

USING CROSS EXAMINATION TO CHALLENGE CHILD CUSTODY EXPERTS: A
STEP ALONG THE WAY OF CREATING A MORE PRODUCTIVE USE OF
PSYCHOLOGISTS IN RESOLVING CHILD CUSTODY DISPUTES.

by

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Forensic Psychologists & Attorneys: Where Muddled Thinking Reigns Supreme

Over the years, I have observed attorneys scratching their heads upon leaving depositions of psychologists (1). I have observed attorneys pulling their hair out after reading a child custody evaluation authored by a child custody expert (CCE). Admittedly, these reactions vary as a function of the direction the psychologist's wand is pointing that day relative to the lawyer's case. But strong negative reactions, punctuated by waves of utter confusion, are almost always present in contested child custody cases. The phrase "what is s/he talking about?" is a frequently heard refrain referring to the CCE. Are such reactions irrational? This article takes the position that they are not.

This article discusses ways to think about and deal effectively with CCEs in the family court. It offers alternatives to the attorney falling prey to feelings of exasperation and futility. Limited space allows presentation of only a few alternatives and only a limited technical analysis of the situations that create the need for those alternatives. A full day seminar could be devoted to taking apart standardized tests commonly used in custody evaluations, e.g., the MMPI or the MMCI. Here, the reader will get no more than an appetizer. Within these limitations, ways are presented for exposing the lack of scientific foundations for the work of CCEs. The article discusses ways to build challenges to the credibility of and weight ascribed to CCE recommendations and a discussion of the major obstacles to these efforts emanating from the family court and from the New Jersey Rules of Evidence. Deposition and cross examination questions are used to illustrate the major points. Finally, more constructive modes of functioning are proposed to replace the outmoded CCE model in divorce cases where child custody is an issue.

Preliminary Considerations: How Do CCEs Become Involved and How Are They Appointed.

By way of review, most divorcing families with children eventually settle their issues without a trial, yet the preparation of each divorce case is undertaken as if a trial were inevitable. This mind-set has widespread effects, including the premature and unnecessary introduction of CCEs into the families of divorcing parents. Parents who are unable to agree on custody and/or allocation of parenting time arrive at what I call a "systemic-tolerance-threshold" that is defined by court schedules, the level of patience of the attorneys or the court, and the willingness and ability of the parties to bankroll a drawn out court battle over custody. Once the threshold is exceeded, the parties are directed by the court or the attorneys to be seen by a CCE. How the CCE is appointed has important implications. The worst scenario is for the court to appoint one CCE. The parents are told that this process does not preclude their hiring a private CCE to work exclusively for one side, but most of these parents cannot afford to pay one such expert much less two or three. The court appointment provides unwarranted immunity to the CCE, has the effect of endorsing and insulating the CCE's bad practices described in this paper, and robs the divorce process of the "truth" that can emerge from a contest between two experts facing off. The court appointed CCE working alone simply has too much power to influence the court relative to the objective quality of what s/he has to offer. (2)

The Context: A Typical Child Custody Evaluation

The typical child custody evaluation involves: (1) review of records (health, criminal and academic), (2) interviews with the parents and children in a variety of configurations, and (3) administration of a battery of standardized psychological tests. Some evaluations may include (4) visits to the schools and (5) interviewing of so-called co-lateral sources (e.g., relatives or neighbors). Once the data have been collected, many cases experience a lull in the action. Everyone waits a relatively long time for the CCE to deliver a report even though one of the main reasons the CCE was brought into the case was to quickly help ease the stress in the family, particularly stress experienced by the children. This fact seems to have virtually no effect on the pace of CCEs producing reports. My speculations about the reasons for this are beyond the scope of this paper. However, as a psychologist who has prepared well over one thousand psychological reports, I have never been able to discern why it takes so long to produce these evaluation reports except that these mind-numbing documents are hugely overwritten. It is difficult to justify a \$10,000 or \$15,000 fee for a few report pages. This means that a report, that should be at most ten pages, balloons to upwards of 50 to 80 pages or more. This enlargement process not only supports the inflated charges but wastes time and the participants are forced to cool their heels and dig deeper into their bank accounts.

During the hiatus, the data are evaluated and the expert's opinion is fashioned into the report. Many reports include specific recommendations. The report is submitted to the court and may be shared with the parties and their attorneys with or without restrictions.

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Unfortunately, the CCE report is rarely shared with the parents in draft form, for discussion purposes, prior to submission to the court. Therefore, the parents are almost always surprised by the CCE's recommendations and one or both parents inevitably is left feeling angry and hurt, perhaps even confused. The attorney is then put in the role of helping the client accept the findings and recommendations or to discredit some or all of the report. (3) There are two predominant roles in this scenario: the psychologist as oracle and the attorney as gladiator. Both psychologist and attorney are paid handsomely for playing these roles.

The Audience for this Paper

I believe the audience for this paper will fall at several points on a continuum from 1 to 5: (1) like and endorse CCEs; (2) value CCEs on a "case by case basis"; (3) have little or no use for CCEs, (4) discount all value of CCEs; or (5) believe that CCEs often do damage in the child custody determination process. Readers are invited to place themselves on the continuum now and then after reading this article and then six months from now.

The recent widely publicized case of In the Matter of the Suspension or Revocation of the License of Marsha J. Kleinman, Psy.D.. License No. 35s100231900. to Practice Psychology in the State of New Jersey (4) is illustrative of the last point on the continuum and warrants a brief description at the outset.

On July 13, 2012 Administrative Judge Edith Klinger revoked Kleinman's license as a psychologist in New Jersey for various reasons pertaining to her psychotherapy work within a child in a contested custody matter. (5) Much of the case rested on evidence from audiotapes and videotapes provided by Kleinman. I believe that this case could not have been proved without this evidence of what actually was in the interactions between Kleinman and the child. The important take away is that very negative and damaging professional conduct can occur in forensic child custody activities. I think even the sharpest critics of CCEs are hesitant to accept this premise because it is so dissonant with their past experiences or desire to believe that mental health professionals at least try to do the correct thing (6). In some ways it is easier to believe that the strenuous complaints of a parent in a child custody situation are the product of sour grapes or illustrative of the anger and poor judgment that are documented in the CCE's report. The alternative view is that the parental protest is well founded and based on the misbehavior of the professional due to his/her poor training, lack of experience, bias, laziness and the like. Whether Kleinman is an outlier in the CCE community or the tip of an iceberg remains the subject of speculation until more cases surface. It is unfortunate that New Jersey legislative initiatives that would have required child sex abuse evaluations to be videotaped have stalled. Legislation like this could be a start in the direction of opening up child custody evaluations for systematic documentation and scientific scrutiny. At the current time, all we can do is trust CCEs to accurately report the specific circumstances of their evaluations. This trust flies in the face of everything I know about the vicissitudes of human perception and memory.

I have used this prefatory material in order to create a mind set for the reader to make it more likely that the material presented will be given serious consideration.

Cross-examining and Discrediting the CCE

Attorneys will be aided by adopting certain attitudes and beliefs relative to CCEs that they cross-examine:

1. You will never hit a "home run" against a CCE, so don't even try. In other words, don't spend much time on trying to disqualify the CCE. His/her testimony will be heard.
2. You should approach the deposition and cross-examination with realistic goals. Courts want to believe and trust mental health experts who conduct CCEs (7)
3. The most important achievable goal in a deposition or at trial is to undermine the CCE's credibility in the eyes of the Court.
4. In setting out to achieve #3 you must avoid getting lost in the technical weeds. If you "lose" the Court's interest or attention, you have lost this part of your case.
5. Never permit the examination of the CCE to be personal or sarcastic.
6. Be thoroughly familiar with the rules of evidence, especially NJRE 702 (8)

Effective questioning of CCEs must be based on understanding certain underpinnings. I categorize the first of these as substantive. The "Best Interests of the Child" (BIC) is the keystone of all child custody evaluations. This is a "construct" meaning that it is not real such as height or weight but symbolic like loyalty or honesty. BIC cannot be measured directly. In order to measure BIC, the construct must be defined. Unfortunately BIC is not defined even though courts, attorneys and CCEs toss around the term as if everyone is on the same page with this construct. This is misguided.

The practice of using any mental health expert to assist the Court in resolving disputes over child custody is fatally flawed for one basic reason. The keystone constructs of "Parenting", as in "good parenting" or "better parenting", and "best interests of the child" have never been adequately defined or subjected to thoroughgoing empirical analyses. In addition, there is no evidence in the literature that I can find where more sophisticated constructs such as "goodness of fit" ala Chess & Thomas, 1999 (9) between parent and child have been defined and measured. All of the players in the child custody dispute drama act as if these constructs have been defined and measured or that doing so is not essential to the proper resolution of the child custody dispute. Both assertions are categorically false. In fact, all of the other problems with child custody evaluations flow from this state of affairs. This is not to say that psychologists lack common sense. Hence, when the psychologist uses common sense, some of his or her recommendations will add up for the attorney, Court or parent. However, common sense is a necessary but not sufficient condition for being an expert. Experts have to have common sense plus. Today's CCEs fall short on the "plus" part. I would label cross examination based on theorists and researchers "substantive" or "definitional" issues whereas the next section deals with what I would term "technical" or "psychometric" issues.

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Substantive Issues: Defining the Best Interests of the Child

The seminal work in this area was published in 1973 by Goldstein, (Anna) Freud & Solnit (10) and is described in the book entitled Beyond the Best Interests of the Child (BIC). Over the next 23 years these authors published three more books on the same topic, culminating in 1996 with The Best Interests of the Child: The Least Detrimental Alternative (11). This major contribution of the early work of these authors book was not developing a concise or novel way to define BIC. Rather, the major contribution was to argue that the child's interest should trump the interests of the adults in the family or related social group. The last book (11) in the series strikes a somber tone and reflects sharply reduced expectations for the children of divorce. Hence, the title words "Best Interests of the Child" are counterbalanced by the gloomy phrase "Least Detrimental Alternative". As argued elsewhere in this article, the authors note the lack of consensus on the meaning of BIC and how mental health professionals and the courts fail to recognize the very real limits of their professional knowledge in this area.

I have found that many matrimonial attorneys and courts have not read any of these basic BIC books or even heard of any of them. Sadly, I have found that many CCEs have not read these books. This is inexcusable, not because the ideas set forth are novel today but because even forty years ago, these authors captured, wrote down and discussed all of the major issues of today in the child custody arena. These texts are as fresh as if they were written last year. (12)

Anna Freud hit the nail on the head when she wrote that the BIC is a product of psychodynamic theory about children and good judgment (what I call "common sense"). She stressed the lack of consensus on the nature and definition of BIC (13). The present day limits of Freud et al.'s contributions stem from their reliance on psychodynamic theory. You will rarely if ever come across a CCE that genuinely and exclusively uses psychodynamic theory (other than a vagrant psychodynamic term thrown in here or there). Hence the only element remaining from Freud's contribution is good judgment and common sense. Freud argued that the most important element in a child's best interests was continuity of care. This makes common sense but never rose above the level of speculation.

CCEs cannot even agree among themselves about what variables are important in custody evaluations. For example, in a recent survey of Canadian psychologists who routinely perform child custody evaluations, out of 60 variables, the level of conflict between parents was rated 25th in importance, while parental pressure on a child to choose one parent rather than the other was rated 44th in importance. At the current time, accurate assessment of variables pertinent to child custody evaluations is not possible. The material presented in child custody evaluations is no more than guesswork on the part of the psychologist (14). The belief that there is a scientific approach to child custody evaluation is a myth but, like many myths, there are many professionals, not only psychologists, who ardently reject this notion. The expert will act as if s/he can assess critical variables and can make empirically based

recommendations even though this is not true. They will do this due to professional pride, wanting to make money, have feelings of power and compassion, and so on.

Technical Issues: Psychometrics

In terms of technical issues, it is well to remember that the attorney does not have to become a psychologist in order to discredit child custody recommendations. However, s/he must master a few basic psychological ideas including one item of technical information. This material is a subset of psychometrics or psychological measurement. There are two reasons for this recommendation. One, psychometric material is simple to understand and use. Two, many psychologists are no more than dimly aware of psychometrics as they apply to child custody evaluations. This is a fertile area for cross examination. (15)

Under the psychometric heading, there are two basic concepts. Point one is reliability. In the mental health literature, reliability means consistency. It does not mean accuracy. Imagine getting on a scale 10 times within ten minutes and the scale showing ten significantly different weights. If you were a psychologist, you would conclude that the scale is generating unreliable or inconsistent data. The scale is not unreliable but the data it generates are unreliable. If the scale shows the same weight ten times, it is reliable over the ten minute period. Point two is validity. In the mental health literature, validity means accuracy, that is, the extent to which the test data measure what they are purported to measure. This time imagine two scales, one is an unbiased balance beam with a counterweight of 145 pounds on one side and you on the other. When you step on it, the scale is in equipoise so we know that you weigh 145 pounds. Now you immediately get on the conventional scale and it shows that you weigh 160 pounds. You get on and off the conventional scale ten times and each time it reads 160 pounds. The conventional scale data are reliable (consistent) but are not valid (accurate) measures of your weight. Every test and every procedure used by the CCE should generate data possessing acceptable levels of reliability and validity. So if test A measures "good parenting" or "the best interests of the child", then data from A, generated by the test should be the same or similar from one time to the next and should accurately measure what they are supposed to measure. The later quality is very elusive because the key elements of a child custody evaluation have never been defined. However, let's say for example, part of "good parenting" is giving verbal as opposed to non-verbal instructions to children. If we identify a group of parents who give a lot of verbal instruction and if we give test A to them, the data from test A should strongly suggest the tendency to give verbal instructions. If, in addition to giving verbal instructions, there were 24 other known qualities of "good parenting", we would want our test to be highly associated with these characteristics. Sadly, there is no defined set of qualities and therefore there is no such test.

In addition to the foregoing factors, the attorney should be familiar with the following; (1) the reliability of test data decreases over time. The longer the time between when you measure and what you commenting on, the less the reliability. This is why fresh data are preferable to stale data. (2) Reliability sets a limit on validity which can be

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expressed in an equation that you don't have to worry about. The upshot is that unreliable data cannot be valid.

Since you may safely assume that the CCE will get to testify, preparation of questions is warranted. Substantive questions are used to discredit the CCE. These would include the following (16):

1. Have you ever heard the word "construct"? If so, do you know what it means?
2. On page x of your report you refer to the BIC, please define what you mean by this?
3. Where did you come up with this definition?
4. Are you aware of any other definitions?
5. Why did you choose this one?
6. Are you familiar with the word "theory?"
7. Please tell me what theory or theories inform the tests you select, the way you combine data, the way you formulate recommendation?
8. Are you 100% certain of the accuracy of your evaluation?
9. If there is some uncertainty, what is it?
10. Have you read The Best Interests of the Child? (Before the Best Interests of the Child, Beyond the Best Interests of the Child, etc). What do you remember from these books?
11. Would you please share how the best interests of the child is defined in those books?
12. Did you rely on any one of the Freud texts to formulate your opinion in this case? Did you rely on any other sources to formulate your opinion in this case? What were they? Please give us a synopsis of (refer to books cited)

Mindful all the while of the looming hazard of "getting into the weeds", the cross examination would move onto tests such as the MMPI or MMCI or Rorschach or the Kinetic Family Drawing technique. How can you take apart the expert's testimony on these test data? Regarding the MMPI, ask

- i. Was that MMPI standardized on parties in the process of divorce?
- ii. Are data from the MMPI reliable?
- iii. Over what time period?
- iv. In what study?
- v. Does the study show that the MMPI is 100% reliable?
- vi. What are implications of lower reliability for your report?
- vii. What is this test supposed to measure?
- viii. Does it measure good parenting or the best interests of the child?
- ix. How does it do this?
- x. How do you know?
- xi. How sure are you?
- xii. Is there room for error?
- xiii. How does your report testimony take account of such errors? (18)

Of course this kind of questioning takes practice. The CCE has plenty wiggle room. The CCE will seek refuge in the argument that s/he blends the test data (and everything else at his or her disposal) into an opinion of the BIC or of good parenting. If you refuse to be taken in by this, you would take a step back and ask, how reliable is the blended opinion and how valid is it? How do you know? Again there are no satisfactory answers to this for the CCE to give. (19)

How to Deconstruct the Recommendations in the CCE's Report

Visualize the recommendation section of a CCE report. Scan, cut and paste this section onto a clean page and separate every sentence into a new section. Think of each sentence as a piece of colored thread. Next try to find the predicate statement: facts, test scores, etc. in the body of the report, in other words, where is the basis for this sentence in the body of the report. You will have trouble doing this because the body of the report and the recommendations are what organizational psychologists refer to as "loosely coupled", i.e. there is little or no connection between recommendations and what precedes them.

As an attorney for two decades and a tenured professor of psychology for nine years, I have concluded that I will never turn the juggernaut of the mental health expert away from the divorce court. I have faced these folks in the court room and outside and have said, "you don't know what you are talking about or you wouldn't know the best interests of the child if it came up and bit you on the behind..." I have embarrassed no one. And no one has dared to refute my arguments. For certain parts of the child custody business, things are going along just fine. No one is about to upset the apple cart by even acknowledging that such questions and issues exist.

I believe that many courts are loathe to make custody decisions by themselves when they can defer to an expert (7, 15, 17). It is extremely rare for a court to reject the expert's input. The court may not believe that the expert has "the answer" but is swayed by its own lack of time and expertise and by the fact that the expert at least spent time with the parties and the children. The expert is the last person who will admit, "I don't know what I'm talking about." For reasons I do not understand, no academic has undertaken to define and measure the important constructs mentioned above. No academic has committed to assess the various parts of a custody evaluation to find out what parts of the evaluation might contribute to useful recommendations. There appears to be little interest in changing these things. The expert remains in the oracle role and the adverse gladiator attorney is like Horatio at the Bridge for his client -victim. The battle ensues and gobs of money, time and emotion are needlessly wasted.

A Promising Solution

I want to eliminate or reduce the perceived need for expert evaluations in child custody disputes and I want to relinquish the need to be a gladiator as a divorce lawyer. For the past year I have been exploring the merits of collaborative and cooperative divorce law. Others have recently discussed these approaches and I won't repeat what they have

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said. What happens in these new forms of legal practice is that the CCE is put in the position of problem solving as a cognitive and behavioral change agent instead of being the oracle of common sense or scientifically unfounded recommendations. Real problems of divorcing parents are presented and real solutions are expected. If these are not forthcoming, it is painfully and quickly evident. There is no hiding behind mind numbing 80 page reports and esoteric standardized tests. If done properly, this role is very challenging work for the CCE so I expect few will come running to embrace it.

End Notes

- (1) In this article I have used the terms “psychologist” and “child custody expert” interchangeably.
- (2) The problem here is the imposition of child custody arrangements based on the biases contained in the CCE’s “truth” or version of reality. I have no issue with parties cooperating to create their own version of what is best for them.
- (3) The famous sociologist Erving Goffman (1952) wrote a paper titled, On Cooling the Mark Out: Some Aspects of Adaptation to Failure. Journal of Interpersonal Relations, 15 (4), 456-463. That is a fascinating analysis of the urban scam known as, Three Card Monte. One role in this scam involves "cooling the mark" that entails an ostensible by-stander (shill) talking to the mark who has just lost all of his money and convincing him that the game was fair and above board. In my view, the parallel is this: one of the main tasks of the CCE is to defuse any anger on the part of the parent and to legitimize our entire approach of making child custody decisions to society in general. At the same time, the CCE is protected from expressions of party anger by various forms of judicial immunity from suit. The parties are effectively sealed in an unhealthy environment.
- (4) Kleinman was reportedly the child's play therapist but the issues in the case greatly overlap those that arise in a typical child custody evaluation conducted by a CCE.
- (5) The ALJ decision was sent to the Board of Psychological Examiners that will accept, modify or reject this decision after a hearing in October 2012.
- (6) A well-known psychologist, Paul Meehl, known for his dedication to the scientific method described what he called the "My aunt Mary" phenomenon to the effect that a plausible premise that is strongly supported by empirical data is rejected by an audience member who cites a singular contrary event or several such events as proof against the premise. This type of reaction can be expected here. There will be attorneys who sing the anecdotally-based praises of CCEs but without consideration of the questions raised in this article. (see P.E. Meehl (1986) Clinical versus Statistical Prediction: A theoretical Analysis and Review of the Evidence. Northvale, NJ: Jason Aronson (originally published in 1954).
- (7) Barbrack, C.R. (2010). Parent Coordinators in the Family Court: Another Questionable Venture. Paper based upon testimony before the New Jersey Supreme Court,
- (8) NJRE 702 opens a wide door to allow entry of the CCE’s testimony and is the greatest obstacle to discrediting the CCE and is the main reason CCE testimony is

almost never barred. The attorney must accept that s/he is fighting an uphill battle against the CCE but even small victories can be important victories.

(9) Chess, S. & A. Thomas (1999). Goodness of Fit: Applications from Infancy Through Adult Life. Levittown, Pa.: Brunner Mazel

(10) Goldstein, J., Freud, A. & Solnit, A.J.(1973). BeyondThe Best Interests of the Child. New York: Free Press.

(11) Goldstein, J., Solnit, A.J. Goldstein, S. & Freud, A. (posthumously) (1996). The Best Interests of the Child: The Least Detrimental Alternative. New York: Free Press.

(12) If pressed for time, the reader should read the Least Detrimental Alternative text since it summarizes all of the earlier work. Practice pointers in this area are: first read the Least Detrimental Alternative book and second, prepare deposition questions that address the CCE's familiarity with this basic text and with psychoanalytic theory and terminology.

(13)The LDA text begins with bleakly accurate language:

When the state intervenes in family life, it does so in the name of the “best interest of the child”. And this phrase has been embraced by mental health professionals, child advocates, government officials, and scholars. But there is little consensus, in law or science, about what “best interests” means. In the absence of a clarifying definition, personal preferences of lawyers, judges and social workers may govern decision-making. And when two adults compete for a child’s custody, ‘best interests of the child’ can easily be subverted by being equated with the “best interests of the ‘more deserving’ adult” (p. xiii).

(14) Expert witnesses are not permitted to testify on matters that involve no more than common sense or common knowledge. A practice pointer would be to file a motion in limine to bar the admission of any expert testimony on BIC. The motion would raise the fatal flaws of the best interests standard. But even if the argument is superbly crafted and eloquently delivered, it is likely to lose. However, even in losing, his tactic might serve to chip away at the expert's overall credibility. The motion in limine represents an all-out attack on the expert that can cause the expert to be more circumspect in his testimony. This has to be argued assertively. At this juncture of the case, there is no place here for ambivalence on the part of the attorney.

(15) Jameson, B.J, Ehrenberg, M.F., & Hunter, M.A. (1997)Psychologists Rating of the Best Interests of the Child Custody & Access Criterion: A Family Systems Assessment Model. *Professional Psychology: Research & Practice*, 28 (3), 253-262.

(16) Another practice pointer is to prepare questions that thoroughly explore the CCE's training in and knowledge of psychodynamic theory.

(17) Barbrack, C.R. (1991). Beyond the Guessed Interests of the Child. Newsletter of the Carrier Foundation, Belle Mead, New Jersey.

(18) This form of questioning is designed to reveal the CCE’s lack of fundamental knowledge. Hence the questions are not phrased as one would ordinarily ask a leading question.

(19) This is one of the most important tips I can provide. At points in the cross examination like this one, the CCE will feel backed into a corner and will play his or her

“get out of jail free card”. You will know this when you hear word “clinical” or any of its variants such as “clinically” or “from a clinical perspective”. I interpret this as the curtain going up on the magical part of the story. Like snake oil, the word clinical is designed to cure all testimonial ills and to recoup any ground lost in prior colloquies. Most of us have seen this show. The attorney asks, “well doctor, where in the MMPI manual does it say that this or that subtest measures parenting ability?” CCE: “it doesn’t say that. Attorney: “well doctor how do you come to use the MMPI to come to the conclusion that Ms. Smith should be the PPR?” CCE: “well, it’s not just that test. I take the MMPI results and results from the other tests and form a clinical impression. It is my clinical impression that is the basis for my recommendation.” Here, and everywhere it is used, the word “clinical” opens the door to almost anything the CCE wants to say. “Clinical” is the fudge factor, the wiggle room wedge, the magic number...what you call it does not matter. The word “clinical” means that the CCE does not know what s/he is talking about and has left the solid ground of science or almost-science for some ethereal place in the clouds where words mean things that they don’t mean on earth and where principles of logic and science do not apply. The kindest interpretation of the word “clinical” is that it represents the art of applied psychology. In my experience there are extraordinarily few artists among the ranks of the CCEs who practice in New Jersey. I know a few and none of them practices in the area of child custody evaluation.