

## DISCUSSION PAPER FOR LEGAL REFORM

### PROTECTING THE INTEGRITY OF FAMILY LAW LITIGATION: PREVENTING VEXATIOUS COMPLAINTS AGAINST ASSESSORS

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#### Executive Summary

The courts in Canada and the United States have evolved to rely, in part, on assessments by mental health professionals serving as experts to bring some objectivity to the determination of the best interests of the child (Bala, 2004). Custody and access and child protection assessments (parenting capacity assessments) are conducted by psychologists, social workers and psychiatrists with broad child and family experience.<sup>1</sup> Complaints to regulatory bodies by parents against practitioners who conduct custody/access and child protection assessments are frequent and on the rise. Next to complaints relating to sexual misconduct, College complaints against assessors addressing family law disputes occur more frequently than any other type of complaint (CPO Bulletin, 2007; Kirkland & Kirkland, 2001). As a result, those who are willing and able to conduct these assessments are dwindling. This exodus of available and qualified assessors is a significant problem facing family law lawyers and the courts in Ontario, and most importantly, children and their families who are left at risk. Legal costs increase, families endure stressfully long wait-times and children suffer while their parents remain in tense custodial limbo due to excessive delays caused by a dearth in available assessors.

The family court oversees matters relating to family law disputes and ultimate determinations of parenting arrangements believed to be in a child's best interests. We, along with others who support this proposal, maintain that under the provisions of the *Regulated Health Professional Act Procedural Code*,<sup>2</sup> and the *Social Work and Social Service Work Act, 1998* (in the case of the Ontario College of Social Workers and Social Service Workers),<sup>3</sup> Colleges need to have clear legal criteria to apply before they launch any investigation into a complaint filed by a parent against an assessor, and before the assessor has to expend energy, resources and time to respond to such a complaint. This test is essential

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<sup>1</sup>Practitioners who conduct custody/access assessments and child protection assessments are referred to as "assessors" throughout this paper.

<sup>2</sup> Schedule 2 to the *Regulated Health Professionals Act*, S.O. 1991, c.18.

<sup>3</sup> S.O. 1998, c. 31.

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to minimize commonly occurring vexatious complaints which significantly impact on the court's capacity to optimally utilize family assessments and retain the availability of qualified assessors. The family law justice system is seriously undermined every time a vexatious complaint is made by a parent to the College against an assessor without any gatekeeping by the court or Colleges. Equally important, the health discipline complaint process is undermined and loses legitimacy. This is a major social and legal problem that needs to be remedied. Three options for resolution of this problem are provided for consideration.

### **A. Underlying Issue**

Divorce can have many negative<sup>4</sup> consequences, including intense legal disputes over the care and custody of children. Families of divorce face multiple stresses; adjustment can be seriously delayed, if not stymied, by prolonged litigation over child care and control that can drag on for years. The implications for children are both immediate and long term. For example, studies confirm that people raised in divorced families tend to marry less and divorce more (Wallerstein & Lewis, 2005). Parental divorce is also a key variable in predicting referrals of school age children for mental health treatment (Felner, Stolberg & Cowen, 1975). It is estimated that 20-25 percent of children raised in divorced families suffer emotional disturbance as adults as compared to the rate of 10 percent for children raised in intact families (Hetherington & Kelly, 2002).

### **B. Custody and Access and Child Protection Assessments<sup>5</sup>**

Assessments are principally ordered when clinical issues predominate and/or are used by parents and legal counsel to resolve disputes before they actually go to court. It has been estimated that assessors testify in less than 5 percent of cases that are assessed (Austin & Jaffe, 1990). In reality, these assessments represent an important tool for dispute resolution of custody and access conflicts between parents.

In determining the best interests of the child, the courts have benefited from the consultation with skilled, neutral assessors, who are knowledgeable in family law principles, child development, adult assessment and family systems theory.

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<sup>4</sup> Austin, G. W., & Jaffe, P. G. (1990). Follow-up study of parents in custody and access disputes. *Canadian Psychology*, 31, 72-79.

<sup>5</sup> We refer to custody and access assessments throughout this proposal as custody assessments. These may be ordered by the court pursuant to s. 30 of the Children's Law Reform Act, RSO 1990, c. C.12 as amended or; s.54 of the Child and Family Services Act, RSO 1990, c. C.11 as amended. Court ordered assessments may be made on consent of the parties or following a contested motion. Assessments may also be done outside the court process, voluntarily and typically once the parties have obtained independent legal advice, clarifying process and other terms using an assessment retainer contract. However many assessors require a court order before proceeding, even when the assessment is on consent, in the mistaken belief that this will offer the process some protection.

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Many assessors work alone, bringing their professional training guidelines and experience to address the questions posed by the family and the court. Other assessors work in teams or family court clinics that harness the talents and skills of different and multiple mental health professionals to assess complex family problems referred by the court. Assessors quickly learn that the parents referred for custody/access and parenting capacity assessments are not regular patients. They are litigants whose principal aim is to win a legal dispute. Thus, the usual therapeutic paradigm does not apply and the relationship between assessor and parent is specific to the time-limited assessment process. There is no patient-doctor/health professional relationship and no presumed right of complete confidentiality. By way of the order or the consent formalized into a consent agreement, the assessor's report and recommendations become part of the open court record and are accessible to an inquiring public if they so choose. The assessor serves as a consultant to a judge. The assessor is not retained by one parent, but rather by both parents and other parties. Ultimately, the client is actually the court, which oversees the process aimed at determining the best interests of children. In this regard, the court is the ultimate defender of the public good and the assessor is a health or social service professional who agrees to serve as the court's expert.

In the court process, the assessor's findings, expertise and testimony may be vigorously tested through cross-examination before the judge prior to final determination of the issue. In the end, the court's use of the assessor's report and evidence is discretionary.

In other words, any health professional willing to serve in this capacity must be prepared to contend with the rigors of litigation. Lawyers and judges accept the importance of this evidence but they also expect the assessor to ultimately be able to defend his or her findings and recommendations in court. No one knows at the time of appointment if there will be settlement or if the case will proceed to trial. Lawyers for both sides can cross-examine the assessor at trial. Moreover, in some cases the parties will seek second opinions, critiques from other evaluators, and/or assistance from their own privately retained experts in preparing for cross-examination. Hence, the assessor already assumes a willingness to undergo professional scrutiny when appointed, to ensure the reliability that the court might place on the report and the evidence of an assessor. A well prepared, experienced and expert assessor accepts that possible scrutiny. The assessor serves as expert to the court in respect to both parties and their children. It is vital work which has proven its value across North America.

### **C. Complaints to Regulatory Colleges**

There is a serious potential jeopardy that the assessor faces outside the courtroom in the absence of the protection of the court. No amount of skill, training or preparation can prevent or avoid this jeopardy. If it arrives, it feels like

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a professional sucker punch and has no correlation to the skill, experience and savvy of the assessor. This jeopardy arises from disgruntled parents making complaints to the regulatory bodies that govern the health professionals. If a parent has been described in an assessment report in a way that the parent considers unfavourable and wants to discredit or even harass the assessor, that parent is able to exploit the health discipline complaint process; psychologists and psychiatrists, under the *Regulations Health Professions Act 1991*<sup>6</sup> (RHPA) and social workers under different legislation. Such a complaint may be made after the assessment report is prepared and before a trial occurs, or after a trial in which the parent receives an unfavourable result. Rather than (or in addition to) challenging the report in the usual family litigation process (or appealing a court decision), a parent may file a complaint to the assessor's College.

This is a process that is cost-free to the complainant involved litigation, who will be treated the same as any other therapeutic client or patient. These complainants are given full rights to pursue the assessor through the College, without any recognition or protection arising from the fact the assessor was either appointed by the court or consented to by both parties, and open to full scrutiny under that process.

In the case of the College of Psychology of Ontario (CPO), approximately one-third of all annual complaints arise out of custody and access and parenting capacity assessments (CPO Bulletin, 2007). Complaining to a regulatory body is an increasingly common tactic for complainant parents. A survey of 61 state and provincial licensing boards over a 10-year period reported that only 1 percent of complaints resulted in findings of "formal fault" against the assessor (Kirkland & Kirkland, 2001).

Of course, there may be circumstances where assessors might be unprepared and inexperienced and both parents in the dispute file a complaint. It might be, for example, a report unfinished after a lengthy period, an assessor who fails to see all parties or who clearly lacks competence or essential knowledge, or a practitioner assuming a dual role. In most cases, however, these complaints are filed as part of a litigation strategy and/or to transfer the litigation activity to attacking the assessor. Given that personality disorders or characteristics of these disorders occur in about 60% of the high conflict separating or divorcing parents (Johnston & Campbell, 1988), the complainant may have a personality disorder, and this has perhaps been so identified by the assessor.

The Colleges take the position they must investigate all complaints, and treat all complainants equally. Colleges may take the greater part of a year to gather the information, schedule a meeting of the ICRC (Complaints Committee), evaluate the grievance (which has likely blossomed into several letters and responses), and prepare a decision for the member and the complainant. The complaints

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<sup>6</sup> *Supra* note 1.

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exact a serious toll on the assessor who may be functioning as a solo practitioner, carrying the emotional and professional burden alone. There may be appeals, and the process can drag on for years. Major college resources are also consumed by these complaints.

Who finances the cost of an assessor who is the subject of a college complaint? Not the family justice system or the parties to the litigation. It must be financed by the health professional or their insurer. Physicians have access to lawyers through the Canadian Medical Protective Association (CMPA). Most psychologists and social workers have the equivalent in legal services available through group liability insurance, after a deductible is paid. There is no information available as to the percentage of assessors who retain legal counsel to assist them through the complaint investigation. It is generally acknowledged, however, that any complaint can have serious professional and personal consequences, which include loss of reputation, a tarnished record and personal humiliation even if the complaint is not referred for further investigation and the professional is vindicated. Any future dealings with the College will lead to repeat airing of past complaints to the complaint panels, even if the earlier complaints were never referred to discipline for adjudication. As a result, many assessors retain counsel, often at their own expense, to provide representation and assistance during the complaint process.

Many assessors refuse to act as assessors after they have been subjected to the demeaning and expensive process of dealing with vexatious complaints. The most concerning reality is that the family justice system has to contend with a depleted pool of qualified assessors willing to do this important and valued work.

Professional license in our society is a privilege that is accorded to a specific group in return for regulation in the public interest under defined ethical and professional responsibilities. The Colleges have the clear mandate to protect the public from their members who may be unscrupulous, incompetent, unethical or irresponsible in carrying out their functions. In this dragnet of regulation, the fact that the complaint pertains to a health professional who conducted assessments in a polarized legal context has been treated as irrelevant or extraneous by the Colleges under their legal mandate. The hegemony of regulation does not allow for any differentiation between complaints from members of the public who were provided health or equivalent services as clients or patients, and complaints from parents struggling with their ex-partners over the custody or access of their children.

Furthermore, the current College procedure forces the assessor to respond to the complainant, even though this may have a direct impact on an ongoing legal custody process. The complainant may benefit from having such a response from the assessor, to which the other parent has no concurrent access. If one disgruntled parent makes a complaint to the College, the other parent has no standing in the complaint process. If the custody or access issue is still before

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the family courts when the complaint is received, the College proceeding can interfere with the court's ability to determine the disputed issues and/or another assessor must be involved.<sup>7</sup>

There is a contradiction between the court and regulatory body where both attest to represent the public good. The assessor is caught between discordant worlds. The family court may be fully satisfied with the contribution of the assessor while the College is looking for possible misconduct at the behest of a complainant. It is a formula for dysfunction and distorts the important role intended to be played by health discipline regulatory bodies.

When a disgruntled parent commences civil litigation against a custody assessor, the Superior Courts in both Alberta and Ontario have extended immunity against civil liability to the custody assessor. Recognizing the special status of the assessor as an expert witness in the family law custody proceedings, judges have granted protection to assessors from civil liability, including on a summary/preliminary motion. That judicial recognition of special status in custody disputes and judicial protection against abuse of process by disgruntled parents, have not been similarly adopted by the Colleges in the complaint process.<sup>8</sup>

No wonder qualified health professionals are increasingly reluctant to do this very important work, highly valued by the courts and family lawyers. They are pushed out of the field by complainants and zealous regulators who believe they must demonstrate that they are carefully scrutinizing the work of assessors under their broad powers as "protectors of the public." From the assessor's perspective, the professional, financial and personal costs are simply too great. Consequently, fewer qualified assessors are available, the delay to find an assessor is lengthened and the costs increase, including the resulting human cost to the children, parents and other family members of the continuing dispute.

When a regulatory College ignores the context in which these complaints arise, this has impact on the administration of family justice, and ultimately on the welfare of children. Assessments are complex and multidimensional; they arise in a particular context and serve a specific legal function. What the Colleges or the RHPA ignore and what is essential, in our view, is an understanding that the court itself is the foremost legal forum in which the public's welfare is being served in custody disputes. In this regard, the family court process already provides very significant scrutiny and oversight. The court can disqualify an assessor, and the lawyers or parties themselves can assess the work and cross-examine to require the assessor to defend his or her evidence and

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<sup>7</sup> *MacIntosh v. MacIntosh* (21 November 2007), Ottawa 54979/97A (Ont. Sup. Ct.).

<sup>8</sup> See *Boychyn v. Abbey*, 2001 CarswellOnt 4112, (30 July 2001), Barrie 00-B1672 (Ont. Sup. Ct.); and *Smith (Next Friend of) v. Kneier* (2001), 288 A.R. 144, 2001 ABQB 291 (Alta. Q.B.).

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recommendations if the need arises. Absent a consensus of both parties that the assessor was unprofessional or incompetent (for example due to delay or other incompetence), or a complaint from the judge or court, the College should not be involved in complaints brought by family law litigants. The College system does not have any of the legal checks and balances or accountability that the complainant faces in the family court system.

### **D. Possible Legal Reforms**

We believe that there needs to be recognition in the legislation that complaints against assessors about custody/access and child protection assessments

should be handled differently than complaints arising out of direct therapeutic or other services provided by a health professional to a patient.

Other jurisdictions in North America have recognized the seriousness of this problem through statutory change. Colorado appears to be the only state or province where such complaints against mental health professionals in court ordered assessments are actually prohibited from being the subject of discipline. *The Colorado Mental Health Practice Act* (1998) states:

*“The provisions of this article shall not apply to mental health professionals acting within the scope of a court appointment to undertake custodial evaluations in domestic relations cases in the courts of this state or to mental health professionals acting within the scope of a court appointment to undertake domestic and child abuse evaluations for purposes of legal proceedings in the courts of this state (2-43-222, section 7).”*

This approach is clearly intended to promote the concerns of the family justice system. However, we believe that the Colorado model does not strike the right balance between the needs for protection of all concerned.

We have identified three possible remedies, and perhaps some combination thereof, for consideration with the hope of protecting children and families and stemming the exodus of health professionals from performing family court assessments. These possible remedies are as follows:

#### **1. Written Consent of Custodial Parent(s) to the College**

Ontario could change the RHPA and the *Social Work and Social Service Work Act, 1998* to require the signed consent of both parents as a precondition to the College proceeding with a complaint. Ontario could adopt the model of the California Board of Psychology which states:

*“Complaints concerning **child custody issues** against a psychologist must include, not only a release/consent signed by the complaining party,*

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*but a release/consent for each child involved signed by the adult with legal custody."*

If the complainant is the parent who does not have legal custody, the College must obtain the prior written consent of the custodial parent as well to proceed with a complaint. In the case where both parents share legal custody or where custody has yet to be determined, the complaint would still need to be supported by both parents as there is a presumption of shared care and control. This model recognizes that the complainant is usually the parent who is dissatisfied with the current custody and access arrangement, or is unhappy with changes to custody and access flowing from the assessment. This approach should also address the fact that in the present complaint system, the non-complainant parent never receives communications from the College, may not be made aware of the complaint, has no standing with the College, and has no right to prohibit the personal health information of the child/children from being given to the complainant through the complaint system. Furthermore, if the custody order of the court is under appeal, the non-complainant parent should be able to prevent this collateral attack and/or to seek a role in the process.

### **2. Gatekeeping Test and Right of Appeal**

In the case of child custody or access and child protection matters, the College should be required to assess the complaint against a clear legal test defining what is vexatious, frivolous or an abuse of the family court process. Perhaps there should be a presumption of abuse of process when a complainant files a complaint against an assessor. Sometimes these complaints arise during the assessment process, before the trial is even conducted. The onus should be placed on the complainant to prove the complaint is not a litigation tactic or otherwise vexatious. This gatekeeping function should occur prior to investigation of the complaint itself by the ICRC, meaning before the member has been forced to file his/her response.

In the case where the College considers the complaint not to be vexatious then the assessor should have the right of appeal on the preliminary issue of jurisdiction to the Ontario Superior Court of Justice, being a court that also administers the custody laws of the province. Likewise, if the College declines to process the complaint, the complainant should have a right of appeal to the same court. The College should be the respondent on the appeal in either case. The possibility of costs being awarded should be determined in advance.

The advantage of these remedies is to preserve the role of the Colleges in their regulatory function over provisions of health services to the public, while giving the Colleges the necessary legal authority to apply clear tests in custody and access and child protection assessments. It protects the assessor by assuming that vexatious complaints will be identified and not processed by the College, with supervision by the Ontario Superior Court of Justice.

### **3. Judicial Gatekeeping Responsibility**

Arizona is one jurisdiction that has recently recognized that complaints to professional colleges will not be allowed, regardless of the objectivity, balance or accuracy of the assessments. Indeed, as has been outlined above, complaints arise from the litigious, emotion-laden context of court-related assessments occur. The rationale for judicial screening as a remedy is that the custody assessment is essentially an extension of the court process. In this regard, the court has assumed the obligation to protect the integrity of its procedures and to safeguard the mental health professional who has agreed to serve in this exacting role from vexatious complaints which are usually aimed at subverting the legal process.

Arizona's Revised Statute (32-2081) states:

*"The board shall not consider a complaint against a judicially appointed psychologist arising out of a court ordered evaluation, treatment or psychoeducation of a person to present a charge of unprofessional conduct unless the court ordering the evaluation, treatment or psychoeducation has found a substantial basis to refer the complaint for consideration by the board."*

This solution places the gatekeeper function with the family court in respect to the initial determination of whether there is to be any complaint. One major advantage of this approach is that judges are already apprised of both parties and their arguments/positions, as well as the context and likely motivation for making a complaint. The judge is charged with an appreciation of the best interests of the child, whereas a regulatory College has no prior or comprehensive knowledge or special insight into these complex family law matters. It also ensures that complaints that are forwarded to the Colleges are actually worthy of regulatory intervention and are aimed at ensuring protection of professional standards and conduct. A possible disadvantage is that it may be perceived as limiting College jurisdiction with regard to the professional activities of its members.

#### **E. Conclusion**

Having qualified assessors prepare reports for use in the courts plays an important role in resolving family law conflicts, hopefully without a trial. They are essential for minimizing risk and promoting the interests of children in high conflict family disputes. Providing due process with one hand (the court) and allowing unchecked abuse of process with the other hand (unfettered complaints to the regulatory body) is poor social policy. It exacts a huge individual and societal cost.

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Qualified assessors are increasingly unwilling to serve as assessors due to the high risk of a College complaint. The family courts have come a long way from the rip and tear litigation of the past. Custody/access and child protection assessments expose the strengths and weaknesses of the family system, the specific needs and adjustment of the children, and propose a model for parenting arrangements (custody and access) aimed to promote healthy long-term adjustment and well-being. Assessments provide an objectivity that is otherwise missing when the litigation process occurs between parents or other parties trying to win in court. If qualified assessors are not available, children are likely to suffer.

In the end, we all aim to serve and protect the public: assessors, judges, lawyers and the Colleges. Our attempted solutions often become the problem. We need to find a way to prevent working at cross-purposes, to identify and stop the vexatious complaints, and to ensure that children and their families are the true beneficiaries of our combined talents and expertise.

### **F. Your Assistance is Needed**

We need to confirm the existence of the problem and its impact. We would also like you to consider the possible solutions listed above or to propose others. We need the stakeholders to participate. To provide your feedback, including to confirm/question the existence of the problem and your reasoned assessment of the possible range of solutions, please email your name, occupation/profession and comments to the following email address designated for this purpose: [custodyassessorreform@sgmlaw.com](mailto:custodyassessorreform@sgmlaw.com) as soon as possible. Your name and all the information that you provide will be stored, collected and used by members of the committee (authors of this discussion paper) to facilitate possible legal reform as contemplated in the discussion paper. You may be contacted in the future by the committee via the email address information that you provide. This committee may use and disclose comments provided by email without disclosing the author. However, if we would like to identify you to the Colleges and/or Ministers of the Provincial Government, you will be contacted to obtain your permission to disclose that you are the author. Please do not communicate any personal health information nor identity of complainants to this committee, unless you have prior written consent to do so.

Thank you for your assistance.

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