

## QUESTIONS GUIDE CCEs



## Specific-Questions Guide to Child Custody Investigations

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A decade ago, many of us who were writing in the child custody field were calling on judges, attorneys, and forensic evaluators to begin the child custody evaluation process by identifying specific questions to guide the investigation.

A perusal of evaluation reports and court orders from across the country reveals that few jurisdictions have incorporated into their court orders specific questions to guide forensic evaluators in their investigations. No matter how skilled a forensic examiner may be in conducting an evaluation, the relevance of the information gathered in the evaluation is directly tied to the clarity and scope of the questions that guide the investigation.

### Many Questions to Ask and Answer

Too often, forensic examiners who are appointed by the court to conduct child custody investigations do not query the court or the attorneys about the substantial concerns that led to the decision to order evaluations. Under the presumption that forensic examiners are best able to define the nature and scope of their evaluations, judges and attorneys often provide little guidance about what specific relevant variables need to be assessed and why. When judges fail to translate the issues in dispute into specific psycho-legal questions that may be answered by child custody evaluators, they handicap their appointed experts. When court orders do not contain specific questions, it falls to the attorneys to craft these questions for forensic examiners to investigate. Attorneys who do not provide forensic examiners with questions to guide their investigations increase the likelihood that psycho-legal issues in dispute will not be directly addressed. When forensic examiners receive court orders to begin evaluations and do not seek specific questions to guide their investigations, the forensic examiners are engaging in poor practice.

Identification of specific questions to guide the evaluation process allows forensic examiners to choose relevant and reliable tests. If evaluators do not know the specific questions to be investigated, they are unable to choose appropriate tests. Similarly, if evaluators do not know the specific questions to be investigated, they are unable to conduct focused interviews with parents, children, and collateral informants about those areas of concern. Finally, if evaluators do not know the specific questions to be investigated, they are less likely to be able to separate the wheat from the chaff as information and test data are reviewed.

### Illustrative Cases

A recent California case has been interpreted as reminding evaluators that the scope of an evaluation is defined in the court's order. *In re Marriage of Seagondollar*, 2006 Cal App. LEXIS 779 (May 25, 2006). Another recent California decision requires that evaluators identify the tests that they intend to administer

to litigants undergoing forensic evaluations. *Carpenter v. Yamaha*, 141 Cal App 4th 249 (2006). In *Carpenter*, the court cited existing law requiring that the party seeking a court-ordered evaluation "shall specify the ... diagnostic tests and procedures ... ." The court then consulted the Oxford English Dictionary (2nd ed., CDROM, 1989), in which "specify" is defined as "to speak of fully or in detail." The court concluded: "The way to describe these 'diagnostic tests and procedures' — fully and in detail — is to list them by name."

Though it appears to be a logical extension of due process protections that litigants be informed of the nature and scope of evaluations prior to agreeing to participate, there are disadvantages that must be considered. Not one of our many tests is universally useful in child custody disputes. The specification in advance of tests to be used removes from evaluators a decision best made by mental health professionals. Additionally, the acceptance by both attorneys of the tests to be used might undercut legitimate post-evaluation criticism of the manner in which the tests were used.

By including specific questions in court orders or stipulations, judges and attorneys increase the likelihood that evaluators will stay on course, investigate the issues of concern, and, in preparing their reports, provide information that bears directly upon the issues before the court. Additionally, the availability of specific questions to which evaluators can refer will lower the risk of investigative intrusion into areas of a parent's or child's life that are not directly tied to the issues in dispute before the court.

According to the Federal Rules of Evidence, relevant evidence is that having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (Rule 401). Expert testimony is intended to assist judges in understanding the evidence or determining facts in issue (Rule 702). Relevant expert testimony should be based on opinions drawn from interpretations of reliable data and gathered through the correct application of reliable scientific procedures.

It is noteworthy that in examining the issues in dispute in *Carpenter*, the Fourth District Court of Appeal for the State of California also tackled the thorny issue of copyright protection (or lack thereof) for tests used by psychologists in forensic evaluations. The court concluded that there is no "statutory authority precluding a trial court, in its discretion, from ordering the disclosure of the written test questions and answers." The court called attention to the fact that in the case before it, the two copyright holders, "Pearson and Harcourt ... suggest a satisfactory means by which the tests can be provided after the mental examination." The court ruled: "Based on the record before it, the trial court erred in concluding that the written test questions could not be provided to Carpenter due to copyright law."

The *Carpenter* court's ruling on the issue of copyright protection should be of interest to matrimonial attorneys. Evaluators whose findings and opinions are challenged often balk at disclosing tests and test data and frequently allude to copyright protection in expressing their resistance to disclosing specified test-related items.

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