

MODEL ORDER APPOINTING A CUSTODY EVALUATOR: A TOOL TO SUPPORT JUDGES IN MAKING INFORMED AND SAFE BEST INTERESTS DETERMINATIONS

INTRODUCTION

This model order is a tool designed to assist judges in drafting orders for the appointment of custody evaluators. The order and commentary (on facing page) offers a framework that courts should modify to match the local rules and practices in their jurisdiction, and the circumstances of a given custody case. Electronic copies of the order are available for this purpose. The order devotes particular attention to domestic violence, but it is an appropriate resource for any custody case whether or not domestic violence has been identified. We recommend that the tool be used in conjunction with National Council of Juvenile and Family Court Judges' (NCJFCJ) *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide (Navigating Guide)*, which contains detailed guidance for courts on, among other things, deciding when an evaluation is necessary in a custody case.

A free copy can be of *The Navigating Guide* can be downloaded at:
<http://www.ncjfcj.org/resource-library/publications/navigating-custody-and-visitation>

Courts wishing to modify this template to meet the needs of their community can contact NCJFCJ for technical assistance through its Resource Center on Domestic Violence: Child Protection and Custody at FVDinfo@ncjfcj.org or 1-800-527-3223.



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ORDER APPOINTING CUSTODY EVALUATOR

[COURT NAME]

[Petitioner's Name],) Case No.: [Number]
)
Petitioner,) [Case Title]
)
vs.)
)
[Respondent's Name],)
)
Respondent)
_____)

IT IS ORDERED, that _____,
whose office is located at _____
_____ and whose contact information is
_____ (business telephone) and _____
_____ (email), is hereby appointed to conduct a custody
evaluation for these proceedings regarding the following children:

_____.

COSTS

Based on the respective financial and other relevant circumstances of
the parties, payment for the evaluation shall be allocated as follows:
_____% of the cost shall be paid by the Respondent, _____% by the
Petitioner, and _____% by the court.

COMMENTARY

COSTS

It is important for the order to explicitly address the question of what parties or entities are responsible for payment of the evaluation. Many jurisdictions will have procedures and rules in place that govern the allocation of costs for court-ordered custody evaluations. Users should adjust this language to fit the rules and practices in their jurisdiction.

1 **EVALUATOR QUALIFICATIONS AND EXPERIENCE**

2 The above-named evaluator's appointment shall be contingent upon the
3 submission to the Court within _____ days of the date of this order, an
4 affirmation confirming that the evaluator meets the qualifications set forth
5 in Attachment A of this order.

6 In the event that the above-referenced evaluator fails to comply with
7 this provision within the prescribed time frame, the court shall terminate
8 the evaluator's appointment.

9 Any evaluator who has been pre-qualified to conduct evaluations in this
10 jurisdiction need not submit his or her qualifications.

11 **EXISTING ORDERS**

12 Copies of any and all orders related to this matter, including
13 parenting time, paternity and child support, are attached herein as
14 Attachment B.

15 **SAFETY**

16 The parties shall meet separately with the evaluator at separate times.

17 The evaluator shall avoid whenever possible identifying one party or
18 subject child as the source of negative information about another party or
19 subject child.

20 The evaluator should avoid attributing direct quotes to children.

21 If it becomes essential to share information with one party or subject
22 child that may be another party or subject child at risk, the evaluator shall
23 warn the party at risk in advance about the disclosure.

24 The evaluator may refer any party to resources for safety based on the
25 information they have gathered regarding the family.

26 Any party who feels the evaluation process is jeopardizing his or her
27 safety shall file a written declaration with the court detailing reasons for
28 the concern within ____ days of the date on which the concern arises. Copies

EVALUATOR QUALIFICATIONS AND EXPERIENCE

The term “custody evaluator” has different meanings across jurisdictions. Some courts might appoint a custody evaluator to simply gather information about a family and provide it to the court, a role that could be served by professionals from varying backgrounds. Many jurisdictions, however, confine custody evaluation to professionals with mental health expertise. This section is intended to give courts the flexibility, where permissible under local rules, to tailor qualifications to the particular demands of a case. For example, if the court is concerned about the presence of coercive and controlling dynamics between the parents, the evaluator might be required in this order to demonstrate knowledge of and/or experience with the impact of domestic violence on family functioning.

Many courts may be subject to statutory or rule-based requirements for evaluator qualifications. These qualifications can be the basis of the content of Attachment A. This attachment is also designed to assist a court in learning how the evaluator’s qualifications match the issues about which the court is seeking information and/or analysis. A court may request that an evaluator use the attachment to demonstrate what aspects of their qualifications and experience is relevant to each issue that the court has identified as a subject of the evaluation.

For further information regarding evaluator qualifications and the process of choosing an evaluator, see the *Navigating Guide*, pp. 17-18 and Bench Card II, Side 1.

EXISTING ORDERS

It is important that the court, the evaluator, the parties, and counsel have knowledge and a clear understanding of all existing court orders related to the family, including but not limited to orders of child support, parenting time, and paternity.

Especially where there is no current court order regarding parenting time, the court should consider whether to enter such an order, as authorized by governing law, to ensure fair and safe access to the children for both parents pending the outcome of the custody proceedings.

SAFETY

The purpose of this section is to alert the court and the evaluator to the potential for

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1 of the declaration should be served on all counsel, unrepresented parties,
2 and the evaluator.

3 **SCHEDULING**

4 The evaluator shall make initial contact with each party separately
5 within _____ days of the date of this order to coordinate the scheduling
6 of the evaluation process.

7 The evaluator shall complete the report and notify the court of such
8 completion at least _____ days before the custody hearing in this matter
9 is conducted.

10 **COOPERATION WITH EVALUATOR**

11 The parties shall cooperate fully with the evaluator on a timely basis,
12 including scheduling and keeping appointments, providing information and
13 records, identifying collateral witnesses, and signing consents to release
14 information about themselves and the children.

15 ***Privileges***

16 Where cooperation with the evaluator requires a party or subject child
17 to waive a statutory privilege (e.g., therapist-patient), attorneys for the
18 parties must insure that their clients understand the implications of waiving
19 or declining to waive a privilege.

20 Any privilege covering the subject child(ren) shall be waived or
21 asserted according to the laws of the jurisdiction.

22 **EVALUATOR DISCLOSURES**

23 The evaluator shall, in the initial meeting, inform each adult party,
24 each child's counsel and any child who, in the professional judgment of the
25 evaluator, has the ability to understand the information: 1) the purpose,
26 nature, and method of the evaluation, 2) the evaluator's reporting
27 requirements under state law, including but limited to, the evaluator's
28

danger to family members in the evaluation process, especially when domestic violence is present in the family. Disclosing domestic violence is always potentially dangerous to victims and their children. Family members who disclose domestic violence to custody evaluator are particularly vulnerable because the process is not confidential. An evaluation report that concludes a family is experiencing domestic violence need not identify the source of that information to trigger an abuser's retaliation against family members who the evaluator interviewed. The elements of this section are designed to minimize the danger created by such disclosures. Many jurisdictions give parents the option to meet with the evaluator separately, but require the parent to request this accommodation. An abused parent who makes this request, however, risks retaliation from the abuser.

The complaint procedure for addressing concerns about the evaluation process does raise the same safety concerns, particularly for unrepresented parties who must initiate the complaint themselves. Due process demands that any communications with the court be shared with all parties and counsel, which limits the protective measures that could be implemented in this context. On balance, the drafters of this model order felt there should be an avenue available for victims of abuse to voice their safety concerns about the process and to hold evaluators accountable for unsafe practices. Courts should use their discretion in implementing this provision.

Additional guidance on safety measures can be found in the *Navigating Guide*, pp. 21 - 22 and Bench Card II, Side 1 ("Safety First") and Bench Card IIA, Side 2 ("The evaluator shall").

SCHEDULING

Ordering an evaluation for a custody case can extend what is already a lengthy period of uncertainty for families as the case winds its way through the court process. Setting a clear schedule for the evaluator can help to minimize unnecessary delays.

COOPERATION WITH EVALUATOR

The custody evaluation process is, by its nature, invasive. Private and often sensitive aspects of the parents' and children's lives are exposed to strangers whose judgments can trigger life-altering changes in families. The court should be mindful of this dynamic in defining the obligations of parents and children to forgo their personal privacy in the evaluation process. The language in this section attempts to strike a balance between the need for information and the personal autonomy of family members being evaluated, particularly with respect to the integrity of any therapeutic relationships of family members. Where parties are unrepresented, the court must insure that the unrepresented parties

obligation to report any suspected child abuse and neglect, and threats to harm one's self or another person.

The lack of confidentiality of the process may be disclosed to the child and shall be disclosed to adult parties.

EVALUATION

Content of Report

The report shall include a written explanation of the evaluation process that describes the purpose of the evaluation, the procedures used, the scope of the evaluation, and the analysis that substantiates the evaluator's interpretations and conclusions regarding the specific issues set forth below. The report shall include a list of all documents and persons consulted, including any known sources of information that were not consulted and an explanation for why these sources were not consulted.

Domestic Violence Screening

In recognition of the significant impact that domestic violence has on parenting and the child(ren)'s well-being, the evaluator shall, at the outset of the investigation, use a protocol to screen for domestic violence, including the presence of coercive and controlling dynamics, with or without physical violence that rises to the level of criminal domestic violence under state law.

Information Gathering

The evaluator shall consult multiple data sources and corroboration for information whenever possible.

Attached herein, as Attachment C, are the following court files for prior and pending criminal and civil matters relevant to these proceedings:

1. _____
2. _____
3. _____

(Continued from page 3a)

understand their rights to privilege in the context and the potential consequences of declining to waive the privilege.

For additional guidance, refer to the *Navigating Guide*, pp. 21 - 22.

EVALUATION

Setting out clear expectations for an evaluator can go a long way toward insuring a court receives the information and/or analysis it needs to make an appropriate custody and/or visitation determination. Whether a court adopts the model language or fashions its own, orders appointing an evaluator must convey, with specificity, what information the court needs and how the court would like the information presented.

Content of Report

Prescribing the content of the evaluator's report enhances the transparency of the process, helping both to promote evaluator accountability and to give the parties a sense of fairness. The evaluator's report should demonstrate that the evaluator was competent and balanced in his or her information-gathering and/or analysis. Requiring this transparency can be an important check on bias and the reaching of conclusions not supported by the evidence.

Domestic Violence Screening

The absence of documentary evidence in the form of police reports, medical records or protective orders does not mean that domestic violence is not present in a family. Coercive and controlling dynamics, even in the absence of physical violence, threaten a child's well-being and undermine the abused parent's ability to parent. Victims may not feel safe revealing this information or they may not identify their family dynamics as domestic violence. For these reasons, the drafters urge universal screening for domestic violence as part of the evaluation process.

Information Gathering

To the extent possible, the court should provide the evaluator with any records to which it has access that are pertinent to the evaluation. Those materials could include criminal records, court files from any civil or criminal cases involving the parties or child(ren), as well as any child protection records involving family members. The parties should also have the opportunity to provide information and suggest sources to the evaluator. Relevant sources of information about the family, whether identified by a party or the evaluator, include extended family members, school records and personnel, medical and mental health records and providers, co-workers of the parents, and any professionals who have come into contact with the family, including clergy, shelter advocates,

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1 The parties shall provide evaluator any additional pleadings filed in
2 the above cases after the issuance of this order.

3 ***Investigation and/or Analysis***

4 The evaluator shall:

5 ____ conduct an investigation by gathering information regarding the
6 following issue(s):

7 ISSUE #1:

8 ISSUE #2:

9 ISSUE #3:

10 ISSUE #4:

11 The evaluator shall:

12 ____conduct the following analysis of the following issue(s):

13 ISSUE #1:

14 ISSUE #2:

15 ISSUE #3:

16 ISSUE #4:

17 Where domestic violence is identified, the evaluator shall determine
18 the full context of the abuse and its implications for parenting and the
19 child(ren)'s well-being. The context to be explored includes, but is not
20 limited to, the origin, progression, frequency and duration of the behavior,
21 which abusive patterns of behavior were relied upon to the achieve control
22 (psychological, physical, sexual, financial), an assessment of the risk of
23 reoccurrence, and the existence of the behavior with multiple partners.

24 The implications for children to be explored include the nature and
25 frequency of the child(ren)'s exposure to domestic violence, which includes
26 not only directly witnessing the violence, but also observing the aftermath-
27 injuries to a parent, physical disarray in the home, and the lingering
28 atmosphere of tension and fear that follows the violence. In addition, the

(Continued from page 4a)

attorneys, and child-welfare workers.

For additional guidance on information gathering, refer to the *Navigating Guide*, pp. 16-20 and Bench Card IIA, Side 1.

Investigation and/or Analysis

Although it is a fundamental principle that the court has ultimate authority over custody/parenting time decisions, there is ongoing debate in the judiciary about the role of evaluators and the point at which that role becomes an inappropriate delegation of judicial authority. In light of this division of opinion, it is important for court's to clearly delineate the task they are assigning to an evaluator. This section is designed to give courts the flexibility to narrowly tailor the evaluator's task to a court's particular needs.

Courts opting to confine the evaluator's work to information gathering would complete only the first set of blanks and might even delete the analysis section from the order. Courts seeking both analysis and information gathering would complete both sections. It is also possible that a court would ask an evaluator to provide only analysis of facts that are already before the court.

Examples of issues the court might want investigated include: whether there is present or past substance abuse; whether either parent has a mental health diagnosis and if they are receiving treatment; the extent, nature, and context of any violence in the family.

Examples of requests for analysis include: What is the impact of the abusive parent's behavior on his/her relationship with the children? How does the parent's mental health diagnosis affect his/her ability to parent?

Guidance for the court in framing the scope of the evaluator's work, including a discussion of investigative versus analytic roles, can be found in the *Navigating Guide*, pp. 16 - 17 and Bench Card Side II, Side 1.

The analysis section of the model order sets forth required elements for the evaluation in cases where domestic violence, as previously defined in the order, has been identified. Specifically, the evaluator must make three critical inquiries to determine the nature and effects of the abuse: the context of the abuse, its implications for the safety and well-being of the child(ren), and its implications for the parenting of both the abusive parent and the abused parent.

Guidance about information relevant to domestic violence can be found in the *Navigating Guide*, Card II, Side 2, under the heading "*Be Specific about the Information You Need.*"

1 evaluator shall investigate whether the child(ren) exhibit behaviors that can
2 manifest as a result of exposure to domestic violence. Such behaviors
3 include, but are not limited to, sleep disturbances, bedwetting, age-
4 inappropriate separation anxiety, hyperactivity, aggression, depression or
5 anxiety.

6 Determining the implications of the abuse for parenting should include
7 an examination of both the abusive parent's parenting and how the abuse
8 affects the abused parent's ability to parent. This analysis should include
9 an assessment of whether the abuse interferes with the abused parent's
10 ability to exercise parental authority or disrupts or harms the parent-child
11 relationship.

12 The evaluator shall provide an analysis of how the domestic violence
13 affects each element of the applicable legal standards for determining the
14 legal best interests of the child.

15 ***Issues beyond the Scope***

16 To the extent that the evaluator identifies issues beyond the scope
17 articulated herein, the evaluator shall take the following action:
18
19

20 The evaluator may, to the extent that issues outside the evaluator's
21 expertise arise in the course of the evaluation, consult with experts in the
22 relevant issue area. The evaluator, however, shall not to delegate components
23 of the evaluation to any individual without prior approval of the court, and
24 the report shall list all experts consulted and the issues discussed.

25 ***Cultural and Socio-Economic Status of the Family***

26 The evaluator shall account for the family's cultural identity and
27 socio-economic status (e.g., poverty status) as part of the evaluation and
28

Issues beyond the Scope

This section is designed to serve as an additional tool for courts to use to define the parameters of the evaluator's role. Courts should use discretion and refer to local rules and practice to determine whether and how to use this section.

This section clarifies that consultation with appropriate experts regarding issues beyond the evaluator's area of expertise raised in an evaluation is a permissible practice. Transparency regarding such consultations is assured by the requirement that the report include the name of any expert and the issue for which the consultation was sought.

1 indicate how cultural and/or socio-economic considerations affected the
2 evaluator's investigation and/or analysis.

3 ***Psychological Testing***

4 If the evaluator elects to use psychological testing in the course of
5 the evaluation, the evaluator must be trained in the use of any test
6 administered, have the requisite mental health expertise to analyze,
7 interpret, and draw conclusions from the test data, adhere to the
8 professional ethical standards for the use and interpretation of such tests,
9 recognize the limits of any testing administered, and view the results within
10 the full context of information from clinical interviews and other data
11 gathered. Any conclusions drawn from the testing results should account for
12 the stress inherent to custody and divorce disputes.

13 If psychological tests are used, the evaluator is to describe the
14 purpose of the test, whether it was administered in part or in whole, what
15 the test instrument was designed to measure, on what populations the test's
16 "norms" were developed, and what standing the test has in the scientific
17 community of mental health practitioners.

18 **COMMUNICATION**

19 ***Counsel***

20 Unless the parties otherwise stipulate, *ex parte* communication between
21 counsel and the evaluator is prohibited, except for the scheduling of
22 appointments, exchanging of documents.

23 Where there is counsel for the child, this counsel may communicate with
24 the evaluator about the purpose, nature, and method of the evaluation and any
25 limits on the confidentiality of the process for the purposes of conveying
26 such information to the counsel's client.

Psychological Testing

Courts should be alert to an evaluator's over-reliance on psychological tests. While psychological testing may yield helpful information in some instances, it is important for courts to recognize the limitations of this tool. Currently, there exists no psychological test that is validated for the assessment of parenting capacity. There is also no psychological test to determine whether a person is an abuser or victim of abuse; in fact, the use of psychological testing in cases involving domestic violence could lead to inaccurate conclusions and improperly shift the focus away from the abusive parent.

For additional guidance on the use of psychological testing, refer to the *Navigating Guide*, pp. 20-21 and Bench Card III, Side 2.

COMMUNICATION

This section reflects the common practice in most courts of imposing constraints on *ex parte* communication between the evaluator and the court and between the evaluator and counsel for the parties regarding any substantive issues in the case.

See also, Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation*, Standard 4.4.

Counsel

Courts may consider, however, an alternate approach, which permits some communication between attorneys and the evaluator, but requires that the evaluator document all such communication, refrain from considering counsel's statements as evidence, and independently verify any factual assertions made during the discussions.

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1 ***Witnesses/Parties***

2 The evaluator shall have the discretion to initiate communication with
3 any person, party or agency that may provide relevant information to the
4 evaluator.

5 ***Court***

6 Any communication between the court and the evaluator shall be in
7 writing to all parties or by conference call with all parties and/or their
8 attorneys. The parties and their attorneys must have reasonable notice of
9 any conference call between the court and evaluator.

10 ***Exigent Circumstances***

11 If the evaluator determines that exigent circumstances exist requiring
12 court intervention, the evaluator shall notify the court in writing with
13 simultaneous copies to the attorneys for the parties and child and seek
14 further direction from the court.

15 **ROLE OF EVALUATOR**

16 The evaluator shall serve solely and exclusively in a capacity to
17 investigate and/or conduct an analysis on behalf of the court. The evaluator
18 shall not act in any other capacity or role, including but not limited to: a)
19 a therapist for any party or any child who is a subject of this proceeding;
20 b) advisor to the parties; i.e. is not to give parties advice with respect to
21 any issue, whether legal or parenting, even if a party seeks such advice; and
22 c) mediator, settlement facilitator; or parenting coordinator, even if one or
23 both parties seek such services.

24 It is a conflict of interest for any psychologist who has treated a
25 child or any of the adults involved in this proceeding to perform an
26 evaluation concerning the child.

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Witnesses/Parties

The evaluator's ability to acquire information from witnesses may be limited by the scope of a party's consent to consult with professionals.

ROLE OF EVALUATOR

In smaller jurisdictions, it may not be possible for an evaluator to avoid dual roles. In such instances, the evaluator should notify the court of any past or existing relationships with the parties and child(ren) upon being appointed. In addition, the court may wish to adopt a "waiting period" after an evaluator has submitted an evaluation before he or she may be eligible to play a therapeutic role with a child or parent.

For additional information, please refer to the *Navigating Guide*, p. 23.

1 **BIAS/CONFLICT OF INTEREST**

2 The evaluator shall disclose to the court within ____ days of the date
3 of this order any familial, financial or social relationship that the
4 evaluator has with the attorneys of record, the presiding judge, any parties
5 or child(ren) in this case and the nature of such relationship.

6 The evaluator shall strive to maintain impartiality throughout the
7 process by monitoring his or her values, perceptions, and reactions actively
8 and to seek peer consultation in the event that they perceive any loss of
9 impartiality.

10 The evaluator shall remain aware throughout the process of his or her
11 own biases, including but not limited to biases related to culture, gender
12 identity, sexual orientation, socio-economic status, ethnicity, religion,
13 race or disability.

14 **WITHDRAWAL**

15 The evaluator may, upon a showing of good cause, request that he/she be
16 allowed to withdraw as evaluator by notifying the court in writing, with
17 simultaneous copies to attorneys for the parties and child and to any
18 unrepresented party. The court shall then schedule a hearing on the issue.
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BIAS/CONFLICT OF INTEREST

It can be difficult to detect the presence of bias. For this reason, the court must stress the importance of the transparency of the evaluator's analysis process. Requiring detailed explanation of the basis for the evaluator's conclusions can help make transparent the presence of bias.

WITHDRAWAL

This section should be modified to match local procedures and rules for withdrawal.

1 **ACCOUNTABILITY OF EVALUATOR**

2 The evaluator shall notify the court within 7 days of appointment if
3 they have been disciplined by any licensing agency or professional
4 organization.

5 ***Removal***

6 Any party seeking the removal of an evaluator shall _____
7 _____
8 _____.

9 ***Complaints***

10 Any complaint regarding conduct of or procedure employed by evaluator
11 will be handled in the following manner: _____
12 _____
13 _____.

14 **CONFIDENTIALITY/ DISTRIBUTION OF REPORT**

15 All child custody evaluation reports are confidential. The evaluator,
16 attorneys and each party shall duplicate and disseminate reports only in
17 compliance with this Order and any further Orders of the Court. Violations
18 of this Order and any further Orders on the subject of duplication and
19 dissemination may be subject to monetary or evidentiary or other sanctions to
20 be reasonably imposed.

21 The report shall be distributed as follows: _____
22 _____
23 _____
24 _____

25 No one has the right to disseminate the report to any individuals or
26 institutions except upon Court Order after notice and hearing.
27
28

ACCOUNTABILITY OF EVALUATOR

Disciplinary procedures differ among the states and professions within the custody evaluation field. Courts should consider whether to specify what types of disciplinary outcomes (e.g., suspended sanctions, letters of admonition, stipulations) would trigger the duty to report.

Removal and Complaints

The purpose of these sections is to urge courts to consider mechanisms for holding the evaluator accountable to the parties and the court. Given the invasiveness of the evaluation process and the influence an evaluator's recommendations can have on the outcome of a case, accountability procedures can help give the parties voice and a greater sense of fairness in the process.

CONFIDENTIALITY/ DISTRIBUTION OF REPORT

There is a range of opinion and practice on how widely an evaluation report should be disseminated. Some courts, through rules or orders, provide the report to counsel only, allowing unrepresented parties to review the report, but not obtain a copy. Other jurisdictions do not impose any limits on distribution of the report. This model order takes an approach grounded in safety for the children by limiting the instances in which children or others who may misuse it can access the report.

No one has the right to use the report for any purpose other than this proceeding except upon Court Order after notice and hearing.

Upon request of an attorney for the child, an attorney for a parent, or an unrepresented parent, the Court may, in its discretion and with any reasonable safeguards imposed, grant a child the right to read the report.

Dated this [day] of [Month],

ENTER:

Judge

ATTACHMENT A: QUALICATIONS AND EXPERIENCE

Minimum Qualifications

Relevant Experience:

ISSUE #1:

ISSUE #2

ISSUE #3

ISSUE #4

ATTACHMENT B, EXISTING ORDERS

ATTACHMENT C, COURT FILES



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