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The Browning of America—Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes

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The Browning of America—Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes

Cynthia R. Mabry*

Table of Contents

Introduction.....	414
I. The Reason that Culture Is Likely to Become an Issue for Parents in Custody Disputes.....	416
II. Making Custody Determinations Under the Best Interests of the Child Standard.....	418
A. Best Interests Criteria and the Absence of Culture as an Express Factor.....	418
B. Consideration of Culture Under Other Criteria.....	420
C. Other Effects of Culture on Placements and Parenting Time.....	423
III. Culture and Ethnic Heritage: A Relevant Factor but Not a Sole or Controlling Factor.....	425
IV. Evaluative Criteria that Mental Health Professionals Use in Custody Evaluations.....	428
A. Specific Criteria that Mental Health Experts Evaluate.....	429
B. The Current Role of Culture in Mental Health Evaluations..	430
C. Ranking of Mental Health Professionals' Criteria.....	434

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V. The Necessity for Cultural Competence Among Parents and Professionals.....	435
VI. International Emphasis on Culture.....	439
VII. Culture and Custody of Indian Children	440
VIII. Conclusion.....	441

Introduction

Natasha Kapoor-Acuña is Indian.¹ Her husband, Walter, is a Mexican native.² They speak to their two children in Spanish, Hindi and English.³ In this multicultural family, the children also pray in Spanish and Hindi.⁴ The two parents have blended two cultures successfully.⁵ Each year, thousands of bicultural and multicultural families like the Acuña family are created.⁶ Given America's divorce rate, however, many of those marriages will end in divorce.⁷

Throughout the United States, the best interest of the child is a paramount concern in adjudicating child custody proceedings.⁸ Each state legislature has compiled a list of best interests criteria to aid decision-makers who must determine which parent should be awarded custody of a

1. See Louise Rafkin, *On the Couch: Natasha Kapoor-Acuña and Walter Acuña*, S.F. CHRON., Aug. 3, 2008, at F2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/03/LVJF11L4F5.DTL#ixzz0dNYcfKrO> (describing a multicultural family).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 19 (2004) [hereinafter CURRENT POPULATION REPORTS 2004], available at <http://www.census.gov/prod/2004pubs/p20-553.pdf> (listing the characteristics of male-female unmarried and married couples).

7. See WEN-SHING TSENG, DARYL MATTHEWS & TODD S. ELWYN, CULTURAL COMPETENCE IN FORENSIC MENTAL HEALTH: A GUIDE FOR PSYCHIATRISTS, PSYCHOLOGISTS, AND ATTORNEYS 205 (2004) (noting that there is a high divorce rate and the number of diverse lifestyles cause culture to play a significant role in custody disputes).

8. See James N. Bow & Francella A. Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115, 125 (2004) (noting that although laws vary from state to state, "decision making is based on the best interests of the child, which is the major thrust of custody laws in all 50 states").

child or whether the parents should share custody.⁹ The Children's Bill of Rights provides that every child has a right to education that "foster[s] respect for [the] child's parents, for the child's own cultural identity, language and values, as well as for the cultural background and values of others."¹⁰ Although international laws require decision-makers to give due consideration to the child's cultural background, many jurisdictions in the United States have not included express provisions in statutes that would require courts to consider culture among the criteria for deciding custody.¹¹

Considering the substantial increase in the number of bicultural and multicultural families that exist today, Part I of this Article defines culture and explains why it is likely to be a factor in many dissolutions of marriages and other non-marital relationships. Part II discusses the best interests standard that a majority of states use to determine custody and varied criteria under which some courts have considered custody and illustrate the absence of culture among those criteria. Part III explains that although it is an important and relevant factor, culture should not be the sole factor in custody determinations. Part IV shows which criteria mental health experts who conduct custody evaluations consider and how mental health experts rank the importance of those criteria. Part V discusses the need for culturally competent parents, judges, lawyers and mental health professionals involved in bicultural or multicultural family disputes. Finally, this Article concludes by reasoning that because bicultural and multicultural families do disrupt and dissolve, more disputes should involve

9. See, e.g., ALA. CODE § 12-15-1.1 (LexisNexis 2007 Reg. Sess.) (noting "[t]his chapter shall be liberally construed to the end that each child coming within the jurisdiction of the juvenile court shall receive the care, guidance, and control, preferably in his or her own home, necessary for the welfare of the child and the best interests of the state"); CAL. WELF. & INST. CODE § 16000 (2008 Supp.) (stating that "[i]t is the intent of the Legislature to preserve and strengthen a child's family ties whenever possible, removing the child from the custody of his or her parents only when necessary for his or her welfare"); D.C. CODE ANN. § 16-2353 (LexisNexis 2007) (noting that "[a] judge may enter an order for the termination of the parent and child relationship" upon a finding "that the termination is in the best interests of the child"); IND. CODE ANN. § 31-34-19-6 (LexisNexis 2007 Reg. Sess.) (emphasizing that the juvenile court should enter a decree consistent with best interests of the child); VA. CODE ANN. § 20-124.3 (West 2007 Reg. Sess.) (listing factors the court should consider "[i]n determining the best interests of a child for purposes of determining custody or visitation arrangements").

10. Lawrence de Bivort, *Children's Bill of Rights* ¶ 17, <http://www.newciv.org/ncn/cbor.html> (last visited Jan. 18, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. See, e.g., ALA. CODE § 12-15-1.1 (LexisNexis 2007 Reg. Sess.) (indicating that the best interest of the child is the foremost concern).

consideration of culture. Thus, more statutes should be amended and decision-makers and evaluators must be culturally sensitive to ensure that culture is not ignored in the process of determining which placement is in the multicultural child's best interests.

I. The Reason that Culture Is Likely to Become an Issue for Parents in Custody Disputes

Culture is "the configuration of learned behavior and results of behavior whose components and elements are shared and transmitted by the members of a particular society."¹² It represents "the ethos of a people as well as a way of life."¹³ It is an embodiment of distinctive achievements of human groups, their artifacts, and their traditional ideas accompanied by their values.¹⁴

Tens of thousands of biracial and multiracial families live in the United States.¹⁵ A survey of the United States population that was released in 2004 indicates that there were 228,000 unmarried interracial couples¹⁶ in the United States and 47,000 couples were living with children under the age of eighteen.¹⁷ More than 500,000 married interracial couples were living with children under the age of eighteen.¹⁸

The cultural make-up of the families that were surveyed for that population study varied.¹⁹ Of married couples, there were 49,000

12. Laurie L. Wilson & Sandra M. Stith, *Culturally Sensitive Therapy with Black Clients*, in COUNSELING AMERICAN MINORITIES: A CROSS-CULTURAL PERSPECTIVE 5 (Donald R. Atkinson et al. eds., 4th ed. 1993); see also Cynthia R. Mabry, *African Americans Are Not Carbon Copies of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 416 (1998) (discussing the importance of cultural considerations in the mediation process).

13. SADYE LOGAN ET AL., SOCIAL WORK PRACTICE WITH BLACK FAMILIES: A CULTURALLY SPECIFIC PERSPECTIVE 24 (1990).

14. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 2.

15. CURRENT POPULATION REPORTS 2004, *supra* note 6, at 19; see also Cathy Areu, *First Person Singular: Soledad O'Brien, CNN's "American Morning" Anchor*, THE WASH. POST MAG., Feb. 4, 2007, at 8 (revealing that her mother is a black Cuban and her father is a white Australian and that she defines herself as "the poster child for 'multi-culti,' for sure").

16. CURRENT POPULATION REPORTS 2004, *supra* note 6, at 19.

17. *Id.*

18. *Id.*

19. *Id.*

black and Asian families.²⁰ There were 416,000 black and white families and 578,000 white and Asian families.²¹ Additionally, 1,888,000 families consisted of one Latino partner and one non-Latino partner.²²

Many bicultural married couples have minor children living in their home.²³ The black and Asian couples were parenting 24,000 children.²⁴ Black and white couples were parenting 224,000 children.²⁵ White and Asian couples were parenting 279,000 children, while blended Latino and non-Latino couples were parenting 1,102,000 children.²⁶

A smaller group of bicultural families consisted of unmarried couples who were parenting children.²⁷ The 13,000 unwed black and Asian couples were parenting 4,000 children.²⁸ The 138,000 black and white couples were parenting 30,000 children.²⁹ The 77,000 white and Asian couples were parenting 13,000 children.³⁰ Lastly, 330,000 unwed Latino/Non-Latino couples were parenting 156,000 children.³¹

The above figures did not include multicultural families. Moreover, more than 1000 transracial adoptions occur each year.³² At a minimum, more than 20,000 transcultural adoptions also occurred when American parents adopted children from other countries.³³ Even though the exact number of affected persons is unknown, it follows that the potential for family breakdown in multicultural families, as it is in other families in the United States, is substantial.

20. *Id.*

21. *Id.*

22. *Id.*

23. CURRENT POPULATION REPORTS 2004, *supra* note 6, at 19.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. CURRENT POPULATION REPORTS 2004, *supra* note 6, at 19.

30. *Id.*

31. *Id.*

32. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY: LIVING ARRANGEMENTS OF CHILDREN 7 (2001), available at <http://www.census.gov/population/socdemo/child/p70-104.pdf> (lamenting the challenges of obtaining accurate counts of adoptees).

33. *Id.*

II. Making Custody Determinations Under the Best Interests of the Child Standard

In a majority of jurisdictions in the United States, courts and parties rely upon the best interests of the child standard to determine which parent should receive custody of a child when there is a divorce or a breakdown in an unwed couple's relationship.³⁴ This equitable standard is designed to assist judges and attorneys in ascertaining which "parent has acted and/or will act more in the child's best interest"³⁵ The trial courts have broad discretion in making custody determinations.³⁶

A. Best Interests Criteria and the Absence of Culture as an Express Factor

Each state that applies the best interests standard makes the determination based upon a list of criteria that is set forth in the applicable state's child custody statute. For example, the District of Columbia's statute lists seventeen criteria for consideration:

In determining the care and custody of a child, the best interest of the child shall be the primary consideration. To determine the best interest of the child, the court shall consider all relevant factors, including, but not limited to:

- (A) the wishes of the child as to his or her custodian, where practicable;
- (B) the wishes of the child's parent or parents as to the child's custody;
- (C) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest;
- (D) the child's adjustment to his or her home, school, and community;
- (E) the mental and physical health of all individuals involved;
- (F) evidence of an intrafamily offense as defined in section 16-1001(5);
- (G) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare;

34. See Bow & Quinnell, *supra* note 8, at 125 (stressing that despite variance in the law, decision making is based on the best interest of the child).

35. DIANE BRENNEMAN & LINDA RAVDIN, DOMESTIC RELATIONS MANUAL FOR THE DISTRICT OF COLUMBIA § 8-20 (2003).

36. See Van Sickel v. McGraw, 134 P.3d 338, 340-41 (Alaska 2006) (noting that trial courts are vested with broad discretion in determining child custody).

- (H) the willingness of the parents to share custody;
- (I) the prior involvement of each parent in the child's life;
- (J) the potential disruption of the child's social and school life;
- (K) the geographic proximity of the parental homes as this relates to the practical considerations of the child's residential schedule;
- (L) the demands of parental employment;
- (M) the age and number of children;
- (N) the sincerity of each parent's request;
- (O) the parent's ability to financially support a joint custody arrangement;
- (P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment, and Responsibilities, and medical assistance; and
- (Q) the benefit to the parents.³⁷

Courts have noted that the factors listed in the varied statutes are not exhaustive.³⁸ Accordingly, when custody disputes arise, judges must consider all relevant factors.³⁹ A court's failure to consider relevant and minimum factors is an abuse of discretion.⁴⁰ However, because few statutes expressly include the child's culture as a criterion for consideration, it may be overlooked in the analysis.⁴¹

37. See D.C. CODE ANN. § 16-914(a)(3) (LexisNexis 2009), and MICH. COMP. STAT. ANN. § 722.23(1) (West 2009) (considering any factor that is relevant to a "particular child").

38. See, e.g., *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 866 (Ill. App. Ct. 2006) (examining the Illinois best interest statute), and D.C. CODE ANN. § 16-914(a)(3) (2009) (noting that the list was not limited to the listed criteria).

39. See, e.g., *Gambla*, 853 N.E.2d at 866 (stating that the judge has the power to consider other relevant factors in determining the child's best interest), and BRENNEMAN & RAVDIN, *supra* note 35, at 8-21 (identifying a minimum of factors that District of Columbia courts must consider).

40. See BRENNEMAN & RAVDIN, *supra* note 35, at 8-21, and *Fitzgerald v. Fitzgerald*, 464 A.2d 110, 112-13 (D.C. 1983) (reversing and remanding an opinion that did not make findings on several statutory criteria).

41. See generally Linda K. Thomas, *Child Custody, Community and Autonomy: The Ties that Bind?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 645 (1997) (discussing invocations of culture and community in child custody decisions, and the possibility that those considerations will be overlooked where they are not mandated).

With regard to the culture factor, the Minnesota statute represents an exception.⁴² It provides that when there is a custody dispute between two parents, the fact finder should consider "the capacity and disposition of the parties to give the child, love, affection, and guidance, and to continue educating and raising the child in the child's culture"⁴³ A separate provision of the Minnesota statute further provides that "the child's cultural background" should be a consideration.⁴⁴ Culturally sensitive legislators in Connecticut and Hawaii have also added consideration of the child's cultural background as a specific criteria to those state custody statutes.⁴⁵ In fact, the State of Hawaii requires a special written plan concerning certain matters that affect the child's well being, including the child's culture.⁴⁶

B. Consideration of Culture Under Other Criteria

Where there is no express provision for culture in state statutes, a few courts have considered culture under statutory provisions other than the best interests criteria discussed above.⁴⁷ The Alaska statute, for example, requires consideration of the child's social needs.⁴⁸ The Alaskan Supreme Court used that provision in *Van Sickle v. McGraw*,⁴⁹ to credit a biracial child's Native American mother, given that the white father ignored the child's Native American cultural needs.⁵⁰ The court also considered the

42. MINN. STAT. § 518.17 (2009).

43. MINN. STAT. § 518.17 subd. 1(10) (2009).

44. *Id.* at subd. 1(11).

45. *See* CONN. GEN. STAT. § 46b-56 (c)(13) (2009) ("In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider . . . the child's cultural background"); HAW. REV. STAT. § 587-27(2)(B) (2009) (listing culture as an element of consideration); ARIZ. REV. STAT. § 8-112 (LexisNexis 2009) (mandating that the court shall conduct a social study before adoption, which shall include a social history of the child and the child's birth parents); ARK.CODE ANN. § 9-13-405 (West 2009) (searching for strong cultural ties to another country).

46. *See* HAW. REV. STAT. § 587-27(2)(B) (2009) (listing the child's culture as an important consideration in child custody disputes).

47. *See supra* Part II.A (discussing courts' application of cultural interests through "catch-all" provisions such as best interests).

48. *See* ALASKA STAT. § 25.24.150(c)(1) (2009) (listing the court's considerations in child custody matters).

49. *Van Sickle v. McGraw*, 134 P.3d 338, 342-43 (Alaska 2006) (finding that the trial court did not abuse its discretion in granting primary physical custody to Joshua).

50. *See id.* (noting that the mother's home would better foster the child's culture, in part because she was Native American).

fact that the child would have greater exposure to his Native American heritage in the city where his mother resided.⁵¹

Another statutory provision that may evoke a discussion of culture is the child's adjustment to his or her community.⁵² This provision is interpreted broadly.⁵³ Under this provision, whether the child is thriving in his or her current environment is explored.⁵⁴ The environment that the court chooses should be one in which the child will feel comfortable.⁵⁵ Often that means that the child will interact with others who share his or her cultural heritage.⁵⁶ In *Van Sickel v. McGraw*, the court awarded primary physical custody to the child's father.⁵⁷ Among other best interests factors, the court reasoned that the child would have better cultural opportunities and contact with extended family members in Sitka, Alaska, where her father resided.⁵⁸ The child's Tlingit heritage would also more likely be recognized in Sitka—a region that is noted for its Tlingit culture—than in the Michigan community where the child's mother lived.⁵⁹

Certainly, if the child has reached the prescribed statutory age for stating a preference, the child's wishes should be considered.⁶⁰ In all states, a child who is twelve or older may state his or her preference for living with one parent and that preference will be given great weight.⁶¹ In *Rooney v. Rooney*,⁶² the court considered the Caucasian father's ability to meet the child's cultural needs and the child's preference for placement with his father.⁶³ The child's mother was Tlingit.⁶⁴ Again, the court discussed

51. *Id.*

52. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 5/602(a)(4) (West 2009) (stating that the child's adjustment to his community is a factor of the child's best interest).

53. *See, e.g.*, *Van Sickel*, 134 P.3d at 342 (interpreting broadly an Alaskan custody factor when deciding to grant child support to the father).

54. *Id.*

55. *Id.*

56. *See id.* (discussing the importance of culture in a child's upbringing).

57. *See id.* at 343 (affirming the lower court's award of custody to the father).

58. *Id.* at 342–43.

59. *Van Sickel v. McGraw*, 134 P.3d 338, 342–43 (Alaska 2006).

60. *See, e.g.*, *Wade v. Corinthian*, 283 Ga. 514, 515 (Ga. 2008) (noting that the child's choice of parent in a custody hearing is normally controlling).

61. *See, e.g.*, D.C. CODE § 16-914(a)(3)(A) (2009) (listing the child's preference of parent as a factor), and 750 ILL. COMP. STAT. ANN. § 5/602(a)(2) (West 2009) (noting the child is given a preference in selecting which parent to be the custodian).

62. *See Rooney v. Rooney*, 914 P.2d 212, 218 (Alaska 1996) (describing a custody battle and the importance of cultural considerations in the disposition).

63. *See id.* at 218 (considering the child's desire to live with his father).

several relevant factors in the Alaska statute.⁶⁵ With respect to culture, it held that the father could meet the child's needs.⁶⁶ The appellate court decided that:

[T]he opportunities for [the child] to be exposed to his Tlingit heritage are greater in Sitka than in Wrangell [T]he court must consider the child's cultural needs as one factor in the overall context of his best interests. We think it clear from the above finding that the superior court considered Morgan's cultural needs, and it is implicit that the court believed these needs could be met through its custody order. Morgan will be with his mother for three months each year as well as during various school vacations. She undoubtedly will also see him upon her visits to Wrangell. Additionally, the superior court mandated that Tom take measures with Morgan to assure adequate contact with Virginia's family members in Wrangell and otherwise address his cultural needs. Finally, noting that "Morgan is a child of mixed ethnic background," the GAL stated her belief that it is "imperative that Morgan learn all that he can about both cultures." Thus, we conclude that the superior court adequately considered Morgan's cultural needs and therefore did not abuse its discretion.⁶⁷

In this context, it was held that a child who is old enough to express a mature rationale for living with one parent for cultural reasons should be allowed to live with that parent if that parent is fit.⁶⁸

Similarly, a factor that requires consideration of each parent's interrelationships with the other parent, relatives, and others may have cultural underpinnings.⁶⁹ With Chinese, African-American, Latino and Native American families, for example, the custodial parent's willingness to promote interrelationships between grandparents, aunts, uncles, cousins and other members of the extended family is important.⁷⁰ Under the "all relevant factors" provision,⁷¹ some courts have considered cultural heritage

64. *Id.* at 217–18.

65. *Id.* at 216–18.

66. *Id.* at 218.

67. *Id.* at 218.

68. *Rooney v. Rooney*, 914 P.2d 212, 217–18 (Alaska 1996).

69. *See, e.g.*, D.C. CODE § 16–914(a)(3)(C) (2009), *and* DEL. CODE ANN. tit. 13, § 722(a)(3) (2009) (ING), *and* 750 ILL. COMP. STAT. ANN. § 5/602(a)(3) (West 2009) (listing interrelationships as child custody factors).

70. *See* TSENG, MATTHEWS & ELWYN, *supra* note 7, at 209–10 (discussing the importance of grandparents and extended family).

71. *See* 750 ILL. COMP. STAT. ANN. 5/602(a) (West 2004) (instructing decision makers to consider "all relevant factors" when making custody decisions).

as a factor in custody disputes.⁷² In *In re Marriage of Gambla*,⁷³ the court considered all of the eight specific factors noted in the Illinois best interests statute.⁷⁴ Then the court considered culture under the catch all provision labeled as "all relevant factors."⁷⁵ The appellate court ruled that the child's cultural background was "appropriately weighed."⁷⁶

C. Other Effects of Culture on Placements and Parenting Time

Some courts have reached custody decisions by considering culture in other contexts that affect minor children.⁷⁷ Those considerations relate to the potentially adverse effect that culture would have on a child's well being if the child was placed with one parent.⁷⁸ Another perspective involves what would happen to a child if the cultural laws of another country were considered.⁷⁹

In *Shady v. Shady*,⁸⁰ the court made a custody determination in a case where abduction of the child was likely.⁸¹ The trial court issued a finding involving several factors and also discussed the role that culture played in its decision.⁸² The court cited one risk that it considered before it ordered supervised access for the father:

72. See, e.g., *In re Marriage of Gambla and Woodsen*, 853 N.E.2d 847, 865–67 (Ill.App.Ct. 2006) (describing the factors used in making the child custody order).

73. *In re Marriage of Gambla and Woodsen*, 853 N.E.2d 847, 869–71 (Ill. App. Ct. 2006) (finding that it is permissible for the court to consider race in granting custody to a parent as long as it is not the sole factor).

74. *Id.*

75. See *id.* at 866–68 (finding that the child needed to learn how to exist as an African American in a society that sometimes is hostile).

76. *Id.* at 870.

77. See, e.g., *Shady v. Shady*, 858 N.E.2d 128, 143 (Ind. App. 2006) (finding Egyptian culture having an effect on the custody of the child), and *In re A.A.F.*, No. 10-05-00078-CV, 2005 WL 3148094, at *3 (Tex. App. Nov. 23, 2005) (listing the child's safety as an important factor in a custody termination hearing).

78. See, e.g., *In re A.A.F.*, No. 10-05-00078-CV, 2005 WL 3148094, at *3 (Tex. App. Nov. 23, 2005) (describing the child's safety as an important factor).

79. See, e.g., *Shady v. Shady*, 858 N.E.2d 128, 143 (Ind. App. 2006) (analyzing the negative cultural impact on the child in a custody proceeding).

80. See *id.* (affirming a lower court custody decision in favor of the mother that considered various factors including the child's cultural needs, the culture of the parents, and the parents' family ties).

81. *Id.* at 143.

82. *Id.* at 141–43.

[Risk] Profile 5. When one or both parents are foreigners ending a mixed-culture marriage. Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to [his] family of origin. This is a way of insisting that [his] cultural identity b[e] given preeminent status in the child's upbringing.⁸³

The child's father had strong family ties in Egypt.⁸⁴ Therefore, the court held that the father's parenting time with the child should be supervised.⁸⁵ When the father appealed the trial court's order, the appellate court affirmed the trial court's decision because the trial court had not abused its discretion when it ordered supervised visitation in that situation.⁸⁶

In *In re A.A.F.*,⁸⁷ as it was considering the Hispanic American children's emotional and physical needs, the court heard testimony from the children's caseworker who also served as their counselor.⁸⁸ The caseworker testified that the children would suffer "culture shock" if they were placed with their paternal grandparents who were strangers to the children.⁸⁹ The children were born in the United States and they only spoke English.⁹⁰ The parties agreed that preserving the children's Latino heritage was important but they were not raised as Mexican Americans.⁹¹ Their Mexican grandparents only spoke Spanish and had not developed a relationship with the children before they were removed from their mother's home.⁹² Accordingly, the court ruled that the children should be

83. *Id.* at 141.

84. *Id.* at 142.

85. *See* Shady v. Shady, 858 N.E.2d 128, 143 (mandating supervision because of the risk that the father would abduct the son and take him to Egypt).

86. *Id.*

87. *In re A.A.F.*, No. 10-05-00078-CV, 2005 WL 3148094, at *3 (Tex. App. Nov. 23, 2005).

88. *Id.* at *6.

89. *Id.* at *6-8.

90. *Id.* at *6.

91. *Id.*

92. *In re A.A.F.*, No. 10-05-00078-CV, 2005 WL 3148094, at *8 (Tex. App. Nov. 23, 2005).

placed with their foster parents who wanted to adopt them after the mother's rights were terminated.⁹³

In *Foster v. Waterman*,⁹⁴ the mother was unmarried when the child was born.⁹⁵ Later the mother married someone who was not the child's father.⁹⁶ Anjela, the child who was at the center of the custody battle, was one-fourth Korean because her paternal grandmother was Korean.⁹⁷ Consequently, Anjela's father argued that it was important for her to have "maximum involvement with her Korean heritage."⁹⁸ Thus, he contended that he should receive primary physical custody of Anjela so that she would be exposed to her Korean culture.⁹⁹

The Court of Appeals of Iowa ruled that Anjela's ethnic heritage was an important concern; however, it refused to transfer custody to the father.¹⁰⁰ It reasoned that both parents lived in diverse communities.¹⁰¹ Additionally, custody would not be transferred because the mother supported Anjela's relationship with her paternal grandmother, shared Anjela's interest in Korean culture, enrolled Anjela in martial arts classes, and practiced speaking the Korean language with Anjela.¹⁰²

III. Culture and Ethnic Heritage: A Relevant Factor but Not a Sole or Controlling Factor

Culture is particularly relevant when interracial couples divorce. "The more distinctly a child's cultural inheritance varies from that of the dominant society, the more it must be taken into account. The more bias or hostility that exists against an aspect of the child's cultural inheritance, the more that cultural component needs to be considered."¹⁰³

93. *Id.* at *1, *8.

94. *See Foster v. Waterman*, No. 06-1183, 2007 WL 2119125, at *8 (Iowa Ct. App. July 25, 2007) (finding both parents are capable of providing competent and comparable care to their child).

95. *Id.* at *1.

96. *Id.* at *1.

97. *Id.* at *2.

98. *Id.*

99. *Id.*

100. *Id.* at *3.

101. *Foster v. Waterman*, No. 06-1183, 2007 WL 2119125, at *3 (Iowa Ct. App. July 25, 2007).

102. *Id.*

103. *See* TSENG, MATTHEWS & ELWYN, *supra* note 7, at 207 (calling for "special

On the other hand, even though culture is a relevant and important consideration, children should not be placed with a particular parent solely because the parent and the child share physical characteristics.¹⁰⁴ A few cases that decided whether race should be a factor in custody decisions are instructive here. In *Beazley v. Davis*,¹⁰⁵ the trial court awarded custody to the child's African-American father because the child had African-American physical characteristics. The appellate court overturned the trial court decision and held that placement based on physical characteristics violated the Fourteenth Amendment of the United States Constitution.¹⁰⁶ In 1984, in *Palmore v. Sidoti*,¹⁰⁷ the Supreme Court of the United States ruled that race is a relevant consideration in custody disputes, but the Court forbade consideration of race as the sole factor in a custody determination.¹⁰⁸

Similarly, culture should be a relevant factor in custody disputes, but as courts have ruled in connection with race, culture cannot and should not be the sole factor upon which a custody determination is based.¹⁰⁹ The

consideration" when a child has an interethnic background or her parents have formed an interracial marriage).

104. See *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (N.Y. App. Div. 1997) (discussing that the decision of which parent a child will reside within a custody dispute can include consideration of race among other factors, but ultimately should focus on what is in the child's best interest).

105. See *Beazley v. Davis*, 545 P.2d 206, 208 (Nev. 1976) (discussing that if race in child custody proceedings is used in an attempt to accomplish permissible state policy, then such a consideration constitutes impermissible discrimination in violation of the Fourteenth Amendment).

106. *Id.* at 208.

107. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (stating that race is a factor that may be considered in custody disputes, but sole focus on race as a determining factor is impermissible).

108. See *id.* at 432; accord *Tallman v. Tabor*, 859 F. Supp. 1078, 1085 (E.D. Mich. 1994) (allowing consideration of race as one factor), and *Fontaine v. Fontaine*, 133 N.E.2d 532, 534–35 (Ill. 1956) (forbidding race alone to outweigh other factors), and *Davis v. Davis*, 658 N.Y.S.2d 548, 550 (N.Y. App. Div. 1997) (stating that "race 'is not a dominant, controlling or crucial factor' but must be 'weighed along with all other material elements'" (quoting *Farmer v. Farmer*, 439 N.Y.S.2d 584, 590 (N.Y. App. Div. 1981))).

109. See *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 865 (Ill. App. Ct. 2006) ("In a custody dispute, the primary interest is the best interest and welfare of the child."); *In re the Custody of M.A.L.*, 457 N.W.2d 723, 726–28 (Minn. 1990) ("[A] child's ethnic heritage is not a controlling factor in a custody dispute, but is a factor to consider."); *Rooney v. Rooney*, 914 P.2d 212, 218 (Alaska 1996) ("[A]though it seems clear from the evidence that the opportunities for Morgan to be exposed to his Tlingit heritage are great . . . this is not the sole test in custody disputes."); see also ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12(1)(a) (2002) (forbidding consideration of the child's or the parent's race or ethnicity in determining custody).

child in *Gambla* was biracial because her mother was African American and her father was Caucasian.¹¹⁰ In making the custody determination, the Illinois trial court considered eight factors and declared that in all aspects the parents were equally qualified to be awarded custody.¹¹¹ Ultimately, however, the court decided the scales tipped in the mother's favor because she could provide a "breadth of cultural knowledge and experience" that the child's father was not able to provide.¹¹²

In an Iowa case, *In re Marriage of Kleist*,¹¹³ the trial court also considered the cultural differences between a father who was born and raised in Minnesota and a mother who was born and raised, for some part of her childhood, in Havana, Cuba.¹¹⁴ The child's mother was Latino and the child's father was Caucasian.¹¹⁵ At the custody hearing, the mother argued that she should receive custody of the couple's biracial daughter, Juliana, because in the Latino community, motherhood is sacred.¹¹⁶ She explained that Latino culture mandates that mothers assume the primary caretaker role for young children, especially when the young child is a female child.¹¹⁷ The mother also contended that she needed to be the custodial parent so that she could continuously guide and instruct Juliana in Spanish and English.¹¹⁸ Along with other best interest factors, the trial judge considered the mother's cultural beliefs and awarded the mother custody.¹¹⁹

When the father appealed the trial court's decision, the Court of Appeals of Iowa overruled the lower court's custody decision and granted custody to the father.¹²⁰ In its opinion, the trial judge had given "undue weight to the mother's cultural beliefs," which was a pretext for the tender years doctrine that had been abolished.¹²¹ In a subsequent appeal, upon de

110. *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 866–70 (Ill. App. Ct. 2006).

111. *Id.* at 870.

112. *Id.* at 861.

113. *In re Marriage of Kleist*, 538 N.W.2d 273, 278 (Iowa 1995).

114. *See id.* at 275 (discussing cultural differences between biracial parents and finding that the best interests of the child were served by awarding primary physical custody to wife).

115. *Id.* at 274.

116. *Id.* at 275.

117. *Id.*

118. *Id.* at 275–76.

119. *See id.* (considering the mother's flexible work hours, her profession as a family therapist, and that Juliana already was in her physical custody).

120. *In re Marriage of Kleist*, 538 N.W.2d 273, 274 (Iowa 1995).

121. *Id.* at 274–75.

novo review, the Supreme Court of Iowa vacated the appellate court's decision with a lengthy discussion of the cultural ramifications and how culture should be considered in child custody cases:

The fighting issue is the extent to which Adriana's Hispanic heritage should be permitted, if at all, to impact the custody decision. On the one hand, we agree entirely with the court of appeals' expressed view that "we cannot let a person's cultural beliefs put him or her in a *superior position* when we assess the custody issue." At the same time, we do not believe a court should ignore the way in which a person's background shapes their attitude toward parenting. If a litigant held a fixed cultural belief that the genetic superiority of boys entitled them to greater opportunity than girls, for example, we would surely consider such a factor in the placement of a child. Likewise here, Adriana's beliefs translate into a distinctive parenting style. Neither the ethnic origin of such a belief, nor the fact that she holds it, is controlling. What is important is the *impact* of that belief on her role as a parent.

The record reveals that Adriana harbors genuine doubt that a woman can fulfill the mothering role outside the caretaking context. Her parenting style relies heavily on close verbal interaction—alternating between English and Spanish—and small continuous nurturing and guidance activities. Although she could learn to adjust her style to accommodate a noncustodial role, the adjustment for her would be particularly difficult. It would, in Dr. Fredericks' opinion, take longer than for most parents. Her unhappiness in the meantime, Dr. Fredericks opined, would likely manifest itself in an unrelenting solicitation of expressions of love and loyalty from Juliana, ultimately leading to an intense and conflictual relationship that would have difficulty surviving. Such an outcome would clearly not be in Juliana's best interest.¹²²

On the other hand, the court ruled that cultural beliefs alone would not place one parent in a superior position over the other parent when custody determinations are made.¹²³

IV. Evaluative Criteria that Mental Health Professionals Use in Custody Evaluations

Increasingly, mental health professionals are making child custody evaluations when there are disputes between parents.¹²⁴ Most

122. *Id.* at 277 (internal citations omitted).

123. *Id.* at 277–78.

124. *See* Bow & Quinnell, *supra* note 8, at 124–25 (discussing the role mental health professionals play in parental custodial disputes).

often, evaluations are conducted as a result of a court appointment by a judge, as a part of the mediation process, or as a result of the parties' stipulated request for an evaluation.¹²⁵ Usually, the mental health expert who conducts the evaluation is a psychologist.¹²⁶ However, other professionals such as social workers, therapists and psychiatrists have conducted evaluations in some cases.¹²⁷ The mental health professional's goal is "to measure how successful each parent is at the job of parenting."¹²⁸

Common reasons that attorneys and judges seek mental health professionals' expertise in custody evaluations include: parental conflict, a parent's mental instability, allegations of physical or sexual abuse or neglect, or a parent's abuse of alcohol.¹²⁹ A majority of judges and attorneys whose opinions were published in survey results have found that court-ordered evaluations by external experts were "very helpful" or "extremely helpful" for making custody determinations.

A. Specific Criteria that Mental Health Experts Evaluate

The American Psychological Association's guidelines urge psychologists to base any recommendations that they make on "what is in the best psychological interests of the child."¹³⁰ Factors that psychologists consider in evaluating parents include: the bond

125. *Id.* at 116, 123–25.

126. *Id.* at 124.

127. *See id.* at 118 (noting that there has been a significant increase in referrals since the last study was completed in referrals for evaluations). *See also* *Coles v. Coles*, 204 A.2d 330, 330 (D.C. 1964) (offering testimony from adult and child psychiatrists, a psychologist, and a guardian ad litem); Kathryn A. LaFortune & Bruce N. Carpenter, *Custody Evaluations: A Survey of Mental Health Professionals*, 16 BEHAV. SCI. LAW 207, 209–10 (1998) (listing the occupations of evaluators who had been surveyed but indicating a preference among lawyers for psychologists); TSENG, MATTHEWS & ELWYN, *supra* note 7, at 93–95 (listing the evaluative tests that some mental health experts administer for conducting custody evaluations and how those assessments may be modified when cultural factors are considered).

128. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 93.

129. *See id.* (discussing various factors considered by judges and mental health professionals in various tests used to help settle custody disputes).

130. Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCH. 677, 677–79 (July 1994), available at <http://www.apa.org/practice/guidelines/child-custody.pdf>; TSENG, MATTHEWS & ELWYN, *supra* note 7, at 207–08.

between the child and the parent, the child's wishes, the parent's wishes, the child's adjustment to her home and school; the parent's past parenting role and the parent's psychological maturity.¹³¹

B. The Current Role of Culture in Mental Health Evaluations

The 1994 version of the American Psychological Association's Guidelines for Child Custody Evaluations in Divorce Proceedings (the Guidelines) cautions psychologists against allowing their own biases against a party's culture to influence their recommendations and evaluations.¹³² But not until the Guidelines recently were revised in February 2009 did a direct reference to the importance of culture from another perspective—the best interest of the child—appear in the Guidelines.¹³³ Section 6 of the Guidelines now provides that:

6. Psychologists strive to engage in culturally informed, nondiscriminatory evaluation practices.

Rationale. Professional standards and guidelines articulate the need for psychologists to remain aware of their own biases, and those of others, regarding age, gender, gender identity, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status. Biases and an attendant lack of culturally competent insight are likely to interfere with data collection and interpretation, and thus with the development of valid opinions and recommendations.

Application. Psychologists strive to recognize their own biases and, if these cannot be overcome, will presumably conclude that they must withdraw from the evaluation.¹³⁴

In the revised guidelines, the APA also emphasizes the importance of appropriate cultural considerations in evaluations:

1. The purpose of the evaluation is to assist in determining the psychological best interests of the child.

131. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 207–08.

132. See Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Proceedings*, 49 AM. PSYCH. 677, 677–79 (July 1994) (recommending that psychologists who cannot overcome such biases should withdraw from an evaluation and urging psychologists to "guard against relying on their own biases").

133. COMM. ON PROF'L PRACTICE & STANDARDS, AM. PSYCHOLOGICAL ASS'N, *GUIDELINES FOR CHILD CUSTODY EVALUATIONS IN FAMILY LAW PROCEEDINGS* § 1 (2009).

134. *Id.* § 6.

Rationale. The extensive clinical training of psychologists equips them to investigate a substantial array of conditions, statuses, and capacities. When conducting child custody evaluations, psychologists are expected to focus on factors that pertain specifically to the psychological best interests of the child, because the court will draw upon these considerations in order to reach its own conclusions and render a decision.

Application. Psychologists strive to identify the psychological best interests of the child. To this end, they are encouraged to weigh and incorporate such overlapping factors as family dynamics and interactions; cultural and environmental variables; relevant challenges and aptitudes for all examined parties; and the child's educational, physical, and psychological needs.¹³⁵

Some of the above criteria that mental health professionals consider in that regard are similar to the best interests criteria that legal professionals consider. However, one concern that judges and attorneys expressed is that too few mental health professionals are making evaluations or making recommendations based on the best interests criteria that are set forth in statutes.¹³⁶ A 2004 study provided evidence that lawyers and judges opined that mental health experts need to place more emphasis on consideration of the best interests criteria set forth in relevant statutes.¹³⁷ In particular, legal professionals were concerned that child custody evaluators were not submitting evaluations that were child-centered.¹³⁸ In their view, custody evaluators were considering only a few specific criteria: child preference and the parents' strengths and weaknesses.¹³⁹

Attorneys and judges also have expressed concerns about biased attitudes of some mental health professionals that may influence the mental health expert's evaluation. The described attitudes included how the expert's "personal issues" could "influence and impact their relationships and ensuing opinions" because custody conflicts are so emotionally charged.¹⁴⁰ An evaluator with an established relationship or one who is

135. *Id.* § 1.

136. *See* Bow & Quinnell, *supra* note 8, at 122–23 (observing that there was an apparent lack of knowledge regarding the best interest criteria).

137. *See id.* at 122, 124–25 (calling for a comprehensive report that remains concise and can be compiled as quickly as possible).

138. *See id.* at 124 (explaining that child custody evaluation can be improved by focusing on the child).

139. *See id.* (noting the absence of child-centered criteria in custody evaluations due to the focus on parental strengths and weaknesses).

140. *See id.* (recognizing the difficulty of keeping personal biases out of the custody evaluation due to the emotional elements present), and TSENG, MATTHEWS & ELWYN, *supra*

hired by only one parent may align himself or herself with that parent and "unconsciously screen out information that does not fit [his or her] preconceived notions."¹⁴¹ For example, if a mental health expert has a professional relationship with one parent or is hired by one parent who is not a member of a minority culture, it is possible that some mental health experts who are not culturally sensitive will recommend placement with the parent who is a member of the dominant culture.¹⁴²

Unlike the American Psychological Association, the American Academy of Child & Adolescent Psychiatry (AACAP) clearly included cultural considerations in its Practice Parameters for Child Custody Evaluations.¹⁴³ The AACAP urges psychiatrists to "assess how the final [custody] decision would affect issues of culture and ethnicity and their impact on the growth and development of the child."¹⁴⁴ The AACAP's Code of Ethics also requires that psychiatrists abide by Principle V which provides that "[t]he evaluation . . . focus[es] upon the inherent uniqueness of the individuals involved, their developmental potentials and of the social, economic, ethnic, racial and sexual context within which they live."¹⁴⁵

Despite these guidelines, culture was not a separate factor that mental health professionals were considering: a 1997 study by three Canadian physicians—Jameson, Ehrenberg, and Hunter—evaluated a list of up to sixty criteria that mental health professionals reported evaluating.¹⁴⁶ In the

note 7, at 216 (expressing concerns about biased judges who have their "own conceptions of an 'adequate' parent").

141. Bow & Quinnell, *supra* note 8, at 124 (proposing supervision or consultation as possible "reality checks" to avoid such influences). *See also* LaFortune & Carpenter, *supra* note 127, at 214–15 (demonstrating that mental health professionals also have concerns about bias).

142. *See, e.g.*, Bow & Quinnell, *supra* note 8, at 124 ("[M]ental health professional associations also expressed increased concern about dual relationships (i.e. therapists acting as evaluators), evaluators functioning in a perceived biased role (e.g., hired by only one party) or displaying biased attitudes . . .").

143. Stephen P. Herman, M.D. et al., Abstract, *Summary of the Practice Parameters for Child Custody Evaluation*, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY (1997), <http://www.aacap.org/page.wv?section=Summaries&name=Summary+of+the+Practice+Parameters+for+Child+Custody+Evaluation> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

144. *Id.*

145. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, CODE OF ETHICS, Principle V (1980), available at <http://www.aacap.org/galleries/AboutUs/CodeOfEthics.PDF>.

146. *See* Barbara J. Jameson, Marion F. Ehrenberg & Michael A. Hunter, *Psychologists' Ratings of the Best-Interests-of-the-Child Custody Access Criterion: A Family Systems Assessment Model*, 28 PROF. PSYCHOL.: RES. & PRAC. 253, 259 (1997) (listing the top sixty items rated as being the most important when making child custody and

United States, four renowned studies were conducted on American psychologists, those studies were: LaFortune and Carpenter, Ackerman and Ackerman, Keilin and Bloom, and Bow and Quinnell. LaFortune and Carpenter's 1998 study examined use of twenty-one criteria.¹⁴⁷ The 1997 Ackerman and Ackerman study ranked forty criteria.¹⁴⁸ Eleven years earlier in 1986, the Keilin and Bloom study examined twenty-one criteria.¹⁴⁹ Finally, Bow and Quinnell's more recent 2001 study examined eleven evaluative criteria.¹⁵⁰ Although it is not mentioned in any of the prominent studies, one wonders whether an expert's cultural bias may also seep into the process and influence recommendations.

In general, mental health professionals examined some of the same criteria that lawyers and judges must examine under state mandates. Mental health experts' assessments of parents are categorized under three themes: relational assessment, needs of the child assessment, and abilities of the parent assessment.¹⁵¹ The focus of the relational assessment is on relationships between the parents that encompass potential inter-parental conflict and parent-child relationships.¹⁵² The needs-of-the-child assessment is child-centered.¹⁵³ It prioritizes the child's needs through legal statutes that include consideration of developmental issues and "the child's daily routine, education, and preferred activities."¹⁵⁴ The third assessment

access recommendations).

147. See LaFortune & Carpenter, *supra* note 127, at 216–24 (listing the factors important to mental health professionals in custody outcomes).

148. See Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL.: RES. & PRAC. 137, 141 (1997) (ranking decision-making criteria for sole custody cases separately from joint custody cases).

149. See William G. Keilin & Larry J. Bloom, *Child Custody Evaluation Practices: A Survey of Experienced Professionals*, 17 PROF. PSYCHOL.: RES. & PRAC. 338, 341–42 (1986) (rating decision-making criteria used in single-parent custody cases).

150. See James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL.: RES. & PRAC. 261, 265 (2001) [hereinafter *Psychologists' Current Practices*] (ranking the State of Michigan's "Best Interests of the Child Criteria").

151. See Jameson, Ehrenberg & Hunter, *supra* note 146, at 254 (outlining the three assessments used in their survey).

152. See *id.* ("The relational assessment area was designed to take into account current findings regarding the importance of relationship variables in mediating the effects of divorce on children.").

153. See *id.* (laying out the components of a custody evaluation and decision centered on the child's needs in the situation).

154. *Id.*; see *id.* at 257 (including the child's "emotional, relational, academic and health

area focuses on each parent's ability to meet the child's needs.¹⁵⁵ The evaluators look at the level of stability that the parent offers, the parent's history in functioning as a parent, and the parent's ability to provide a supportive emotional and physical environment for the child.¹⁵⁶

C. Ranking of Mental Health Professionals' Criteria

In the afore-mentioned studies, mental health experts were asked to rank the criteria that they considered in child custody evaluations. Survey results showed that according to these experts, the most important criteria included:

- Parent's drug abuse
- Parental alienation
- Parenting skills
- Emotional bonds
- Parent's psychological stability
- Presence of domestic violence
- Child's current environment
- Child's wishes, needs, gender, and age.¹⁵⁷

In no study's list of important factors does a clear showing of culture exist as a criterion.¹⁵⁸ Nevertheless, one mental health expert asserts that socio-cultural factors are critical to a discussion of parenting practices and how they match a child's needs.¹⁵⁹ In addition, Bow and Quinnell's 2004 survey of legal professionals, both attorneys and judges, placed great emphasis on the need for the mental health professionals' comparison of the

needs").

155. *See id.* at 254 (providing the framework for assessing a portion of the child custody evaluation on what the parent can provide for the child).

156. *See id.* at 254, 257 (incorporating criteria stressed in legal statutes and "indicative of empirical research on parenting and divorce").

157. *See, e.g.,* LaFortune & Carpenter, *supra* note 127, at 216 (listing the factors important to custody outcomes), *and* Jameson, Ehrenberg & Hunter, *supra* note 146, at 255–57 (listing the items of importance in the three assessment areas identified by the study).

158. *See* sources cited *supra* notes 133–53 and accompanying text (demonstrating that culture is a criterion lacking in these studies).

159. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 66.

parents on statutory criteria.¹⁶⁰ Since most states do not include cultural considerations in that list of statutory criteria, even the most vigilant experts may fail to consider culture in appropriate cases.

In early 2009, the APA included culture in its guidelines. It is too early to tell whether psychologists will apply that guideline at all or whether they will apply it properly. As late as 2002, however, a study revealed that psychologists were giving "insufficient attention to sociocultural factors."¹⁶¹ Yet these factors "are critical to a discussion of parenting practices and how they match a child's needs."¹⁶² A mental health evaluator's "cultural ignorance" in a people's parenting styles may result in an invalid assessment that focuses on incorrect data, ignores correct data or draws inaccurate conclusions about a particular parent's parenting ability.¹⁶³

V. The Necessity for Cultural Competence Among Parents and Professionals

Everyone who is involved in custody evaluations and determinations should be culturally competent. Cultural competence is the "ability of individuals and systems to respond respectfully and effectively to people of all cultures, classes, races, ethnic backgrounds, sexual orientations, and faiths or religions—in a manner that recognizes, affirms, and values the worth of individuals, families, tribes, and communities, and protects and preserves the dignity of each."¹⁶⁴

A lawyer's cultural competence is essential in custody disputes involving bicultural or multicultural families. To be culturally competent, a lawyer must: "(1) respect the dignity of all individuals and families; (2) approach every child as a member of a family system; (3) respect individual, family, and cultural differences; (4) adopt a non-judgmental posture that focuses on identifying strengths and empowering families; and

160. See Bow & Quinnell, *supra* note 8, at 120 (providing a table that ranked the importance of certain components in the evaluation report).

161. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 94–95.

162. *Id.* (citing generally S. Azar & L. Cote, *Sociocultural Issues in the Evaluation of the Needs of Children in Custody Decision-Making: What Do Our Current Frameworks for Evaluating Parent Practices Have to Offer?*, 25 INT'L J. L. & PSYCHOL. 193–217 (2002)).

163. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 95.

164. CHILD WELFARE LEAGUE OF AM., CULTURAL COMPETENCE DEFINED (2001) <http://www.cwla.org/programs/culturalcompetence/culturalabout.htm> (last visited on Mar. 17, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

(5) appreciate that families are not replaceable."¹⁶⁵ Likewise, this expectation of cultural competence could be and should be applied to judges, mental health experts and others who evaluate bicultural and multicultural families that are engulfed in conflict. Culturally competent and sensitive legal and mental health professionals would not "evaluate parenting attitudes, skills, and behaviors based on dominant, middle-class norms."¹⁶⁶

Custody evaluators, guardian ad litem, and mental health professionals also should be expected to have a certain level of cultural competence before they write reports, testify, or gather information that may persuade a court.¹⁶⁷ "The test for competency of an expert is whether the witness exhibits sufficient knowledge of the subject matter."¹⁶⁸ The APA Guidelines promote cultural competence:

When an examinee possesses a cultural, racial, or other background with which psychologists are unfamiliar, psychologists prepare for and conduct the evaluation with the appropriate degree of informed peer consultation and focal literature review. If psychologists find their unfamiliarity to be insurmountable, the court will appreciate being informed of this fact sooner rather than later.¹⁶⁹

Courts that have relied upon mental health experts have acknowledged the experts' competency to address cultural concerns. When a guardian ad litem testified in *Rooney*, he concluded that the child who was of biracial

165. Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 745-46 (2006).

166. Solangel Maldonado, ABA Family Law Section, Remarks at the Spring 2008 Meeting, *The Role of Race, Ethnicity, and Culture in Custody Disputes 2* (unpublished CLE Meeting Materials 2008).

167. See, e.g., GA. CODE ANN. §§ 19-9-3(3)(J)(O), (7) (2008), and see David A. Martindale, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70, 72-73 (2007) (requiring custody evaluators' cultural competence), and ILL. SUP. CT. R. 908(a) (requiring judicial training in cultural and diversity issues), and Dr. Pratibha Reebye, *Child Custody-Access Evaluation: Cultural Perspectives*, <http://www.priory.com/psych/custody.htm> (last visited Mar. 17, 2010) (addressing the evaluator's and the family's cultural influences and citing several related sources) (on file with the Washington and Lee Journal of Civil Rights and Social Justice), and *Guidelines for Child Custody Evaluations in Proceedings*, § 6 AM. PSYCHOL. 677, 678 (July 1994) (cautioning psychologists against engaging in cultural and societal biases during evaluations and recommendations).

168. *In re Marriage of Gambla and Woodson*, 853 N.E. 2d 847, 863 (Ill. App. Ct. 2006).

169. Am. Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677-80 (2009), available at <http://www.apa.org/practice/guidelines/child-custody.pdf>.

ethnic background needed to be exposed to both cultures.¹⁷⁰ Four psychologists testified in *Gambla*: all of whom agreed that culture was a relevant consideration in that custody dispute.¹⁷¹ One psychologist testified about how cultural variables would affect test results.¹⁷² That psychologist stated that an African-American mother's ethnicity could have caused elevated scores.¹⁷³

Most family disputes are settled before trial. Most custody disputes are solved through negotiations between parents or through attorneys and mediation.¹⁷⁴ Consequently, mediators and arbitrators also should be trained and prepared to make relevant inquiries and help the parties to address cultural considerations.¹⁷⁵ The Model Standards of Practice for Family and Divorce Mediation requires that mediators be aware of, recognize, and understand the impact of culture.¹⁷⁶

When culture is considered, specific criteria for determining a parent's cultural competence should be enumerated. The child's parents' capacity and willingness to meet the child's needs should not be left out of this discussion. Custodial and non-custodial parents alike who spend a significant amount of time with the child should demonstrate cultural competence. The following is a suggested list of criteria for making a determination of a parent's cultural competence. Does each parent:

- support relationships with relatives/others who share the child's culture;
- instruct/educate the child in her culture and language;

170. *Rooney v. Rooney*, 914 P.2d 212, 217–18 (Alaska 1996).

171. *Gambla*, 853 N.E.2d at 863–64, 868 (noting that the psychologist had taught classes on multicultural counseling and used "cultural variables" to score the parent's personality).

172. *Id.* at 864.

173. *See id.* (finding that cultural variables among African American women are common).

174. Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 AM. PSYCHOL. 1, 3–4 (2005).

175. *See* LaFortune & Carpenter, *supra* note 127, at 212 (favoring a recommendation for mediation of custody disputes).

176. *See Model Standards of Practice for Family and Divorce Mediation*, ASS'N OF FAMILY & CONCILIATION COURTS (Aug. 2000), http://www.afcnet.org/resources/resources_model_mediation.asp (referencing culture in the Overview and in Standards II, VIII, and XIII) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

- reside in a community where the child will have cultural opportunities (ministries, neighborhoods, schools, role models);
- have a breadth of cultural knowledge; and,
- is the parent willing to expose a biracial or multicultural child to all relevant cultures?

The parent who is more willing and able to nurture the child's culture should receive a credit as the child's best interest is considered.

In addition, the evaluator must consider what is a normal relationship or interaction for a parent of this particular culture. If the evaluator does not know what is normal, she should seek a consultation with a cultural expert.¹⁷⁷ To illustrate, in the spring of 2009, many Americans sat aghast as they watched an Indian baby throwing ritual on CNN.¹⁷⁸ The reporter informed the viewing public that on an annual basis naked babies are tossed from a high tower into sheets that men hold taut fifty feet below.¹⁷⁹ This is a social norm for Indian parents who want to bring good luck and good health to their children.¹⁸⁰

Needless to say the ritual is not a social norm for American evaluators and decision-makers. Someone who does not understand this process may accuse the parent who engages in similar conduct of abusing the child or failing to protect the child. An evaluator who is not familiar with such customs may evaluate this parent as someone who has abused the child. Other questions that should be considered in cases involving bicultural and multicultural children include: "What is the family structure and system? What kind of support is available from an extended family? What are the cultural implications of a child being raised by certain parents within a particular marriage-family system?"¹⁸¹ Also, the evaluator should consider the parent's "cultural attitudes and practices of child rearing."¹⁸²

177. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 208.

178. *See Villagers Throw Babies from Temple Roof*, CNN, May 1, 2008, <http://edition.cnn.com/2008/WORLD/asiapcf/05/01/babies.tower> (noting that no babies have been injured) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

179. *Id.*

180. *See id.* (criticizing the event as "unsafe").

181. TSENG, MATTHEWS & ELWYN, *supra* note 7, at 209.

182. LaFortune & Carpenter, *supra* note 127, at 212.

VI. International Emphasis on Culture

State legislators in the United States could take a cue from international laws and amend their statutes accordingly. On an international level, culture routinely is considered in decisions about children; for example the United Nations Convention on the Rights of the Child provides that "State Parties shall . . . ensure alternative care for . . . a child. . . . When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."¹⁸³

Like the few states in the United States that have made express provisions for consideration of culture as a factor in custody determinations, some countries have passed similar provisions or analyzed cultural considerations when making custody decisions. In the case of *In re Marriage of Malak*,¹⁸⁴ after considering several factors, a Lebanese court awarded custody to the child's father.¹⁸⁵ Both parents were Lebanese nationals.¹⁸⁶ Culture was one of the considerations: "As well as the parents and the two minor children [sic] have many friends, neighbours [sic] and relatives in Lebanon and they are tied up to their country, their permanent residence, and home state with lots of environmental [sic], traditional, social habits, heritage, moral and cultural links."¹⁸⁷ The California court denied the mother's petition to change custody.¹⁸⁸ The Court of Appeal for the Sixth District of California held that the Beirut, Lebanon court's custody determination must be recognized in the State of California and that the Lebanese court had considered criteria much like those that a California court would be required to consider.¹⁸⁹

In 1996, drafters for the Republic of South Africa enacted two separate articles in its Constitution that address culture:

30. Language and culture—Everyone has the right to use the language and to participate in the cultural life of their choice, but no one

183. United Nations: Convention on the Rights of the Child, Nov. 29, 1989, 28 I.L.M. 1448, 1464, *entered into force* Dec. 5, 1989.

184. *In re Marriage of Malak*, 227 Cal. Rptr. 841, 842 (Cal. Ct. App. 1986) (concluding that the father may keep custody of his children under Lebanese decrees).

185. *Id.* at 848.

186. *Id.* at 847.

187. *Id.* at 847 n.1 (quoting the record of a Lebanese court).

188. *Id.* at 842.

189. *Id.* at 848.

exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities—(l) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, [practice] their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.¹⁹⁰

The State of Minnesota's statute could be a model for other states in the United States; however, the above provisions from South Africa's Constitutional provisions are even more comprehensive in this regard. One or both of the above articles could be incorporated more in United States custody statutes as additional best interests criteria.

VII. Culture and Custody of Indian Children

The Indian Child Welfare Act of 1978 (ICWA)¹⁹¹ requires placement of Indian children with Indian family members or members of their tribe when custody of an Indian child is disputed.¹⁹² The goal of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . ." ¹⁹³ In passing ICWA, Congress rectified the states' failure "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."¹⁹⁴

ICWA sets forth statutory presumptive placement preferences for Indian children.¹⁹⁵ The hierarchy includes: 1) the child's extended family (which includes specific family members, blood relatives or stepparents),

190. CONST. OF THE REPUBLIC OF S. AFR., No. 108 of 1996, §§ 30, 31 (1996), available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

191. 25 U.S.C. §§ 1901–1963 (1978); see generally *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43–53 (1989) (construing ICWA provisions regarding tribal jurisdiction).

192. 25 U.S.C. § 1903 (defining the terminology of ICWA).

193. *Id.* § 1902.

194. *Id.* § 1901(5).

195. See *id.* § 1915 (listing the types of placement and the order of preferences as to which type should be employed at certain times and under certain circumstances).

2) other members of the child's tribe; and 3) other Indian families.¹⁹⁶ State courts are bound by those preferences unless good cause to deviate from them is shown.¹⁹⁷ However, there is a split of authority on whether ICWA applies in custody disputes.¹⁹⁸

VIII. Conclusion

The number of bicultural families has increased manifold since the Lovings—a biracial couple—fought for recognition of their marriage in the State of Virginia.¹⁹⁹ Like other families, these adults with children are separating. As a result, more legal and mental health professionals must be mindful of whether culture is an important consideration for such families and whether they, as experts, are culturally competent and sensitive enough to assess, evaluate, and advise these family members.

All legal and mental health professionals who have the opportunity to influence what happens to a child should expand their knowledge about culture and culture competence about the people for whom custody decisions and evaluations are made.²⁰⁰ Where large numbers of interracial marriages and large numbers of people of color reside, for example, there should be legal professionals and mental health experts who are competent to address cultural concerns affecting the particular persons of color who are in that community. They should obtain training in recognizing how culture affects children and their parents in the community in which they are called upon to make custody determinations. The Association of Family and Conciliation Courts has promulgated a requirement that

196. *Id.* § 1915(a).

197. *See* C.L. v. P.C.S., 17 P.3d 769, 773 (Alaska 2001) (finding that the lower court properly found good cause to deviate from the ICWA placement preferences by its consideration of certain relevant factors).

198. *Compare* Whitworth v. Whitworth, 222 S.W.3d 616, 657 (Tex. App. 2007) (denying application of ICWA in custody disputes), with Peter Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 812–13 (2000) (stating that "[o]ne goal of ICWA is to promote greater tribal involvement in state child custody proceedings involving Indian children").

199. *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (holding that the State of Virginia's miscegenation statutes that prevented African American and Caucasian couples from marrying violated the equal protection and due process clauses of the United States Constitution).

200. *See* CHILD WELFARE LEAGUE OF AM., *supra* note 164 (offering recommendations for things that agencies may do to promote cultural competence).

"expected training for all child custody evaluators [should] include: . . . (4) the significance of culture and religion in the lives of parties[.]"²⁰¹

Everyone who is involved in the decision-making process should consider the impact of a parent's cultural beliefs on his or her role as a parent. The professionals must be willing and capable of exploring cultural concerns and to embrace cultural differences between themselves and the people whom they serve. In addition, mental health and legal professionals of diverse backgrounds should be commissioned to make evaluations and decisions. All of the professionals should also advocate for express cultural competence criteria and guidelines.

Over time, the criteria that legal and mental health professionals use to make decisions has changed to reflect contemporaneous issues that affect families. In 1986, when Keilin and Bloom conducted their study, domestic violence was not listed as a concern or an important factor among mental health experts. By 2001, however, when Bow and Quinnell conducted their follow up study, "domestic violence [had] gained attention and concern among evaluators . . ." ²⁰² Now, more state legislatures should include express provisions in best interests criteria to ensure that culture is not ignored in the custody process. Thus, most states in the United States should amend their statutes to include express criterion for consideration of culture when it is appropriate. "[T]he statutory criteria applicable to custody disputes in divorce cases exemplify the legislative intent of what is important in custody decisions . . ." ²⁰³ Until legislators make statutory amendments, judges should regularly consider culture and order mental health professionals to include culture in their evaluations under the catchall provisions in state custody statutes.

In addition, more research must be done and analysis regarding how culture affects children in certain placements should be completed. LaFortune and Carpenter called for research regarding whether factors used to make the custody determination actually predict better outcomes.²⁰⁴

201. ASS'N OF FAMILY & CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION 8 (May 2006), available at <http://www.afcnet.org/pdfs/Model%20Stds%20Child%20Custody%20Eval%20Sept%202006.pdf>.

202. *Psychologists' Current Practices*, *supra* note 150, at 265, and *see, e.g.*, Van Sichel v. McGraw, 134 P.3d 338, 343 (Alaska 2006) (requiring consideration of domestic violence).

203. *See* BRENNEMAN & RAVDIN, *supra* note 35, at 8–19 (including disputes among unmarried couples too).

204. LaFortune & Carpenter, *supra* note 127, at 222.

Moreover, a study of custody must be performed to ascertain why culture is not showing up in more cases. One question that must be answered is whether legal and mental health professionals are ignoring culture or whether culture is not addressed because it is a non-issue for the child's parents or the older children. Another issue involves the high number of cases resolved by mediation and settlement and how such resolution contributes to the lack of cultural discussions in judicial decisions and literature. Finally, whether a culture-blind approach is in biracial or multiracial children's best interests should be examined.

In sum, a need for more emphasis on culture has developed because many more bicultural and multicultural families have been created. A multicultural family may break-up, just as any other family might, and so best interests criteria in other states should expressly require consideration of the child's culture and each parent's propensity to address the child's cultural needs. On the other hand, it should be noted that this factor is just one among many factors that may be considered. As the trial court in *Gambla* ruled, a "broad stroke" approach by which the biracial child is placed with the parent with whom she shares physical characteristics is not the right answer.²⁰⁵ Instead, evaluators and decision makers should look at all relevant factors including culture and advocating for the best interests of the child in custody proceedings. Judges, attorneys, and mental health professionals who make custody determinations are making crucial decisions that affect a child's life. Finally all of the evaluators and decision-makers must be culturally sensitive when the child and the parents who are involved in the dispute are bicultural or multicultural families.

205. See *In re Marriage of Gambla and Woodson*, 853 N.E.2d 847, 869–870 (agreeing with the trial court's statement "that it did not believe in a 'broad stroke' approach that would award custody to [the mother] solely because she is African-American").