

On the Limitations of Child-Custody Evaluations

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Child-custody litigation is typically hostile, stressful, and expensive. For thousands of years, society has wrestled with the issue of properly assigning custody of children when parents fight over it. In King Solomon's court, there were no licensed psychologists to extensively interview families, apply psychological tests, and offer recommendations. Today, it is commonplace in our society to have psychologists evaluate families litigating over custody.

In the United States, approximately 100,000 custody battles take place each year.¹ However, psychological evaluations are not ordered in all contested custody cases. By and large, a custody investigation is ordered when it is unclear who should be designated as the primary residential parent² and when there are resources available to pay for the examination.

Custody evaluations can be pricey. Results of a nationwide survey of psychologists in 2001 in the United States revealed that the average charge for a custody evaluation was \$3,335, topping out at \$15,000.³ While some jurisdictions provide programs that offer custody investigations at reduced cost,⁴ fees exceeding the nationwide survey maximum have been reported. In 2003, the Florida Court of Appeal noted that one psychologist charged \$20,000—an amount equal to the parties' entire net worth, and questioned how it could be in a child's best interest for the family's resources to be depleted by fees of this magnitude.⁵ There are no statistics available in the psychological literature that measure the degree to which custody evaluations influence judicial decisions, but there is little question that these investigations affect the lives of those so evaluated.⁶

In light of the impact of custody examinations on families litigating over such matters, it is important to understand how well these investigations perform. Are families getting their money's worth? Do the recommendations stemming from these evaluations represent the best possible custodial arrangements? These are the fundamental questions underlying an order for a psychological evaluation of a family litigating over custody.

To answer these questions properly, one should rely on

sound scientific data. More specifically, well-conducted scientific research should tell us: (1) how a child's best interest will be served by being placed primarily with one parent over the other; and (2) how to identify the parent who can best serve that interest. Custody recommendations to the court should flow from such research.

SCIENTIFIC EVALUATION OF CUSTODY RECOMMENDATIONS

More than a decade ago, in 1993, I reviewed the state of scientific data supporting custody-evaluation reports and found that the lack of good data caused clear problems for judges:

Currently, there is no clear-cut body of scientific data about some of the basic questions that underlie a custody recommendation. For example, there is an absence of strong scientific evidence regarding precise parenting characteristics that guarantee "good parenting." Similarly, we lack sound research data regarding the effects on the future of a child who's been placed with the "wrong" parent. Given the absence of well-established scientific data on these issues, this leaves the mental health professional with tremendous leeway in regard to how he or she decides to go about doing a custody evaluation and in the interpretation of the data collected for that investigation. As such, what one mental health expert might see as critical, another similarly trained professional might see as trivial. This leaves the court in a terrible quandary—one of which the court, at times, may not even be aware.⁷

One year later, the American Psychological Association (APA) issued guidelines for conducting custody evaluations.⁸ The APA guidelines are not based on scientific evidence and are limited in nature. The APA guidelines offer non-mandatory recommendations⁹ about the psychologist's role in conducting custody evaluations, such as maintaining an impartial

Footnotes

1. Ira Daniel Turkat, *Custody Battle Burnout*, 28 AM. J. FAM. THERAPY 201 (2000).
2. Thus, this article focuses only on cases of this kind and not "slam-dunk" cases (e.g., where one parent has repeatedly and recently sexually abused a child in public whereas the other parent has no such history, is stable, and loving toward the child).
3. James N. Bow & Francella A. Quinnett, *Psychologists' Current Practices and Procedures in Child Custody Evaluations Five Years After American Psychological Association Guidelines*, 32 PROF. PSYCHOL. 261 (2001).
4. Leah S. Horvath, T.K. Logan & Robert Walker, *Child Custody Cases: A Content Analysis of Evaluations in Practice*, 33 PROF. PSYCHOL. 557 (2002).
5. *Higginbotham v. Higginbotham*, 857 So. 2d 341, 342 (Fla. App. 2003). See also *Hastings v. Rigbee*, 875 So. 2d 772, 778 n.1 (Fla. App. 2004) (urging careful consideration of costs, such as parenting coordinators, as compared to income of parties before such resources are used).
6. Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role with Firm Boundaries*, 32 PROF. PSYCHOL. 469 (2001).
7. Ira Daniel Turkat, *Questioning the Mental Health Expert's Custody Report*, 7 AM. J. FAM. L. 175 (1993).
8. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994).
9. In some states (e.g., California), however, the licensing board requires that psychologists adhere to APA guidelines.

stance, keeping the child's best interest paramount, and obtaining informed consent. The guidelines do not specify what interview format to follow, what tests to administer, or what particular family data should be generated in order to lead to a particular custodial recommendation.

In 2000, a review of the psychological literature on custody evaluations revealed that the scientific basis for these investigations remained highly deficient, leading the reviewers to a conclusion of significant concern about the usefulness of these evaluations:

One of the primary problems with child custody evaluations is that the assessment of a child's best interest necessarily involves a future prediction by a psychologist. A psychologist must somehow forecast how a particular child is likely to be psychologically adjusted several years postdivorce on the basis of a myriad of complex factors and interactions. It is well-noted that psychologists as a group are particularly inaccurate in making future behavioral predictions and may even be more inaccurate than lay persons are.¹⁰

More than a decade has passed since the APA guidelines were issued, yet current research indicates that scientifically validated tools to assess parenting competency are still not available.¹¹ If custody evaluations by psychologists are not scientifically validated, what then is the court getting when it orders examinations of this kind to take place? This article sees to provide judges with an answer to this critical question.

CUSTODY EVALUATION COMPONENTS

When a psychologist conducts a child-custody investigation, the tasks executed typically are:

- Interviewing key litigation participants;
- Administering psychological tests;
- Conducting observations of the parents and offspring;
- Conceptualizing the results of 1-3; and
- Making recommendations to the court.

Interviewing. Psychologists have yet to agree upon what variables should be evaluated in a custody investigation;¹² thus, there is no scientifically accepted interview format for conducting a custody evaluation. The design of the interviews will vary across evaluators and, quite likely, the quality of these interviews will vary as well. At the present time, *it is up to the evaluator to choose what questions will be asked, not the scientific literature.* In the absence of scientific validity, there is no

David Higginbotham v. Marianne Higginbotham n/k/a Marianne Vacchio

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We affirm the decision of the trial court in this matter but write on areas that otherwise cause us concern.

Dissolution of marriage cases are fraught with anxiety, emotion, and uncertainty. This case involves a seven-year marriage with three minor children. The issues were neither complex nor voluminous.

This court has previously expressed concern about parties spending limited resources that are otherwise needed for the welfare of the children. See *Wrona v. Wrona*, 592 So. 2d 694 (Fla. App. 1991). Here, the trial court signed a stipulated order appointing a licensed psychologist to perform a parenting assessment The psychologist selected was from Manatee County. The Husband's gross monthly income was \$5,446 including overtime, and the Wife's gross monthly income was \$1,560. The assets of the parties were modest. The cost of the twenty-nine-page parenting assessment was \$ 20,000. Scant mention was made of the assessment in the amended final judgment.

If a judicial system is trying to reach a child placement decision in the best interest of the child, it is difficult to grasp how it is in the best interest of the child to deplete the resources of the family to this extent. The concept should be to devise a more cost-effective way of doing a parenting assessment or fashion a court order that would set a financial cap on the amount to be expended, with appropriate directions to the party performing the assessment. The expert, without guidance from the court, may feel compelled to perform an array of tests not otherwise necessary. In fact, the parenting assessment in question delineated that fourteen psychological tests were performed regarding the parents and seven psychological tests were performed regarding two of the parties' three children.

The cost of the parenting assessment here was 24% of the parties' combined gross annual income and 100% of the parties' net worth as reflected on the Husband's financial affidavit.

Affirmed.

10. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL. & L. 866 (2000).
11. Corina Benjet, Sandra T. Azar & Regina Kuersten-Hogan, *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. FAM. PSYCHOL. 238 (2003).
12. Barbara Jameson, Marion F. Ehrenberg & Michael A. Hunter, *Psychologists' Ratings of the Best-Interests-of-the-Child Custody and Access Criterion: A Family Systems Assessment Model*, 28 PROF. PSYCHOL. 253 (1997).

objective way to know whether the interviews in any particular case are designed well or poorly, executed with skill or error, and/or contribute to or detract from the best custodial arrangement being ordered by the court.

Psychological testing. Since there is no scientifically accepted protocol for psychological testing of custody litigation participants,¹³ the assessment instruments chosen for a custody evaluation will depend ultimately on the individual preferences of the psychologist. In the absence of scientific evidence to guide custody examinations, a family that is evaluated by psychologist A may receive a very different evaluation than if seen by psychologist B or C. Where psychologist A may choose to use tests D, E, and F routinely, psychologist B may prefer tests G, H, I, and J, while psychologist C may not adopt any standard testing regimen. There are more than 2,000 psychological tests available commercially to psychologists.¹⁴ While judges may recognize the names of popular tests,¹⁵ such as the MMPI¹⁶ or Rorschach, it would be erroneous to assume that these psychological assessment instruments are scientifically validated for performing custody evaluations: there simply is no scientific evidence that these tests identify the “right” parent in custody litigation.

Observations. It would seem intuitive that to make predictions about how parents and children will behave with each other in the future, one would need to observe their current interactions. With no scientific-research base to determine whether such observations are necessary and, if so, how they should be conducted, it should come as no surprise that psychologists differ among themselves in how they conduct such observations.¹⁷ Whether each parent should be viewed with each child once, twice, or not at all, and, if seen, under what conditions (e.g., performing a difficult task together, playing a game together, discussing a particular topic), has yet to be established by a body of systematic psychological research.

Conceptualization of data. Because there is no consensual scientific guidance for interpreting the data collected during a custody evaluation, the appointed evaluator has tremendous discretion in determining what information to focus on or gloss over, assign weights of importance, or disregard completely. This leaves the psychologist with considerable power accompanied by virtually no oversight. While the evaluator may be subject to questioning by the bench and by counsel, these individuals are usually not practicing psychologists.

In the absence of scientific evidence, two custody evaluators viewing the exact same data set on a family could provide two very different interpretations.¹⁸ These interpretations will reflect the “leanings” of each psychologist toward particular interview, test, and observational data—or what the dictionary defines as bias. According to *Webster’s Revised Unabridged Dictionary*, bias is the “leaning of the mind” or “propensity or prepossession toward an object or view.” When scientific evidence to support a choice of evaluation instrument is lacking and when there is no professional consensus on the matter, the assessment tool chosen reflects the biases or “leanings” of the evaluator. The same holds true for interpretations of the constellation of interview, test, and observational data collected on a particular family.

Custody recommendations. Given that interview format, test selection, observational approach, and data interpretation are more likely influenced by the biases of the evaluator than by scientific evidence, it should come as no surprise that recommendations regarding timesharing and custodial placement suffer from the same weakness. *In the field of psychology, there are no scientifically validated and uniformly accepted timesharing and custodial placement guidelines.*¹⁹ Thus, when a psychologist offers custody recommendations, he or she is offering an opinion that could differ significantly from another psychologist’s interpretation of the same family data. And because psychologists involved in family-law cases can make mistakes in their evaluations, diagnoses, and treatment recommendations,²⁰ when two psychologists differ in their conclusions, it also is possible that both may be wrong.

RECOMMENDATIONS FOR THE JUDICIARY

In a nutshell, courts appropriately seek guidance from mental-health practitioners when ruling on fateful issues like child-custody determinations, but the scientific literature these clinicians rely upon is inadequate to support the needs of the court.²¹ Child-custody evaluations have significant limitations. What then should be done? Should the courts continue to order psychological investigations of families contesting custody? Should psychologists refrain from conducting these examinations?

At the present time, there are no easy answers to these questions. In fact, psychologists themselves disagree as to whether or not they should be offering child-custody recommendations to the court.²² Despite the lack of professional consensus and scientific validity, there are no indications at present that

13. Margaret A. Hagan & Nicole Castagna, *The Real Numbers: Psychological Testing in Custody Evaluations*, 32 PROF. PSYCHOL. 269 (2001).

14. THE FIFTEENTH MENTAL MEASUREMENTS YEARBOOK (Barbara S. Pale, et al. eds., 2003).

15. James N. Butcher & Steven V. Rouse, *Personality: Individual Differences in Clinical Assessment*, 47 A. R. PSYCHOL. 87 (1996).

16. Minnesota Multiphasic Personality Inventory.

17. Mark Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL. 137 (1997).

18. See Turkat, *supra* note 7.

19. This includes the many county guidelines that have appeared across the nation in recent years on timesharing among custodial and noncustodial parents.

20. Ira Daniel Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 J. AM. ACAD. MATRIMONIAL L. 131 (2002).

21. It is beyond the scope of this article to address the standards for the admissibility of evidence. Some of the issues raised here might also raise questions regarding the admissibility of some of the evidence presented in custody-evaluation cases.

22. See Krauss & Sales, *supra* note 10.

courts and attorneys will stop ordering child-custody investigations. Thus, we come to this question: How can the court improve its utilization of these evaluations despite their significant limitations? To this end, consider this list of recommendations for consideration:

Assign an appropriate weight to the custody report. It is imperative to understand that there is no scientific evidence that a better ruling will be made when a custody evaluation is done versus when one hasn't been done. Furthermore, contrary to what the general public might expect, there is no scientific evidence that a psychologist is any better at determining the best custodial placement compared to a judge, an attorney, or a layperson. As such, when a custody recommendation seems based on clear-cut convincing evidence, it likely deserves greater consideration than a recommendation lacking it.

Recognize that quantity may not mean quality. When a psychologist performs a multitude of tests or engages in extensive interviewing, these activities may suggest the evaluation is comprehensive. However, a mechanic can inspect a malfunctioning automobile extensively yet still recommend the wrong course of action. In the case mentioned earlier of a family

being charged \$20,000 for a custody evaluation, the Florida Court of Appeal pointed out that the psychologist's 29-page assessment report seemed to have little, if any impact on the trial court's ruling.²³ A custody evaluation may appear more thorough when a psychologist generates a large amount of information on a family, but it should also be noted that such activity also increases the opportunity for more errors to be made.²⁴ There is no scientific evidence that a more intense custody evaluation leads to a better custodial recommendation.

Differentiate overt behavior from verbal report. Behaviors such as a child crying and a parent hugging one's offspring are overt, objectively measurable, and potentially incontrovertible. The child either cried or didn't. A hug was provided or it wasn't. On the other hand, what one parent says about a child crying or what a psychologist says about a parent's attitudes are more subject to error than overt nonverbal behaviors. Psychological research has shown for some time that overt nonverbal behavior is less prone to distortion than verbal reports of behavior.²⁵ Thus, when considering the contents of a custody-investigation report as part of the evidentiary record, greater confidence can be placed in the overt behaviors dis-

23. Higginbotham, 857 So. 2d at 342.

24. For example, the more tests used leads to more scoring and potentially more scoring errors. Similarly, the more complex our base of information, the more difficult it may be to make correct judg-

ments from it.

25. HANDBOOK OF BEHAVIORAL ASSESSMENT (A.R. Ciminero et al., eds. 1986).

played compared to individuals' reports about behavior. This does not mean that all verbal statements should be discounted; clearly, some assertions convey critical information. However, a prominent psychology professor captured the issue well when he said, "People can tell you anything, but behavior doesn't lie."²⁶

Differentiate between facts and interpretations. Consistent with the above distinction, the scientific literature shows generally that when observing interactions among individuals and providing explanations, "people agree about behavior but not about its causes."²⁷ Thus, when a parent comes to watch a child's soccer game, that parent's presence is typically a readily agreed-upon fact. However, *why* the parent came to the soccer game could be open to debate, ranging from loving intentions to manipulative motives. When studying a custody report, focusing on the behavior of the litigants over the interpretations provided makes the reader less dependent on the explanations themselves, which are prone to bias.

Recognize that quantitative information from psychological tests may not be as useful as desired. Test scores, quantitative indices, and statistical profiles are useful tools of the psychologist—when used appropriately. As noted earlier, there are no scientifically accepted psychological tests for performing a custody evaluation, yet the overwhelming majority of custody evaluators use them.²⁸ Further, the 2,000+ tests that psychologists can choose from differ from one another in many respects, such as the amount of scientific research available on the test, the degree to which the test has been validated, and whether or not the test has ever been used in research on custody litigants. At minimum, the custody evaluator should be able to articulate for the judge why a particular test was chosen for use over others, what deficiencies exist with the chosen test, and what limitations apply to the meaning of the test numbers generated in regard to the family at hand. While quantitative information can give an air of objectivity, it may or may not represent valid or practically useful information. Psychologists themselves indicated in a nationwide survey that they find psychological tests to be less influential when conducting a custody evaluation compared to interviewing and observing the parents and children.²⁹

Properly consider the source. A judge should not be swayed by the recommendations of a psychologist merely because he or she knows the psychologist, likes the psychologist, or respects his or her credentials. Heading a professional group or being involved in bar activities does not validate scientifically the value of such a psychologist's custody recommendations. The fact that a clinician has performed 500 custody evaluations does not mean that there is scientific evidence to

support his or her custody recommendations over someone who hasn't conducted that number of evaluations.³⁰ The most objective source of information is the overt behavior of the litigation participants themselves, devoid of verbal reports about their behavior—even if those reports are made by the most experienced and reputable custody evaluator.

Hold high expectations for a custody report. Given the lack of scientific validity for custody evaluations, some might suggest lowering expectations for what a psychological report should deliver. This would be a mistake. The bench should take a dim view of any custody-evaluation report that fails to be of the highest caliber. In the absence of scientific support for these reports, certain issues should receive considerable attention when reviewing them. For example, does the psychologist's description of the parties and events mesh well with what has been observed in the courtroom? If it doesn't, why is that? Is there a straightforward and logical rationale for the custody recommendations that fits the rest of the evidence in the case? It should. Does all of the information the psychologist gathered lead directly to precise recommendations that appear convincing? If not, why doesn't it? These questions represent the minimal kind of analysis that the court should undertake when evaluating custody-report recommendations.

CONCLUSION

The stakes are high when a family litigates over child custody. In the worst-case scenario, the offspring are assigned to the wrong parent and a suffering unfolds that cannot be undone. This possibility alone provides ample justification for judges to seek the best advice they can when making decisions about child placement.

With mental-health professionals appearing in courtrooms to assist with child-custody determinations, it is not unreasonable to hope that their input would be based on a strong scientific foundation. Just as a physician can rely on the latest research evidence on antibiotics to guide interventions for infections, one would like to believe that psychologists' custody recommendations are validated scientifically. Unfortunately, this is not the case. Not one scientific study has appeared that proves that the child-custody recommendations offered by psychologists lead to better lives for the children participating in these evaluations. Yet custody investigations can produce serious consequences for the children involved. Some consequences may be positive, but unfortunately, the consequences can also be quite negative. This leaves the families litigating over custody in less than optimal circumstances when they are ordered to participate in psychological examinations.

26. Henry E. Adams, personal communication to the author. Among other publications, Dr. Adams is the lead editor for the *Comprehensive Handbook of Psychopathology* (3rd ed. 2001) and wrote the book, *Abnormal Psychology* (1981).

27. Richard W. Robins, Gerald A. Medelsohn, Joanie B. Connell & Virginia S.Y. Kwan, *Do People Agree About the Causes of Behavior? A Social Relations Analysis of Behavior Ratings and Causal Attributions*, 86 J. PERSONALITY & SOC. PSYCHOL. 342 (2004).

28. See Ackerman & Ackerman, *supra* note 16.

29. See Bow & Quinnell, *supra* note 3.

30. This does not mean that experience has no value—just that there is no evidence in the literature that the custodial recommendation of a highly experienced evaluator leads to a better outcome for children involved in custody litigation as compared to an evaluator without such experience.

At present, it would appear that custody evaluators' recommendations are more likely to be influenced by the evaluators' respective biases than by scientific findings. The role of evaluator bias in custody investigations has yet to be adequately investigated by psychologists.

In light of the current scientific status of custody evaluations, judges are encouraged to view psychologists' timesharing and placement proposals with a critical eye. The recommendations presented here for inspecting a custody-evaluation report should prove helpful.

Hopefully, the scientific foundation to support custody recommendations will develop strongly in the future so that the court can come to rely more assuredly on psychological expertise. Families litigating over custody need the current limitations of custody recommendations to be overcome. When proper research evidence accumulates, judges will be able to place greater faith in the guidance offered by custody evaluators.