

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

TAMI L. WINTERNITZ,	)	APPEAL NO.: D065131
	)	
Appellant,	)	
	)	San Diego County Case No.:
v.	)	D536848
	)	
	)	
WILLIAM W. WINTERNITZ, JR.,	)	
	)	
Respondent.	)	
_____	)	

**PETITION FOR REHEARING**

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**PETITION FOR REHEARING**  
**AND REQUEST FOR MODIFICATION OF OPINION**

The unpublished opinion filed February 27, 2015 ("Opinion") omits and misstates undisputed material facts in the record which are relevant to this appeal, such as the court-appointed child custody evaluator's violations of, and noncompliance with, *California Rules of Court, rule 5.220*. Nearly all of the violations and areas of noncompliance were conceded by the evaluator himself at trial of the custody issue. The Opinion also fails to address the mandates of *Rule 5.220 subd. (d)(1)C* expressly mandating that courts "Require child custody evaluators to adhere to the requirements of this rule,"

The following undisputed material facts in the record are either omitted from, or misstated in the Opinion, and request is hereby made for the Opinion to be modified accordingly to include these undisputed facts:

(1) By court orders dated September 1, 2004 and March 15, 2005 from the Yolo County Superior Court, Mother was awarded primary physical custody of Jamison with Father having a visitation time-share of approximately 20%. (*AA 12, 14; AOB 2.*)

(2) Under the schedule existing at the time of Mother's June, 2012 request to relocate to Chico, Father had a 20% time-share with Jamison. This schedule had been in place since 2005 and gave Father alternating weekends, alternating Thursday

nights, and time during Jamison's school breaks. Father's existing time-share (approximately 20%) with Jamison would have been preserved and could have been increased if Jamison lived with Mother in Chico. (*AA-10, 1788; RT-2, 261; RT-3, 406, 413-414; RT-6, 740.*)

(3) Between January 1, 2005 and April 30, 2013, Mother accommodated Father's requests for changes to the visitation schedule 616 times. (*AA 865; RT-1, 20:12 - 67:2; AOB 3.*) Mother also reminded him of child-related events, included him in family celebrations at her home, and offered him additional time beyond that provided in the court order. (*RT-1, 13:4-12, 58:6-16, 59:26 - 60:4, 68:10-22; RT-5, 689:25 - 691:11; AA 72; AOB 3.*)

(4) Mother and Father had formed a respectful, cordial, businesslike, functional, and a good co-parenting relationship. Mother and Father saw each other frequently, particularly on Friday afternoons when Father would go to Mother's home and have a glass of wine and discuss Jamison. (*RT-6, 729:20 - 730:21.*)

(5) Jamison was not "alienated" or "estranged" from Father. The court-appointed expert testified to this fact at trial on May 7, 2013: "[Jamison is] not alienated from her father, and I'll keep saying that." (*RT-2, 205:3-10; ARB 4.*)

(6) Father did not file any motion between March 15, 2005 and May 31, 2012 to modify the custody or visitation schedule. (*RT-4, 566:2-11; ARB 16.*)

(7) Mother's requested move to Chico with Jamison in June, 2012 was not made in "bad faith". The court-appointed expert testified that: "Quite candidly, with respect to the motivation of her move, my understanding of the motivation of her move is that she has met somebody who has a job in Chico; that she wishes to marry him, if she has not already done so, but in any event, wishes to have a committed relationship with him. That -- that is where he lives; that that's where she believes she may have better job prospects. And she would like to own a home, and she does not believe that she can afford to own a home in San Diego. And that is why she moved or wished to move." (*RT-3, 369:7-15; ARB 4, fn. 3.*)

(8) The parties met with Family Court Services in July, 2012 regarding Mother's relocation motion filed June 7, 2012. The Family Court Services recommending counselor also interviewed Jamison and in a report dated July 27, 2012 he recommended that Jamison be allowed to move with Mother to Chico. In the section of the report entitled "Reasons for Recommendations", the recommending counselor stated:

The mother has been the primary parent to the child since 2005. The child herself stated that she has been in the primary care of the mother for as long as she can remember. In this case it is not about one parent being better suited to meet the child's needs over the other, rather about who the child relies on emotionally on a day to day basis. The child herself was very clear in that while she loves both of her parents; the bond she has developed with the mother is something of significant importance to her. The child voiced anxiety about this current summer's separation from the mother, stating that the evening telephone calls do not make up for her not being under the mother's direct care. The child also

reported feeling emotionally responsible for the father's disappointment regarding the possible move. During the interview the child related a recent outing whereby the father took her driving around to look at apartments near her school. The child stated that this felt wrong, and that the father did not appear to be considering her thoughts or feelings at the time. With these factors in mind the undersigned can only recommend that the child remain in the primary care of the mother. (AA 1684; AOB 5.)

(9) At Father's request the court appointed Robert Simon, Ph.D. to conduct a full custody evaluation in this case pursuant to Evidence Code § 730 and Family Code § 3111. (AA 142, 143, 147, AOB 6.) Dr. Simon ultimately issued a report recommending a change of custody to Father if Mother moved. (AA 1788; AOB 8.)

(10) At trial, Dr. Simon testified that with respect to his report, "There were mistakes made in this evaluation in terms of procedure. That is correct. I've testified to that. And I take those mistakes very seriously, and I hold myself accountable for them. *Would I have a question about whether I was neutral if I was on your side of the ledger? Yes, I would. I absolutely would have that question.* (RT-3, 404 - 405; AOB 12 (italics added).)

(11) In his trial testimony, Dr. Simon admitted that his "particular reactions to [Mother]" caused him to doubt his own neutrality in this case, and he twice considered withdrawing from the case as the Evidence Code § 730 expert. (RT-6, 769:21 -770:9; AOB 22.)



(12) In his trial testimony, Dr. Simon conceded that his "many deviations from the standards of practice for custody evaluators was a sign of bias. (*RT-6, 736:22-25, 746:28 -747:3, 745:246-746:20; AOB 22.*)

(13) Dr. Simon testified that his recently published book discusses the importance of "maintaining a comprehensive record" in forensic work to enable the Court, the attorneys, and the litigants to know the basis for the expert's opinion and enable them to determine if there is any bias. (*(T-2, 196:22-24; RT-3, 300:27 - 301:20; AOB 20).*) Dr. Simon conceded that he had not kept records in compliance with the professional standards outlined in his own book. (*RT-6, 761:19 -762:12; AOB 20.*)

(14) The trial court stated that Dr. Simon's report was not "prepared in accordance with his own requirements [his] memo of understanding. . .and that he did not follow his own rules which he advocates in his own book, his own authorities he said he uses in the book, and his own rules that he establishes under a memo of understanding..." (*RT-6, 814:20-815:6; AOB 23.*)

(15) The trial court stated that Dr. Simon's evaluation procedures were at a minimum "negligence". (*8/15/13 R.T. 803; ARB 18.*)

(16) Dr. Simon had a written "Statement of Understanding" with the parties that stated: "Documents that you wish me to consider must be delivered in a manner that ensures their safe transfer into my custody. I require that the

documents be submitted to me by counsel. I will not accept documents from the litigants under any circumstances." (*AA 1856; AOB 6; AOB 20 .*)

(17) Dr. Simon testified that had accepted numerous *ex parte* documents from Father, so many documents in fact that he would "be guessing" to give a number. (*RT-3, 339:3-5; RT-5, 630:25 - 631:3; AOB 11.*)

(18) Dr. Simon admitted that it was "a mistake" for him to have accepted *ex parte* documents from Father in violation of his own written policy. (*RT-6, 777:23-26; AOB 12.*)

(19) Dr. Simon admitted that he had made mistakes in his evaluation procedures and that Mother's counsel had good reason to question his neutrality. (*RT-3, 404:14 - 405:3; AOB 12.*)

(20) Father lied under oath in discovery to Mother's counsel by denying that he had given any *ex parte* documents to the evaluator. (*AA 278, 280; RT-4, 557; AOB pp. 8,11.*)

(21) Dr. Simon refused to produce documents to Mother's counsel requested in a deposition subpoena, and he refused to respond to any of the follow-up letters asking for the missing documents. Dr. Simon testified that he viewed these letters as "harassing" and therefore he "chose" not to respond to them. (*AA 985; RT-3, 383:19-22; AOB 10.*)

(22) Dr. Simon however, responded within 24 hours to letters from Father's attorney regarding payment of his fees. (RT-3, 365:10 - 367:7; AA 1028, 1029-1030; AOB 10.)

(23) Dr. Simon was paid \$36,475.75 by Father for the custody evaluation. (RT-5, 582:22 - 583:10; 617:13-21 (AOB 21.)

(24) Dr. Simon had Father's "credit card on file" and would contact Father for authorization to use it when the retainer was approaching zero. (RT-5, 617:13 - 620:27; AOB pp. 21-22.)

(25) Dr. Simon admitted at trial that it was "an error" for him not to produce Father's *ex parte* e-mails and attachments in response to Mother's subpoena. (RT-3, 313:21-315:23; 315:19 - 316:14; 320:3-7; 326:1 - 327:7; 341:9 - 342-6; AOB 10.)

(26) Dr. Simon acknowledged that he had formed negative impressions about Mother based on the accusations in the *ex parte* documents he received from Father. (RT-5, 594 - 5956; AOB 12.)<sup>1</sup>

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<sup>1</sup> The Opinion at p. 8 inaccurately states that the *ex parte* documents were of little or no use to the evaluator. The undisputed facts in the record demonstrate the exact opposite. Dr. Simon's evaluation report in fact cites to information that came directly from Father's *ex parte* documents (see items \*\*\* above). At trial, Father admitted that the information (i.e., his claims that Mother was inflexible around scheduling) made in his *ex parte* documents to Dr. Simon were false.

(27) Dr. Simon used specific information in the *ex parte* documents from Father to recommend changing Jamison's custody from Mother to Father. Specifically, Dr. Simon's report cited five specific accusations from Father about Mother's alleged inflexibility, all of which were contained in Father's *ex parte* documents. The five examples are:

(28) Scotland Trip Over Christmas 2012: Dr. Simon received *ex parte* documents from Father accusing Mother of being difficult regarding the Christmas schedule in December, 2012 (*RT-5, 595:2-6; ARB 12.*) Dr. Simon adopted as true Father's accusation in the *ex parte* documents without investigation, stating in his report that: "For example, [Mother's] refusing to allow Jamison to go to Scotland with her father and with Jana in December 2012, to see Jill perform." (*AA-10, 1766, fn. 21; ARB 12.*)

(29) Dr. Simon testified that he did not know that Mother had consented to Father's trip and that Father had in fact already taken Jamison to see Jill's play *twice* in the United Kingdom in 2012—a fact Father himself testified to at trial. (*RT-3, 414:24 - 415:8; RT-4, 574:15-26; ARB pp. 12-13.*)

(30) At trial, Dr. Simon admitted that early on in the evaluation, he was provided with a June 5, 2012 letter from Mother's counsel advising "that the parties have agreed on a summer schedule that includes Jamison making her first international trip with her father to London in early July." (*AA-6, 1672; AA-6, 1675, RT-7, 908; ARB 13.*)

(31) Dr. Simon was also notified on November 28, 2012 that Mother had signed two stipulations with Father dividing the Thanksgiving and Christmas/Winter holiday breaks in 2012–2013, which gave Father one–half of the Christmas/Winter break to travel with Jamison to Scotland to see Jill’s play for a *third* time in 2012 if he chose to do so. (AA-1, 150, 154; AA-4, 1101; ARB 13.)

(32) New Hampshire Family Reunions: Dr. Simon also received *ex parte* e-mails and attachments from Father in which Father accused Mother of "not allowing Jamison or being inflexible or difficult about Jamison going on a yearly trip, family reunion trip...in New Hampshire." (RT-5, 594 - 595; ARB pp. 13-14.) Dr. Simon did not investigate this claim with Mother, though he formed negative impressions about Mother based on the accusations in the *ex parte* documents he received from Father. (RT-5, 594 – 5956; AOB 12.)

(33) Father testified on cross–examination that he had in fact taken Jamison to New Hampshire for a family reunion in August, 2012 and to Alabama in 2012 to visit family there. Father further testified that Mother *had in fact agreed* to him taking Jamison to New Hampshire for a family reunion in October, 2011 and that Mother had even switched weekends with him so he could go on the trip. (RT-4, 573:27 -574:3; 575:16 - 576:12.); ARB 14.) Dr. Simon’s report does not negate Father’s false accusations in the *ex parte*

documents about Mother's inflexibility regarding the family reunion trips.

(ARB 14.)

(34) A Thursday Overnight Visit: Dr. Simon adopted, without investigation, Father's allegations in another *ex parte* document dated March 5, 2013, that Mother was difficult about his last-minute demand for a schedule change on a Thursday. (AA-6, 1499-1500.) Dr. Simon did not speak with Mother about the accusations in this *ex parte* document, as his last contact with Mother was on March 4, 2013. (AA-10, 1794; ARB 14.) In his report, Dr. Simon cited this accusation by Father as another example of Mother's inflexibility: "[Mother] also refused Father's suggestion that Jamison spend the night with him on a Thursday after he brought her to this writer's office..." (AA-10, 1766, *fn.* 21; ARB 14.)

(35) 5K Run: Dr. Simon adopted, without investigation, Father's claim in another *ex parte* document dated December 11, 2012 that Mother told Jamison that he was not welcome at her 5K race. (RT-5, 595; AA-6, 1517.) Dr. Simon's report adopted Father's accusation as true without investigation or inquiry of Mother. (AA-10, 1766, *fn.* 21; ARB 15.)

(36) Court Order For Visitation Increase: Father gave *ex parte* documents to Dr. Simon alleging that Mother had violated a court order calling for his visitation time to be increased. (AA-6, 1481; ARB 15.) Dr. Simon cited

this as another example of Mother's inflexibility. (*AA-10, 1766, fn. 21; ARB 15.*)

(37) Dr. Simon testified that he had no idea whether or not Father had ever filed a motion to increase his time with Jamison prior to Mother's motion to move to Chico. (*AA 865; RT-1, 20:12 - 67:2; RT-3, 381:8-382:14; RT-3, 414:20-23; ARB 15.*) Father had not in fact filed any motions between March 15, 2005 and May 31, 2012. (*RT-4, 566:2-11; ARB 16.*)

(38) On October 1, 2012, Dr. Simon was provided with, but failed to review, Mother's visitation calendars showing the nature and number of times she had accommodated Father's requests to make changes to his visitation schedule. (*AA 865 -967, 1673; AOB 6.*)

(39) Dr. Simon testified that he was completely unaware that Mother had in fact accommodated Father's requests for changes to the schedule 616 times since January, 2005 and therefore did not include this information in his report. (*AA 865; RT-1, 20:12 - 67:2; RT-3, 381:8-382:14; RT-3, 414:20-23; AOB 13.*)

(40) In conducting his evaluation, Dr. Simon failed to review the June 5, 2012 letter from Mother's counsel to Father's counsel stating that Mother was agreeable to Father taking Jamison to London in 2012 where Jamison saw Jill's play performance twice. (*AA-6, 1672*)

(41) Dr. Simon also failed to review the information sent to him on November 28, 2012 regarding Mother's agreement to share the Thanksgiving and Christmas holidays with Father. (*AA-1, 150, 154; AA-4, 1101; ARB 19.*)

(42) Dr. Simon also accused Mother of enrolling Jamison in school in Chico without Father's knowledge or consent. (*RT-2, 270:9-26.*) He later testified that this accusation was a mistake, which he was compelled to retract in writing. (*AA 1031; RT-3, 367:8-27; AOB 15.*)

(43) Dr. Simon also accused Mother and Mr. Said of making statements that implied that fiance Evan Said is "a surrogate" father for Jamison, and that it was his impression that "Jamison is drinking that Kool Aid." (*RT-2, 175:8-103.*) On cross-examination however, Dr. Simon admitted that no such statements were ever made by Mother or Mr. Said, and that there was no documentary backup for this accusation. Dr. Simon conceded that Mr. Said's statements to him about his role in Jamison's life were entirely appropriate. (*RT-3, 390:18-395:6; AOB pp. 15-16.*)

(44) Dr. Simon failed to investigate any of Mother's concerns about Father's sexualized behavior towards their children, Father's sleeping in the same bed as Jamison, Father's screaming profanities in the bathroom that upset Jamison, and his taking of medications that made him sleep so deeply that Jamison could not wake him. (*RT-6, 717:17 - 722:28; RT-2, 232:11 - 236:12; AOB pp. 16-17.*)



(45) Dr. Simon testified that he knew Father had lied to him about the incident where Jamison could not wake him, but the lie did not affect Father's credibility with the evaluator. (RT-3, 349:9 - 345:26; AOB 17.)

(46) Dr. Simon also failed to review pertinent documents from Mother's counsel regarding Father's sexualized behavior around the children, including the September 1, 2004 order prohibiting "secret" trips with the girls, and a letter from the oldest daughter to Child Protective Services in Yolo County detailing Father's sexualized behavior towards her and her friends. ((RT-2, 232:11 - 236:12; AOB 16.)

(47) Dr. Simon testified that, as stated by the American Psychological Association's Guideline for Child Custody Evaluations In Family Law proceedings, the purpose of a child custody evaluation report is to assist the court in "determining *the psychological best interests of the child*", and that "*The child's welfare is paramount.*" (RT-6, 782:22-783:10.) Dr. Simon conceded at trial that his report made no mention of the serious risk of psychological harm to Jamison if she was placed in the custody of Father. (RT-6, 28, 755:1 -27.)

(48) Dr. Simon omitted from his report critical information about the serious risk of psychological harm to Jamison if she was placed in Father's custody, and that, "Should the court adopt my recommendations, we're [going]

to have a young lady who is very, very, unhappy ..." (RT-5, 603:13-14; (RT-6, 755:1 -27; AOB 18.)

(49) Not until his last day of testimony, did Dr. Simon disclose the risk of harm to Jamison if her custody were changed to Father. The harm was detailed as follows:

"There's a risk that she does not adjust to the move, becomes depressed, withdrawn, sullen, angry. There is a risk that she becomes angry with her father, blames her father for her not being able to go with her mother, and distances herself from her father and starts to pull back from that relationship. There is a risk that her father does not decrease his work as he has said he will do, and Jamison, instead of being cared for primarily by her father around a reasonable work schedule, becomes a kid who is cared for in a patchwork way. The greatest risk to my way of thinking, Jamison here in San Diego, is that she does not make the transition; she does not adjust, and she becomes very depressed, very angry, withdrawn, maybe defiant, combative. Who knows? But the greatest concern I have is that she just doesn't make the transition, that that's not recognized and dealt with." (RT-6, 742:8 - 743:4; AOB 18-19.)

(50) Dr. Simon agreed that the information about the harm Jamison would suffer from the change of custody should have been in his report. (RT-6, 742:8 - 743:4; AOB 19.)

(51) Dr. Simon conceded that he had not kept records in compliance with the professional standards outlined in his own book. (RT-6, 761:19 - 762:12; AOB 20.)

(52) In addition to the *ex parte* documents he accepted from Father, Dr. Simon failed to produce notes of his interviews with some of Father's collateral

witnesses, his telephone records, or his itemized billing records. (*RT-5, 584:18-28; 622:3-20; AOB 20.*) Dr. Simon testified that it was "a mistake" and "an error" for him not to have produced those records. (*RT-3, 323:23 - 325:1; AOB 21.*)

(53) Dr. Simon decided not to do home visits in this case because Father did not want to pay him for that service. (*RT-2, 185:23-28; AOB 22.*)

(54) In an effort to emphasize to Mother his power as the custody evaluator in this case, Dr. Simon told Mother: 'I know that if I asked you to show up tomorrow morning in your pajamas at 7:30, you'd do it.'" (*RT-3, 291:17-27; AOB 22.*)

(55) Dr. Simon also yelled at Mother in his January 17, 2013 interview with her, and in another instance he became agitated with her for persisting in her request to tape-record their sessions. (*RT-2, 149:1-4; ; 173:23-25; AOB 22.*)

(56) At the conclusion of Dr. Simon's testimony, Mother moved to strike the custody evaluation report due to bias and noncompliance with the applicable law and professional standards. (*RT-6, 796:24 -802:19; AOB 23.*)

(57) The court denied the motion on the grounds that Dr. Simon had stated "under oath that he was a neutral evaluator", and that although: "many of the factors stated by [Mother's Counsel] certainly are a concern, but not a basis

for striking the report and not considering the report. ( *RT-6, 802:28 - 803:16; AOB 23.*)

The Opinion is also vague, imprecise, mistaken, and lacking of any temporal context with respect to other "facts". Request is hereby made for the Opinion to be modified to include the following corrections and undisputed material facts:

(58) Mother and the children moved to San Diego in September, 2004, pursuant to an order from the Yolo County Superior Court dated September 1, 2004. (*AA-1, pp. 8-9; AOB 2.*)

(59) The September 1, 2004 order allowing the move also expressly stated: "Father shall stop his 'secret vacation' trips with his daughters because such trips are laden with sexual overtones for children." (*AA-1, pp. 8-9; AOB 16.*)

(60) Father was involuntarily terminated from his employment with Sutter West in Davis in 2004, and he moved to Massachusetts for seven months before going to San Diego.<sup>2</sup> (*Father's testimony at RT-4, 547:4-22; AA-10, 1836:43-45; ARB 18, fn. 19.*)

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<sup>2</sup> The Opinion at p. 3 states: "After Mother moved to San Diego with the children, Father relocated to San Diego and established an orthopedic surgery practice there."

(61) There was no active litigation in the case from April, 2005 until February, 2012, when Father filed a motion to change venue to San Diego County because he believed Mother was going to request a move-away. (*AA 19, 23; AOB 3.*)

(62) The "instant" move-away motion was filed by Mother in June, 2012.<sup>3</sup> (*AA 60, 74-76, 2662:9-13; AOB pp. 3-4.*)

(63) The Opinion at p. 4 fails to state that Family Court Services recommended that Mother not only retain primary custody of Jamison, but that they be allowed to relocate to Chico. (*AA 1684; AOB 5.*)

(64) The Opinion also mistakenly states that "Mother does not challenge the sufficiency of the evidence supporting the family court's findings that the relationship between Father and Jamison 'would certainly run a high risk of being greatly diminished if the request to move to Chico [were] granted' and it was 'Father and not...Mother who [would] encourage an ongoing relationship between the absent parent' and Jamison." (Opinion, p. 16.) The "findings" and orders made by the trial court were expressly based on Dr. Simon's non-compliant and biased custody evaluation, which Mother has indeed challenged in her appeal.

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<sup>3</sup> The Opinion at p. 3 fails to provide any temporal context for these events.

## LEGAL DISCUSSION

This is a pivotal child custody evaluation case wherein the trial court ignored statutory and case law, and the California Rules of Court mandating all courts to enforce the law and to ensure that child custody evaluators follow the law. The underlying question posed in this case is: Are child custody evaluation laws made to be broken? The answer to that question is found in a review of the following statutes and case law:

\* *Family Code section 3111(a)* states in pertinent part:

In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation in cases where the court determines it is in the best interests of the child. *The child custody evaluation shall be conducted in accordance with the standards adopted by the Judicial Council pursuant to Section 3117, and all other standards adopted by the Judicial Council regarding child custody evaluations. (Fam. Code § 3111(a) emphasis added.)*

\* *Family Code section 3117* provides that the Judicial Council shall adopt standards for full and partial court-connected evaluations, investigations, and assessments related to child custody.

\* Consistent with the directives of Family Code section 3117, the Judicial Council adopted California *Rule of Court, rule 5.220*, setting forth the standards of practice for custody evaluators, and also making it very clear that each court *must* "require child custody evaluators to adhere to the requirements of this rule." (*Rules of Court, rule 5.220 (d)(1)(C).*)

And ironically, some of the best case law regarding custody evaluators and evaluations comes from the Fourth Appellate District.

\* As set forth in *Marriage of Seagondollar (2006) 139 Cal.App.4th 116, 1120*, "The rules of procedure for reaching family law decisions—contained in the Family Code, the Code of Civil Procedure, and the Rules of Court, and local court rules— are not mere suggestions. The rules of procedure are commands which ensure fairness by their enforcement." (*Id. at 1120.*)

And then there is the excellent legal analysis set forth in *Adams v. Jack A. (2012) 209 Cal.App.4th 1543*. The court in that case observed as follows:

*Evidence Code section 730* authorizes a court to "appoint a disinterested expert who serves the purpose of providing the court with an impartial report." (*Adams, at 1563, citing Mercury Casualty Co. v. Superior Court (1986) 179 Cal.App.3d 1027, 1032.*) "The job of third parties such as...evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee..." (*Adams, at 1563, citing Howard v. Drapkin (1990) 22 Cal.App.3d 843, 860.*) "In the area of child custody, judges 'order evaluations to obtain a neutral mental health professional's assessment of the family, each parent's capacity to parent, and the children's needs and capabilities.' [Citation.]" (*Adams, at 1563.*)

"Because 'the results of an independent evaluation generally are given great weight by the judge in deciding contested...custody issues, the Judicial Council has adopted rules of court establishing uniform standards of practice for court-ordered custody evaluations.' [Citations.] *California Rules of Court rule 5.220* governs child custody evaluators appointed under *section 730* and requires them to '[m]aintain objectivity, provide and gather balanced information for both parties, and control for bias.' (*Cal. Rules of Court, rule 5.220(h)(1).*)" (*Adams, at 1563.*)

"Thus, impartial objectivity is a critical requirement for a *section 730* child custody evaluator. The following passage from a recent opinion, although discussing special masters rather than evaluators, is instructive: 'Special masters are generally used in high-conflict family law cases. One or more of the parties is likely to be combative, adversarial and difficult to deal with. The special master remain neutral and impartial. The special master must avoid the appearance of favoring one side or the other or aligning himself with one side or the other.'" (*Adams, at 1563, citing Rand v. Board of Psychology (2012) 206 Cal.App.4th 565, 569.*)

"If the evaluator's capacity to provide a disinterested assessment is compromised, then the court is necessarily deprived of a ...competent and impartial opinion on the child's best interest." (*Adams v. Jack A., 209 Cal.App.4th at pp. 1564-1565.*)

A custody report, if biased, "is *highly prejudicial* to the injured party", and an award of custody based at least in part on a biased report *must be reversed*. (*Adams, at 1565, 1567.*)

Dr. Simon admitted that he did not comply with the professional standards of Rule 5.220 nor those outlined in his own book. Dr. Simon questioned his own neutrality during the evaluation and testified that Mother's counsel had good reason to question his neutrality as the § 730 expert given his numerous deviations from the Rules of Court and established professional standards. Dr. Simon himself testified that his deviations and noncompliance with professional standards in his custody evaluation is "a sign of bias" and thus a violation of *Rule 5.220((h)(1))* mandating custody evaluators to "[m]aintain objectivity, provide and gather balanced information for both parties, and control for bias". (*Rule 5.220(h)(1).*)



Dr. Simon's acceptance and utilization of *ex parte* documents from Father—in violation of the evaluator's own written statement of understanding expressly prohibiting this conduct—and his admission that he formed negative opinions about Mother and her "flexibility" based on the *ex parte* documents amounts to bias *per se*. Dr. Simon adopted, without investigation, the allegations in Father's *ex parte* documents and cited them in his report in recommending a change of custody from Mother to Father. Worse yet, at trial, it was demonstrated through Father's own testimony that the allegations in his *ex parte* documents to Dr. Simon were untrue, and that Dr. Simon had not made any inquiries of Mother about the allegations in Father's *ex parte* documents.

Dr. Simon also failed to comply with *Code of Civil Procedure* § 2020.410 by refusing to produce documents from his file duly subpoenaed by Mother's counsel. Compliance with the Code of Civil Procedure is mandatory, not merely optional. (*Marriage of Seagondollar (2006) 139 Cal.App.4th 1116, 1120.*) Dr. Simon's refusal to turn over duly subpoenaed documents is further indicia of his bias against Mother in this proceeding.

Dr. Simon's failure to review relevant documents from Mother (provided to him early on in the evaluation) was a direct violation of *Rule 5.220(e)(2)(A)* mandating that the custody evaluator review pertinent documents related to custody. It is inexcusable that Dr. Simon failed to review and consider

Mother's visitation calendars showing her 616 accommodations of Father's requested changes to the schedule which would directly refute Father's claims that Mother was "inflexible" with respect to scheduling.

Instead of complying with *Rule 5.220(e)(2)(A)*, Dr. Simon ignored these pertinent documents and concluded that Mother was "inflexible" as alleged in Father's *ex parte* documents. It is equally inexcusable that Dr. Simon failed to review Mother's documents (including a court order on the subject) regarding Father's past and recent inappropriate behaviors towards their daughters. This is particularly important where Father had recently resurrected his "secret trips" with Jamison—conduct expressly prohibited in the order of September 1, 2004.

Dr. Simon's omission of information from his report about the serious risk of psychological and emotion harm Jamison would suffer if her custody were changed to Father is a direct violation of *Rule 5.220(e)(3)(A)* mandating that "In any presentation of findings, the evaluator must...present all relevant information, including information that does not support the conclusions reached." (*Rule 5.220(e)(3)(A)*).

The court's conclusion that because Dr. Simon said under oath that he was nonetheless "neutral" despite all of his willful violations of *Rule 5.220* turns the law on its head.

"The rules of procedure for reaching family law decisions—contained in the Family Code, the Code of Civil Procedure, the California Rules of Court,

and local court rules—*are not mere suggestions*. The rules of procedure *are commands* which ensure fairness by their enforcement." (*Marriage of Seagondollar, supra, 139 Cal.App.4th 1116, 1120.*)

Dr. Simon admitted at trial that he exhibited bias against Mother, that he twice considered withdrawing from the case because of concerns about his own lack of neutrality, and that Mother's counsel had good reason to question his neutrality as the *Section 730* expert. The trial court stated that "negligence" would be "a minimal phrase" for Dr. Simon's evaluation procedures. Yet the trial court (and now the appellate court) has abdicated its responsibility of enforcing *Rule 5.220* as expressly required by subd. (d)(1)(C) of the Rule which states that all courts must: "Require child custody evaluators to adhere to the requirements of this rule," (*Rule 5.220 subd. (d)(1)C.*) The courts' nonenforcement of *Rule 5.220* has made this custody evaluation unfair and unjust as to Mother and Jamison. The Opinion defies *Rule 5.220, Seagondollar* and *Adams*. It also sends a message that neither courts nor custody evaluators need comply with the standards in *Rule 5.220*. The Opinion should therefore be certified for publication given its serious departure from existing law.

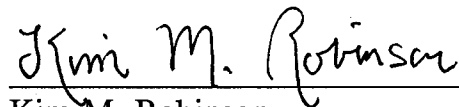
## CONCLUSION

The evaluator's knowing and intentional violation of Rule 5.220 and the professional standards in his own book caused even the evaluator himself to question his own neutrality and to twice consider withdrawing from the case as the *Section 730* expert. The evaluator further acknowledged that in light of all of his errors, omissions, mistakes, receipt of *ex parte* documents from Father, and non-adherence to the Rules of Court and the professional standards in his own book, Mother's counsel had "good reason" to question his neutrality and objectivity in the case. There is no question that the evaluator lost his impartiality and neutrality in this case and that the court failed its duty to require compliance with Rule.5.220.

Appellant therefore requests that the Opinion filed on February 27, 2015 be modified in accordance with the undisputed material facts identified above and in accordance with applicable law requiring reversal of the underlying custody order.

Respectfully submitted,

Dated: March 12, 2015



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Kim M. Robinson  
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE (WORD-COUNT)

I, Kim M. Robinson, certify the Petition for Rehearing contains 5,146 words, including footnotes, and is printed using 13–point New Century Schoolbook font. Petitioner relies on the word count function of the software program Word Perfect 5.1 for the word count, and notes that citations such as "Cal.App.4th" have been counted as three words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 12, 2015 at Oakland, California.

  
\_\_\_\_\_  
Kim M. Robinson

## PROOF OF SERVICE

THE UNDERSIGNED STATES:

I, Kim M. Robinson, am a citizen of the United States of America. I am over the age of 18 years and am not a party to the above–entitled action. On March 12, 2015, I served copies of the following documents:

### PETITION FOR REHEARING

on the parties in this action as follows:

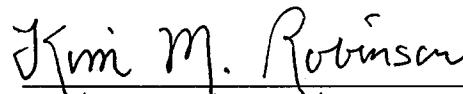
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350 McAllister St., Rm. 1295      Appellate Court website)  
San Francisco, CA 94102

XX (BY MAIL) I placed a true copy of the aforementioned document(s) in a sealed envelope with postage fully prepaid and addressed as indicated above in a U.S. Post Office box at Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on March 12, 2015, at Oakland, California.

  
\_\_\_\_\_  
Kim M. Robinson