

**IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

STEPHEN DOYNE, PH.D.,

Petitioner,

vs.

SAN DIEGO COUNTY SUPERIOR

COURT,

Respondent

YVONNE LEIJEN; EMAD J.

TADROS

Real Parties in Interest

Court of Appeal No. D051229

From the Superior Court for San
Diego (D485969)

Jeffrey F. Bostwick, Judge (Dept. F-
4)

**BRIEF OF AMICUS CURIAE:
CALIFORNIA ASSOCIATION OF PSYCHOLOGY PROVIDERS
IN SUPPORT OF PETITIONER**

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ARGUMENT

The California Association of Psychology Providers (CAPP) is a professional organization dedicated to the public's interest in the services of psychologists throughout the state of California. Over the last two decades, CAPP has advocated for the integrity of the practice of professional psychology in several different venues, including hospitals (see *California Ass'n of Psychology Providers v. Rank*, 793 p.2d 2 (Cal. 1990).), private practice, and the courtroom. CAPP members provide psychological services in many settings, including matters before California courts. A significant portion of these services relate to custody disputes. This particular case involves experts who have been appointed as custody evaluators in family law disputes and raises unanswered legal questions.

While this case concerns a psychologist who functioned as a custody evaluator pursuant to section 3111 of the California Family Code, it should be noted that psychologists are not alone in conducting these evaluations. *See* Cal. Fam. Code § 3111 (2007). Marriage and family therapists, social workers, and psychiatrists are also appointed as custody evaluators, and the questions of law presented by this case affect these professionals as well. Additionally, because many custody evaluators are appointed under section 730 of the California Evidence Code, a clarification of these experts' obligations will be beneficial to court-appointed experts outside the realm of custody evaluations. *See* Cal. Evid. Code § 730 (2007).

The facts of this case involve a court-appointed expert who is subject to the competing demands of the parties in a custody dispute. The expert, Dr. Stephen Doyne, was appointed pursuant to section 730 of the California Evidence Code. *See* Cal. Evid. Code § 730 (2007). Fifteen months following the completion of his evaluation and submission of the report, Dr. Doyne's entire file was subpoenaed by one of the parties. It is worth noting that prior to this subpoena the parties had not seen the entire file; instead, they had agreed to see only the section of the report setting forth the recommendations.

Since that time, the requesting party asked for and received data that supported the report as applied to him, but not the data from the non-requesting party. Because of the sensitive nature of the information, as well as the length of time that had lapsed since the initial filing of the report, Dr. Doyne contacted the non-requesting party to receive approval to send the complete contents of the file. The non-requesting party denied Dr. Doyne permission to release the complete file.

Dr. Doyne's situation is representative of the difficulties that custody evaluators face when attempting to navigate similar legal questions. As an experienced custody evaluator, Dr. Doyne was aware of his obligations to respond to the subpoena, but was also concerned about how to disclose this information considering that a Local Rule requirement that privileged information collected in a custody evaluation must be withheld. *See* San Diego Local Rule of Court § 5.10.4(j). Dr. Doyne ultimately informed the

requesting party that, because of his concern that the material may be covered under the psychotherapist-patient privilege, he would require a court order to release the complete file. He also offered to submit the file for an *in camera* review. Subsequently, the requesting party filed a motion to compel production, and oral arguments were heard from both sides on the existence of a privilege.

At the hearing on the motion to compel production of the file, Dr. Doyne and the requesting party presented arguments about the confidentiality of the data gathered by a court-appointed expert during a custody evaluation. Central to these arguments were questions about the existence of basic duties between the evaluator and parties in a custody dispute. Indeed, the Respondent identified a number of important issues integral to these questions, and to which there are no straightforward answers. The Respondent agreed that the obligations of a court-appointed expert are not at all clear and the law offers little guidance.

More broadly, the paucity of guidance on questions concerning the duties of custody evaluators is problematic for clinicians at the center of disputes about parental rights. Parties in a custody dispute typically feel strongly about the information they disclose to evaluators. The parties recognize its sensitive nature, as well as its importance in assisting the court to make a determination about parental rights. The result is that the opinions of custody evaluators are subject to attack and influence from

multiple parties. This emotional dynamic is exacerbated by a lack of clear direction in the law.

We wish to emphasize that these issues are not merely academic. The lack of clear direction as to their legal obligations makes evaluators more vulnerable than they would otherwise be. At the initial meeting with the evaluatees, evaluators typically set forth their understanding of their obligations, the limits of confidentiality, etc.. However, the certitude of evaluators when discussing these obligations is necessarily limited by the lack of guidance in the law. Without this guidance, court-appointed evaluators can find themselves in the midst of heated family conflicts that spill beyond the confines of the family court. It is not unusual for evaluatees to file a complaint with the state regulatory board that is charged with overseeing the evaluator's professional license. In fact, these complaints are so common that the first question (excluding identifying information) on the California Board of Psychology's consumer complaint form asks if the complaint concerns a child custody issue. Indeed, even in this particular evaluation a complaint was filed by one of the evaluatees against Dr. Doyne but ultimately dismissed. When facing these complaints, evaluators such as Dr. Doyne have little support from the law upon which to base their defense.

In sum, CAPP is not aware of any case law that speaks to the obligations of custody evaluators toward the court, the parties in interest, and the large volume of sensitive information collected during evaluations.

As noted above, this lack of clarity presents difficulties for custody evaluators, as well as for the parties under evaluation. To address these matters, CAPP urges review. We believe that the following issues that were discussed in oral arguments are of great importance:

Issue number 1: Whether any of the materials gathered by custody evaluators in support of their recommendations may be withheld (even following a valid subpoena).

Issue number 2: To whom do custody evaluators owe legal and/or ethical obligations? Are these obligations solely to the court or also to the parties and/or children at issue? Does this change once the matter is finally adjudicated?

Issue number 3: If there is no privilege between custody evaluators and their data sources, do those sources have a privacy interest?

It is our hope that litigation of these issues will bring a measure of clarity to an otherwise difficult and complicated practice, and we thus urge the court to accept this case for appeal.

Dated this 11th day of July, 2007.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that this brief contains 1130 words.

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