al., *Testifying Experts and Non-Testifying Trial Consultants: Appreciating the Differences*, 8 J. CHILD CUSTODY 32, 36 (2011) ("Lawyers and experts, however, seem to confuse roles and are unfamiliar with the rules of identifying an expert and then claiming work-product or privilege."). This debate is neither new nor resolved but the traps should be clear by now to all professionals. *See* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for a More Precise, Fundamental Analysis*, 48 HOUS. L. REV.265 (2011).

[29] Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-keeping in the* Daubert *Era*, 59 U. MIAMI L. REV. 1, 22-23 (2004).

[30] For policy discussions, see Mellisa Holtzman, *Definitions of the Family as an Impetus for Legal Change in Custody Decision Making: Suggestions from an Empirical Case Study*, 31 LAW & SOC. INQUIRY 1 (2006); Douglas M. Teti, et al., *Supporting Parents: How Six Decades of Parenting Research Can Inform Policy and Best Practice*, 30 SOC. POL'Y REP. 1 (2017).

structural change have not altered the ethical duty to clients who expect zealous advocacy. Indeed, a fear for lawyers in the trenches who try to effectively and ethically represent families is that bar counsel and judges may not be as protective of efforts to protect children as ethical codes which require aggressive representation like a personal injury and commercial attorney.[31]

Being an empathic person is not enough protection for lawyers who practice with families. The fact that there is no jury in family matters (except in Texas or Georgia) may actually make little difference. Advocacy before a judge may be qualitatively different than a jury, but the stressors of litigation may be even greater.[32] Further, some research suggests that there is reason to give pause regarding how the adversarial system may process lay and expert information as evidence in trials even before judges-of-one. The current model implements the notion, from the inception of Western theories of justice, that truth is best elicited by skillful cross-examination and when zealous representation has prevailed. As one scholar wrote many years ago:

> Whatever then its lineage, whatever support its assumptions may derive from comparative law or comparative institutional studies, the adversary system as a human device for getting at the truth of disputed facts in a lawsuit is staked on the assumption that from the struggle between the litigants aided by their advocates, each with ardor presenting one side of the case and each with the utmost skill attempting to detect the weaknesses of his adversary's evidence or points of law, the jury which must choose between the conflicting versions of the truth, and the court which is to select the applicable rules of law will have before them, more often than not, the relevant material from

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31 *See* Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283 (1999).

32 Older lawyers of more seasoned years may argue that jury trials (before summary judgment and rocket dockets) were less stressful than a trial before one person who may never have represented a single parent in child protection or custody. Of no small matter, though beyond the discussion here, the adversarial system may reveal unethical professional practices, but it may also drive good people out of the system. *See* Frank E. Vandervort, Robbin Pott Gonzalez & Katlheen Coulborn Faller, *Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection*, 30 CHILD. & YOUTH SERV. REV. 546, 547 (2008) ("We discovered that a number of child welfare workers experience tehri interactions with lawyers as so stressful that it constitutes a heavy contributing factor to burnout and turnover.").

> which to fashion by their joint efforts a just decision. Such is the theory of the adversary system, and such are its assumptions.[33]

The obligatory or habitual reliance on this form of adversarial truth-seeking makes it no less a powerful myth than it works to discern fact from fiction, perception from lying.[34] Much like the perfect rationality and knowledge of buyers and sellers in markets held dearly by economists for generations, this myth has created a false ideal. A couple of lawyers with an assigned judge can, in a matter of hours, ferret out an objective truth (whatever that may mean to the clients or philosophers) and then render a decision framed by the law of "best interests" or "interpersonal violence" or "abuse or neglect" as defined by statutes that must apply to millions of family transactions across multiple economic, personality, and mental health variables.[35]

Unlike criminal and tort litigation, the fact that parents must continue to cooperate makes the model of adversarial systems even less rational, whatever its roots.[36] This is another more pain-

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[33] Edward F. Barrett, *Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 481 (1961).

[34] *See* Felicity Nagorcka, Michael Stanton, & Michael Wilson, *Stranded Between Partisanship and the Truth-A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U.L. REV. 448, 452 (2005) ("David Luban states that 'non-accountable partisanship' dominates the adversarial system. This is because lawyers advocate their clients' interests with the 'maximum zeal' permitted by law, and are morally responsible neither for the ends pursued by their client nor the means of pursuing those ends, provided both are lawful.").

[35] *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 24 (1987) ("A custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy. Use of expert and character witnesses can be especially harmful. 'The parents will call each other officially crazy, and the children will begin to wonder about themselves as well as their parents. Also, the 'efforts of attorneys, working in an adversary spirit, can escalate conflict between parents and draw children into divorce arguments.'").

[36] *See* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2120 (2012) ("This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court, but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes."); s*ee also* Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC'Y. 50, 50 (1995) ("Microeconomics concerns the efficiency of markets, but I was more interested in the majesty of law, the struggle of politics, and the deciphering of culture. My explanation of the successes of

ful flaw in this process. Once the trial is done and the judge decides, families are then subject to what may be termed the "cliff effect." This too often means that families return to court in various iterations during the legal minority of a child; and if the family has resources, they continue to hire more experts or new experts. Thus, the presentation and filtering of expert opinion to a judge suggests the need for a more creative approach which recognizes the constitutional and social need for an adversarial system but concurrently adjusts for the impact of bias and the ethical duty of family lawyers to vigorously represent clients.[37]

III. Forensic Opinion Without a Hot Tub

It is worthwhile to give more study and debate to myriad roadmaps for structural changes to family courts.[38] In the

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economics will reveal limits in models of rational behaviour that insulate economics from psychology and sociology.").

[37] For an interesting analysis of the intersection of science and policy, see generally MORRIS B. HOFFMAN, THE PUNISHER'S BRAIN: THE EVOLUTION OF JUDGE AND JURY (2014). A recent study is worth reading. *See* Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Reply to Weinshall-Margel and Shapard: Extraneous Factors in Judicial Decisions Persist*, 108 PROC. NAT'L ACAD. SCI. E834-E834 (2011) ("We have presented evidence suggesting that when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment"). The statistical analysis has been subject to challenge. *See* Andreas Glöckner, *The Irrational Hungry Judge Effect Revisited: Simulations Reveal that the Magnitude of the Effect Is Overestimated*, 11 JUDGMENT & DECISION MAKING 601, 601 (2016) ("According to previous findings on mental depletion, the 'irrational hungry judge effect' should at best be small in magnitude (if existing at all; see Carter & McCullough, 2013),which might render the observed extraneous influence less relevant from a practical point of view and the need for state interventions less urgent.").

[38] One of the most hopeful articles on this topic was written by Professor Schepard in 1998. *See* Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 95 (1998) ("Traditionally, family courts take the view that their responsibility is to decide specific disputes between parents after an adversary hearing. Evidence continues to accumulate, however, that this traditional adversarial approach to divorce and separation drives parents further apart, rather than encouraging them to work together for the benefit of their child. Overall, adversary procedure usually does children more harm than good.").

meantime, courts are necessary, because without an adjudicatory authority that the *polis* accepts, the alternative is likely more individual and group violence and oppression. As Thomas Hobbes argued centuries ago, human beings may respond less than graciously or civilly to anything that deters wants and needs; thus, the state exists for the safety of one group from another.[39] When evidence derives from an expert, the subsequent discussion becomes whether the adversarial system can discern the scientific foundations of expert opinion evidence in child custody cases when the experts do not agree among themselves. Does the "hot tub" at least narrow the space between research methodology and anecdotal evidence in the guise of experience or non-identified case studies?[40]

In most instances, and in some form or variation, expert opinion is grounded in *Daubert v. Merrell Dow Pharmaceuticals*[41] and its progeny. The power to give an expert opinion using social science, rather than physics or chemistry, to opine on psychological and parenting capacity is judicially and legislatively

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39 *See* Rakes v. United States, 352 F. Supp. 2d 47, 61 n.9 (D. Mass. 2005) ("It is true that since feudal times, see F.L. Ganshof, Feudalism xv-xviii (Philip Grierson trans., Longmans, Green & Co. 1st English ed.1952) (1944), it has been recognized that governments primarily exist to secure the safety of their citizens, see THOMAS HOBBES, LEVIATHAN ch. 30 at 231 (Richard Tuck ed., Cambridge Univ. Press 1991) (in English) ("Summi imperantis officia . . . manifeste indicat institutionis finis nimirum salus populi" or "The office of the sovereign . . . consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people.")").

40 There are many examples of the misuse of individual beliefs and case examples as research or science in family courts. *See* Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD. LEGAL RTS. J. 1, 11 (2006) ("PAS's twenty-year run in American courts is an embarrassing chapter in the history of evidentiary law. It reflects the wholesale failure of legal professionals entrusted with evidentiary gatekeeping intended to guard legal processes from the taint of pseudo-science.").

41 509 U.S. 579 (1993). Not all states are *Daubert* states but there is generally some form of gate-keeping and threshold reliability test. *In re* Sarah C., 864 A.2d 162, 164 (Me. 2004) ("To meet the two-part standard for the admission of expert testimony, the testimony must also meet a threshold level of reliability."). For purposes of this article, reference is not generally made to federal or state variations on FED. R. EVID. 701-705. These rules do provide an anchor for policy and appellate decision-making but the case law and statutorily-created exceptions drive outcomes.

authorized.[42] As scholars have noted quite thoroughly, qualifications and the reliability of expert opinions in family court should adhere to rules of scientific methodology:

> Using a Daubert analysis should likewise result in the exclusion of the expert's testimony on "best interests." A decision on the ultimate issue requires legal analysis and consideration of many factors, some of which may not be known to the expert. Because the best interest standard is admittedly indeterminate, it is not possible to critically assess the expert's predictions on which outcome would serve the child's best interests. In other words, the expert's opinion would not have scientific validity and should not be allowed under Daubert.[43]

What is misunderstood (or ignored) is that the Western tradition of an *adversarial system* does not permit a judge to do more than hear evidence in a courtroom under rules enacted generations ago. Consequently, a stranger vested with constitutional authority and donning a robe must divine a result from evidence proffered in a matter of hours according to the rituals and constraints of a courtroom. The risk in such a compressed environment is that expert opinion becomes a "truth detector."[44]

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42 *See, e.g.,* Commonwealth v. Hoose, 5 N.E.3d 843 (Mass. 2014) (observing that particularly in the case of psychological or behavioral sciences, lack of prevalence data alone may not be sufficient to justify a ruling that the theory is unreliable).

43 Ramsey & Kelly, *supra* note 29, at 22-23; *see also* AMERICAN PSYCHOLOGICAL ASSOCIATION SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (2012), http://www.apa.org/practice/guidelines/forensic-psychology.aspx and https://www.scribd.com/document/363048476/APA-2012-Specialty-Guidelines-for-Forensic-Psychology; Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 869 (2004) ("Derived not from experimentation but observation, there is serious question as to whether much of this behavioral evidence can meet the Daubert definition of reliable science. Nonetheless, this evidence continues to be admitted routinely at trial, often with little critical analysis by the court and sometimes even after the evidence has been discredited in its own field.").

44 *See* United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986) ("We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far in present circumstances."); State v. Black, 537 A.2d 1154, 1157 n.1 (Me. 1988) ("We note that a significant number of jurisdictions have recognized that although an expert may testify in order to explain inconsistent conduct or testimony of the victim, the expert cannot offer an opinion as to the truth of the victim's story."); State v. Maday, 892 N.W.2d 611, 619 (Wis. 2017) ("Expert testimony does not assist the fact-finder if it conveys to the jury the expert's own beliefs as to the veracity of another witness.").

What then matters in child protection or child custody cases is that hiring competing experts to provide data that supports their position will not find an answer in adversarial combat between equally bankrolled parties with resources and lawyers.[45]

Daubert mandated that scientific evidence be subject to a "reliability test." Among the factors (neither science nor law are static events) *Daubert* suggested are the following: whether the theory or technique can be or has been tested; whether the theory or technique has been subjected to peer review and publication, as such review increases the likelihood that substantive flaws in the methodology will be detected; the known or potential rate of error; and whether the theory or technique enjoys general acceptance within the relevant scientific community.[46] While *Daubert* has value in terms of grounding this discussion, *General Electric Co. v. Joiner*,[47] has special relevance to expert forensic opinions in family court:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[48]

Critics argue, quite vigorously, that such an adversarial method of finding facts and applying law only increases the duration and intensity of family conflict, harms children, and only benefits the lawyers economically. The statement itself does not

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45 *See* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 949 (2008) ("Under these conditions, the adversary case-by-case method, dependent on individual prosecutors, defense attorneys, judges, and juries and their ability to understand and marshal the requisite expertise in case after case, especially given the system's many imbalances, is not a good way to address forensic sciences. The risk of error in individual cases is high.").

46 *See* FED. R. EVID. 702.

47 522 U.S. 136 (1997).

48 *Id.* at 146; *see* Sophia Adrogué & Allen Ratliff, *The Care and Feeding of Experts: Accountants, Lawyers, Investment Bankers, and Other Non-Scientific Experts,* 47 S. TEX. L. REV. 881, 899-900 (2006) ("[M]ethodologies that are generally accepted in practice in the real world are not always accepted in court. Further, methodologies interchangeable in the real world are often more strictly separated by case law.").

answer the social policy problem of what society should do when parents have a child and, for reasons that might be quite sad and unfair, find themselves caught in this adversarial system.[49] The question for modern family courts looking at any reforms is whether an expert's duty is more than mere role-keeping in family court. A more trenchant and honest view may be to accept that the environment itself could lack the capacity to challenge scientific opinion.[50]

Similar to the ethical requirements for forensic psychologists under the APA Specialty Guidelines,[51] there is a duty for all experts (who are not merely consulting but intend to be sworn in) to transparently disclose alternative hypotheses, to provide the court (and parties) with data that supports or does not support the conclusion in a report, and to provide informed consent and assure that children or vulnerable parties know the scope and consequences of the role. As in *Joiner*, the risk otherwise is the *ipse dixit* analysis or what is otherwise termed confirmation bias.[52] Given the concerns enumerated, the next section ad-

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49 *See* Neal & Grisso, *supra* note 10, at 209-10 ("Finally, we imagined a legal context that might change the role of forensic examiners in a way that accepts adversarial participation through expert evidence—a legal context full of practical, scientific, and ethical questions. These questions may or may not be worth trying to answer as we strive to improve the validity and reliability of forensic mental health evaluations and to foster trust in our work process and products.").

50 Bruce Budowle, et al, *A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement*, 54 J. FORENSIC SCI. 798, 799 (2009) ("There have always been challenges to the use of science in legal proceedings. In the adversarial system the evidence is criticized in a negative, nonconstructive manner."); Kirk Heilbrun & Stephanie Brooks, *Forensic Psychology and Forensic Science: A Proposed Agenda for the Next Decade*, 16 PSYCHOL., PUB. POL'Y & L. 219, 242 (2010) ("However, there is good reason to think that poor practice of forensic psychology has the potential to harm the accuracy of legal decision making and the interests of both defense and prosecution across a range of legal decisions.").

51 *See* AMERICAN PSYCHOLOGICAL ASSOCIATION SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY, *supra* note 43.

52 *See* Martine B. Powell & Sandra Lancaster, *Guidelines for Interviewing Children During Child Custody Evaluations*, 38 AUSTRALIAN PSYCHOL. 46, 49 (2003) ("The issue of confirmation bias is particularly relevant to custody decisions because these decisions are inherently subjective and value laden. For example, personal bias has been shown to predict the type of custody

dresses whether the "hot tub" can help or at least mitigate harm and may prove more effective for judicial decision making.

IV. Hot Tubbing as a Worthy Experiment

Recent studies have raised concerns about the need for judges to become even more active participants in trials and the need for sensitivity to client perceptions of procedural fairness.[53] One such response to greater judicial engagement in the expert witness process has been referred to variously across jurisdictions as "hot-tubbing," "concurrent evidence," or "expert conference," the terms refer to a process where competing experts are allowed to testify in a less overtly adversarial process in which experts openly discuss differences of opinion and the respective rationales for their conclusions.[54] Commentators seem to agree that the process is intended primarily to save time and money and to result in increased claim settlement; furthermore, the practice requires more preparation by the judge and less control over the process by counsel.

While the hot-tubbing approach has slowly moved across many English-speaking countries since early experimentation in Australia during the 1970s, the type of proceedings and under what conditions hot-tubbing is allowed or encouraged varies. This section will consider recent trends in several countries and whether the respective approaches are suitable for perhaps one

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arrangements favored by mental health professionals with some professionals preferring to award custody to parents of one gender over the other.").

53 Gary Edmond, Ann Ferguson, & Tony Ward, *Assessing Concurrent Expert Evidence*, 37 CIV. JUST. Q. 1, 19 (2018) ("If judges are going to become more active participants in civil proceedings, and in the process compromise more of their traditional impartiality and independence, then such shifts should be grounded in procedures that are demonstrably valuable, have clearly understood mechanisms of operation, and can be guided by evidence as to the conditions in which they are most likely to produce desirable and undesirable results.").

54 *See* Edie Greene & Natalie Gordon, *Can the Hot Tub Enhance Jurors' Understanding and Use of Expert Testimony?*, 16 WYO. L. REV. 359, 382 (2016) ("Judges and attorneys have expressed various concerns about the ways that concurrent evidence sessions will change their role in the courtroom. Judges are concerned that hot tubbing would place additional managerial burdens on them, and attorneys worry that it would remove their control of witness examination, which might disrupt their planned trial strategies.").

of the most adversarial areas of legal practice: child custody litigation.

A. *Australia and the United Kingdom*

Throughout the past decade, scholars have credited a rising unease among English and Australian jurists about the perceived "bias and partisanship" increasingly evident in expert testimony proffered by one party against the other in civil court proceedings.[55] Eventually this concern led to rule changes in Australia permitting various "concurrent evidence." Professor Gary Edmond grounds support for this evidentiary and trial technique for competing experts as follows:

> Historically, adversarial legal systems have left the selection and refinement of evidence to the parties. This devolution, sometimes referred to as "free proof," applies to all kinds of evidence, including expert evidence. Recently in Australia, common-law judges began to modify the way expert evidence is prepared and presented. Judges from a range of civil jurisdictions have conscientiously sought to reduce expert partisanship and the extent of expert disagreement in an attempt to enhance procedural efficiency and improve access to justice. One of these reforms, concurrent evidence, enables expert witnesses to participate in a joint session with considerable testimonial latitude. This represents a shift away from an adversarial approach and a conscientious attempt to foster scientific values and norms.[56]

In 2011, Alexandra Conroy noted adoptions could employ hot-tubbing—a process she observed had been used in "international arbitration and in construction disputes" but not in family courts.[57] Here again the English courts were influenced by an international practice. Concurrent testimony was taken from three experts and deemed a success because it reduced the testimony from an anticipated two days to a mere four hours. The complexity of the litigation itself in such cases is not the issue, rather it is the variance in expert opinions that must be resolved by the fact finder.[58]

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55 *See* Edmond, *supra* note 14, at 159.

56 *Id*. at 160.

57 *See* Alexandra Conroy, *Hot Tubbing Expert Witnesses*, 35 ADOPTION & FOSTERING 79 (2011).

58 *See generally* David Wilson, et al., *Hot-Tubbing Experts: Is There Scope for the Use of Concurrent Expert Evidence?*, 8 J. INTELLECTUAL PROP. L. & PRAC. 691 (2013).

The transition to utilizing hot-tubbing in Australia and England has, of course, a different structural baseline than the United States as these countries long ago reduced the role of the jury in civil cases, a key institutional change that shifts the fact-finding locus to the bench.[59] Although this limitation on civil jury rights has often been cited as a key distinction between these jurisdictions, in the United States child protection and child custody cases are non-jury trials (with a few exceptions not relevant here) as a matter of law and constitutional tradition.[60]

Edmond describes the hot-tubbing method of trial in these jurisdictions as occurring in two parts: first, the experts, after being sworn in, are "asked to comment about the case, the issues, their opinions and the differences between them, sometimes punctuated by questions from the lawyers, the judge, and even other experts participating in the session."[61] The second half of

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59 *See* Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7, 13 (1999) ("The frequency of civil jury trials steadily declined in England and Wales from the middle of the nineteenth century, when judges were given the right to refuse trial by jury. Today, less than one percent of civil trials are jury trials."). The debate about the efficacy and necessity of jury trials in the United States is not new either. *See* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 669 (1918) ("In these days when the demand for a more efficient administration of justice is finding a response as never before in the ranks of the legal profession, when a sympathetic and scientific attempt is being made to simplify procedure in the courts of the several states and of the United States, it is important to consider how far the path is blocked by the provisions in the state and federal constitutions guaranteeing the right to trial by jury"); *see also* Donald Alexander, *Civil Juries in Maine: Are the Benefits Worth the Costs*, 34 ME. L. REV. 63, 63 (1982) ("Despite the civil jury's long history of successful resistance to change, new conditions make it imperative that we conduct a fundamental review of this functioning of the civil jury as an instrument of justice in the twenty-first century.").

60 *See, e.g.,* Kiser v. Kiser, 385 S.E.2d 487, 508 (N.C. 1989) ("Prior to the passage of this act the distribution of assets upon divorce depended on the application of other rules of law. Hence, there is no constitutional right to trial by jury on questions of fact arising in a proceeding for equitable distribution of marital assets under our long-standing interpretation of article I, section 25 and its predecessors, but rather any right to jury trial would have to be created by the express language of the act itself."); Buck v. Robinson, 177 P.3d 648, 653-54 (Utah App. 2008) ("Furthermore, there is no right to a jury trial in domestic cases where there is a similar mix of remedies but those matters remain equitable.").

61 Edmond, *supra* note 14, at 164.

the session then involves what has been described as more typical of the adversarial process with cross-examination. The benefits of this process are several, according to this analysis: it "provides a discursive, cooperative environment"; experts like it; it reduces partisanship and enhances communication, comprehension, and decision making; it reduces lawyer influence; and it saves time, money, and institutional resources.[62] However, after extensive engagement with a variety of practitioners familiar with the process, Edmond concludes that concurrent evidence or hot-tubbing is a "useful tool with limited potential."[63]

The General Case Management Practice Note for the Common Law Division of the New South Wales Supreme Court takes a slightly more expansive view of concurrent testimony.[64] A provision proved that all expert testimony will be taken concurrently unless the court determines otherwise or has appointed its own expert. One might expect, given the movement of this practice generally, to see a rule of this type becoming commonplace in civil litigation across most common law jurisdictions. The question remains, however, whether such a rule should move to the family-law domain, with its competing tensions, thus modifying an adversarial process by facilitating expert consensus about the science and data being transferred and transformed for interpretation and weighing by the court.

Lisa Wood has observed that Australia's experience with concurrent evidence has been a positive one. She opined that the "experience of Australia indicates that the practice is effective in saving both time and costs and repatriates to experts their proper role of assisting the court to resolve disputes. It does away with the gladiatorial combat between cross-examining counsel and expert that was hitherto characteristic of litigation."[65] Any court practice believed to save parties and court time and money is bound to have traction when rule revisions are considered.[66]

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62 *Id*. at 169.

63 *Id*. at 186.

64 *See* Kathy Sant & Nicholas Broadbent, *Joint Conferences and Concurrent Evidence in Medical Negligence Cases*, 127 PRECEDENT (SYDNEY, NSW) 27 (2015).

65 Lisa C. Wood, *Hot Tub Redux*, 32 ANTITRUST 31 (2018).

66 *Id*.

In late 2016, Scotland became the next in the line of nations employing concurrent evidence.[67] There, scholars have argued that this more iterative exchange may benefit the fact-finder by removing the presentation of evidence from the purely adversarial model. In Scotland, the process proceeds in the following manner:

1. Counsel agree on the agenda of substantive topics for the concurrent evidence session.
2. The presiding judge begins the conference discussion by asking an expert to set forth her opinion on the agreed upon issue.
3. This is followed with an invitation to others to respond and to question each other if necessary, to fleshing out the issues and points of divergence.
4. As a final phase, the attorneys are asked to pose any questions they think relevant with the judge reserving the right to question as well.[68]

In one case, the presiding judge was apparently satisfied with this process and observed: "They were also able to challenge one another's position. This brought the topics into sharp focus. Each expert had to crystallise his position."[69] Lord Woolman noted that this approach might be most appropriate where only a "narrow technical dispute exists" and that there was a high degree of "common ground" between the parties.[70] It was also important that the parties support the taking of this type of evidence. Few family law cases may meet such a test factually. More likely, the judge, as fact finder, could at least have a chance to more accurately apply the forensic opinions based upon research to an outcome for the family than the adversarial system alone may produce in current practice.

B. *New Zealand*

The application of hot tubbing in New Zealand has been far less certain. A recent edition of *LawTalk*, the New Zealand Law Society's magazine, for example, took up the challenges of adversarial expert witness testimony in such a small and relatively iso-

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67 *See* Katherine Doran, *All in Together: Hot-tubbing", or Concurrent Expert Evidence: Is the Experience Likely to Be Repeated?*, 62 L. SOC'Y SCOTLAND 53 (2017).

68 *Id*.

69 *Id*.

70 *Id*.

lated country.[71] Members of the bar have resorted to hiring international experts to deal with some of the perceived bias among the small pool of locally available experts. The policy concerns that ushered in concurrent evidence in other jurisdictions, such as perceptions of expert bias and high costs, are particularly acute in New Zealand.

The article notes that the most common application of hot-tubbing in New Zealand is in the criminal court, which is quite a deviation from experience across Australia and the United Kingdom.[72] The article reiterates some of the observations that hot-tubbing is quite promising from an institutional perspective in that it reduces time spent and places the judge more at the center of the conferencing process. Conversely, counsel tend to feel a loss of control over the expert witnesses, and for that reason, counsel become far more selective in choosing which experts to testify.[73] (Not a bad thing perhaps).

The issue of hot-tubbing or the conference of experts, as it is known in New Zealand, has not yet been researched there. Provision exists for its application, however, in various contexts.[74] In some contexts, such as expert testimony in regulatory process judicial review, courts have found the adversarial process as embodied in cross-examination is the more appropriate fact-generating tool.[75] In one noteworthy application of the appropriateness of the conference of experts in New Zealand, Justice Wild found that the conference of experts is appropriate when cross-examination is not the most effective means of managing expert testimony but that the conference "only works" when "convened by an independent person with relevant expertise."[76]

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71 *See* Angharad O'Flynn, *Working with Expert Witnesses in New Zealand*, 46 LawTalk 46 (2017).

72 *Id*.

73 *Id*. at 51.

74 *See* Cross on Evidence, EVA 84.5, s. 84.1 (10th ed. 2014).

75 *See, e.g.*, Powerco Ltd. v. Commerce Comm'n and HC WN CIV-2005-485-1066 [2006] 662 (NZ June 9, 2006); *see generally* Commerce Comm'n v. Cards NZ Ltd HC Auckland CIV-2006-485-2353, (July 27, 2009); Strong Wise Ltd. v. Esso Australia Resources Pty Ltd. [2010] FCA 240, (2010) 185 FCR 149 at [93]–[96].52 Strong Wise Ltd. v. Esso Australia Resources Pty Ltd. [2010] FCA 240, (2010) 185 FCR 149 at [95].

76 Powerco Ltd., ¶¶51-54. *Id.*

V. Conclusion

Families are more fragile than ever, and that is unlikely to change anytime in the next generation or two. Children are more vulnerable to removal for neglect and abuse as a result of poverty, addiction, and violence. In this sense, it is not only U.S. commentators who have attributed serious socio-legal problems to expert evidence but, over the last decade, "English and Australian judges have become increasingly anxious about the quality of expert evidence appearing in courts, particularly in their civil-justice systems."[77] As this article explored, the policy and practice problem does not consist merely in finding the means to reform bureaucratic and institutional bodies.

Lawyers by their very nature are conservative about change, because change, by its intrinsic nature, means unpredictability in client advice and outcomes. Change is a threat to stability and many of the unwritten rules that govern courtrooms, especially in criminal and family law where volume poses significant stresses upon the judicial system. Reforming court procedures in certain ways could prove more effective for the use of social science and endorse and enforce the excellent work of the unbiased and ethical forensic experts evaluating children and parents. There is always a risk that charm and wit in the hot tub may override boring but accurate and ethical opinions. But that happens already with lawyers in an adversarial system. This reform is not about obtaining perfection in outcomes in child custody trials but refining and reducing error rates or the misuse of psychological and forensics science to opinions that may powerfully influence fact finders.

Even with the possibility of error in the adversarial system, reforming the one-person bath-tub into a hot tub may have welcome outcomes. First, experts are more likely to "stay in their lane" and not confuse courts (intentionally or negligently) by transforming the role of therapist to forensic expert and giving opinions beyond the scope of ethical duty and legal admissibility. Experts who avoid discussion and challenge of other experts may decline to be tested in that arena, thereby reducing flawed experts and increasing the positive role of ethical experts in child custody cases. Second, lawyers who hire forensic experts would

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77 Edmond, *supra* note 14, at 160.

have a more precise ethical duty to the court, because selective use of data or the use of hired-guns who rely on their version of science-by-licensure will be *directly* tested by professionals who know the language and the research. Lawyers will have to sharpen their skills and preparation—as will judges—because direct examination will require knowledge and precision, and cross-examination will not be isolated to lawyer and expert one-on-one.

The hypothetical this article started with is not the least bit unusual. If judges, experts, and lawyers may more freely probe and engage in a discursive exchange of ideas, then not only are litigants likely to save money and courts to save time, but outcomes might be more just. The current randomness of outcomes too often depends on fake science or elaborate explanations that merely sound scientific but do not benefit families. Making everyone more accountable across disciplines has value to society and families that are vulnerable and deserve the best evidence, not the best legerdemain.[78] Thus, the question is whether to allow for more adversarial gamesmanship or begin to implement processes that still meet constitutional concerns but make available a more transparent system for fact finding by experts, lawyers, judges and, most importantly, families caught in the throes of child custody and child protection litigation.

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78 *See* Teresa S. Renaker, *Evidentiary Legerdemain: Deciding when* DAUBERT *Should Apply to Social Science Evidence*, 84 CAL. L. REV. 1657, 1692 (1996) ("Courts assessing psychological syndrome evidence after Daubert have confused the inquiry by adjusting the test to exclude aspects of the testimony that function as scientific knowledge (but do not meet the requirement of scientific validity), while admitting aspects of the testimony that function as specialized knowledge.").