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Inequity in Private Child Custody Litigation

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INEQUITY IN PRIVATE CHILD CUSTODY LITIGATION

Dale Margolin Cecka†

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INTRODUCTION

Woody Allen and Mia Farrow were never married. When they separated, Allen sought custody of their children. Because their custody dispute was not a matrimonial matter, it should have been heard in New York Family Court. Family Court hears child abuse and neglect, juvenile delinquency, paternity, and other matters such as Persons in Need of Supervision (i.e. “incorrigible children”¹). New York Family Court is the court of *pro se* clients, the court where people wait all day for their cases to be called, the court where there are no paper towels in the public bathroom. It is the court that most lawyers avoid even if someone can pay them to take their case. But Allen, through his Manhattan attorneys, actually filed his custody petition in Supreme Court.² In New York’s Supreme Court, he would have the opportunity to take depositions and to have a multi-day trial utilizing the rules of evidence. He would also be issued a written opinion, formally written by a judge, instead of one that is typed (or handwritten) on a boilerplate form at the end of the hearing. There would also be paper towels in the public restroom at Supreme Court.

How and why was Allen able to get his case in to Supreme Court, even though jurisdictionally, since it was not a matrimonial matter, it belonged in Family Court? The author is actually unable to find how, exactly, Allen achieved this procedural impossibility, because the file is sealed.³ The trial court’s 33-page opinion,⁴ as

¹ A Person in Need of Supervision (PIN) is defined by the Family Court Act as: “A person less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient[.]” N.Y. FAM. CT. ACT § 712 (McKinney 2014). Citywide in 2001, the most common allegations on PINS petitions were incorrigible behavior. ERIC WEINGARTNER ET AL., VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 8 (2002), http://archive.vera.org/sites/default/files/resources/downloads/159_243.pdf [<https://perma.cc/JWU3-2EWQ>].

² “Supreme Court” is the trial-level court of general jurisdiction in the New York State Unified Court System. It is vested with unlimited civil and criminal jurisdiction. See generally N.Y. CT. R. §§ 202.1-70. In most states, this is known as “Circuit Court.”

³ See Bruce Weber, *Woody Allen Files Child-Custody Lawsuit*, N.Y. TIMES (Aug. 14, 1992), <http://www.nytimes.com/1992/08/14/nyregion/woody-allen-files-child-custody-lawsuit.html> [<https://perma.cc/RT9B-EW2K>] (“Details of the suit, which was filed in State Supreme Court in Manhattan, were not known, because the court ordered the papers sealed.”); see also *Farrow v. Allen*, 608 N.Y.S.2d 57 (App. Div. 1993) (Mem.) (“Motion to seal the records is granted.”). Opinions are available on Westlaw and Lexis, but not court filings. The original trial court opinion from Supreme Court is *Allen v. Farrow*, No. 68738/92 (N.Y. Sup. Ct. June 7, 1993). The appellate opinions are *Allen v. Farrow*, 626 N.Y.S.2d 125 (N.Y. App. Div. 1995); *Allen v. Farrow*, 611 N.Y.S.2d 859 (N.Y. App. Div. 1994).

⁴ *Allen v. Farrow*, No. 68738/92 (N.Y. Sup. Ct. June 7, 1993).

well as the appellate decisions,⁵ mention only that the matter came to Supreme Court as “a special proceeding.”⁶ But the reason he (and his attorneys) wanted to be in Supreme Court instead of Family Court is clear. By all measures, it is a higher status court.

This article explores the history and implications of a two-tiered system for adjudicating matrimonial—as opposed to non-matrimonial—custody matters. As the author uncovered by calling every clerk’s office in every major city in the country, matrimonial matters are under a different jurisdiction or part of court in nine states.⁷ This differential treatment has implications for the outcome of private custody cases. It also reflects a bias in the administration of justice, based on race and socioeconomic class. Perhaps most importantly, it causes the government and other outside parties (such as court appointed guardians *ad litem*) to be more involved in the private lives of poor families and families of color than they are with middle and upper-middle class families.

Part I of the article discusses the demographics of marriage rates, showing that the majority of unmarried parents with custody disputes are poor and/or are people of color. This is in contrast to married parents with custody disputes, who are more likely to be white and middle or upper middle class. Part II starts by exploring the history behind the two-tiered system for adjudicating matrimonial versus non-matrimonial custody matters, and then describes the current lay of the land. Part II also paints a picture of the cul-

⁵ *Allen v. Farrow*, 626 N.Y.S.2d 125 (N.Y. App. Div. 1995); *Allen v. Farrow*, 611 N.Y.S.2d 859 (N.Y. App. Div. 1994).

⁶ “In the underlying special proceeding herein, commenced in August of 1992, petitioner sought to obtain custody of, or procure increased visitation with, the infant children” *Allen v. Farrow*, 626 N.Y.S.2d 125, 126 (N.Y. App. Div. 1995). “In this special proceeding commenced by petitioner to obtain custody of, or increased visitation with, the infant children . . . we are called upon to review the IAS Court’s decision” *Allen v. Farrow*, 611 N.Y.S.2d 859, 860 (N.Y. App. Div. 1994). The author surmises that Allen was able to get the matter into Supreme Court by filing a writ of habeas corpus. See N.Y. DOM. REL. LAW § 70(a) (McKinney 1988). According to subsection (a) of the statute, “Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.” DOM. REL. LAW § 70(a). Prior to state laws regarding child custody and the development of the “domestic relations exception” in federal court, this was also a way to get a matter regarding custody of a child before a federal court. See Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIM. LAW. 1, 3-4 (1993).

⁷ See Appendix, *infra*.

ture of Family Courts throughout the country.⁸ Part III is an overview of the substantive nature of private child custody cases, including the best interest standard and the use of guardians *ad litem*. Part IV takes two states, New York and Virginia, to show how jurisdictional difference manifests itself in practice in private child custody cases. Part V concludes that our country's family law "system" is reflective of bias against poor families and families of color. The jurisdictional differences between matrimonial and non-matrimonial custody cases are not based on the best interests of the child and should be eliminated. All custody matters in every state should be heard by the same level of state court.

I. DEMOGRAPHICS OF MARRIAGE AND PARENTHOOD IN 2016

Marriage is a very different institution, in most respects, than it was less than a century ago. According to recent data from the Centers for Disease Control, 40.2% of all births in 2014 were to unmarried women.⁹ The percentage of non-marital births varies widely among ethnic groups; among black mothers, the non-marital birth rate is 70.9%, in contrast to the non-marital birth rate among whites, which is 29.2%.¹⁰ Among Hispanics it is 52.9%, and Native Americans, 65.7%.¹¹ Parents of color make up the vast majority of non-married parents.¹²

Among African American men, the differences are extreme. Of all male populations, a black father is the least likely to be married to the mother of his children.¹³ There are numerous institutional explanations for this, which are beyond the scope of this article. Black men are six times more likely than white men to be incarcerated,¹⁴ and Black men's underemployment may also de-

⁸ The term "Family Court" is used throughout the article to mean the courts that hear child dependency, delinquency, custody, paternity, Child/Person in Need of Supervision (CHINS/PINS) and other matters. As discussed throughout this article, some of these courts also hear divorce, but many family courts do not have jurisdiction over divorce matters.

⁹ Brady E. Hamilton et al., *Births: Final Data for 2014*, NAT'L VITAL STAT. REP. Dec. 2015, at 1, 2, 7, http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf [<https://perma.cc/XA4P-D5RD>].

¹⁰ *Id.* at 40.

¹¹ *Id.* at 40-41.

¹² *Id.* at 41.

¹³ *Id.* at 7.

¹⁴ THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> [<https://perma.cc/V5ME-Q65C>].

crease their ability and desire to get married.¹⁵

The rate of marriage also varies across socioeconomic groups.¹⁶ It has been steadily declining among the less educated for decades, creating a class divide.¹⁷ A 2011 study by the Pew Research Center found that, although 64% of college-educated Americans were married, fewer than 48% of those with some college or less were married.¹⁸ “In 1960, the report found, the two groups were about equally likely to be married.”¹⁹

In other words, educated, high-income adults are still marrying at high rates, but lower income adults are not. In fact, only women in the top 10% of Americans in earnings saw their marriage rates increase between 1970 and 2011, whereas women in the bottom 65% in earnings saw their marriage rate declining by more than 20 percentage points.²⁰ In the words of economist Justin Wolfers, marriage has become “an indulgence” for the “well off.”²¹

Numerous other studies have shown that, after marriage, both women and men tend to be much better off financially than those who are unmarried.²² The median income for single-mother families is \$25,493, just 31% of the \$81,455 median income for two-parent families.²³ The poverty rate for children in single-parent families is triple the rate for children in two-parent families.²⁴ In 2011, 42% of single parent households experienced at least one “hardship,” such as unpaid rent or mortgage, phone disconnection, utility disconnection, and unmet medical and/or dental

¹⁵ See William Marsiglio & Mark Cohan, *Contextualizing Father Involvement and Paternal Influence: Sociological and Qualitative Themes*, in *FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES* 75, 79-80 (H. Elizabeth Peters et al. eds., 2000).

¹⁶ Andrew L. Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. TIMES: FIELD NOTES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/08/fashion/weddings/falling-marriage-rates-reveal-economic-fault-lines.html> [<https://perma.cc/E63C-P2N6>].

¹⁷ *Id.*

¹⁸ *Id.* (citing D'VERA COHN ET AL., PEW RESEARCH CTR., *BARELY HALF OF U.S. ADULTS ARE MARRIED — A RECORD LOW* 8 (2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf> [<https://perma.cc/F4LF-PTZ5>]).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Claire Cain Miller, *Marriage Rates Keep Falling, as Money Concerns Rise*, N.Y. TIMES: THE UPSHOT (Sept. 24, 2014), <http://www.nytimes.com/2014/09/24/upshot/for-the-young-money-is-increasingly-trumping-marriage.html> [<https://perma.cc/A6EU-39A5>].

²² Yarrow, *supra* note 16.

²³ LEGAL MOMENTUM, *SINGLE PARENTHOOD IN THE UNITED STATES - A SNAPSHOT* (2014 EDITION) 2 (2014), <https://www.legalmomentum.org/sites/default/files/reports/SingleParentSnapshot2014.pdf> [<https://perma.cc/B25U-BFUR>].

²⁴ *Id.*

needs.²⁵

All told, approximately 60% of children in this country living in single-mother homes are impoverished.²⁶ The Department of Children and Families further estimates that, as of 2013, at least one-third of all American children live without their biological fathers present in the home, up from 22% in 1997.²⁷ Moreover, the federal government reports that the many of the one million parents it serves through its Access and Visitation program are both low-income and unmarried.²⁸

Single parenthood is clearly on the rise, but only for those on the bottom of the economic ladder. When single parents cannot settle custodial matters on their own, they seek help from our justice system. They need custody, visitation, and child support orders, but not property settlement and divorce decrees. There are procedural and substantive implications to this difference which we cannot overlook any longer.

II. STRUCTURE AND CULTURE OF FAMILY COURT

A. History

Before the mid-twentieth century, it was very difficult to obtain a divorce in the United States.²⁹ Divorces were only granted if one of the parties was at “fault.”³⁰ Because the grounds were so hard to prove, case law regarding remedies developed slowly, if at all.³¹ The “innocent” spouse would usually just get everything: the children,

²⁵ *Id.*

²⁶ Jacqueline Kirby, *Single-Parent Families in Poverty*, HUM. DEV. & FAM. LIFE BULL., Spring 1995, at 1, 1, <http://www3.uakron.edu/schulze/401/readings/singleparfam.htm> [<https://perma.cc/KN5G-EVBD>].

²⁷ OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUM. SERVS., ACCESS AND VISITATION GRANT PROGRAM: FY 2013 UPDATE 2 (2014), http://www.acf.hhs.gov/sites/default/files/programs/css/fy2013_av_final_0515.pdf [<https://perma.cc/NS2S-66F4>].

²⁸ *Id.* at 1.

²⁹ Jason L. Honigman, *What “No-Fault” Means to Divorce*, 51 MICH. ST. B.J. 16, 16-17 (1972); see generally Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces 2* (Fed. Reserve Bank of San Francisco, Working Paper No. 2007-03, 2007), <http://www.frbsf.org/publications/economics/papers/2007/wp07-03bk.pdf> [<https://perma.cc/GD6K-GHAN>] (noting that many states did not eliminate fault-based divorce until the mid-twentieth century).

³⁰ W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFF., Fall 2009, at 81, 81, http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf [<https://perma.cc/ZT3T-DAU6>] (explaining that Ronald Regan first enacted no-fault divorce in California, and that the other states in the Union followed suit over the next 15 years).

³¹ Honigman, *supra* note 29, at 21-24.

property, and alimony.³² The appellate courts had little need to address issues regarding the placement of children or parenting abilities under this “winner take all” result.³³

No-fault divorces, which emerged in 1970,³⁴ suddenly increased the number of divorces and opened up a Pandora’s box of legal issues.³⁵ The courts were now forced to separate “fault” from child custody, child support, alimony, and property disposition. Moreover, it quickly became clear that the issues of child custody and child support were substantively and procedurally different from dissolution of marriage, in that they required ongoing contact and possible modification, at least until the child reached age 18.³⁶ Principles of *res judicata* and contract law were upended.³⁷

Prior to the first no-fault divorce law, juvenile courts had already been established in all states to handle juvenile delinquency and status offenses.³⁸ In the early twentieth century, some states decided that other children’s issues, such as dependency, would be heard in juvenile courts as well.³⁹ By the 1970s, as divorce prolifer-

³² Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 288 (1998).

³³ *Id.* at 288-89.

³⁴ California’s Family Law Act of 1969—the first such statute—took effect in 1970. See Wilcox, *supra* note 30, at 81 (explaining that California was the first state to allow no-fault divorce).

³⁵ See, e.g., Wilcox, *supra* note 30, at 81-82.

³⁶ In all states custody and child support orders are modifiable until a child is 18. See, e.g., 24A AM. JUR. 2D *Divorce and Separation* § 899 (2016) (“Orders in divorce proceedings as to the custody of minor children are not final in the sense that they are not subject to change, but are, in their nature, interlocutory and subject to modification at any future time during the lives of the parents and the minority of the children . . .”).

³⁷ For example, in all states child custody orders can be modified based on a change in circumstance, up until a child is 18. See, e.g., VA. CODE ANN. § 20-108 (2011). Spousal support matters can also be modified based on new circumstances, e.g., VA. CODE ANN. § 20-109 (2001), and spouses retain the right to seek a new spousal support order even after a final decree of divorce, e.g., VA. CODE ANN. § 20-107.1(D) (2016).

³⁸ See generally Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777 (2002); Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L. & HUMAN. 135 (2003); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997).

³⁹ See, e.g., GREGORY J. HALEMBA ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, OHIO FAMILY COURT FEASIBILITY STUDY: SUMMARY OF MAJOR RECOMMENDATIONS 1 (1997), <http://www.ncjj.org/pdf/OhioFCFeasibilitySummary.pdf> [<https://perma.cc/H5JQ-VR5E>] (footnotes omitted) (“The first evidence of this is in a 1912 enactment of the New Jersey legislature which vested county juvenile courts with jurisdiction to hear and determine all domestic relations disputes. Ohio followed in 1914 with a court consolidation from the domestic relations side when their legislature passed a bill that

ated,⁴⁰ some states subsumed all domestic matters into one court.⁴¹ But other states kept divorce and its multiple issues separate from all of the other child-related causes of action.⁴² In those states, this meant, for example, that juvenile and Family Courts decided custody matters regarding unmarried parents, while the traditional trial courts decided matrimonial custody matters.⁴³

From the beginning, specialized Family Courts were different from other courts because they were so informal.⁴⁴ This is true even though family and juvenile matters are often “quasi-criminal.”⁴⁵ For example, civil “findings” of abuse and neglect against parents can strip a parent of physical and legal custody of a child; an order terminating parental rights is considered the “death sentence” of child welfare.⁴⁶ A child adjudicated a “delinquent” is subject to imprisonment. Progressive-era legal reformer Reginald Herbert Walker Smith reflected on the paradox:

[T]he domestic relations and juvenile courts . . . are rapidly eliminating the traditional forbidding aspects of a criminal trial

created a Division of Domestic Relations in the Hamilton County Court of Common Pleas with jurisdiction over divorce, alimony matters, delinquency, dependency, neglected and crippled children, adults contributing to or tending to cause delinquency or dependency, and failure to provide support. Although it was not labeled family division or family court, the Cincinnati court’s enhanced Domestic Relations Division of the early 20th Century is most commonly credited with achieving the nation’s first family court consolidation.”).

⁴⁰ See generally Wilcox, *supra* note 30, at 81-82 (explaining that divorce became much more common after the termination of fault requirements).

⁴¹ See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 13 (1998).

⁴² *Id.* at 9 (discussing that Pennsylvania does not have a unified family court).

⁴³ *Id.* at 17 (“When the state legislature created the [New York] ‘Family Court’ in 1962, it excluded matrimonial and probate matters, including guardianship of minor children, from that court’s jurisdiction. Matrimonial matters, including divorce, annulment and separation, are handled in Supreme Court, a higher status court than family court, while the family court handles numerous related matters such as child support and custody, visitation and domestic violence, as well as juvenile dependency and delinquency.”).

⁴⁴ See, e.g., Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 544-45 (2007).

⁴⁵ See, e.g., *How is a Juvenile Delinquency Case Different from a Criminal Case?*, SUPERIOR COURT OF CAL. CTY. OF L.A., <http://www.lacourt.org/division/juvenile/JV0056.aspx> [<https://perma.cc/LVE9-AAEC>] (last visited Nov. 13, 2016).

⁴⁶ Stephanie N. Gwillim, Comment, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 344, 344 n.13 (2009). See generally NAT’L DIST. ATT’YS ASS’N & NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, STATUTORY COMPILATION: PHYSICAL CHILD ABUSE PENALTIES (2013), [http://www.ndaa.org/pdf/Physical%20Child%20Abuse%20Penalties%20Compilation%202013%20\(3\).pdf](http://www.ndaa.org/pdf/Physical%20Child%20Abuse%20Penalties%20Compilation%202013%20(3).pdf) [<https://perma.cc/7U25-BYJ8>].

by informality of procedure, by using the summons instead of the arrest, by having the attending officers in plain clothes, and by having the parties sit around a table with the judge instead of standing in cages or behind bars, nevertheless the machinery of the criminal law is more and more being used.⁴⁷

Even as a proponent of specialized juvenile and family courts, Smith could see the conundrum of adjudicating fundamental rights, such as family integrity and liberty, using ambiguous standards of substantive and procedural due process.⁴⁸

B. *Current Structure*

Today each state's Family Courts use their own terms of art and follow their own rules.⁴⁹ There is also wide disparity in how Family Courts are organized and administered.⁵⁰ In many states, even localities have their own practices and lingo.⁵¹ These differences are very unclear from the information that is available to the public.⁵² In fact, the only way the author was able to get the answer to the simple question of whether unmarried parents file custody

⁴⁷ REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 75 (1919).

⁴⁸ The controversy over substantive and procedural due process in child-related matters is beyond the scope of this article, but much has been written on the subject. See, e.g., Jane M. Spinak, *Reforming Family Court: Getting it Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 34-38 (2009).

⁴⁹ See Appendix, *infra*.

⁵⁰ See e.g., HALEMBA ET AL., *supra* note 39, at 3 ("There is wide diversity in the jurisdictional inclusion of family courts, their operations, and the management structure within which they exist.").

⁵¹ For example, in the Richmond, Virginia Juvenile and Domestic Relations (JDR) Courts, all petitions and motions are written on court forms, available online. In contrast, the bordering county of Henrico has an entirely different custody form, which must be obtained in person. In Henrico any motions after the first petition must be filed on Henrico's own "Miscellaneous Motion," also obtained at the courthouse. Unlike JDR Courts in Central and Eastern Virginia, Fairfax County and Prince William JDR in Northern Virginia use "Model Discovery." The examples of varied practices and terminology in Virginia JDR courts are endless.

⁵² For example, the webpage for the Superior Court for Indianapolis, Indiana, says that "[t]he Circuit and Superior Court exercise concurrent jurisdiction over all civil issues[.]" and only notes that the Superior Court Civil Division handles "domestic relations matters." *Circuit and Superior Courts of Marion County: Marion Superior Court*, CITY OF INDIANAPOLIS & MARION CTY., <http://www.indy.gov/eGov/Courts/Superior/Pages/Home.aspx> [<https://perma.cc/4R73-SBFA>] (last visited Nov. 13, 2016). The webpage for the Circuit Court specifies that it hears civil matters only. *Circuit and Superior Courts of Marion County*, CITY OF INDIANAPOLIS & MARION CTY., <http://www.indy.gov/eGov/Courts/Circuit/Pages/home.aspx> [<https://perma.cc/Z45C-KNLZ>] (last visited Nov. 25, 2016). Neither webpage notes a difference between matrimonial or non-matrimonial matters.

petitions in the same courthouse as married parents was by having a research assistant call clerks' offices in every major city in every state of the country.⁵³ The research assistant actually had to call two clerks' offices in most states, one in the "general" trial court and one in the family/juvenile court or division. The results were that in nine states—Alabama, Colorado, Connecticut, Indiana, New Jersey, New York, Ohio, Tennessee, and Virginia—non-matrimonial custody matters are separate from matrimonial matters.⁵⁴ In these nine states, this means that either the non-matrimonial matters are heard in a separate division of the same level of court, or they are heard in a juvenile/family court with an entirely different jurisdictional mandate and court rules.

C. *Common Themes*

Family Courts⁵⁵ are notoriously known as the "stepchildren" of the legal system.⁵⁶ Family Courts share many physical commonalities: they are often in crowded, dilapidated buildings with a pervasive sense of chaos.⁵⁷ They also have normative similarities. Courtrooms are informal; forms, instead of formal pleadings, are used.⁵⁸ There is also widespread use of non-legal professionals (social workers, psychologists) to "evaluate" and inform the court about families and children.⁵⁹ Lastly, civil and criminal issues and consequences are intertwined within Family Courts.⁶⁰ A significant

⁵³ For the results of these efforts, see Appendix, *infra*.

⁵⁴ *Id.*

⁵⁵ Again, in this article, the generic term "Family Court" refers to any court that hears dependency, delinquency, custody, paternity, CHINS/PINS, and other juvenile matters. Some of these "Family Courts" also hear cases involving divorce. But, as will be discussed in Part III *infra*, many "Family Courts" do not have jurisdiction over matrimonial matters.

⁵⁶ Ross, *supra* note 41, at 3. See also Michel Marriott, *Family Court Is Struggling with Caseload, Experts Say*, N.Y. TIMES (Nov. 15, 1987), <http://www.nytimes.com/1987/11/15/nyregion/family-court-is-struggling-with-caseload-experts-say.html> [<https://perma.cc/4JPS-MYZE>].

⁵⁷ *Id.* at 5 ("Family courts in most states conjure up overcrowded facilities lacking the veneer of civility, let alone majesty, whose chaotic site itself speaks volumes to the frequently downtrodden and almost always traumatized families that pass through them.").

⁵⁸ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 972 (2013) ("[T]he use of 'form orders' discourages reason-giving. These orders are primarily forms with check-boxes and fill-in-the-blank spaces. Where space is allowed for explanation and reason-giving, it is very limited.").

⁵⁹ See Hill, *supra* note 44, at 537-38.

⁶⁰ For example, aside from juvenile justice, there are numerous examples of criminal and civil intersection in the domestic relations realm. Family protective orders, which are "civil," are issued every day in family courts, but violations of them often

amount of literature has described these themes.⁶¹

1. Litigants in Family Court

Family Court litigants are generally poor.⁶² People of color make up a disproportionately high number of litigants in Family Court.⁶³ Many of these people are *pro se*.⁶⁴

In a survey conducted by the New York State Unified Court System, 84% of self-represented litigants in Family Court reported being people of color.⁶⁵ Significantly, only seven percent of the *pro se* litigants in the New York survey identified themselves as white, as compared to ninety-two percent that identified as African-Ameri-

result in jail time. See VA. CODE ANN. § 18.2-60.4 (2016). Non-custodial parents are also incarcerated on a daily basis for failure to pay civil child support orders. See *Child Support and Incarceration*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx> [https://perma.cc/VJ5E-UPE3] (last updated Feb. 10, 2016).

⁶¹ See, e.g., Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. POVERTY L. & POL'Y 473, 487 (2015) (footnotes omitted) (“[T]oday there remain many variations among family courts in terms of organization and administration, there nonetheless exists a shared institutional history and culture among family courts. This includes a common origin and philosophy that manifest in three interrelated features: interventionism (e.g., use of social workers and medical and mental health professionals to conduct evaluations of litigants), informalism (e.g., simplification of procedures and forms, and efforts to resolve disputes outside of the litigation process), and intersecting systems, including the enduring interrelationship of criminal and civil procedures in family courts.”).

⁶² In West Virginia in 2001, some estimate that 90-95% of family law litigants fell below the poverty level. Warren R. McGraw, *Family Court System Awarded \$1.3 Million Federal Grant to Help Families*, W. VA. LAW., Oct. 2001, at 8, 8; see also Joy S. Rosenthal, *An Argument for Joint Custody as an Option for all Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 132-33 (2007) (citing OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 3-4 (2005)) (“It is well documented that most people who appear in New York City’s Family Courts are poor people of color. According to the New York State Unified Court System’s Office of the Deputy Chief Administrative Judge for Justice Initiatives (DCAJJI), 84% of self-represented litigants in New York Family and Housing Courts are people of color, and 83% reported a household income of under \$30,000 and 57% reported household income of under \$20,000.”).

⁶³ See Rosenthal, *supra* note 62, at 132 (explaining that a New York City Family Law study found that 84% of self-represented litigants in New York State Unified Courts are people of color).

⁶⁴ *Id.*; see also Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) (footnotes omitted) (“The surge in *pro se* litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managers and in systematic studies.”); Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 121, 121 n.152 (2005) (“The family court has invited the *pro se* litigant. The *pro se* litigant has accepted the invitation in droves.”).

⁶⁵ Rosenthal, *supra* note 62, at 133.

can or Hispanic.⁶⁶ This explains why, according to family court lore,⁶⁷ while visiting a Philadelphia family court, a lawyer from Apartheid-era South Africa asked, “[w]here’s the white juvenile court?”⁶⁸

2. Exploding Dockets

Family Courts are also notorious for being overcrowded, underfunded, and understaffed, by both judges and support staff.⁶⁹ Each year a higher proportion of civil cases across the country involve family problems.⁷⁰ In the last few years, domestic relations cases alone made up between 25% and 30% of all state trial court filings.⁷¹ In 1995, the National Center for State Courts emphasized that domestic relations cases were the “largest and fastest-growing segment of state court civil caseloads.”⁷² In 2013, state trial courts heard approximately 5.2 million cases involving domestic rela-

⁶⁶ *Id.* at 131 n.10.

⁶⁷ This story was related to Martin Guggenheim, renowned family and child welfare scholar, by one of his colleagues, Bob Schwartz. *Id.* at 133-34. Professor Guggenheim repeated this story at CUNY School of Law’s 2003 Symposium. Symposium, *The Rights of Parents With Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 72-73 (2003) (“One cannot address the subject of children in foster care in the United States, and especially in New York City, without staring at a shocking truth of a system that a veritable Martian couldn’t help but recognize to be apartheid.”).

⁶⁸ Rosenthal, *supra* note 62, at 134.

⁶⁹ Ross, *supra* note 41, at 5.

⁷⁰ See Hill, *supra* note 44, at 544 n.64 (“Family Court caseloads are growing faster than caseloads of other courts; caseloads tripled between 1980 and 2000.”).

⁷¹ See, e.g., DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 90 (6th ed. 2013) (“Domestic relations cases account for about 30 percent of case filings. In recent years, the percentage of domestic relations cases has remained relatively unchanged.”); Patricia G. Barnes, *It May Take a Village. . . Or a Specialized Court to Address Family Problems*, A.B.A. J., Dec. 1996, 22, 22 (“Together, juvenile and domestic relations cases comprise more than 30 percent of the civil docket in state courts.”). In terms of aggregate caseload distribution, however, domestic relations cases make up between five and six percent of civil dockets. See ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 7 (2015), http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx [<https://perma.cc/L6AS-G6NS>] [hereinafter LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS]; see also ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 4 (2011), <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf> [<https://perma.cc/QF9B-N8VA>].

⁷² ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 38 (2004). *But see* LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS, *supra* note 71, at 4 (noting that state domestic relations caseloads have declined about 10% since 2004).

tions.⁷³ Judicial appointments lag behind.⁷⁴ Referees (attorneys who are *not* judges) are used to preside over cases across the country.⁷⁵ In other words, “[j]udges in such courts at best merely keep cases moving along[.]”⁷⁶ For example, “[i]n Chicago, each judge hears sixty cases a day.”⁷⁷ The average Brooklyn Family Court case receives “slightly over four minutes before a judge on the first appearance, and a little more than 11 minutes on subsequent appearances[.]”⁷⁸ Across the country, because of lack of staffing and turnover, record keeping is described as “primitive” and disorganized.⁷⁹ “Family courts in most states conjure up overcrowded facilities lacking the veneer of civility”⁸⁰

3. Status and Reputation in the Legal Profession

As discussed above, most litigants in Family Court are *pro se*. If they have representation, it is court-appointed, but very few jurisdictions appoint lawyers for indigent parties on private family matters.⁸¹ Moreover, family law and court appointments are not areas

⁷³ LAFOUNTAIN ET AL., 2013 STATE COURT CASELOADS, *supra* note 71, at 7.

⁷⁴ See Rosenthal, *supra* note 62, at 131 (footnotes omitted) (“Although filings have increased steadily, the number of Family Court judges in New York City (47) has not changed since 1991.”).

⁷⁵ See Hill, *supra* note 44, at 532 (“[In New York Family Court,] practices include officially sanctioned shortcuts like the ever-expanding use of court attorney referees to preside over cases”); *id.* at 532 n.12 (citing Merrill Sobie, Practice Commentaries, N.Y. FAM. CT. ACT § 121 (McKinney 2006)) (“The use of court-attorney referees to address exploding caseloads is not unique to the New York City Family Court. In part because of the legislature’s failure to authorize additional judges, family courts throughout the state have relied on these non-judicial employees.”).

⁷⁶ Ross, *supra* note 41, at 11.

⁷⁷ *Id.*

⁷⁸ John Sullivan, *Chief Judge Announces Plan To Streamline Family Court*, N.Y. TIMES (Feb. 25, 1998), <http://www.nytimes.com/1998/02/25/nyregion/chief-judge-announces-plan-to-streamline-family-court.html> [<https://perma.cc/HTJ8-B2VU>]; For more about the persistent problems of New York City’s Family Courts, see ANNIE E. CASEY FOUND., ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 44-48 (2000), <http://files.eric.ed.gov/fulltext/ED439189.pdf> [<https://perma.cc/4C46-XRKL>].

⁷⁹ Ross, *supra* note 41, at 11.

⁸⁰ *Id.* at 5; see also Hill, *supra* note 44, at 531 (“That the Family Court is ill-equipped to address the needs of the hundreds of thousands of cases handled therein is not news.”).

⁸¹ For example, in Virginia, parties in private civil custody matters are not entitled by statute or in practice to court-appointed lawyers if they are indigent. The only indigent parties who are entitled to court appointed lawyers for civil family matters in Virginia are non-custodial parents who are facing jail time as a result of failure to pay child support, and parents in termination of parental rights proceedings brought by the state. New York City is the only jurisdiction the author is aware of in which, by discretion (not statute), judges appoint counsel for indigent parents in private custody matters. However, in order to receive a court appointment, the party must be at

that elite law graduates pursue.⁸² Family Courts judges usually have limited prior judicial experience—appointment or election to Family Court is often the judge’s first judicial post.⁸³ Family Courts are “viewed as the ‘despised, entry-level “kiddie court”’ from which many judges wish to escape.”⁸⁴ Many lawyers, judges, and legal scholars dismiss cases involving child custody “as having little theoretical legal significance.”⁸⁵ This perception is not helped by the fact that, for various reasons,⁸⁶ the rules of evidence and ethical boundaries are ignored in Family Court.⁸⁷ As one Judge reports: “I try to make my courtroom informal. If I think it will help in reaching a settlement, I invite them to my office rather than staying in the courtroom.”⁸⁸ Scholar and practitioner Leah Hill perfectly summarizes the experience of this author,⁸⁹ and likely countless

or below the federal poverty line. *See* Rosenthal, *supra* note 62, at 137 (footnote omitted) (“Most working people are not entitled to court-appointed assistance. Although some unions offer Legal Assistance Programs, free legal services for custody and visitation cases are virtually non-existent for others. Thus, a large income gap separates people who are eligible for a free, court-appointed attorney, and those who can afford to pay normal attorney’s fees, which, at \$250-\$500 per hour, could add up to \$5,000 or \$10,000 per case.”). *See also generally* NATALIE ANNE KNOWLTON ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 2, 12-15 (2016), http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [<https://perma.cc/XF2R-KFT5>] (“Self-represented litigants in family court largely desire legal assistance, advice, and representation but it is not an option for them due to the cost and having other financial priorities. Attorney services are out of reach, while free and reduced-cost services are not readily available to many who need assistance.”).

⁸² *See generally* David Wilkins et al., *Urban Law School Graduates in Large Firms*, 36 Sw. U. L. REV. 433, 489-92 (2007).

⁸³ David J. Lansner, *Abolish the Family Court*, 40 COLUM. J.L. & SOC. PROBS. 637, 638 (2007) (“The Family Court is generally a place that people want to escape. Judges move from family court to supreme court and federal court, but almost never the other way.”).

⁸⁴ Ross, *supra* note 41, at 5; *see also* Lansner, *supra* note 83, at 637 (“The Family Court was established as an ‘inferior court,’ and it has lived up (or down) to its classification.”).

⁸⁵ Ross, *supra* note 41, at 4.

⁸⁶ Many judges employ techniques that skirt traditional rules of evidence with good intentions, trying to accommodate and understand the needs of *pro se* litigants. But the lack of decorum and procedure also has negative consequences, some of which are discussed below, and some of which are beyond the scope of this article. In any event, the informality of Family Court is striking to any lawyer who practices in other civil and criminal courts.

⁸⁷ *See generally* Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts To Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2706 (2014).

⁸⁸ Martha Delaney & Scott Russell, *Working with Pro Bono Clients*, BENCH & B. MINN., Aug. 2005, at 1, 6, http://www2.mnbar.org/benchandbar/2005/aug05/law_at_lrg.htm [<https://perma.cc/KX9U-76QS>] (quoting Hon. Bruce Peterson).

⁸⁹ The author was a student attorney for Juvenile Rights Practice (JRP) of Legal

other lawyers and social workers who tread the waters of the New York City Family Court System each day:

The New York City Family court is a unique breeding ground for informal practices that perpetuate the appearance of impropriety and undermine litigants' faith in the court. In addition to the frenzied pace and unimaginable caseloads, the casual familiarity that inevitably develops among institutional players and the legacy of closed proceedings, have shaped the court into a world unlike any other.⁹⁰

In many jurisdictions, family matters are heard on a lower "level" of court than other civil matters (for state-by-state jurisdictional differences see Appendix, *infra*). For example, in Virginia, custody and juvenile matters are heard on the same level of court as small claims and traffic tickets.⁹¹ But even in other states, such as New York, where Family Courts are on the same level as other trial courts, they are not given the same respect.⁹² The vivid words of Joy Rosenthal perfectly encapsulate the author's daily experience in the five boroughs of New York City.⁹³

Aid in Manhattan Family Court from 2002-2004, then an attorney for JRP in Bronx Family Court from 2004-2006, and then operated a legal clinic representing children in Queens Family Court from 2006-2008. During these six years, she also appeared frequently in Brooklyn Family Court and on occasion in Staten Island Family Court on Staten Island. The latter was remarkably less crowded and more "white."

⁹⁰ Hill, *supra* note 44, at 532 n.11. "[U]nofficially sanctioned practices like ex parte communications between certain judges and some institutional providers" are characteristic of the informality in Family Court. *Id.* at 532. The Author also experienced these practices on a daily basis in her six years practicing in NYC Family Courts. See generally ANNIE E. CASEY FOUND., *supra* note 78. For additional perspectives, see Andrew White, *A Matter of Judgment: Deciding the Future of Family Court in NYC*, CHILD WELFARE WATCH, Winter 2005-2006, at 1; Alyssa Katz, *Bringing Order to the Court*, CHILD WELFARE WATCH, Winter 2005-2006, at 9, both available at *Child Welfare Watch: A Matter of Judgment*, CTR. FOR N.Y.C. AFFAIRS, <http://www.centrernyc.org/publicationarchives/2014/8/21/child-welfare-watch-a-matter-of-judgement> [<https://perma.cc/VC9Q-2ANS>].

⁹¹ While both Courts are technically "District" courts by name, they are wholly different entities. One is a "General District Court" while the other is a "Juvenile and Domestic Relations District Court." See *Virginia's Court System*, VIRGINIA'S JUD. SYS., <http://www.courts.state.va.us/courts/home.html> [<https://perma.cc/U26K-JNNS>] (last visited Nov. 19, 2016).

⁹² Rosenthal, *supra* note 62, at 130-31 (noting the differences between Supreme Court and Family Court in New York, discussing the discrepancy between the two courts, calling family court the "poor person's court," and noting that Family Court judges hear more cases than supreme court judges).

⁹³ "New York City Family Court calendars are unbelievably congested. Nearly all litigants are told to come to court when the court opens at 9:30 A.M. They are not given specific appointments. It is not unusual for an attorney to appear on ten cases a day divided among different courtrooms on different floors of the courthouse. Nor is it unusual for judges to hear over 80 cases each day (sometimes just for administrative matters, sometimes for actual hearings). With calendars like that, judges must hear

III. DISCRETIONARY NATURE OF CUSTODY MATTERS

Child custody cases between private parties are known to be extraordinarily challenging for judges.⁹⁴ There are a number of reasons for this. Child custody litigants are emotional and acrimonious.⁹⁵ By the time they reach a trial, the parties have usually been battling over the most important issues of their lives for years. It is often said that “there are no winners in family court.”⁹⁶ With a stranger making personal decisions for them, and with hurtful or embarrassing things inevitably aired in court, parties are unlikely to be completely happy. On the judge’s end, there is fundamental distrust of the parties.⁹⁷ Judges do not feel that they can get an accurate depiction of the facts from anyone: “There is an almost knee-jerk reaction by the judges that parents cannot be trusted to provide the court with all the information necessary to reach the best resolution of disputes involving children.”⁹⁸ Just as most lawyers shy away from family law, many judges are adverse to custody

whichever case is ready, meaning having all of the litigants, attorneys and witnesses present and prepared to appear. As a result, litigants often must wait hours for their case to be heard, even if their case is only on the calendar for return of service. . . . [B]oth the Bronx and Manhattan courthouses are dilapidated, filthy and depressing. In the Bronx Family Court, for instance, litigants must often wait in line for hours to get into the building because the buildings’ elevators are routinely broken or being repaired. Often only one elevator is in use to carry roughly 3,000 people a day up to the court, where the courtrooms are on the 6th, 7th and 8th floors. If litigants are not present, their cases cannot be called. As a result, judges must adjourn cases, often for months at a time, delaying justice and litigants’ day in court. This all adds up to give the family courthouses the milieu of a welfare office rather than a representation of justice. Once inside the courtroom, cases are often rushed or adjourned, if they are heard at all. Cases may be adjourned for weeks or even months at a time, and litigants may be told to come back again and again. This is frustrating for those who have to work or have child-care responsibilities because they have to take a whole day off each time they must appear in court, and/or arrange for others to take care of their children. Parents have told me that they have used all of their vacation time for the year waiting in Family Court. One parent told me that she lost her job because of required Family Court appearances.” *Id.* at 135-36 (footnotes omitted).

⁹⁴ “[J]udicial decision-making in these cases is viewed as extremely difficult” Hill, *supra* note 44, at 534; *see also* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 373 (2008) (noting that the “best interest of the child” standard often does not give the judge any guidance for her ruling and therefore the judge’s decision making process is unbridled and subjective).

⁹⁵ Hill, *supra* note 44, at 534.

⁹⁶ *See, e.g., Preparing for A Family Court Hearing*, LAW OFFICES OF LYNDA L. HINKLE, <http://www.lyndahinkle.com/preparing-for-a-family-court-hearing> [<https://perma.cc/Z76Y-QL5R>] (last visited Nov. 26, 2016).

⁹⁷ Lidman & Hollingsworth, *supra* note 32, at 288.

⁹⁸ *Id.*

cases.⁹⁹ Indeed, the difficulty of custody cases was demonstrated in a 2005 Alabama custody ruling that had seven different opinions written by six judges.¹⁰⁰

A. *Best Interest of the Child*

In order to grapple with the exceedingly complicated issues of custody, in the mid-twentieth century states across the country developed “best interest of the child” (BIC) tests and incorporated them into statute.¹⁰¹ Every state now has a BIC statute.¹⁰² These statutes have been the subject of an enormous amount of literature. As described by Lidman and Hollingsworth:

[The best interest standard] was and still is a highly indeterminate test. It is often devoid of significant legislative guidelines and instead invites the court to explore the fullest range of the family’s prior history and philosophy of child-rearing. The courts [become] embroiled in the sifting and winnowing of a multitude of factors and [are] called upon to exercise exceedingly broad discretion on a case-by-case basis. At the same time this wide discretion has nearly exempted the trial court from appellate review. Many authors have argued cogently that the best interest standard should be revised.¹⁰³

Numerous scholars conclude that BIC statutes provide judges with little concrete guidance¹⁰⁴ and force judges to make inherently bi-

⁹⁹ Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 812, 812 n.31 (1984).

¹⁰⁰ *Ex parte G.C., Jr.*, 924 So.2d 651 (Ala. 2005). Justice Parker, in his dissent, noted: “neither the applicable child-custody laws nor the relevant legal precedents appear to be particularly unclear or inconsistent. . . . After considerable reflection, I have concluded that the primary cause of the Court’s varied and often conflicting opinions in this case is disagreement over foundational issues that underlie the more visible custody issues.” *Id.* at 674 (Parker, J., dissenting). His dissent quite competently proceeds to set out those foundations.

¹⁰¹ Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 117, 117 n.19 (2009); *see also* VA. CODE ANN. § 20-124.3 (2012); N.Y. DOM. REL. L. § 70 (McKinney 1988).

¹⁰² McLaughlin, *supra* note 101, at 117, 117 n.19.

¹⁰³ Lidman & Hollingsworth, *supra* note 32, at 289-90 (footnotes omitted).

¹⁰⁴ June Carbone, *Child Custody and the Best Interests of Children—A Review of From Father’s Property To Children’s Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 723 (1995) (book review) (“Even putting aside the possibility of judicial bias, judges lack a basis on which to evaluate the best interests of a particular child in the absence of guiding principles.”). For example, these are the factors Virginia’s statute lists, with no other guidance in how to use or rank them: “1. The age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs; 2. The age and physical and mental condition of each parent; 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child’s life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child; 4.

ased decisions.¹⁰⁵

B. *Unclear and Controversial Role of Guardians ad Litem*

Because of the gravity and difficulty of making custody decisions, in the mid-twentieth century family courts and legislatures developed another “tool”: the guardian *ad litem* (“GAL”).¹⁰⁶ Again, an enormous amount of literature has been written about the ambiguous and highly controversial role of the GAL in private child custody disputes,¹⁰⁷ which is beyond the scope of this article. Suffice it to say that no consensus exists on either the duties of the guardian *ad litem* or the form of advocacy one should use.¹⁰⁸ In

The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members; 5. The role that each parent has played and will play in the future, in the upbringing and care of the child; 6. The propensity of each parent to actively support the child’s contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child; 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child; 8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference; 9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and 10. Such other factors as the court deems necessary and proper to the determination.” VA. CODE ANN. § 20-124.3 (2012). For other critiques of the factor-based BIC approach, see, for example, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615 (2004); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 226-27 (1975).

¹⁰⁵ Kohm, *supra* note 94, at 337 (quoting MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 40 (2005)) (“The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out.”).

¹⁰⁶ See generally Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109-12 (2002) (discussing the history and background of guardians *ad litem*).

¹⁰⁷ See, e.g., *id.*; Lidman & Hollingsworth, *supra* note 32; Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

¹⁰⁸ See, e.g., JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 40-41 (3rd ed. 2007) (“I had expected to find a discrete number of prevailing models on representing children and thought that I might be able to present sets of minority and majority views on how the role had spontaneously evolved in the different states as a result of the sudden requirement of guardians *ad litem* in CAPTA. In the end we could find no trends; not even two states matched in theory and practice.”); Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interests Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381,

some states a guardian *ad litem* is not even an attorney or advocate at all.¹⁰⁹

The guardian *ad litem* has been defined as any and all of the following: a court-appointed investigator who makes recommendations to the court about who should have custody; a lawyer who represents a child; an advocate for the “best interest” of the children; and a facilitator/mediator.¹¹⁰ The GAL is sometimes called the “eyes and ears of the court.”¹¹¹ In some states, GALs are allowed to provide facts and opinions to the court without taking the witness stand or being subject to cross-examination.¹¹² Consequently, everything they are asked to report to the court about their conversations with children and parents is hearsay. GALs serve “a quasi-judicial role . . . cloaked in judicial immunity.”¹¹³

Because of this role, parents’ attorneys advise their clients to be cooperative with GALs, as GALs’ recommendations carry a tremendous amount of weight.¹¹⁴ But many scholars consider it paradoxical that the court appoints a GAL because of the court’s inherent distrust of parents (discussed above),¹¹⁵ yet then the GAL invariably gathers most of her “facts” and forms her opinions based on interviews with parents.¹¹⁶

The GAL essentially serves as an expert witness without any expert qualifications and without having to be a witness. First of all,

386-403 (2011); Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing To Do*, 27 *PACE L. REV.* 869, 876-85 (2007).

¹⁰⁹ See, e.g., CONN. R. SUP. CT. FAM. § 25-62 (2016) (“Unless the judicial authority orders that another person be appointed guardian ad litem, a family relations counselor shall be designated as guardian ad litem. The guardian ad litem is not required to be an attorney.”); OHIO REV. CODE ANN. § 2151.281(H) (LexisNexis 2016) (“If the court appoints a person who is not an attorney admitted to the practice of law in this state to be a guardian ad litem, the court also may appoint an attorney admitted to the practice of law in this state to serve as counsel for the guardian ad litem.”).

¹¹⁰ Lidman & Hollingsworth, *supra* note 32, at 256.

¹¹¹ *Id.* at 257.

¹¹² See, e.g., STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS *Ad Litem* for Children S-1 (VA. JUDICIAL COUNCIL 2003), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf [<https://perma.cc/PFX4-NBL2>].

¹¹³ Lidman & Hollingsworth, *supra* note 32, at 257.

¹¹⁴ *Id.* at 257-58 (“All attorneys will caution their clients to give *guardians ad litem* the utmost cooperation because this person’s recommendation carries much weight with the court.”).

¹¹⁵ See notes 97-98 and accompanying text, *supra*.

¹¹⁶ In the Author’s experience representing hundreds of parents in child custody cases where GALs are appointed, the parents are the primary source of facts and witnesses for the guardian *ad litem*-investigator. Rarely does the guardian *ad litem*-investigator seek out witnesses or information sources other than those identified for them by the parents.

a GAL cannot be qualified as an “expert” because there is no such thing as a lay or attorney “expert” in custody cases.¹¹⁷ And unlike child custody evaluators, who are frequently psychologists,¹¹⁸ GALs are not required to possess any specific credentials.¹¹⁹ There is not even a consensus on the appropriate “training” for GALs.¹²⁰ In most states, the way to get on the “list” for appointments is to attend a continuing education course,¹²¹ agree to accept assignments, and then continue accepting assignments.¹²² GALs become experts by default: “The more often a particular individual performs that role, the more likely that the trial court will rely on him [or her] as if he [or she] were an expert.”¹²³

¹¹⁷ See *Heistand v. Heistand*, 673 N.W.2d 541, 550 (Neb. 2004) (“Qualification cannot occur in guardian ad litem situations because no recognized area of general expertise with regard to ‘custody’ or ‘child placement’ exists.” (quoting Lidman & Hollingsworth, *supra* note 32, at 275)).

¹¹⁸ See Am. Psychological Ass’n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOLOGIST 863, 863 (2010), <https://www.apa.org/pubs/journals/features/child-custody.pdf> [<https://perma.cc/E6W8-HJQ4>] (“Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the ‘psychological best interests’ of the child”); see also Lidman & Hollingsworth, *supra* note 32, at 275, 275 n.95.

¹¹⁹ Ducote, *supra* note 107, at 111, 138 (noting that Guardians have no training requirements and that Guardians are the least trained about domestic violence of any actors in the civil justice system). See also Hollis R. Peterson, Comment, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1083, 1083 n.4 (2006) (“Given the nature and importance of this role, it is disturbing that many guardians ad litem have very little training or education in children and families, receive little compensation for their work, and often are reported to provide substandard representation to their child clients.”).

¹²⁰ Ducote, *supra* note 106, at 111-16 (describing the many states that formed oversight committees to evaluate Guardians and how their recommendations diverged).

¹²¹ For example, in Virginia the only mandatory training is one seven-hour CLE course. See STANDARDS TO GOVERN THE APPOINTMENT OF GUARDIANS *Ad Litem* Pursuant to § 16.1-266, Code of Virginia, § I(B)(1) (VA. JUDICIAL COUNCIL 2015), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_standards_children.pdf [<https://perma.cc/6CW9-U7C2>]. See generally Nat’l Council of Juvenile & Family Court Judges, *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, TECHNICAL ASSISTANCE BULL., Mar. 1998, 1, 70-75, <https://www.ncjrs.gov/pdffiles1/Digitization/194267NCJRS.pdf> [<https://perma.cc/V5LC-XTPS>].

¹²² This is the Author’s experience of “getting on the list” as a court appointed attorney in New York and Virginia, and has been reported to me by my colleagues in many other states.

¹²³ Coffey v. Coffey, 661 N.W.2d 327, 341 (Neb. Ct. App. 2003) (quoting Lidman & Hollingsworth, *supra* note 32, at 276-77).

IV. THE EFFECTS OF THE JURISDICTIONAL DIFFERENCES ON CUSTODY MATTERS

Because of the ambiguous and discretionary nature of child custody law and practice, what *type* of court decides a particular case truly makes a difference. This is not the same as saying it matters which judge you get. And this is not just because Family Courts have a different physical and cultural atmosphere, as described above, from other trial courts. There are statutory and common law differences between Family Courts and other trial courts. Two states, New York and Virginia, exemplify this.

A. *New York*

The contrasting cultures of New York Supreme Court and Family Court¹²⁴ have been described above and in countless articles by scholars and practitioners over the past thirty-plus years.¹²⁵ In fact, it has been almost twenty years since the revered Chief Justices of New York's highest court, the Hon. Judith Kaye and the Hon. Jonathan Lippman, published a scathing report on the state of New York's Family Court system and proposed vast improvements to Family Court, including streamlining all domestic relations matters.¹²⁶ Under Chief Justice Kaye's proposal, matrimonial matters would be heard in the same place as other family matters.¹²⁷ But nothing has happened in those twenty years, despite repeated calls for reform.¹²⁸

¹²⁴ New York's version of "circuit court" in other states is called Supreme Court. It is the trial-level court of general jurisdiction in the New York State Unified Court System. It is vested with unlimited civil and criminal jurisdiction. Despina Hartofilis & Kimberly McAdoo, Reply, *Separate But Not Equal: A Call for the Merger of the New York State Family and Supreme Courts*, 40 COLUM. J.L. & SOC. PROBS. 657, 657 (2007).

¹²⁵ See, e.g., *id.*; Hill, *supra* note 44; Caroline Kearney, *Pedagogy in a Poor People's Court: The First Year of a Child Support Clinic*, 19 N.M. L. REV. 175 (1989).

¹²⁶ Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 145 (1998) ("[We propose] a constitutional amendment that will fundamentally restructure the trial court system in New York and create a Unified Family Division . . ."). This proposal never moved forward.

¹²⁷ *Id.* at 145, 147.

¹²⁸ See, e.g., ANNIE E. CASEY FOUND., *supra* note 78, at 49-51; JULIA VITULLO-MARTIN & BRIAN MAXEY, VERA INST. OF JUSTICE, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES 20-21 (2000), <http://www.vera.org/sites/default/files/resources/downloads/nyfamilycourt.pdf> [<https://perma.cc/866F-M868>]; CTR. FOR COURT INNOVATION, NEW YORK CITY FAMILY COURT: BLUEPRINT FOR CHANGE EXECUTIVE SUMMARY 3 (2002), <http://www.courtinnovation.org/sites/default/files/blueprin1.pdf> [<https://perma.cc/RBZ2-GFQ7>].

1. Different Rules & Procedure

First of all, as discussed in the introduction, the rules of New York Family Court and Supreme Court are different.¹²⁹ This has been clearly stated and upheld by appellate courts.¹³⁰ One major difference between these two courts is the lack of requirement of a preliminary conference in family court.¹³¹ Therefore, non-marital families have fewer opportunities for settlement of their custody issues, increasing the probability that a judge (with the help of other outside parties, discussed further below) will make the ultimate decisions about a family's life.

There are also a number of other procedural differences. There are rarely depositions in New York family court,¹³² meaning all evidence is a surprise. Because there is no pre-trial opportunity to explore the evidence, it is more likely for traumatic and embarrassing things to be disclosed in open court.¹³³ The lack of deposi-

¹²⁹ Compare Uniform Civil Rules for the Supreme Court and the County Court, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.1-71, with Uniform Rules for the Family Court, N.Y. COMP. CODES R. & REGS. tit.22, §§ 205.1-86.

¹³⁰ See Lansner, *supra* note 83, at 642, 642 n.21 (“These due process violations are compounded by the lack of effective appellate review. The appellate courts have made review largely meaningless, often ignoring pervasive violations of the Constitution, New York statutory and decision law, and rules of evidence as harmless error.”). For examples of appellate court case law on the role of law guardians, see Nancy S. Erikson, *The Role of the Law Guardian in a Custody Case Involving Domestic Violence*, 27 FORDHAM URB. L.J. 817, 824-25, nn.32-35 (2000).

¹³¹ See Erikson, *supra* note 130, at 821.

¹³² This assertion is based on the Author's experience. Although discovery is permitted in New York Family Court custody proceedings, because the proceedings are designated special proceedings, discovery must be requested and the movant bears the burden of proving that “the requested discovery was necessary and that providing the requested discovery would not unduly delay [the] proceeding[.]” *Bramble v. N.Y.C. Dep't of Educ.*, 4 N.Y.S.3d 238, 240 (N.Y. App. Div. 2015); *accord In re Dominick R. v. Jean R.*, 2005 WL 1252573, *3 (N.Y. Fam. Ct. Feb. 14, 2005) (“Custody proceedings brought pursuant to the Family Court Act are ‘special proceedings’ rather than ‘actions’ and, as such, are governed by Article 4 of the CPLR. Unlike CPLR 3102(b), which provides for ‘disclosure by stipulation or upon notice without leave of court,’ CPLR 408 specifically provides that ‘leave of court shall be required for disclosure’ in a special proceeding.”).

¹³³ The embarrassment may be compounded by the fact that matters regarding juveniles are open to the public in N.Y. Family Court. See Alan Finder, *Chief Judge in New York Tells Family Courts to Admit Public*, N.Y. TIMES (June 19, 1997), <http://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html> [<https://perma.cc/TGU9-GLMJ>]. But see William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/18/nyregion/at-new-york-family-courts-rule-for-public-access-isnt-heeded.html> [<https://perma.cc/ADP6-D62V>]. Even if these proceedings were not open to the public, there are still judges, caseworkers, and witnesses present to hear family intimacies. See *New York City Family Court Overview*, NYCOURTS.GOV,

tions further decreases the likelihood of settlement for families.¹³⁴ Written opinions are rare in Family Court,¹³⁵ aside from those drafted on forms immediately following a hearing.¹³⁶

2. Use of Child's Attorneys in New York Family Court

Another major difference is the appointment of "child's attorneys" (the rough equivalent of GALs, and previously called "Law Guardians") in New York Family Court, which does not occur in Supreme Court.¹³⁷ Although the Family Court Act does not expressly mandate appointment of child's attorneys in custody cases, judges in New York City assign them to every case.¹³⁸ The author is not personally aware of the practices in Upstate New York;¹³⁹ however, it is safe to assume that the child's attorneys are appointed in custody cases with frequency. This is because child's attorneys are present in almost every other case in New York Family Court¹⁴⁰ and

<https://www.nycourts.gov/courts/nyc/family/overview.shtml> [<https://perma.cc/6BDZ-T6UX>] (last visited Nov. 27, 2016).

¹³⁴ Without discovery or depositions, the parties must resort to trial.

¹³⁵ Kim Susser, *Weighing the Domestic Violence Factor in Custody Cases: Tipping the Scales in Favor of Protecting Victims and Their Children*, 27 *FORDHAM URB. L.J.* 875, 884 (2000).

¹³⁶ E.g., *Family Court Forms*, NYCOURTS.GOV, <http://www.nycourts.gov/forms/familycourt> [<https://perma.cc/FJH7-Q523>] (last updated Jan. 3, 2013).

¹³⁷ N.Y. Family Court Act section 241 states that "minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel." N.Y. FAM. CT. ACT § 241 (McKinney 2010). As a practicing attorney in New York, the Author was called a "law guardian" for many years, but the terminology was changed to "child's attorney" or "attorney for the child" in all statutes by a 2009 bill. Assemb. 7805, 2009 Leg., 232nd Sess. (N.Y. 2010). Prior court opinions and literature used the "law guardian" term, and the transition to the new terminology is still occurring in practice.

¹³⁸ This assertion is based on the Author's experience. The Children's Law Center ("CLC") in Brooklyn is contracted to take on custody cases in New York City. Legal Aid and Lawyers for Children also take some cases.

¹³⁹ The author did take occasional cases in Nassau County Court, and this was the practice there, too.

¹⁴⁰ See *Nolfo v. Nolfo*, 149 Misc.2d 634, 635 (N.Y. Sup. Ct. 1991) ("Historically, law guardians are appointed in Family Court abuse and neglect proceedings where the rights of children in delinquency proceedings (Article 3), supervision proceedings (Article 7) and child protective proceedings (Article 10) are at issue. Proceedings to terminate parental rights under Social Services Law section 384-b, and to place children in protective custody under Family Court Act section 158 and to continue children in placement or commitment under Family Court Act section 249(a) all require the appointment of a law guardian to protect the interests of the subject children."); see also *In re Orlando F.*, 40 N.Y.2d 103, 112 (1976) ("Consequently, although no statute currently so provides, we hold that, in the absence of the most extraordinary of circumstances, at the moment difficult to conceptualize, the Family Court should direct the appointment of a Law Guardian in permanent neglect cases to protect and represent the rights and interests of the child in controversy.").

can quickly be called to a case.¹⁴¹ Child's attorneys' offices are located inside New York Family courthouses.¹⁴²

This stands in stark contrast to Supreme Court, which is not subject to the Family Court Act.¹⁴³ Child's attorneys are also not part of the daily life in Supreme Court. In fact, courts have indicated that child's attorneys are unnecessary in matrimonial actions.¹⁴⁴ As one court concluded, "the appointment of law guardians in matrimonial actions is comparatively rare. Counsel cites but one reported case . . . in which a law guardian was appointed in a divorce action. . . . The court there found a clear danger to the children, which justified the appointment of a law guardian."¹⁴⁵

To be clear, the author is not necessarily opposed to appointing law guardians in private custody matters. This author, a former law guardian,¹⁴⁶ certainly endorses the appointment in child protective matters, using the New York standards of client-directed advocacy.¹⁴⁷ But appointing law guardians in private custody matters is an entirely different substantive issue.¹⁴⁸ In private custody matters, the state has not made any allegations against parents or intervened in family life against the will of the child and/or parents.¹⁴⁹ In private custody matters, the parents retain legal custody and therefore decision-making power over their children. Child preferences regarding parents are analyzed differently and

¹⁴¹ This is again based on the Author's experience. Note that CLC only represents children in custody cases.

¹⁴² This is true in all five boroughs of New York City and also in Westchester County, New York. In other parts of the country, the same is true: in Denver, Colorado, the Colorado Office of the Child's representative is located at 1300 Broadway Street, which is the courthouse in Denver. This is also true in Salt Lake City, Utah (450 State St, Salt Lake City, UT 84114), as well as in Fayetteville, North Carolina (117 Dick Street Fayetteville, NC 281348).

¹⁴³ Robert M. Elardo, *Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts*, 29 *FORDHAM URB. L.J.* 1125, 1125-27 (2002) (noting that the Family Court Act does not apply in supreme court and therefore that the right to counsel in the Family Court Act for indigent parents is unavailable in supreme court).

¹⁴⁴ *Nolfo*, 149 Misc.2d at 635 ("Family Court Act section 249 does not mandate such an appointment in divorce actions in which a custody dispute is but one of the elements in controversy.").

¹⁴⁵ *Id.* at 636.

¹⁴⁶ As noted, the Author was a law guardian in New York State from 2004-2006.

¹⁴⁷ *Rules of the Chief Judge*, N.Y. COMP. CODES R. & REGS. tit.22, § 7.2(d)(2) ("If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.").

¹⁴⁸ See Lidman & Hollingsworth, *supra* note 32, 293-94, 304-06.

¹⁴⁹ *Cf. id.* at 293-94 (describing the state's role in abuse and neglect proceedings).

given different weight than in child protective matters.¹⁵⁰

In any case, no matter what one's position on the use of law guardians in private custody matters, the bottom line is that law guardians are regularly appointed in New York Family Court on custody matters, but not in Supreme Court.¹⁵¹ Why should unmarried parents and their children be treated differently than married ones?

3. Use of Court Ordered Investigations by ACS in Family Court

Another enormous difference between New York Family Court and Supreme Court is the use of court-ordered, non-forensic evaluations,¹⁵² which are done, in the case of New York City, by the state's child protective agency.¹⁵³ The Family Court Act, again, authorizes this.¹⁵⁴ The practice is so common that it is explained to clients and the public on numerous law firm websites.¹⁵⁵ The par-

¹⁵⁰ Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 *LOY. U. CHI. L.J.* 299, 334, 341 n.179 (1998); see also Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1428-29 (1996).

¹⁵¹ See notes 137-145 and accompanying text, *supra*.

¹⁵² Non-forensic evaluations are those not done by a qualified "expert" such as a child custody evaluator. For details on child custody evaluators, see Alan M. Jaffe & Diana Mandeleew, *Essentials of a Forensic Child Custody Evaluation*, L. TRENDS & NEWS (Am. Bar Ass'n, Chicago, Ill.), Spring 2011, http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/2011_spring/forensic_custody_evaluation.html [<https://perma.cc/2WYP-BJRU>].

¹⁵³ Hill, *supra* note 44, at 539.

¹⁵⁴ *Id.* at 539, 539 n.46 (citing N.Y. COMP. CODES R. & REGS. tit.22, § 205.56(a)(1) (2006) ("(a) The probation service or an authorized agency or disinterested person is authorized to, and at the request of the court, shall interview such persons and obtain such data as will aid the court in: (1) determining custody in a proceeding under section 467 or 651 of the Family Court Act[.]")).

¹⁵⁵ See, e.g., *Court Ordered Investigations in NY Family Court Cases*, SPODEK LAW GROUP: LEGAL BLOG (Aug. 5, 2013), <http://www.spodeklawgroup.com/court-ordered-investigations-in-ny-family-court-cases> [<https://perma.cc/YM7D-24JF>] ("In a litigated custody or visitation case, the parties are often subject to forensic investigations. These are mental health investigations of the parties to the litigation and their collateral contacts. In addition to the forensic reports, the parties might also be asked to submit to court ordered investigations ('COI'). These are court ordered investigations of the parties, and their homes [sic] and can be done by the Administration for Children's Services ('ACS'), the Probation Department and other third party agencies that are affiliated with the New York Family Court system."); Law & Mediation Office of Darren M. Shapiro, P.C., *How Are Child Custody Cases Affected by Abuse and Neglect Claims?*, LONG ISLAND FAM. L. & MEDIATION BLOG (May 31, 2014), <http://www.longislandfamilylawandmediation.com/2014/05/31/child-custody-cases-effected-abuse-neglect-claims> [<https://perma.cc/RL77-3N5P>] ("In a child custody or parenting time case, a referee or judge might ask Child Protective Services, for Long Island cases, or Administration for Children Services, for New York City cases to perform what is called a

ties are asked to consent to the investigation and allow the agency to report its findings to the court confidentially.¹⁵⁶ The reports are delivered directly to the judge and made a part of the court file *before* the hearing on the merits of the case.¹⁵⁷

This practice is shockingly “problematic on a number of fronts[,]”¹⁵⁸ particularly to anyone who has worked within the child welfare system and to any parent who has feared getting a visit from CPS. ACS is not a “neutral” investigator; its legal charge is to investigate abuse and neglect and “protect children.”¹⁵⁹ Not only could ACS investigations in private child custody matters lead to unnecessary interventions, which have not come about by proper protocol,¹⁶⁰ but this practice also implies fault¹⁶¹ and demonstrates lack of respect for Family Court litigants’ privacy. This is parallel to the cultural and physical atmosphere of Family Court, described in Section III, which gives Family Court litigants the impression that their family problems are not worthy of respect. Moreover, it is quite striking that, from the author’s experience,¹⁶² New York City Family Court judges are often highly dissatisfied with the investigations and services that ACS provides.¹⁶³ For Family Court judges to turn around and use ACS as a reliable and trustworthy gatherer of “facts” in a private case is ironic and further reinforces the message that Family Court litigants are not worthy of respect.

Court Ordered Investigation. The investigation’s purpose is to determine whether the children involved in a child custody case are being exposed to abuse or neglect. What happens in the case is that a CPS or ACS worker will visit and speak with the children and the parents and make a report back to the court.”).

¹⁵⁶ Hill, *supra* note 44, at 537 (citing *Kessler v. Kessler*, 10 N.Y.2d 445, 456 (1962)).

¹⁵⁷ *Id.* at 539-40.

¹⁵⁸ *Id.* at 540.

¹⁵⁹ See, e.g., N.Y. FAM. CT. ACT § 1011 (McKinney 1970); Hill, *supra* note 44, at 540, 540 nn.52-53; *Mission & Organization*, ADMIN. FOR CHILD. SERV., <https://www1.nyc.gov/site/acs/about/mission-organization.page> [<https://perma.cc/W98D-EQ5S>] (last visited Nov. 13, 2016) (“The Administration for Children’s Services protects and promotes the safety and well-being of New York City’s children, young people, families, and communities by providing excellent child welfare, juvenile justice, and early care and education services.”).

¹⁶⁰ For a discussion of proper child abuse reporting protocol, see generally Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 56-59 (2014).

¹⁶¹ See Hill, *supra* note 44, at 540-41 (“To be sure, this atmosphere of suspicion is not lost on Family Court litigants who understand all too well the power of ACS to disrupt family life.”).

¹⁶² This experience is echoed by Leah Hill. *Id.* at 543 (“As a group, Family Court judges have an inside view of the deficiencies at ACS and many have voiced their frustration with the agency’s sometimes inept handling of cases in Family Court.”).

¹⁶³ *Id.* at 543-44.

In Supreme Court there are no non-forensic evaluations.¹⁶⁴ A Supreme Court judge can order a forensic evaluation, but that is vastly different. A forensic evaluator first has to be qualified as an expert.¹⁶⁵ A forensic expert is also subject to rigorous cross-examination.¹⁶⁶ “This two-tier system begs the question, why do we need non-expert investigations in Family Court?”¹⁶⁷

B. *Virginia*

1. JDR Is Not a Court of Record

In Virginia, there are also statutory and practical differences between custody cases heard in Circuit Court (matrimonial actions) versus in Juvenile and Domestic Relations (“JDR”) Court (non-matrimonial actions). Interestingly, the Virginia Code provides the circuit court and JDR court with concurrent jurisdiction over custody disputes when the parents of the child are separated, but not divorced.¹⁶⁸ This means that unmarried parents must always go to JDR, but married parents have a choice when they also intend to file a divorce. In the author’s experience, if a party has an attorney, that party is almost always advised to file their custody

¹⁶⁴ *Id.* at 546 (“[T]here isn’t a supreme court rule that parallels the Family Court rule governing court-ordered investigations.”).

¹⁶⁵ See Law & Mediation Office of Darren M. Shapiro, P.C., *supra* note 155 (“Forensics is the word used for investigations and reports made by psychological professionals for the court which are then used to aid in deciding how to rule on the dispute.”). See also generally Meredith Kelly et al., *Best Practice Guide: Analyzing the Role of Forensic Evaluators in the New York State Court System*, JUST. ACTION CTR. STUDENT CAPSTONE J., May 2, 2012, 1, 8-10, http://www.nyls.edu/documents/justice-action-center/student_capstone_journal/cap12kellyetal.pdf [<https://perma.cc/NPP2-X4B9>] (“The authorizing court rule for the New York Supreme Court is the Uniform Rules for the New York State Trial Courts (‘Uniform Rules’), Part 202.18 titled, ‘Testimony of Court-Appointed Expert Witness in Matrimonial Action or Proceeding,’ which allows courts to ‘appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation.’”). N.Y. COMP. CODES R. & REGS. tit. 22, § 202.18 (2008). See also N.Y. COMP. CODES R. & REGS. tit. 22, §§ 623.1-.10, 680.1-11 (outlining rules for mental health professional panels that certify expert witnesses in the First and Second Judicial Departments).

¹⁶⁶ Testimony given by experts in matrimonial actions or proceedings is subject to the rules of evidence, which allow for cross-examination. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 690.12 (“The applicant shall be given an opportunity to call and cross-examine witnesses and to challenge, examine and controvert any adverse evidence.”).

¹⁶⁷ Hill, *supra* note 44, at 546.

¹⁶⁸ VA. CODE ANN. § 16.1-244(a) (2003) (“[W]hen a suit for divorce has been filed in a circuit court, . . . the juvenile and domestic relations district courts shall be divested of the right to enter any further decrees or orders to determine custody, guardianship, visitation or support . . . and such matters shall be determined by the circuit court unless both parties agreed to a referral to the juvenile court.”).

petition(s) concurrently with their divorce (when possible) so that they can have their whole case heard in Circuit Court.

Like family courts in New York, JDR courts in Virginia are subject to entirely different rules than Circuit Court.¹⁶⁹ For example, discovery is only permitted in JDR court if a party makes a motion to a judge and shows “good cause.”¹⁷⁰ Even if discovery is granted, JDR prohibits depositions.¹⁷¹ In reality, the author finds that JDR parties rarely utilize *any* of the tools of discovery, besides subpoenas *duces tecum*. Moreover, there are no pre-trial settlement conferences in JDR, unlike in Circuit Court,¹⁷² and surprise witnesses are par for the course. A party is not even required to mail a copy of a witness subpoena to the opposing side.¹⁷³

Most shockingly to the author upon admittance to Virginia, JDR is not a court of record.¹⁷⁴ Whatever happens in JDR can be appealed “*de novo*” to Circuit Court.¹⁷⁵ A second trial subjects JDR litigants to one more layer of litigation and court intervention, and also requires them to prove their case, and air their troubles—twice. The numerous differences between courts of record and Circuit Court in Virginia are beyond the scope of this article. However, it is important to note that *pro se* parties rarely actually “appeal” their cases to Circuit Court because they either do not know it is an appeal of right, or they do not have the time or energy to do so.¹⁷⁶

2. Use of Guardians *ad Litem*

Another major difference is the use of guardians *ad litem*

¹⁶⁹ VA. SUP. CT. R. 8:1-22.

¹⁷⁰ VA. SUP. CT. R. 8:15(c).

¹⁷¹ *Id.* (“In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.”).

¹⁷² See, e.g., *Virginia Beach Divorce Pretrial Order*, CIR. CT. CITY VA. BEACH, <https://www.vbgov.com/government/departments/courts/circuit-court-judges/Documents/Divorce%20Pretrial%20Order.pdf> [<https://perma.cc/G8SR-B95P>] (last visited Nov. 13, 2016).

¹⁷³ In practice, the author always does this, but it is not required. VA. SUP. CT. R. 8:13(e) (“This Rule does not apply to subpoenas for witnesses and subpoenas *duces tecum* issued by attorneys in civil cases as authorized by Virginia Code §§ 8.01-407 and 16.1-265.”).

¹⁷⁴ Statutes governing the Juvenile and Domestic Relations District Courts are under Title 16.1, “Courts Not of Record.”

¹⁷⁵ VA. CODE ANN. § 16.1-296(A) (2009) (“From any final order or judgment of the juvenile court affecting the rights or interests of any person coming within its jurisdiction, an appeal may be taken to the circuit court within 10 days from the entry of a final judgment, order or conviction and shall be heard *de novo*.”).

¹⁷⁶ Based off of author’s experience and interviews.

(“GALs”). In Virginia, guardians *ad litem* are statutorily obligated to investigate for the court and recommend what is in the child’s “best interest” in private custody cases.¹⁷⁷ They are not subject to cross-examination.¹⁷⁸ They may submit written reports prior to the hearing.¹⁷⁹ In fact, appellate courts uphold and sanction the role of GAL as a virtual court employee with *carte-blanche* to investigate,

It is the guardian *ad litem* who retains the ultimate responsibility and accountability to the court in carrying out his or her role in the manner required by the court, as well as the applicable statutory and judicial mandates. . . . [W]e find no error in the court’s order directing [parents] to permit the guardian *ad litem* and a member of his staff to visit their homes on an unannounced or announced basis, for the purposes stated in the court’s order.¹⁸⁰

Guardians *ad litem* are appointed by statute in JDR courts.¹⁸¹ In some JDR courts, GALs are appointed in every custody case.¹⁸² This is as opposed to Circuit Courts, where they are appointed infrequently.¹⁸³ And just as in New York, GALs are usually present in JDR courthouses all day long (in private offices and attorney workrooms) and are immediately available for appointment. GALs do not have such a presence in Circuit courthouses, where the entire range of civil and adult criminal matters are heard each day.

The practice of appointing GALs in what are more likely cases where the litigants are poor is essentially *codified* in Virginia law. Virginia Code section 16.1–266(F) provides that the JDR court may appoint a guardian *ad litem* for the child in contested custody cases,

¹⁷⁷ VA. SUP. CT. R. 8:6.

¹⁷⁸ STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS *Ad Litem* for Children S-1 (VA. JUDICIAL COUNCIL 2003), http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/children/gal_performance_standards_children.pdf [<https://perma.cc/8UYL-ZWRL>].

¹⁷⁹ *Id.* at S-9, S-10.

¹⁸⁰ *Ferguson v. Grubb*, 574 S.E.2d 769, 775 (Va. 2003).

¹⁸¹ VA. CODE ANN. § 16.1-266(F) (2005) (“In all other cases which in the discretion of the court require counsel or a guardian *ad litem*, or both, to represent the child or children or the parent or guardian, discreet and competent attorneys-at-law may be appointed by the court. However, in cases where the custody of a child or children is the subject of controversy or requires determination and each of the parents or other persons claiming a right to custody is represented by counsel, the court shall not appoint counsel or a guardian *ad litem* to represent the interests of the child or children unless the court finds, at any stage in the proceedings in a specific case, that the interests of the child or children are not otherwise adequately represented.”).

¹⁸² This is consistent with the author’s experience, especially in the City of Richmond JDR Court.

¹⁸³ This is consistent with the author’s experience. The author also conducted interviews with family law attorneys in Fairfax, Norfolk, and Clarke Counties (on file with the author), which confirmed this practice.

with the caveat that, *if both sides are represented by counsel*, the court must first make a determination that the interests of the child are “not otherwise adequately represented.”¹⁸⁴ Therefore, if both parties have counsel (in other words, financial means), the court has to determine whether a GAL is necessary *before* appointing one. The judge cannot *automatically* appoint a GAL as she would when both parties are *pro se*.¹⁸⁵

Again, the debate over the appropriateness of the use of GALs in private custody cases is beyond the scope of the article. However, it is well documented that GALs are tasked to, and do, make judgments about families every day.¹⁸⁶ These “subjective opinions on the fitness of a parent” are often questionable, at best.¹⁸⁷ The reality is that subjective opinions about families are utilized much more often in JDR than in Circuit Court in Virginia.

V. CONCLUSION

For various cultural and historical reasons, our country has an extremely varied system for adjudicating matters of the family. As only uncovered by dozens of calls to clerks’ offices, the system is especially confusing regarding the differences between matrimonial and non-matrimonial custody matters.¹⁸⁸ These differences in jurisdiction may not have started out as intentionally biased against poor people of color, but the disparate impact is clear. Given the highly subjective and controversial methods for deciding private custody matters, adding one more layer of potentially biased judgment is unfair to poor families of color. The “best interest” of a child, however loose of a legal standard, is not different if the child’s parents are married or not. All custody matters in every state should be heard at the same level of state court.

¹⁸⁴ VA. CODE ANN. § 16.1-266(F) (2005).

¹⁸⁵ Under Virginia law indigent parties in JDR court are entitled to have counsel appointed only in cases brought by the state. *See* VA. CODE ANN. §§ 16.1-266(D)(2)-(3) (2005). However, there may also be persons who proceed *pro se* because they do not meet the indigence threshold, *see* VA. CODE ANN. § 19.2-159 (2008), but are nonetheless unable to afford private counsel. *See* note 81 and accompanying text, *supra*.

¹⁸⁶ *See, e.g.*, Lidman & Hollingsworth, *supra* note 32.

¹⁸⁷ *See, e.g.*, Jennifer Sumi Kim, *A Father’s Race to Custody: An Argument for Multidimensional Masculinities for Black Men*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 32, 34 (2014) (“The adjectives used to describe [Dad] (‘unassuming,’ ‘mild mannered’) and [Mom] (‘pushy,’ ‘difficult’) are striking and of little relevancy in a custody case.”). This is also the experience of the author with GALs and was recounted in interviews with family law attorneys, on file with the author.

¹⁸⁸ *See* notes 53-54 and accompanying text, *supra*, and Appendix, *infra*.

APPENDIX

State	City contacted	Separate part of court for matrimonial v. non-matrimonial cases?	Notes
Alabama	Birmingham	Yes	The Domestic Relations Division of the Circuit Court hears matrimonial cases. The Family Court Division of the Circuit Court hears non-matrimonial cases.
Alaska	Anchorage	No	The Superior Court hears both matrimonial and non-matrimonial cases. Contested cases are heard by judges, while uncontested cases are heard by magistrates.
Arizona	Phoenix	No	The Family Court Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Arkansas	Little Rock	No	The Domestic Relations Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
California	Los Angeles	No	The Family Law Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Colorado	Denver	Yes	The Domestic Relations Division of the District Court hears matrimonial cases. The Juvenile Division of the District Court hears non-matrimonial cases.
Connecticut	Bridgeport	Yes	The Family Division of the Superior Court hears matrimonial cases. The Family Support Magistrate Court hears non-matrimonial cases.
Delaware	Wilmington	No	The Family Court hears both matrimonial and non-matrimonial cases.
Florida	Jacksonville	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Georgia	Atlanta	No	The Family Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Hawaii	Honolulu	No	The Family Court hears both matrimonial and non-matrimonial cases.
Idaho	Boise	No	The District Court hears both matrimonial and non-matrimonial cases.
Illinois	Chicago	No	The Domestic Relations Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Indiana	Indianapolis	Yes	The Superior Court hears matrimonial cases. The Circuit Court hears non-matrimonial cases.
Iowa	Des Moines	No	The Civil Division of the District Court hears both matrimonial and non-matrimonial cases.

Kansas	Wichita	No	The Family Law Department of the District Court hears both matrimonial and non-matrimonial cases.
Kentucky	Louisville	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Louisiana	New Orleans	No	The Domestic Division of the Civil District Court hears both matrimonial and non-matrimonial cases.
Maine	Portland	No	The Family Division of the District Court hears both matrimonial and non-matrimonial cases.
Maryland	Baltimore	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Massachusetts	Springfield	No	The Probate and Family Court Department of the Trial Court hears both matrimonial and non-matrimonial cases.
Michigan	Grand Rapids	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Minnesota	St. Cloud	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Mississippi	Jackson	No	The Chancery Court hears both matrimonial and non-matrimonial cases.
Missouri	Kansas City	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Montana	Billings	No	The District Court hears both matrimonial and non-matrimonial cases.
Nebraska	Omaha	No	The District Court hears both matrimonial and non-matrimonial cases.
Nevada	Las Vegas	No	The Family Division of the District Court hears both matrimonial and non-matrimonial cases.
New Hampshire	Manchester	No	The Family Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
New Jersey	Newark	Yes	The Dissolution Section of the Family Division of the Superior Court hears matrimonial cases. The Non-Dissolution Section of the Family Division of the Superior Court hears non-matrimonial cases.
New Mexico	Albuquerque	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
New York	New York City	Yes	The Supreme Court hears matrimonial cases. The Family Court hears non-matrimonial cases.
North Carolina	Charlotte	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.

North Dakota	Fargo	No	The District Court hears both matrimonial and non-matrimonial cases.
Ohio	Columbus	Yes	The Domestic Relations Division of the Court of Common Pleas hears matrimonial cases. The Juvenile Division of the Court of Common Pleas hears non-matrimonial cases.
Oklahoma	Oklahoma City	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Oregon	Portland	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Pennsylvania	Philadelphia	No	The Domestic Relations Branch of the Family Division of the Court of Common Pleas hears both matrimonial and non-matrimonial cases.
Rhode Island	Providence	No	The Domestic Relations Division of the Family Court hears both matrimonial and non-matrimonial cases.
South Carolina	Charleston	No	The Family Court hears both matrimonial and non-matrimonial cases.
South Dakota	Sioux Falls	No	The Circuit Court hears both matrimonial and non-matrimonial cases.
Tennessee	Memphis	Yes	Both the Circuit Court and Chancery Court hear matrimonial cases. The Juvenile Court hears non-matrimonial cases.
Texas	Houston	No	The Family Court Division of the District Court hears both matrimonial and non-matrimonial cases.
Utah	Salt Lake City	No	The District Court hears both matrimonial and non-matrimonial cases.
Vermont	Burlington	No	The Family Division of the Superior Court hears both matrimonial and non-matrimonial cases.
Virginia	Virginia Beach	Yes	The Circuit Court hears matrimonial cases. The Juvenile and Domestic Relations District Court hears non-matrimonial cases.
Washington	Seattle	No	The Family Court Division of the Superior Court hears both matrimonial and non-matrimonial cases.
West Virginia	Charleston	No	The Family Court hears both matrimonial and non-matrimonial cases.
Wisconsin	Milwaukee	No	The Family Court Division of the Circuit Court hears both matrimonial and non-matrimonial cases.
Wyoming	Cheyenne	No	The District Court hears both matrimonial and non-matrimonial cases.