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DIVORCE INVESTIGATION REPORTS IN OHIO CHILD CUSTODY DETERMINATIONS

Ohio law formerly required preparation of divorce investigation reports in all child custody proceedings involving children under 14 years of age. In 1971 the mandatory investigation statute was replaced by an Ohio Rule of Civil Procedure that made child custody reports discretionary. After criticizing the officially stated reasons for the change, the author turns to the evidentiary problems created by the Ohio law governing use of extra-judicial reports at trial and concludes that repeal of the mandatory rule was ill-advised. He proposes, therefore, that the courts take full advantage of investigative reports and give them presumptive weight.

I. INTRODUCTION

WHEN DR. JULLIETTE DESPERT published *Children of Divorce* 20 years ago, her attitude toward the inept judicial treatment of custodial determinations was one of regret and resignation.¹ She urged parents both to avoid court-made decisions concerning custody of the children and to seek qualified private opinions as to alternative procedures which could render better judgments on custody questions.² However valid such advice, judicial determination remains

1. J. DESPERT, *CHILDREN OF DIVORCE* (1953) [hereinafter cited as DESPERT].

2. In a divorce proceeding the parties may stipulate by written agreement who is to have custody of the children. The court is not bound by such an agreement, but usually will defer to the parents' wishes. *Bastian v. Bastian*, 13 Ohio Op. 2d 267, 269, 160 N.E.2d 133, 136 (Cuyahoga County Ct. App. 1959). This child custody agreement could be the result of one of the professionally suggested private procedures.

Perhaps the best known proposal of a private method for settling the question of child custody was made by Dr. Lawrence J. Kubie. He advocated that a panel of psychiatrists be chosen jointly by the parents to determine the issue. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964). At least one such arbitration agreement has been judicially honored. *Sheets v. Sheets*, 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1964).

A major problem of the Kubie proposal is its expense. The average parents simply cannot afford the high cost of professional arbitration committees. In addition, some important considerations in child custody decisions, such as speed of adjudication and continuity of the child's environment, would have to be sacrificed since gathering and organizing such a committee would take a long time. See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-52 (1973) [hereinafter cited as *BEYOND THE BEST INTERESTS*]; Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 74 (1969).

the predominant method of resolving custody disputes. Commentators, therefore, have focused their efforts on making suggestions to upgrade the quality of the judicial custody determination by changing the substantive law of custody,³ the procedures in the courtroom,⁴ or even the physical structure of the courtroom.⁵

Despite these proposals to modernize the court custodial decision-making process, the Ohio General Assembly has chosen to take a step backwards by repealing Ohio Revised Code section 3105.08, which provided for mandatory divorce investigation in cases involving children under 14 years of age.⁶ Under the repealed statute the investigation was undertaken at the request of the court or referee

3. One suggestion has been to play down the role of the biological parent and to give the child to its "psychological" parent. Note, *Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests,"* 73 YALE L.J. 1201 (1964). See also note 18 *infra*.

A second suggestion has been to place heavy emphasis on children's need for "continuity." BEYOND THE BEST INTERESTS, *supra* note 2. See also Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFFALO L. REV. 1 (1972); Katz, *Foster Parents versus Agencies: A Case Study in the Judicial Applications of "The Best Interests of the Child,"* 65 MICH. L. REV. 145, 153-70 (1966); Watson, *supra* note 2.

4. A popular suggestion has been to provide the child with his or her own attorney. Inker & Peretta, *A Child's Right to Counsel in Custody Cases*, 5 FAMILY L.Q. 108 (1971). Equally popular has been the suggestion to include sociologists and social scientists in the decisionmaking process. Kubie, *supra* note 2. See also Merder, *The Need for an Expanded Role for the Attorney in Divorce Counseling*, 4 FAMILY L.Q. 280 (1970); Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 609 (1958).

5. The goal of the structural changes has been to create a less formal and adversarial atmosphere. For example, Cuyahoga County has moved the Domestic Relations Bureau and the Domestic Relations Courts into an office building. When a referee handles a case, an ordinary conference room is used with an oblong table around which the parties converse. The courtrooms themselves are small, and when court is in session, the doors are closed to encourage an atmosphere of privacy. For a description of the Toledo Family Court facilities, which have also taken on an informal appearance, see VIRTUE, *FAMILY CASES IN COURT* 183 (1956) [hereinafter cited as VIRTUE].

6. The former § 3105.08 of the Ohio Revised Code (Act of July 25, 1967, 132 Ohio Laws 970 (repealed 1971), formerly Law of May 28, 1951, § 8003-9, 124 Ohio Laws 185, formerly Law of February 14, 1938, 117 Ohio Laws 807) read in part:

On the filing of a petition for divorce, annulment, alimony, or a motion for change of custody of minor children, the court of common pleas may, and in cases in which there are children under fourteen years of age involved shall, cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than five days before trial.

The court, on its own motion, may cite either party to the action from any point in the state to appear in court and testify as a witness.

and consisted of an interview of both parents in their respective homes by an experienced caseworker. The report of the caseworker was made available to the court and both parties. This procedure was replaced by Ohio Rules of Civil Procedure 75(D) and (P) which now make such independent judicial investigations regarding the character, family relations, past conduct, earning ability, and financial worth of the parties to the action wholly discretionary, regardless of the ages of minor children whose custody is at issue.⁷

This Note will examine the official acknowledgement of the need

7. OHIO R. CIV. P. 75:

...
(D) Investigation. On the filing of a complaint for divorce, annulment, or alimony, where minor children are involved, or on the filing of a motion for change of custody of minor children, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than seven days before trial. Such report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

...
(P) Custody and change of custody of children. Upon hearing, the court shall decide which of the parents shall have the care, custody and control of the children, taking into account only that which would be for the best interests of each child. Any child over fourteen years of age may be allowed to choose which parent it prefers to live with, unless the court finds that the parent so selected is unfit to take charge. Prior to hearing, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than seven days before trial. Such report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

Provisions permitting a child to choose the parent with whom it desires to live shall apply also to proceedings for modification of former orders fixing custody.

If the court finds, with respect to any child under eighteen years of age, that neither parent is a suitable person to have custody, it may commit the child to any other relative of the child who shall have care, custody and control of the child. If the court, in the exercise of its discretion, finds that the child has no relative who is a suitable person to have custody, it may certify the cause to the juvenile court for further proceedings. When the court certifies the cause to the juvenile court it shall send the juvenile court a copy of the court's findings, together with so much of the record and such further information, in narrative form or otherwise, as it deems necessary or as the juvenile court requests. Thereupon the juvenile court shall have exclusive jurisdiction over the care, custody, control and support of the child.

for divorce investigations in Ohio and other states, the reasons given for the repeal of the mandatory divorce investigation in Ohio, and the evidentiary problems created by using any investigative report at trial. The Note contends that the courts need the investigative reports prepared by specialists in the child care field to reach informed decisions on issues of child custody. It concludes with a proposal designed to enable the Ohio courts to make use of their discretionary powers in order to obtain and utilize such reports for the benefit of the children concerned.

II. THE NECESSITY FOR SPECIALIZED COURT ASSISTANCE

The need for some type of specialized court assistance in divorce cases has been recognized in Ohio for nearly half a century.⁸ As early as 1925, the Toledo Family Court borrowed probation officers from the juvenile court to gather information to aid in custody determinations.⁹ In 1938 the use of investigators was statutorily recognized in Ohio to be within the discretion of the trial court.¹⁰ The Toledo Family Court went so far as to establish a special department to carry on such investigations, although not required to do so by statute.¹¹ When divorce investigations were made mandatory in cases involving children under 14 years of age in 1951,¹² "the statute [did] little more than express in legislative enactment procedures which [had] been common practice in several of the family courts for a number of years."¹³ In 1971 Ohio reverted to discretionary divorce investigation. Some counties ignored the legislative change and continued ordering divorce investigations where minor

8. VIRTUE 182.

9. *Id.* at 195. In 1931, seven years before the Ohio General Assembly codified divorce investigation procedures, the Cuyahoga County Court of Appeals became the first Ohio court to note in a reported decision the "very valuable service which is now recognized as being rendered by the Domestic Relations Bureau." The court deemed the information so gathered to be "of invaluable help to the trial judge in aiding him to reach a just and correct conclusion as to the disposition of the various cases." *Mahoney v. Mahoney*, 9 Ohio L. Abs. 434, 435 (Cuyahoga County Ct. App. 1931).

The court commented further that "almost as a matter of necessity, the trial judge in charge of [domestic relations] cases is bound to unburden himself somewhat of the detail entailed in the determination of those cases." *Id.* at 435.

10. Law of February 14, 1938, 117 Ohio Laws 807.

11. VIRTUE 195-96.

12. Law of May 28, 1951, § 8003-9, 124 Ohio Laws 185, *formerly* Law of February 14, 1938, 117 Ohio Laws 807. Now, see OHIO R. CIV. P. 75(D), (P).

13. VIRTUE 177.

children were involved.¹⁴ In other counties the investigations are now initiated by motions of litigants and referrals by judges and referees of their own volition.¹⁵

Ohio has not been alone in using extra-judicial investigative workers to provide information for family court judges. Minnesota's family courts regularly borrow social workers from the county welfare department in custody cases.¹⁶ The Superior Court of New Jersey in the recent case of *In re P*,¹⁷ after lengthy consideration of psychiatric and sociological reports, abandoned the traditional "rule-of-thumb" approach that would have given custody to the biological parents absent a showing of their "unfitness," and instead allowed the child's psychological parents to retain custody.¹⁸ In general, the courts of most states have looked favorably upon the use of some form of extra-judicial service in family courts where the custody of minor children must be decided.¹⁹

14. Interview with Henry L. Williams, Chief Investigator of the Domestic Relations Bureau of Cuyahoga County, in Cleveland, Ohio, July 21, 1973 [hereinafter cited as Williams Interview].

15. *Id.* Mr. Williams revealed that although mandatory investigations were no longer required by statute, his department remains overburdened with requests for home investigations in connection with custody cases.

16. *See, e.g.,* Gumphrey v. Gumphrey, 262 Minn. 515, 115 N.W.2d 353 (1962). For an Ohio approval of Minnesota's nonadversary approach, see Woodruff v. Woodruff, 36 Ohio Op. 2d 165, 217 N.E.2d 264 (C.P. Miami County 1965).

Commenting upon the Minnesota system, Judge Edward F. Waite wrote that "the assistance of expert social workers is always useful and often essential to any assurance of wise action." Waite, *Children of Divorce in Minnesota: Between the Millstones*, 32 MINN. L. REV. 766, 768 (1948).

17. 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971).

18. For analysis of the differences between biological parents and psychological parents, see BEYOND THE BEST INTERESTS, *supra* note 2, at 16-20. *See also* Martire & McCandless, *Psychological Aspects of the Adoption Process*, 40 IOWA L. REV. 350, 354 (1955); Comment, *Adoption: Psychological Parenthood as the Controlling Factor in Determining the Best Interests of the Child*, 26 RUTGERS L. REV. 693 (1973); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963). Courts occasionally choose to ignore expert opinion and provide their own "expertise." *See, e.g.,* Woodruff v. Woodruff, 36 Ohio Op. 2d 165, 217 N.E.2d 264 (C.P. Miami County 1965).

19. *See, e.g.,* New York: *Gluckstern v. Gluckstern*, 2 App. Div. 2d 744, 153 N.Y.S.2d 184 (1956), *remanded*, 17 Misc. 2d 83, 158 N.Y.S.2d 504 (Sup. Ct.), *aff'd with no opinion*, 3 App. Div. 2d 999, 165 N.Y.S.2d 432, *aff'd per curiam*, 4 N.Y.2d 521, 176 N.Y.S.2d 352, 151 N.E.2d 897 (1958); California: CAL. CODE CIV. PRO. § 263 (West 1967); UNIFORM MARRIAGE AND DIVORCE ACT § 405, to date adopted by three states (Arizona, Colorado, and Kentucky), which provides:

(a) In contested custody proceedings, and in other custody pro-

ceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by [the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose].

(b) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.

(c) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (b), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.

See also 2 H. FOSTER & D. FREED, DISSOLUTION OF THE FAMILY UNIT, LAW AND THE FAMILY IN NEW YORK § 29:30 (1966).

Michigan has made use of behavioral scientists' knowledge, but instead of incorporating that information into a report on each custody case, it has set out in the Michigan Child Custody Act of 1970, MICH. COMP. LAWS ANN. § 722.23 (Supp. 1974), 10 factors that are to be taken into account in determining what will serve the child's "best interests":

Sec. 3. "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court

III. OFFICIAL JUSTIFICATIONS FOR THE ELIMINATION OF MANDATORY DIVORCE INVESTIGATIONS IN OHIO

In the face of this growing assent to the value of extra-judicial investigations, Ohio's return²⁰ to discretionary divorce reports indicates dissatisfaction with the investigation procedure itself.²¹ The Staff Notes accompanying this change, effectuated by rules 75(D) and (P), set forth the reasons for the reversal.²²

The Staff Notes maintain that "[e]xperience has shown [that the mandatory divorce investigation] has little value in most cases since

deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Some commentators are uncertain whether judges have the ability to implement such standards:

However, in our judgment, "best interests of the child," even when defined by meaningful standards, remains a sufficiently elusive concept to tax to the utmost the ability of the courts to decide these cases correctly. We believe this suggests development of innovative programs designed to maximize the chances of all pertinent information being considered and appropriately evaluated as well.

Benedek & Benedek, *New Child Custody Laws: Making Them Do What They Say*, 42 AM. J. OF ORTHOPSYCHIATRY 825, 834 (1972).

20. See text accompanying note 14 *supra*.

21. Some of the impetus for repealing the mandatory divorce investigation can be attributed to the Ohio Supreme Court's decision in *Rolls v. Rolls*, 9 Ohio St. 2d 59, 223 N.E.2d 604 (1967), which held that the carrying out of such an investigation was not a jurisdictional prerequisite to hearing a divorce petition. This apparently created some confusion in the state legislature as to the validity of any "mandatory" requirement.

22. The Staff Note to Rule 75(D), in 1 S. JACOBY, OHIO CIVIL PRACTICE 483 (1971):

Rule 75(D) is similar to Section 3105.08, R.C., and concerns investigations when minor children are involved. The rule changes the statute's mandatory investigation requirement. This mandatory investigation has caused much expense and delay in many courts. Experience has shown it has little value in most cases since the custody question is generally amicably settled. The rule further changes the statute by making the investigator sign his report and subjecting him to cross-examination. Finally, the rule allows a court to tax all the expenses of the investigation as costs.

These changes are all designed to make the investigation meaningful and thorough. In most cases investigations are not needed; the parties have agreed on the custody question. However, if it comes to the court's attention in a particular case that one party or both parties may be unfit to have custody the court may order an investigation. The investigator, knowing that he may be cross-examined will do a thorough job and the court can require he do a complete investigation because the expenses of the investigation may be charged as costs. Thus investigations will be used only when necessary and will fulfill their function of child protection and not act as an inordinate delaying factor.

the custody question is generally amicably settled."²³ The fact that most divorces in Ohio are uncontested²⁴ and accompanied by "amicable" custody settlements was the very reason that the Director of the Department of Domestic Relations in Cuyahoga County gave for the statutory institution of the mandatory divorce investigation in 1951:

In most uncontested cases, any information which would cast a doubt upon the fitness of the plaintiff to have custody of the children is not made available to the court by the plaintiff and, since the defendant is not present, never comes to the court's attention.²⁵

Judges and psychiatrists recognize that the amicability of a custody agreement is no measure of its wisdom. On the contrary, amicable settlements all too often bring forward the wishes of only one party and effectively conceal information without which the court cannot fulfill its duty of looking after the best interests of the children.²⁶ Judge Waite has expressed the opinion that the uncontested divorce creates the greatest danger to the child's best interest: "Often the . . . disposition of the children [was] covered by undisclosed agreements between the parties. . . . The good judgment and conscience of the plaintiff and counsel were the only safeguard of the children's interests, and — to put it mildly — were not always adequate."²⁷ In discussing uncontested divorces, Dr. Despert outlined one of the psychological forces that produces results adverse to the child's interest in spite of the facade of agreement. "One wife sin-

23. *Id.*

24. For example, of the 10,359 divorce complaints disposed of during 1973 in Cuyahoga County, 6,823 were uncontested. 1973 REPORT OF CUYAHOGA COUNTY DIVORCE COURT.

25. Brooks, *Mandatory Investigations in Divorce Cases*, 24 OHIO BAR 581 (1951).

26. In apparent recognition of these dangers, Wisconsin law specifically provides that divorces are not to be brought to trial until the court's family services have undertaken to deal with the social and psychological conflicts that inevitably attend divorce actions. WIS. STAT. ANN. § 247.081(2) (Supp. 1974).

27. Waite, *supra* note 16, at 774. Judge Waite commented further:

Often the children were committed to the custody of unfit persons in ignorance of the real facts; often a change of circumstances, such as remarriage of one of the parents, led to an application for change of custody, and then the luckless children, caught between the upper and nether millstones of bitter controversy, needed protection from the court which the judge was not equipped to give. . . . It can hardly be emphasized too much that default cases, where the dangers we are considering are most likely to threaten, make up an overwhelming proportion of all divorces.

Id.

cerely believes that the less the children see of their father the better. How can she believe otherwise, when at this moment she sees the man who was her husband only as a heartless creature who has abandoned her for another woman?"²⁸

A second reason stated in the Staff Notes for rendering divorce investigations discretionary was the avoidance of delay.²⁹ It is difficult to see, however, how delay is a problem. Rule 75(K)³⁰ provides for a 6-week cooling off period between service of process and the divorce hearing. Given this interim, no delay occurs at all unless the investigation takes longer than 6 weeks. In Cuyahoga County, where approximately 10,000 divorce petitions are filed every year,³¹ a custody investigation presently takes from 6 to 8 weeks.³² Thus, the delay is at most 2 weeks. In addition, according to the Chief Investigator for Cuyahoga County, if the investigation staff were returned to its pre-1971 size of 15 from its present size of 6,³³ investigations could be easily completed within the 6-week period.³⁴

Even if the divorce investigations did cause delay and if saving time were of sufficient importance to abandon mandatory investigations, such abandonment would ultimately increase the burden on the courts. A greater number of modification attempts is sure to be produced by hastily approved custody decisions than by those considered carefully in the light of full information about the familial situation.³⁵ When a motion for modification does occur, the court

28. DESPERT 196.

29. See note 22 *supra*.

30. OHIO R. CIV. P. 75(K):

No action for divorce, annulment or alimony may be heard and decided until the expiration of forty-two days after the service of process or twenty-eight days after the last publication of notice upon the complaint; nor shall any such action be heard and decided earlier than twenty-eight days after the service of a counterclaim, which under this rule may be designated a cross-complaint, unless the plaintiff files a written waiver of such twenty-eight day period.

The purpose of this built-in delay is to promote reconciliation. The Toledo courts, for example, offer conciliation services during this 6-week period. Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 356 (1966).

31. In 1973, for example, 10,438 divorce complaints were filed. 1973 REPORT OF CUYAHOGA COUNTY DIVORCE COURT.

32. Williams Interview, *supra* note 14.

33. A reduction of the staff was undertaken pursuant to the erroneous assumption that the repeal of mandatory divorce investigations would result in fewer requests for investigations. See note 15 *supra*.

34. Williams Interview, *supra* note 14.

35. In Ohio the rule has been well established that a motion for modifica-

that initially determined the custody question will not be able to rectify its hasty decision without finally resorting to an independent investigation. Thus, what could have been accomplished in the divorce proceeding will merely have been delayed.

The third justification put forth in the Staff Notes for the elimination of the mandatory investigation was the avoidance of unnecessary court expense.³⁶ The issue was first raised by the prosecuting attorney of Clermont County in 1951, immediately after divorce investigations were made mandatory. In reply to his inquiry regarding who should bear the expense of the then newly inaugurated mandatory investigation procedures, the Ohio Attorney General issued a formal opinion³⁷ to the effect that parties to a lawsuit could not be charged with internal court costs for particular services without express statutory authorization.³⁸ Since Rule 75, in both paragraphs (D) and (P), provides just such authorization, the argument that mandatory investigations are too expensive loses much of its force.³⁹ Whenever a court finds that litigants can share in the expense of the investigations, it will be within its power to have them do so.

In situations where parties cannot afford to make meaningful contributions toward allaying the expense of divorce investigations, the state should assume the costs so incurred. This potential increase in state expenditure can be justified in two ways. First, from a sociological standpoint, any procedure that helps courts make more

tion of child custody will not be granted "unless such action is warranted by a change in conditions or by the discovery of material facts existent at the time of the previous order and then unknown to the court." *Dailey v. Dailey*, 146 Ohio St. 93, 95, 64 N.E.2d 246, 247 (1945). See *Fitzpatrick v. Fitzpatrick*, 4 Ohio App. 2d 279, 207 N.E.2d 794 (1965); *Kelly v. Kelly*, 68 Ohio L. Abs. 212, 212 N.E. 690 (C.P. Lucas County 1951). The use of divorce investigation reports should substantially reduce the number of motions for modification. A well researched report would guarantee that there were no "material facts" left unrepresented to the trial court. In addition competent investigators should be able, at least to some extent, to anticipate certain changes in the family situation by analysis of the observable personality traits of the parents.

36. Note 22 *supra*.

37. 1951 OP. OHIO ATT'Y GEN. 723.

38. *Accord*, *Euclid v. Vogelín*, 152 Ohio St. 538, 90 N.E.2d 593 (1950). See also *Smith v. Smith*, 93 Ohio App. 294, 114 N.E.2d 480 (1952), where it was further noted that payment of such expenses "may be made upon the warrant of the county auditor upon the proper certificate of the Common Pleas judge allowing the claim." *Id.* at 299, 114 N.E.2d at 482.

39. Paragraphs (D) and (P) of OHIO R. CIV. P. 75 provide: "The court may tax as costs all or any part of the expenses for each investigation." OHIO REV. CODE § 3109.04(A) (47 OHIO BAR 1060 (Sept. 16, 1974)) also contains the same language in an amendment effective Sept. 30, 1974.

informed decisions benefits society by mitigating the disruptive effects of divorces.⁴⁰ Indeed, it can be argued that the gains to society attributable to more informed child custody decisions and the savings to the courts resulting from a reduction in the number of modification proceedings,⁴¹ would indirectly pay for the added expense of mandatory investigations.

Secondly, pragmatic considerations also call for the state to help finance divorce investigations. If a litigant is compelled to pay for experts at the outset, he or she will have good reason to hire his or her own expert. Thus, in the name of saving expense, the new rule may cause litigants to attempt to protect themselves by incurring more expense.

IV. THE EVIDENTIARY STATUS OF DIVORCE INVESTIGATION REPORTS

Although the three reasons set forth in the Staff Notes do not adequately support Ohio's change from mandatory to discretionary divorce investigations, the confusion in the courts over the evidentiary status of investigation reports may in part explain the switch. However, if the purpose of the General Assembly was to eliminate this confusion, it would have abolished all divorce investigations. Since it permitted continued use of discretionary investigations, serious evidentiary problems remain, which the Staff Notes conspicuously failed to address.

Extra-judicial divorce investigation reports have produced two evidentiary problems with which Ohio courts have struggled for 40 years. First, the reports often contain hearsay and double-hearsay ostensibly rendering their contents inadmissible.⁴² Secondly, even if

40. A similar view was taken in *Smith v. Smith*, 93 Ohio App. 294, 114 N.E.2d 480 (1952), where the court noted that the "Legislature in requiring an independent investigation under the direction of the court might well have conceived and intended it to be primarily for the benefit of society and the public . . . [and that] the paramount duty of the court [is] to consider and provide for the welfare of the children involved." *Id.* at 298, 114 N.E.2d at 481.

41. See note 35 *supra* and accompanying text.

42. Ohio courts offer the traditional reasons for applying the hearsay rule: to avoid the introduction of testimony on which cross-examination is impossible and the reliability of which is attenuated by its secondhand nature. *Potter v. Baker*, 162 Ohio St. 488, 494, 124 N.E.2d 140, 144 (1955). Of course the availability of the caseworker for cross-examination will not obviate the unavailability for cross-examination of any of the declarants of the internal hearsay (the persons who are interviewed by the worker) that the investigation report contains. On the other hand, there is a class of hearsay declarants

the hearsay rule is applied to exclude the report from the trial record, the trial judge is, nevertheless, permitted to familiarize himself with the report, hearsay and all. A litigant is thus robbed of the opportunity to attack the hearsay, while the trial court may be permanently prejudiced by the evidence.

This conflict is the direct result of adherence to Ohio Revised Code section 2317.39⁴³ and Ohio Rule of Civil Procedure 75(D).⁴⁴

whose availability for cross-examination or *in camera* discussion with the judge or referee is relatively predictable: those members of the child's family who have been interviewed by the caseworker. Thus, where the statements of members of the immediate family are transcribed or commented upon by the caseworker, their theoretical unavailability for cross-examination is not an applicable rationale for excluding the testimony. In reality the immediate family, usually the mother and father and perhaps brothers and sisters of the child whose custody is at issue, will be available for cross-examination if the court or one of the parties requires their presence. Moreover, with regard to an interview with the child, there is a question whether his statement to the caseworker is hearsay at all. Such a statement, even when it describes the activities of the parents, may serve not as evidence of the truth of the statement but to illustrate the child's perception of his environment and to indicate whether the child is content in it. The applicability of the second rationale, that of the reliability of the relator of the hearsay, is also questionable because the party who is relating the hearsay is the caseworker. A professional having no interest in the litigation other than to present a view of the home will in most cases be a sufficiently reliable source of the out-of-court statements. See Note, *Use of Extra-Record Information in Custody Cases*, 24 U. CHI. L. REV. 349, 357 (1957).

The courts could distinguish among the classes of hearsay declarants whose statements are recorded in the investigation reports by excluding those statements taken from members of the community who are not as a general rule readily available for cross-examination (see *Swigart v. Swigart*, 65 Ohio L. Abs. 582, 115 N.E.2d 871 (Montgomery County Ct. App. 1953)), while admitting those statements of the immediate family of the child whose custody is at stake.

43. OHIO REV. CODE ANN. § 2317.39 (Page 1954):

Whenever an investigation into the facts of any case, civil or criminal, pending at the time of such investigation of any court, is made, conducted, or participated in, directly or indirectly, by any court or any department thereof, through public employees, paid private investigators, social workers, friends of the court, or any other persons and a report of such investigation is prepared for submission to the court, the contents of such report shall not be considered by any judge of the court wherein such case is pending either before the trial of the case or at any stage of the proceedings prior to final disposition thereof, unless the full contents of such report have been made readily available and accessible to all parties to the case or their counsel. The parties or their counsel shall be notified in writing of the fact that an investigation has been made, that a report has been submitted, and that the contents of the report are available for examination. Such notice shall be given at least five days prior to the time the contents of any report are to be considered by any judge of the court wherein the case is pending. In the event that a report follow-

The code section authorizes pretrial "familiarization" by the court with the report regardless of its admissibility, provided the parties are notified that the report is available 5 days before the judge "considers" the report. Rule 75(D) similarly makes no mention of admissibility, but requires that the report be made available to the parties upon written request 7 days before trial. The rule leaves unanswered two questions regarding what a court may do with the report: (1) if the rule is complied with, is the report admissible, and (2) if the rule is not complied with, is the report legally non-existent?

Both Ohio Revised Code section 2317.39 and rule 75(D) accordingly render "available" to the court materials that might otherwise be inadmissible and thus totally unavailable to the court. Problems arise, however, when a report is inadmissible from an evidentiary standpoint but nonetheless available to the court under the authorization of either of the above provisions. The court is then torn between upholding availability on the grounds that all pertinent information should be considered by the court in ascertaining the child's best interest, and upholding inadmissibility on the grounds that the evidentiary system should not be compromised. The adherence of the Ohio courts to the traditional notion of evidence being either "in" or "out" has prevented the striking of a balance between these two apparently competing interests.

The Ohio General Assembly made its first attempt to resolve this conflict in 1938 when it enacted General Code section 11979-4⁴⁵ providing for discretionary divorce investigations. The compromise offered by this provision was the creation of a new evidentiary status

ing any investigation is prepared for submission orally, such oral report shall be reduced to writing prior to the issuance of notice of the availability of such report for examination.

This section does not apply only to the utilization of the contents of such reports as testimony, but shall prevent any judge from familiarizing himself with such contents in any manner unless this section has been fully complied with.

44. See note 7 *supra*.

45. Law of February 14, 1938, 117 Ohio Laws 807, as amended and recodified, Law of May 28, 1951, § 8003-9, 124 Ohio Laws 185, as amended and recodified, Act of July 25, 1967, § 3105.08, 132 Ohio Laws 970 (repealed 1971):

On the filing of a petition in divorce or for alimony, the court, in its discretion, may appoint one of its officers to make an investigation as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action, and if the report of said investigation is filed in the case before trial, *may be considered as evidence in the case*, subject to the right of either party to cross-examine the party making the investigation.

The court on its own motion, may cite either party to the action from any point in the state to appear in court and testify as a witness (emphasis added).

somewhere between admissible and inadmissible. Two restrictions were imposed on the introduction of investigation reports into evidence: (1) that the report must be filed before trial, and (2) that either party may cross-examine the investigator whose report was being submitted. The statute made clear that such admissibility was discretionary even if both conditions were met. Thus, the rule was born that a divorce investigation report could be admitted into evidence regardless of the generally applicable formal evidentiary rules, provided both prerequisites were satisfied. Nevertheless, if the court so chose, the filed report might be placed in limbo, available to all parties and the judge, but not admitted formally, even though both prerequisites had been fulfilled.

The problem was perhaps oversimplified in *Welge v. Welge*⁴⁶ in which the court offered a concise solution. In dictum, the opinion stated that the trial court could only consider "evidence" and that if the investigator's report did not have that status, the appellate court would be similarly precluded from assuming the existence of such a report. Neither statutory requirement was fulfilled in *Welge*. The report had not been filed before trial, and the investigator was not made available for cross-examination. Thus the report was inadmissible under General Code section 11979-4 but the availability of the report was left undecided. It was upon these facts that the court eliminated the quasi-admissible status of investigation reports. Arguably, the court's hard line on the evidence question might have been considerably less harsh in the face of a "more admissible" report (for example, if the investigator had been available for cross-examination though the report had not been filed properly before trial). Nevertheless, it would have placed the court in an uncomfortable position to verbalize the evidentiary status of investigators' reports in terms of "degrees of admissibility" and, in effect, admit the failings of the traditional evidentiary rules as applied to investigation reports, especially where a strict construction of the statute would have enabled the court to avoid the issue legitimately.

A year after the *Welge* case was decided, the Ohio General Assembly enacted Ohio Revised Code section 2317.39 and section 3105.08, the recently repealed statute, thereby perpetuating the courts' evidentiary difficulties. Section 2317.39 imposed procedural restrictions on the availability as well as the admissibility of extrajudicial reports: "This section does not apply only to the utilization of the contents of such reports as testimony, but shall prevent any judge from familiarizing himself with such contents in any manner

46. 87 Ohio App. 93, 94 N.E.2d 208 (1950).

unless this section has been fully complied with.”⁴⁷ The legislature thus recognized the evidentiary status that investigation reports had occupied and attempted to bolster due process protections in the face of such extra-judicial “familiarizations.” The specific protection afforded was that of requiring the parties to be notified of the report’s existence 5 days before the judge familiarized himself with the report.⁴⁸

Concurrently, Ohio Revised Code section 3105.08 replaced General Code section 11979-4 and rendered divorce investigations mandatory. Under the new statute the reports were to be made available to either party not less than 5 days before trial. In addition, two other changes were made: (1) the cross-examination requirement was removed as a prerequisite to admissibility, and (2) the language stating that the reports “may be considered as evidence” was deleted.⁴⁹ The latter deletion might have been construed to imply that the normal rules of evidence did not apply to investigation reports and that the use of the report at trial depended only upon the 5 day notice requirement. The omission, however, was taken to imply the reverse, that absent any mention of admissibility the normal rules of evidence applied with the added notice requirement acting as an extra protection for the parties.⁵⁰ The deletion of the cross-examination requirement was cited as further evidence of the General Assembly’s intent to put investigation reports back into the realm of normal evidentiary rules.⁵¹

As of 1951, then, a litigant could still object to the introduction of a report into evidence, relying on the rules of evidence. His objection could be sustained by the very judge who had previously familiarized himself with the inadmissible evidence.

The case of *McQueary v. McQueary*⁵² continued, in dictum, the strict application of the rules of evidence first enunciated in *Welge* and inferred from section 3105.08.⁵³ The opinion would have a

47. See note 43 *supra*.

48. *Id.*

49. Compare Ohio Revised Code § 3105.08 (see note 6 *supra*) with General Code § 11979-4 (see note 45 *supra*).

50. *Beamer v. Beamer*, 17 Ohio App. 2d 90, 91-92, 244 N.E.2d 775, 777 (1969).

51. *Id.* The reverse also could have been inferred by reading the abolition of the cross-examination requirement as a legislative indication that custody hearings were deemed informal. See text accompanying notes 72-73 *infra*.

52. 29 Ohio Op. 2d 24, 200 N.E.2d 722 (C.P. Monroe County 1964).

53. The holding of the case was that “the [divorce] investigator can keep secret the identity and comments of his informants if there is no hearsay in the record before the court.” *Id.* at 28, 200 N.E.2d at 727. Since a divorce

court delete from the report and from the court's memory hearsay and opinions based on hearsay if the report is to be introduced into the record,⁵⁴ but it would also have the court keep the report in the forefront of its considerations in protecting the welfare of the child.⁵⁵ The *McQueary* court recognized the inherent difficulty in following such an order.⁵⁶ To expunge the influence of hearsay from a report and still to consider the report based so heavily on that hearsay appears to be an impossible task. Nevertheless, the court rationalized the rule by relying on the theory that the other evidence admitted to the record would, in most instances, support the decision of the court in any event. Thus a court is told to base its decision on the record, but to use as background other information based on hearsay. The inadequacy of the record in uncontested divorce cases has already been commented upon.⁵⁷ There is little reason to believe that it would be substantially better in contested cases.⁵⁸ Thus, to rely on the official court records, even in contested cases, is to ignore a major reason for instituting divorce investigation, namely to bring to the court information kept out of the record by litigants.

The effect of the *McQueary* decision was intensified by the general rule of appellate review adopted by the Seneca County Court of Appeals in *Beamer v. Beamer*.⁵⁹ There the court was faced with a trial judge who refused to act in accordance with the makeshift procedural safeguards provided in section 2317.39 and who actually introduced into evidence what he had read in an investigation report made available to the parties under section 2317.39. The appellate court first ruled that the investigation report could not attain evidentiary status without the parties' consent.⁶⁰ But in the absence of con-

investigation report could only be admitted into evidence if it contained no hearsay, the investigator would never have to reveal his sources.

54. *Id.* at 27-28, 200 N.E.2d at 726-27.

55. *Id.* at 27, 200 N.E.2d at 725.

56. *Id.* at 28, 200 N.E.2d at 727.

57. See text accompanying note 23 *supra*.

58. "In non-contested divorce cases the evidence which the one party chooses to present is often quite limited, and in contested cases is often highly influenced by emotional factors. To enable the court to determine what best serves the interests of the children it may . . . acquire additional information from any source independent of either of the parties in the action." *Beamer v. Beamer*, 17 Ohio App. 2d 89, 91, 244 N.E.2d 775, 777 (1969).

59. 17 Ohio App. 2d 89, 244 N.E.2d 775 (1969).

60. *Id.* at 95-96, 244 N.E.2d at 779-80. The court cites as support for this proposition the two cases of *Mahoney v. Mahoney*, 9 Ohio L. Abs. 434 (Cuyahoga County Ct. App. 1931), and *Holland v. Holland*, 49 Ohio L. Abs. 237, 75 N.E.2d 489 (Cuyahoga County Ct. App. 1947). Like *Beamer*, both cases involve motions to modify previous custody orders. However, at the time

sent and faced with the problem of the report having been admitted into evidence, the court set forth the following standard for determining whether admission of an investigation report constituted reversible error:

- (a) the error [of putting the report into evidence] was not prejudicial where the evidence received in open court was sufficient to sustain the order and findings, and
- (b) the error was prejudicial where there was not other evidence in the record to sustain the order.⁶¹

Thus, as in *McQueary*, the court increases the importance of the record, which it had assailed as being inadequate in both uncontested and contested divorce cases.⁶² Only the record can control the fate of minor children once a report is erroneously admitted into evidence. If by some chance the parties have not presented other evidence which would lead to the same conclusion as the inadvertently admitted report, then the report constitutes prejudicial error. But if the parties have come forth with their own evidence and such evidence is reflected by the decree, then the report is deemed utterly inconsequential.

One decision that stands out among the Ohio cases in this area is *Woodruff v. Woodruff*.⁶³ There the court simply decided not to apply the "strict rules of evidence" at a custodial hearing, but to allow into evidence any relevant information regardless of formal admissibility. The trial court was thus free to reach its decision on the basis of a careful, open consideration of all available information. The only limitation on this freedom was that a custody award could not be based exclusively on what would otherwise be considered in-

of the *Mahoney* decision there was no statutory law governing divorce investigations. *Holland* was decided under the section of the General Code which only allowed discretionary investigations "[o]n the filing of a petition in divorce or for alimony. . . ." See note 45 *supra*. This is to be contrasted with the law in effect at the time of the *Beamer* decision. Under § 3105.08 divorce investigations were allowed "on the filing of a petition for divorce, annulment, alimony, or a motion for change of custody. . . ." Note 6 *supra*. *Mahoney* and *Holland* can be interpreted, then, as holding that the parties must consent in a custody modification proceeding in order for the investigation to be undertaken, regardless of the report's potential evidentiary status. *Beamer*, on the other hand, uses the consent requirement as a prerequisite to the investigation report's admissibility into evidence since the statute clearly authorizes the investigation itself. This distinction is significant because the consent obstacle to admissibility was mandated neither by case law nor by statute. See text accompanying note 51 *supra*.

61. 17 Ohio App. 2d at 96, 244 N.E.2d at 780.

62. *Id.* at 91, 244 N.E.2d at 777.

63. 36 Ohio Op. 2d 165, 217 N.E.2d 264 (C.P. Miami County 1965).

admissible evidence.⁶⁴ This is the logical solution to the quandary in which trial court judges find themselves when, on the one hand, they are allowed to read the report, but, on the other hand, they must exclude the report as evidence. This approach also preserves in the record all the information considered by the trial court in reaching its decision. In the event of appeal, the appellate court is able to view all relevant information, including hearsay, in its effort to protect the interests of the child.⁶⁵

The enlightened approach of the *Woodruff* court appears to be consistent with the relevant statutory law. Although both section 2317.39⁶⁶ and Ohio Rule of Civil Procedure 75(D) apply generally to the use of extra-judicial reports by the courts, the latter governs the divorce situation wherever these two provisions conflict.⁶⁷ Under traditional rules of statutory construction, a provision that speaks specifically to a given problem controls over a statute that applies in a more general sense.⁶⁸ Since section 2317.39 is relevant to any extra-judicial report in any civil or criminal case,⁶⁹ and rule 75(D) applies specifically to divorce investigation reports,⁷⁰ this canon of construction indicates that the latter provision exclusively applies in

64. *Id.* at 169, 217 N.E.2d at 269.

65. This approach is also consistent with the general rule of appellate review announced in *Beamer v. Beamer*, 17 Ohio App. 2d 90, 96, 244 N.E.2d 775, 780 (1969). See text accompanying note 61 *supra*.

66. See note 43 *supra*.

67. There appear to be only two sources of potential conflict between these provisions. The first is that rule 75(D) requires investigation reports to be made available to both parties not less than 7 days before the custody hearing if written request has been made for inspection, whereas OHIO REV. CODE ANN. § 2317.39 (Page 1954) requires the court to notify the parties of the existence of any report not less than 5 days before the court considers the report. The second source of conflict arises from the fact that rule 75(D) has a cross-examination provision while § 2317.39 does not.

It may be possible to harmonize these statutes to avoid any conflict. If the parties request a copy of the report in writing, they must be allowed such a copy at least 7 days before the hearing and the opportunity to subject the report's author to cross-examination at trial. If no request is made, they will be notified of the report's existence 5 days before the hearing and allowed to study the report in the file, the cross-examination requirement presumably having been waived by the failure to request a written copy under rule 75(D). It is doubtful, however, that the cross-examination requirement is thus abrogated by § 2317.39.

68. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.05 (4th ed. C. Sands 1972).

69. See note 43 *supra*.

70. OHIO R. CIV. P. 75(A) provides: "These Rules of Civil Procedure shall apply in actions for divorce, annulment, alimony and related proceedings, with modifications or exceptions set forth in this rule."

child custody proceedings. The contention that rule 75(D) controls is further strengthened by a decision of the Cuyahoga County Court of Appeals⁷¹ wherein the court adopted the "specific controls over general" rule in holding that Ohio Revised Code section 2947.06, calling for investigations by a probation official, would govern over section 2317.39 with respect to procedural requirements because of the more specific nature of section 2947.06. Thus, it is justifiable to look solely to rule 75(D) for any limitations on the *Woodruff* rule with respect to judicial use of divorce investigation reports.

The only provision of rule 75(D) that addresses itself even tangentially to the evidentiary quandary surrounding the use of extrajudicial reports is the cross-examination requirement.⁷² Nevertheless, this brief reference is sufficient to establish what could arguably be considered legislative acceptance of a *Woodruff* approach. Under rule 75(D), the caseworker responsible for the report must be available for cross-examination if the report is filed with the court. No mention is made of admissibility. Thus, the legislature gives a litigant the opportunity to challenge the validity of a report available to the court regardless of its evidentiary status. Rule 75(D), then, indicates a legislative recognition of the increasingly nonadversarial and informal nature of custody proceedings by allowing cross-examination on matters not formally before the court.

This conclusion can be inferred from a pragmatic analysis as well. For example, if a trial judge were to follow the procedure outlined in *Beamer*,⁷³ and conscientiously apply the rules of evidence to an investigator's report, reports would almost never achieve the status of evidence. A judge would be incapable of accurately labeling any conclusion of the investigator "nonhearsay" where the investigator had spoken to third parties about the custody status of the child. To mandate cross-examination on such a report, which is inevitably honeycombed with hearsay, impliedly recognizes less stringent use of the rules of evidence in custody determination. Otherwise there would be no point in giving the litigants a right to cross-examine an investigator only if the report is formally admitted, since admission is inconceivable under the rules of evidence as normally applied. Thus it can be argued that the legislature has impliedly recognized the informal nature of custodial proceedings originally acknowledged by the judiciary in *Woodruff*.

71. *State v. Smith*, 29 Ohio App. 2d 241, 281 N.E.2d 17 (1972).

72. See note 7 *supra*.

73. See notes 59-61 *supra* and accompanying text.

V. A PROPOSAL

The evidentiary issue, significant in itself, is symptomatic of a larger problem. The greater controversy concerns the courts' ability to make a legal determination of what is essentially a psychological question. The incongruity of placing sociopsychological decisions in the hands of those with legal training has been much discussed in recent years⁷⁴ and is well illustrated by the statement of a leading legal commentator in the field of child custody, whose approach to the situation is the strongest argument for removing custody decisions from the courtroom:

If the courts are to do a better job in custody matters it is essential that such cases be referred to judges who have some knowledge of behavioral science and who are receptive to expert testimony and the recommendations of specialists. In this connection, it is tragic that the literature of psychiatry and psychology has relatively little to offer as a direct aid to a specific decision.⁷⁵

This comment, in spite of its meritorious intention, epitomizes the misconception that has allowed those untrained in behavioral science to bear a responsibility they are not equipped to fulfill.⁷⁶ The prob-

74. See, e.g., *BEYOND THE BEST INTERESTS*, *supra* note 2; Foster, *supra* note 3; Watson, *supra* note 2; Westman, *The Psychiatrist and Child Custody Contest*, 127 AM. J. PSYCHIATRY 1687 (1971).

75. Foster, *supra* note 3, at 3.

76. Some judges have openly recognized the invaluable aid other professionals may provide to those untrained in the interpersonal sciences. For example, Family Court Judge Gilbert Ramirez of New York has stated in a recent interview:

The most important single individual in these cases is a psychiatrist. The ideal thing would be to have a group headed by a psychiatrist intervene in all these cases and have this group interview the mother, speak with the father, examine the child, and speak with anybody else connected with this picture. The group, consisting of the psychiatrist and perhaps a social worker or people in other related fields, should submit to the court a comprehensive report with recommendations as to custody and plan of visitation.

Milgrim, *The Adolescent in Relation to His Separated Yet Inseparable Parents*, in *CHILDREN OF SEPARATION AND DIVORCE* 37, 45 (I. Stuart & L. Abt eds. 1972). See also, Foster, *supra* note 3, at 3.

Recent studies indicate that attorneys, who act as officers of the court and provide the main source of information to the judge, are usually minimally trained in the behavioral sciences. A 1965 study of randomly selected attorneys revealed that of 60 respondents, 55 had taken only one college-level course in psychology, and five had taken no formal course in psychology whatsoever. Selzer & Benedek, *Lawyers' Use of Psychiatry*, 122 AM. J. PSYCHIATRY 212 (1965). Another study reveals that even where the attorney is sensitive to the psychological tensions in his client and is aware of his duty to represent the best interests of the children involved "the undercurrents of commitment

lem is not the lack of literature that might aid specific decisions, but rather the distorted notion that psychological principles can be treated as rules of law. The literature is replete with texts and research articles on the emotional conflicts created by divorce and its effect upon children.⁷⁷ These articles are of value, however, only to those trained to comprehend them. To wait for literature that can be a "direct aid in a specific decision" is unrealistic, since any attempt to make complex psychological principles understandable to laymen is bound to result in oversimplification.

The children of divorce defy easy categorization because children's behavior is inherently variable.⁷⁸ Moreover, the psychological world of the child is not easily analogized to the world of the adult.⁷⁹ Furthermore, even if it were assumed that objective manifestations could be categorized, that these categories consistently presaged a specific result, and that laymen could be trained to recognize these categories (all of which is open to serious question), the existing courtroom environment and personnel do not lend themselves to development of such a decisionmaking process. A similar conclusion was reached by Dr. Andrew Watson, professor of psychiatry and law at the University of Michigan.⁸⁰ In suggesting an answer to the question "whether or not the adversary proceeding distorts the information utilized to make the custodial decision,"⁸¹ Dr. Watson set forth several reasons compelling an affirmative answer, not the least of which was the courts' lack of understanding about the development of children.⁸²

The conclusion is inescapable that the present system cannot fulfill the statutory duty of protecting the best interests of the child,⁸³

to one parent or to the other militate against actually achieving this." Westman, *supra* note 74, at 1687. See also DESPERT 185-213.

77. See, e.g., BEYOND THE BEST INTERESTS, *supra* note 2; DESPERT; W. GOODE, AFTER DIVORCE (1956); B. STEINZOK, WHEN PARENTS DIVORCE (1969); Benedek, *Child Custody Laws: Their Psychiatric Implications*, 129 AM. J. PSYCHIATRY 326 (1972); Cline & Westman, *The Impact of Divorce on the Family*, 2 CHILD PSYCHOLOGY & HUMAN DEVELOPMENT 78 (1971); Landis, *The Trauma of Children When Parents Divorce*, 22 MARRIAGE & FAMILY LIVING 7 (1960).

78. D. FRISKE & S. MADDI, FUNCTIONS OF VARIED EXPERIENCE 326-54 (1961); INDIVIDUAL DIFFERENCES IN CHILDREN (J. Westman ed. 1973).

79. BEYOND THE BEST INTERESTS, *supra* note 2, at 9-28.

80. Watson, *supra* note 2.

81. *Id.* at 58.

82. *Id.* at 58-62. Other reasons given for this distortion include imbalances in the advocacy powers of counsel and the exaggeration and distortion of facts occurring when they are removed from strict family context. *Id.*

83. OHIO R. CIV. P. 75(P) provides: "Upon hearing, the court shall decide which of the parents shall have the care, custody and control of the chil-

although the solutions offered by Dr. Watson could operate to mitigate the effects of the courtroom on the custodial determination. One suggestion, for example, was to move custodial procedures into "chambers."⁸⁴ Though the merits of the suggestion cannot be doubted, one is tempted to ask why a courtroom should be used in the first place if the first order of business is to leave the courtroom. Another suggestion was to "modify the judiciary" and "appoint behavioral science 'judges' to sit with the divorce court judge when he is hearing a case involving child custody."⁸⁵ Once again the merits of the suggestion are unassailable, but one must ask why it would not be preferable simply to give the full responsibility to psychiatrists and psychologists themselves. The most forceful suggestion made by Dr. Watson in response to this question was to adopt the committee notion of Professor Kubie,⁸⁶ in which a group of behavioral scientists is formed to handle the urgent problems, both legal and psychological, of each child of divorce.⁸⁷ A somewhat more practical adaption of the suggestion would be to form an agency composed entirely of such committees, each with its own caseload. Their decisions could be automatically enforced by the courts.

It is unrealistic, however, to expect legislators to acquiesce in such plans.⁸⁸ This is particularly so at this time in Ohio, when the General Assembly has recently expressed its doubt about the sacrifices that have to be made to produce quality child custody reports.⁸⁹ The burden then falls on the courts to assure that adequate information is made available for a proper child custody determination.

The courts too, however, seem unprepared to assimilate such innovations in the light of the nascent rule, adopted by two lower courts to date,⁹⁰ which prohibits a court from relying solely upon an investigation report as a basis for its decision. This reluctance to give controlling weight to investigation reports is difficult to understand, since the report does not even contain a recommendation. It only presents facts and relates the results of interviews. Perhaps it

dren, taking into account only that which would be for the best interests of each child."

84. *Id.* at 78-79.

85. *Id.* at 79.

86. *See* note 2 *supra*.

87. Watson, *supra* note 2, at 79-80.

88. *See* text accompanying note 2 *supra*.

89. *See* text accompanying notes 20-41 *supra*.

90. Hillard v. Hillard, 29 Ohio App. 2d 20, 277 N.E.2d 557 (1971); Woodruff v. Woodruff, 36 Ohio Op. 2d 165, 217 N.E.2d 264 (C.P. Miami County 1965).

is the lack of specialized training of the investigators that alienates the courts. The caseworkers in Cuyahoga County, for example, are not required to have college degrees.⁹¹ Although degrees do not necessarily reflect sensitivity and intelligence in collecting data, if investigation reports are to mature into well-documented studies, their authors must have training in the area of psychology.

A court-initiated renovation of the present system is required to bring Ohio's custody determination procedure to a point where it can begin to aid the court in fulfilling its statutory duty.⁹² First, Ohio's courts must make full use of their discretionary investigative power in both contested and uncontested cases. As indicated previously, it is debatable whether mandatory investigations should have been repealed at all.⁹³ The damage is done however; it is now the duty of the courts to act to prevent mistakes through extensive use of discretionary investigations. In addition, the lack of judicial expertise for making what is essentially a psychological determination renders extra-judicial reports not only useful but necessary. The sole substantive drawback in relying heavily upon these reports, the unprofessional training of the investigators, can be remedied by setting up a standing committee of investigators trained fully in the behavioral sciences. Once such a committee is established, it could produce a high-quality report at moderate cost and in a minimum period of time and expense.

Once the courts have committed themselves to producing dependable divorce investigation reports, the only obstacle to their use would be the restrictive evidentiary rules that limit their availability at trial. Therefore, the courts should adopt the informal procedure employed in *Woodruff*, which admits the reports into evidence if they contain relevant information.⁹⁴ Finally, the courts should give presumptive weight to the conclusions of the report. This step would indicate the willingness of the courts to recognize the expertise of others and would lead to a more satisfactory initial custody determination. It would at the same time leave the court the opportunity to consider countervailing considerations brought out through testimony at trial, which could effectively rebut the presumption raised by the report.

These suggestions envision no changes in the present in-court per-

91. Williams Interview.

92. OHIO R. CIV. P. 75(P).

93. See text accompanying notes 20-41 *supra*.

94. See text following note 63 *supra*.

sonnel. Thus, the suggestion would not have to await any legislative action, for it is presently within the power of family court judges to appoint appropriate personnel to examine children and their environments before making final decisions.⁹⁵ The only potential impediment to the system is the language in section 3109.04, which states "that the court shall decide" custody.⁹⁶ Two courts to date have held that this statute means that the court must make the choice personally; that is, the court cannot delegate its power to make the decision even to the extent of relying solely on an investigation report to render its decision.⁹⁷ However, by establishing a presumption in favor of the report's conclusions, the court would not delegate its decisionmaking power to the investigators. If the presumption is rebutted, the court must ultimately make the determination of which party's evidence is more convincing. If the presumption stands, the court still has decided the case by means of a rule previously determined by it to be reliable.

GEORGE KARL ROSENSTOCK

95. OHIO R. CIV. P. 75(D), (P).

96. OHIO REV. CODE ANN. § 3107.04 (Page 1972).

97. See text accompanying note 90 *supra*.