

# Part II Forensic Evaluations in Civil Proceedings

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## Chapter 6 Child Custody Evaluations: Current Literature and Practical Applications<sup>1</sup>

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### Abstract

The purpose of this chapter is to provide an overview of changes in law and mental health addressing child custody assessment. We provide an historical perspective on the development of legal factors that have influenced thinking about the best interests of the child standard. We discuss changes to professional practice guidelines developed for use by child custody evaluators. Our summary of the peer-reviewed literature focuses on the use of the Forensic Model applied to child custody evaluation and the chapter ends with a review of complex issues in custodial evaluation.

Keywords: child custody, child custody evaluation, best interests of the child, professional practice guidelines in custodial assessment, methods and procedures in custodial assessment

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## Chapter Overview

The purpose of this chapter is to update changes in the child custody arena. However, this chapter does not replace the “Child Custody Evaluation” chapter by Otto, Buffington-Vollum, and Edens (2003) in the first edition of this volume. Instead, we offer a somewhat different approach by placing greater emphasis on the

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<sup>1</sup> We wish to acknowledge the extraordinary assistance of Milfred “Bud” Dale, Ph.D., J.D. and William G. Austin, Ph.D. in the preparation of this article.

evaluation process in child custody assessment. As such, this chapter should extend the discussion in Otto et al. (2003).

## **Changes in Law Regarding the Best Interests of the Child**

Over the past century, child custody determinations and ideas about the best interests of the child have undergone several swings of the pendulum and paradigm shifts (Elrod & Dale, 2008). For centuries, the paternal presumption prevailed, in which the law viewed children as the property of their fathers (Mason, 1994). The U.S. Industrial Revolution saw the emergence of the women's rights movement and calls for women to have custody rights equal to those of the father (Elrod & Dale, 2008). By the turn of the 19<sup>th</sup> century, the paternal presumption was replaced with a maternal, or "tender years," presumption. The "tender years" were generally viewed as those from birth through roughly 7 years of age. The "tender years" presumption stated that, throughout these childhood years, it was in the best interests of children to be in the sole custody of their mothers (Mason, 1999). Fathers were often awarded "visitation" (Elrod & Dale, 2008). Unwed fathers did not have legal rights to their children and seldom sought parenting time or custody. Social policy was built around the notion of a centralized family unit with the mother at home, the father at work, and very young children preparing to enter the workforce (Elrod & Dale, 2008).

With the advent of Freudian theories that placed the mother-child relationship at the center of developmental progress, psychologists stressed the need for children to spend extensive time with the primary maternal caretaker. Little, if any, attention was paid to the role of fathers in raising their children. Social policy was modified to provide a more prolonged childhood with greater attention on children's relationship with their mothers and less attention on children entering the workforce at a young age (Gould, Friedman, & Loveless, 2010; Kelly & Lamb, 2000; Lamb & Kelly, 2009).

Throughout the 1940s to 1960s, psychoanalytic theory began to dominate ideas about mental health, and as such, the legal presumption of the "tender years" found further support for mother-focused child rearing. Most research during the 1950s and 1960s that examined attachment, parenting, and child development was based on research samples that included young children and their mothers (Kelly & Lamb, 2000). The focus on mothers was a matter of convenience, because the American middle-class family was generally composed of a stay-at-home mother and a work-outside-the-home father. For this reason, research regarding child development, child rearing, attachment formation, and parenting was often based only on studies that examined the mother-child relationship--not because fathers were unimportant, but because fathers were generally unavailable to participate in the research because of their work-related responsibilities (Gould et al., 2010;

Lamb & Kelly, 2009). Consequently, this narrowly focused mother-child research generated findings that perpetuated the notion of the “tender years” and children's developmental attachment to their mothers. Little, if any, corresponding research examined how children formed attachments to their fathers. It was not until the late 1960s that researchers began to include fathers in their research (Lamb & Kelly, 2009).

At the same time as researchers began to examine the father's role in child development (Lamb, 2010), changes in the law brought about a shift in legal standards from the “tender years” presumption to the “best interests of the child” standard. Interestingly, despite almost 50 years of legal precedent supporting the “best interests of the child” standard, most judges continue to hold personal beliefs about the greater value of the “tender years” standard as contrasted with the “best interests” standard (Elrod & Dale, 2009).

As research into the role of fathers in child development continued (Lamb, 2010), research into children's attachments also progressed beyond the simple mother-child dyad (Cassidy & Shaver, 2008; Calloway & Erard, 2009). During the 1980s, research supported the view that children were able to form attachments to multiple caretakers. The theory of attachment hierarchies also emerged, describing situations in which children became more attached to parents (who were at the top of the hierarchy) than to other caretakers (who were in lower positions). The idea that children were able to form attachments to multiple caretakers without any risk to their development was contrary to the earlier beliefs found in the psychoanalytic formulations and the “tender years” doctrine (Kelly & Lamb, 2000).

During the 1990s, researchers focused on what each parent contributes in his or her respective parenting style. Early research suggested that father-absent children were at a significantly higher risk for developing maladaptive behaviors than children who had relationships with their fathers (Lamb, 2010). As research methodology has become more sophisticated, findings have revealed some of the father-specific contributions to the development of their children, the short- and long-term negative developmental effects of poor child-father relationships, and the negative impact of poor interparental communication regarding a child's short- and long-term development (Lamb, 2010).

More recent research illustrates that boys may react differently than girls to multiple, nonparental caretakers during their infant and toddler years (Pruett, Ebling, & Insabella, 2004). Other research shows differences between mothers' and fathers' parenting techniques (Pleck, 2010; K. Pruett, 1999). The consensus among experts is that children are best served when they develop strong and secure attachments to both parents, and when such attachments are developed, strong and secure attachments need to be enhanced rather than disrupted during separation and following divorce (Kelly & Emery, 2003).

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# Child Custody Law<sup>2</sup>

Predicting and providing for the best interests and future of children are the goals of every child custody legal proceeding. The now-familiar “best interests of the child” standard (BIOC) has its origins in the 1881 Kansas Supreme Court case *In re Bort*, “We understand the law to be, when the custody of children is the question, that the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that” (*In re Bort*, 1881).<sup>3</sup>

The “best interests of the child” standard found prominence when articulated in 1925 by Judge Cardozo in *Finlay v. Finlay*,

The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. . . . The chancellor in exercising his jurisdiction upon petition does not proceed on the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate, and careful parent’ (citations omitted), and make provision for the child accordingly (*Finlay v. Finlay*, 1925).

The “best interests of the child” standard has served as the foundation of child custody statutes since the 1970s. Today, decisions about custody in most U.S. jurisdictions are determined in accordance with BIOC (Elrod & Dale, 2008).

While the majority of divorcing parents voluntarily make custody and access arrangements and make adequate postdivorce adjustments (Kelly, 2002), one fourth to one third of divorcing couples report significant hostility and discord in the daily care of their children many years after separation (Johnston et al., 2009; Maccoby & Mnookin, 1992; Wallerstein & Kelly, 1980). When the adjudication of disputes concerning custody and access is guided by the best interests of the child standard, those with decision-making authority must recognize that not all children have the same needs and not all children are affected in the same way by divorce (Elrod & Dale, 2008).

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<sup>2</sup> This section draws heavily on an unpublished manuscript provide by Milfred Dale, Ph.D., J.D. that we used with his permission.

<sup>3</sup> We note that the Kansas Supreme Court in *In re Bort* used the term “best interests” and “best interest” interchangeably in its discussion of the best interests of the child. The context of the court’s discussion leads one to believe that the court’s emphasis was on best interests.

## **BIOC: A Dispute-Settlement Task for the States**

In domestic cases, courts perform two functions: Private-dispute-settlement and child-protection (Mnookin, 1975). These fall to state courts for two reasons. First, the Tenth Amendment has traditionally safeguarded state regulatory power over families from federal oversight.<sup>4</sup> In *In re Burrus* (1890), the U.S. Supreme Court noted that “[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States” (pp. 593-594). Second, almost 100 years later, the Court reiterated what has become known as the “domestic relations exception.” The Court noted that, although the Constitution does not mandate exclusion of domestic relations cases from federal court jurisdiction,

state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees (*Ankenbrandt v. Richards*, 1992, p. 689).

## **U.S. Supreme Court Support for the BIOC**

The U.S. Supreme Court has upheld the primary and paramount consideration of the BIOC objective in state court custody determinations. For example, in deciding a case between parents who were issued conflicting orders by two states, the Court noted:

Virginia law, like that of probably every State in the Union, requires the court to put the child’s interests first. The Supreme Court of Appeals in Virginia has stated this policy with unmistakable clarity: “In Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate” (*Ford v. Ford*, 1962).

## **The Child Protection Function of the BIOC**

The U.S. Supreme Court has also addressed the child protection function of the BIOC. The BIOC assigns to the court the task of acting on behalf of the children through *parens patriae*, a doctrine referencing the state’s power “to protect

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<sup>4</sup> See, e.g., *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)(rejecting constitutional challenge to anti-miscegenation law partly on the ground that “[r]egulation of the marriage relation is . . . distinctly one of the rights guaranteed to the States” by the Tenth Amendment).

all who cannot protect themselves.”<sup>5</sup> *Palmore v. Sidoti* (1984) involved a custody dispute in which a white mother who was the primary caretaker of a child married a black man and the district court changed custody. The Court remanded for a consideration of what was best for the child rather than a custody determination based upon race. The Court noted:

The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause (*Palmore v. Sidoti*, 1984, p. 433).

## **BIOC: A Gender-Neutral Solution to a Unique Legal Problem**

The BIOC standard emerged as a gender-neutral solution to a complex, unique legal problem. Unlike most other legal proceedings in which appeals are eventually exhausted, child custody determinations are modifiable until the child reaches the age of majority, usually 18. Child custody determinations are also person-oriented predictions of the future rather than act-oriented investigations of the past (Mnookin, 1975). The law’s paradigm shift to the gender-neutral BIOC standard in the 1970s radically altered the child custody landscape.

The BIOC standard in child custody emerged in response to a transformative constitutionalization of family law that occurred during the latter part of the 20th century. Using the Fourteenth Amendment, the U.S. Supreme Court expanded Constitutional guarantees of equality and recognized broad notions of family-related autonomy or individual rights. This, in turn, led to the striking down of a host of family laws discriminating on the basis of race, sex, and illegitimacy (Meyer, 2008).

Historically, the Court has used the Equal Protection Clause to protect the right to marriage and procreation (*Skinner v. Oklahoma ex. Rel Williamson*, 1942); strike down antimiscegenation laws (*Loving v. Virginia*, 1967); and prevent a family court from transferring custody of a child based on her mother’s decision to marry a man of a different race (*Palmore v. Sidoti*, 1984). In the 1970s, Court rulings and the Uniform Parentage Act ultimately eliminated the network of punitive measures that discriminated against nonmarital children, thus eliminating

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<sup>5</sup> *Parens patriae* is Latin for “father for the people.” In U.S. law, *parens patriae* commonly refers to the State’s legal role as a guardian protecting the interests of children and others who cannot take care of themselves.

the idea of illegitimate children (*Levy v. Louisiana*, 1968). In four cases involving unwed fathers, the Court outlined constitutional requirements and protections for fathers who had seized the opportunity for legal fatherhood and assumed responsibility for their children (*Caban v. Mohammad*, 1979; *Lehy v. Robertson*, 1983; *Quilloin v. Walcott*, 1978; *Stanley v. Illinois*, 1972). Finally, in the 1970s, by replacing the maternal preference for custody with the BIOC standard, the Court's use of the Fourteenth Amendment moved the states toward gender equality (*Elrod v. Dale*, 2008).

## **Strengths and Weaknesses/Limitations of the BIOC**

The individualized nature of the BIOC is both its greatest strength and greatest vulnerability (*Elrod & Dale*, 2008). Its strengths include its “child-centered focus, its flexibility, its minimal a priori bias relative to the parties” (*Wyer, Gaylord, & Grove*, 1987) and its ability to respond to changing social mores, values, and situations in a diverse society (*Elrod & Dale*, 2008; *Kelly*, 1997, 2002). The BIOC standard requires courts to consider parents based on the merits of their parenting and the strength of their parent-child relationships rather than on their gender, economic situation, or sexual orientation or preference (*Kelly*, 1997). A BIOC determination requires a careful consideration of each child's developmental and psychological needs and eliminates a presumptive focus on parental demands, social stereotypes, and cultural traditions. A focus on the BIOC represents the willingness of the court and law to consider children on a case-by-case basis rather than conceptualizing children as a class or homogeneous grouping (*Elrod & Dale*, 2008).

When compared to the variety of legal presumptions it replaced (e.g., the maternal preference rule, the tender years doctrine, the psychological parent preference rule and the fault concept), the strength of the BIOC standard lies in its use of unweighed, unprioritized factors that are indeterminate (*Mnookin*, 1975). Neither among mental health professionals nor the judiciary has consensus been achieved concerning what factors, viewed collectively, define the BIOC standard. (*Gould*, 1999; *Gould & Martindale*, 2009)¶ As a result, the standard has been applied in unpredictable ways, fueling conflict because of their unpredictable application (*American Law Institute*, 2002; *Elrod*, 2001; *Mnookin*, 1975) and often leaves judges to make decisions based on personal experiences and beliefs rather than scientific knowledge about what is best for the child (*Kelly*, 1997). For example, the U.S. Supreme Court, in articulating its reasoning in the case of *Troxel v. Granville*, 530 U.S. 57 (2000), noted (at 61) that the trial court had deemed it appropriate to “look back at some personal experiences. . . .”

## **BIOC: State-Specific Presumptions and Factors**

In making individual custody decisions, many states have identified in statutes or case law BIOC factors to be considered when adjudicating custodial placement of children. These factors provide guidance to judges when determining custodial placement but do not identify the relative value of each factor. Determination of the weight to be placed on one or more factors is generally seen as a decision made by the judge in each case.

Some states' statutes include specific BIOC factors that guide judges in custodial decision making (e.g., Michigan). Other state statutes provide no guidance to judges about specific BIOC factors to guide custodial decision making but have case law that provides some indication of factors to be considered in a BIOC analysis (e.g., North Carolina). In deference to the rights of parents to the care, custody, and control of their children (e.g., *Troxel v. Granville*, 530 U.S. 57 [2000]) parental agreements after dissolution of a marriage or relationship are presumed to be in the best interests of the children.

In the 1980s, notions of gender equality and social science research on the benefits of two cooperating parents led many states to adopt joint custody presumptions. A review of statutes and case law from the 50 states and the District of Columbia indicates that (1) Eight states have statutes or case law that make clear that joint custody is the presumptively favored arrangement. (2) Seven states have statutes or case law directing that joint custodial arrangements are preferred where both parents agree. (3) Six states have statutes or case law that encourages arrangements in which time spent by children with their parents will be apportioned as equally as possible. These states do not address the issue of decision making, however. (4) Nineteen states and the District of Columbia have statutes or case law that encourage frequent and continuing contact between the child(ren) and both parents, but it is presumed that one of the parents will function as the primary (and legal) custodian -- the decision maker. (5) Eleven states do not address the matter in statutory language and case law is unclear. (6) In one state (New Jersey) there is clear case law favoring joint custody. (7) In one state (New York) there is clear case law suggesting that joint custody (as a court-imposed option) is to be avoided.

However, this has not been a panacea for children and families (Elrod & Dale, 2008). Attempting to promote cooperation via joint custody in every case may be beyond the cooperation capacities of the parents and result in conflict that is harmful to children (Johnston et al., 2009; Martindale, 2011).

In 2002, the American Law Institute Principles of Family Dissolution proposed the "approximation rule," calling for courts to:

Allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the



child prior to the parents' separation or, if the parents never lived together, before the filing of the action (§2.08, §2.10).

Proponents of the approximation rule argue that this approach offers an easier to administer and more predictable process (Barlett, 2002; Kay, 2002) that could benefit children by reducing conflict (Emery, Otto, & O'Donahue, 2005). Opponents view the rule as gender-biased, a return to the maternal preference, and unlikely to reduce conflict (Warshak, 2007).

The current debate about the approximation rule aptly illustrates how the adversarial system and gender dynamics permeate system reform attempts (Elrod & Dale, 2008). Although only one state (West Virginia) has adopted a presumption for custody with the primary caretaker, courts often note that "stability, continuity and a loving relationship are the most important criteria for determining the best interests of the child" (*Burchard v. Garay*, 1986).

Beyond these presumptions, statutory and judicial lists of "best interests" factors have steadily increased in many states. Factors are only restricted by their relevance; that is, the court should consider only parental behaviors or factors that have a direct impact on the child and/or the parent-child relationship (Uniform Marriage & Divorce Act, 1979). For example, awareness of the adverse effects of domestic violence on children (Hannah & Goldstein, 2010) led all 50 states to consider spousal abuse as a factor in custodial decision making, with 24 states having a rebuttable presumption against awarding custody to the abusive parent (Gonzalez & Reichmann, 2005).

A child custody evaluator needs to be familiar with state statutes and case law pertaining to the child custody determination.. Evaluators need to be aware of new custody-related legal decisions published by appellate and supreme courts. Child custody evaluations can be affected by a number of factors including, but not limited to, the admissibility of certain types of testimony and a parent's request to relocate with one or more children when the other parent does not choose to move.

There have been numerous attempts to reign in judicial discretion with new presumptions, preferences, or lists of factors, particularly by those critical of the BIOC standard (Sampson, 1999). . Evaluators should routinely ask their legal colleagues for copies of recently published appellate level decisions, relevant articles that appear in legal publications addressing psycholegal factors in family law, and changes in statutes that govern both child custody determination and expert testimony.

## **Parenting Plans**

Statutory, historical, and cultural forces often determine which care arrangements are in a child's best interests (Kelly, 1997, 2002; Kelly & Lamb, 2000; 2009). The mechanisms through which parents plan and care for the future

of their children after parental divorce or separation are commonly called “parenting plans.” Parenting plans range from informal, mutually understood, postdivorce agreements to more formal, detailed, written documents enforced by court orders when conflict persists (Elrod & Dale, 2008). Some jurisdictions require parents to submit parenting time plans prior to appearing before a judge (Elrod & Dale, 2008).

Parenting plans typically address issues of legal and physical custody. Legal custody is defined as the care, control, and maintenance of a child. Often state law divides legal custody into two components: decision making component and a residential placement. The decision making component of legal custody refers to the awarding of legal authority to one or both parents after divorce to make all decisions that are involved in rearing the minor child. These decisions include decisions about residential placement, education, health and mental health care, and religious upbringing.

**Physical custody** involves the day-to-day care of a child and establishes where a child will live (residential placement). The parent with physical custody generally has the right to have his/her child live with him/her although the court often defines a specific distribution of time (parenting access plan) that the child may live with each parent. If the court orders that the child lives primarily with one parent, in most jurisdictions, that parent is said to be the custodial parent. The other parent would be considered the non-custodial parent and would typically have visitation rights to his/her child. If a child lives equally or close to half the time with each of his/her parents, the court may define this as a joint physical custody arrangement. In some joint physical custody arrangements, a parent that has more time with the child may be denoted as having primary physical custody of his/her child while the other parent has secondary physical custody.

There is no consensus across the country regarding terms used in describing legal and physical custody. Some states laws refer legal and physical custody under the term parental responsibility (e.g., Colorado) while other states use the term conservatorship. Evaluators would be wise to know the terms used by the courts in each jurisdiction in which one practices. In addition to parenting plans addressing issues of legal and physical custody, they typically include information about holiday and vacation access; parent-to-parent communication and information exchange; provisions for cooperation and collaboration; healthcare and school decisions; and mechanisms for review and revision. Obviously, few parenting plans cover every conceivable possibility, and this is their inherent weakness when used with high-conflict families. Parents in high conflict seem to possess uncanny abilities to find “soft” spots in the plans and to make unreasonable demands. Sometimes parental conflict and psychopathology overwhelm some of the best-laid plans in ways that place children at risk for the adjustment, academic, conduct, and relationship problems that research indicates too frequently characterizes children of divorce.

Courts are struggling with how to structure parenting plans that meet the needs of children from different families. Some courts have informal guidelines for all children of particular ages, regardless of situation. Other courts have informal guidelines that are used in a more case-sensitive manner. The lack of a uniform approach is, in part, the result of lack of consensus in the mental health field about what current, empirically based literature reveals about parenting plans that foster children's best interests (Tippins & Wittmann, 2005).

## **Children of Assisted Reproductive Technology and the BIOC**

Children born via assisted reproductive technology can often find themselves in a precarious position with respect to their "parents" both at the time of their births and at the time of any divorce or family dissolution. The Centers for Disease Control (2006) reported that, in 2006, more than 40,000 children were born via assisted reproductive technology (ART) (e.g., artificial insemination (AI), in vitro fertilization, (IVT) intrauterine insemination, and surrogacy). In all 50 states, husbands of wives who conceive a child by artificial insemination are considered legal fathers of the child. In the states that allow same-sex marriages, the presumptions of parentage arguably apply (Elrod, submitted for publication).

If the child is born via ART to a single mother or to a same-sex partner, however, the child may have only one legal parent (Elrod, submitted for publication). Efforts to establish a second legal parent through adoption are possible in the four states that allow second parent adoption. When faced with requests to protect intended, functional, or *de facto* parent-child relationships, many courts have denied parental rights to the nonbiological parent, which effectively terminated this relationship. Cases are beginning to appear, however, in which courts have protected children's relationships with nonbiological parents when the biological parents clearly consented and provided opportunities for the children to establish parent-child relationships with the partners. In these cases, the courts have combined BIOC arguments with principles of equitable estoppel and *de facto* or psychological parenting. This follows, at least in principle, the idea that one who intentionally consents to the production of a child or to the formation of a relationship with a child cannot create a temporary relationship that can be assumed and disclaimed at will (Elrod, submitted for publication).<sup>6</sup>

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<sup>6</sup> Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010). V.C. v. M.J.B., 748 A.2d 539, 546 n.3 N.J. 2000)(describing terms as interchangeable but preferring "psychological parent"); *In re L.B.*, 122 P.3d. 161, n.7 (Wash. 2005) (distinguishing the three terms); C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004)(recognizing equal parental rights of a lesbian co-parent who was conceded to be a *de facto* parent by the biological parent).

## Relocation Law

In the United States, laws regarding relocation of children are established by states rather than by the federal government. Each state and the District of Columbia develops its own procedures and standards regarding relocation cases (Austin, Langley, & Atkinson, in press). Twenty years ago, most states allowed a parent with sole legal and physical custody of a child to move with the child following divorce or determination of paternity. Since the mid-1990s, states have followed divergent approaches, but the trend has been to decide cases based on their own facts without a strong presumption for or against relocation (Atkinson, 2010; Elrod, 2006).

The modern view is reflected by New York's Court of Appeals (the state's highest court),

[W]e hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. . . . [I]t serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another' [*Tropea v. Tropea*, 87 N.Y.2d 727, 739-40, 665 N.E.2d 145, 150-51 (1996).]<sup>7</sup>

The trend in case law in the 37 states that have relocation statutes has been for the court to apply the BIOC standard with a list of relocation factors (Atkinson, 2010). The most frequently cited factors include (1) the motives of the parent seeking to relocate; (2) the motives of the parent opposing relocation; (3) the quality of relationship and frequency of contact between the child and each parent; (4) any history or threats of domestic violence; (5) the likelihood of improving quality of life for the child; (6) the likelihood of improving quality of life for the custodial parent and the degree to which benefit to custodial parent will provide benefit to child; and (7) the feasibility of restructuring parenting time (or visitation) in order to preserve or promote the relationship between the child and the parent who is not relocating (Atkinson, 2010; Austin et al., in press).

After a court has considered the relevant factors, its primary decision is to allow or not allow the parent to relocate with the child. Additional remedies include

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<sup>7</sup> Other cases since the mid-1990s reflecting the trend toward examining the facts of each case without a strong presumption for or against relocation include: *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); *Bodne v. Bodne*, 277 Ga. 445, 588 S.E.2d 728 (2003); *In re Marriage of Smith*, 172 Ill. 2d 312, 665 N.E.2d 1209, 1213 (1996); and *Latimer v. Farmer*, 360 S.C. 375, 602 S.E.2d 32 (2004). In addition, *In re Marriage of LaMusga*, 32 Cal.4th 1072, 88 P.3d 81, 12 Cal. Rptr. 3d 356 (2004) softened what appeared to be a strong presumption in favor of allowing the custodial parent to move that had been articulated in *In re Marriage of Burgess*, 13 Cal. 4th 25, 913 P.2d 473, 51 Cal. Rptr. 444 (1996).

adjusting parenting time (or visitation); including modification of custody; allocating transportation costs or adjusting child support; and allocating attorneys' fees (Austin et al., in press).<sup>8</sup> States differ, for example, regarding the degree to which a benefit to the custodial parent that would result from a relocation will be considered to be beneficial to the child without direct proof of benefit to the child from relocation (Atkinson, 2010).

Procedural aspects of relocation vary somewhat from state to state. In most states, a primary custodian wishing to relocate with a child must provide notice of that intent in advance of moving--usually between 30 and 90 days. Common elements of notice include the address of the intended relocation, the date of the planned relocation, the reason for the relocation, the proposed revised parenting-time schedule; and the rights of the other parent to object to the relocation (Austin et al., in press).<sup>9</sup> Courts generally may waive or modify notification requirements in exceptional circumstances, such as cases involving a threat to the safety of the parent or child (Austin et al., in press).

## **Summary**

In this section, changes in law regarding the BIOC standard were discussed. Strengths and weaknesses of the BIOC standard were described. Definitions were provided for the concepts of legal custody, physical custody, and parenting plans. We stressed the need for an evaluator to become familiar with state statutes and case law decisions addressing child custody determination within each jurisdiction in which he or she practices.

In the next section, we describe changes in the professional practice guidelines pertaining to conducting child custody evaluations and related forensic psychological activities such as reviewing a colleague's child custody report.

**Changes in the Practice of Child Custody Evaluations** We begin this section by discussing recent literature in which concerns have been raised about the training and professional practices of child custody evaluators. Survey data suggest that many professionals offering their services as custody evaluators are doing so without first having obtained formal training (Bow & Martindale, 2009). In addition, many practitioners are performing evaluations that do not meet the needs of the courts that have appointed them (Gould, 2006). With increasing frequency, judges have expressed concern with the poor quality of the reports being submitted to them by evaluators (Bow & Quinnell, 2004; Martindale & Gould, 2008), and

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<sup>8</sup> Examples of statutes with remedies such as these include: Ala. Code §§ 30-3-169.2 – 30-3-169.9 (2008); Fla. Stat. Ann. §§ 61.13001(9) (2008); Iowa Code § 598.21D (2008); La. Rev. Stat. §§ 355.14 & 355.16 (2008); Wash. Code §§ 26.09.510 & 26.09.550 (2008); Wis. Stat. § 767.327(2)(c) (2008).

<sup>9</sup> Examples of notice statutes with such requirements include: Ala. Code § 30-3-165 (2008); Fla. Stat. Ann. § 61.13001(3) (2008); La. Rev. Stat. § 355.4 (2008); Wash. Code § 26.09.440 (2008).

problems with the custody evaluation process have become the subject of front page articles in newspapers such as the *New York Times* (Eaton, 2004).

In response to much publicly expressed discontent, in June, 2004, Chief Judge Judith S. Kaye of New York appointed a Matrimonial Commission to review all aspects of matrimonial litigation and make recommendations for improving the manner in which the courts handle such litigation in both Family Court and Supreme Court (Miller, 2006). The most recent data available reveal that licensing complaints against evaluators have increased dramatically (Kirkland & Kirkland, 2001), as have malpractice actions (Marine & Bogie, 2004). Bow and Martindale (2009) reported that more than half of the 138 child custody evaluators who responded to their survey reported having had at least one licensing complaint filed against them. This represents a significant increase from survey data previously reported in which only 35 percent reported a board or ethics complaint (Bow & Quinnell, 2001). Despite the sobering message that these data convey, child custody evaluators report a reasonable degree of satisfaction in conducting child custody assessments (Bow & Martindale, 2009).

In 2001, forensic psychology was officially recognized as a specialty by the American Psychological Association's Committee for the Recognition of Specialties and Proficiencies in Professional Psychology (CRSPPP). Recognition of forensic psychology as a specialty should make "clearer to psychologists in other areas and to applied psychologists who do forensic work that a recognized field associated with a body of knowledge and standards of practice should be learned and respected when practicing in forensic contexts" (Otto & Heilbrun, 2002, p. 9). Child custody evaluations fall squarely within forensic psychology.

The authors of the previously published chapter in this handbook addressing child custody evaluations (Otto, et al., 2003) acknowledged that: "[c]hild custody evaluations may be the most complex, difficult, and challenging of all forensic evaluations" (p. 179). It is critically important to understand the ethics, literature, and laws governing child custody evaluations. The fourth guideline of the American Psychological Association's child custody guidelines -- formally, the *Guidelines for Child Custody Evaluation in Family Law Proceedings* (American Psychological Association, 2010) -- addresses the importance of developing and maintaining specialized competencies. Laws change, existing methods are refined, and new techniques are identified. In child

custody evaluations, general competence in the clinical assessment of children, adults, and families is necessary but is insufficient in and of itself. The court will expect psychologists to demonstrate a level of expertise that reflects contextual insight and forensic integration as well as testing and interview skills" (p. 864).

A similar value is found in the Association of Family and Conciliation Courts' *Model Standards of Practice for Child Custody Evaluation* (AFCC, 2007)

model standard 1.1, “evaluators shall gain specialized knowledge and training in a wide range of topics...[s]ince research and laws pertaining to the field of divorce or separation and child custody are continually changing and advancing, child custody evaluators shall secure ongoing specialized training” (pp. 72 – 73).

Despite the strongly worded recommendations included in these guidelines and model standards, many professionals new to child custody evaluation begin practice without adequate preparation. In a recent survey of 138 child custody evaluators (CCEs) (Bow & Martindale, 2009), one third of the respondents reported not having attended any workshops or seminars on the topic, one third reported reading two or fewer articles or books on the topic, and one third reported receiving no supervision.

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## Professional Practice Guidelines

Since the publication of this Handbook’s previous edition, two of the most comprehensive sets of child custody evaluation practice guidelines have been updated. The American Psychological Association’s 1994 *Guidelines for Child Custody Evaluations in Divorce Proceedings* have been replaced with the *Guidelines for Child Custody Evaluation in Family Law Proceedings* (American Psychological Association, 2010) and the Association of Family and Conciliation Court’s 1994 *Model Standards of Practice for Child Custody Evaluations* have been replaced with the *Model Standards of Practice for Child Custody Evaluations* (Association of Family and Conciliation Courts, 2007).

The developers of these two sets of professional practice guidelines for child custody evaluators appear to have taken different paths. APA’s *Guidelines for Child Custody Evaluation in Family Law Proceedings* (Hereafter: Child Custody Guidelines) appear to have been written with an eye toward maintaining the status quo by broadly defining the scope and purpose of the evaluation, the role of the evaluator, and the procedural safeguards necessary to conduct a satisfactory child custody evaluation. Compared with the first version of the *AFCC Model Standards of Practice for Child Custody Evaluations* (Hereafter: Model Standards), the revised *Model Standards* provide increased specificity and definition of the evaluation task, the role of the evaluator, and the procedural safeguards necessary to conduct a satisfactory evaluation.

The *Model Standards*, approved by the AFCC in 2006 and published in 2007 are noteworthy for the following reasons: (1) There is an emphasis on the use of reliable and valid methods; creation and documentation of detailed records; and, acknowledgement of the limitations of assessment procedures and data; (2) evaluators are reminded that the evaluative task is investigative in nature and they must be familiar with applicable legal principles, with case law, and with statutes

relevant to their work; (3) the importance of role delineation is addressed in detail; (4) the advantages of providing information in written form are explained; (5) evaluators are reminded of their obligations to non-party participants; and (6) the importance of tapping the knowledge base of the mental health fields is stressed.

## **APA's Child Custody Guidelines**

As stated in the American Psychological Association's Child Custody Guidelines (2010), the purpose of a child custody evaluation is "to assist in determining the psychological best interests of the child" in which the examiners "function as impartial evaluators" (p. 864). Evaluators are advised to embrace a "clinically astute and scientifically sound approach to legally relevant issues" (p. 864). Guideline 3 reads: "The evaluation focuses upon parenting attributes, the child's psychological needs, and the resulting fit" (p. 864). Among the limitations of APA's Child Custody Guidelines is the lack of operational definitions for important concepts. Neither the Child Custody Guidelines nor the peer-reviewed literature provides a consensus regarding operational definitions for such terms as "parenting attributes," "child's developmental needs," and "fit."

A distinction must be drawn between a conceptual definition and an operational definition. Faigman et al. (2002) reminded us that "talking about concepts in the abstract is one thing (e.g., aggressiveness, intelligence, reasonable decision, disability). Defining precisely what observations are to count as an instance of the concept and what is not - that is, an operational definition - . . . is far more difficult. Moreover, one can make the world appear to be quite a different place merely by using different operational definitions of something" (p. 123).

The Child Custody Guidelines provide conceptual definitions of terms such as "parenting attributes," "child's developmental needs," and "fit." APA was wise not to have provided a single operational definition for each term. The lack of an articulated operational definition for each concept affords evaluators opportunities to identify and define specific target behaviors for examination in each evaluation (Gould & Martindale, 2009). Our reviews of the reports written by other child custody evaluators reveals that few provide operational definitions of the variables they reported assessing. We encourage the committee overseeing the next revision of the Child Custody Guidelines to direct evaluators to operationally define the specific terms that they intend to evaluate.

Providing an operational definition of a concept allows for a direct comparison of the observations drawn from both parents. When different operational definitions are used to measure the same abstract concept, different measures of the concept cannot logically be compared and contrasted with one another. A consumer of a forensic evaluation has to satisfy himself/herself that the investigator's operational definitions adequately capture the concept that the investigator is purporting to evaluate.



It is important to define a specific set of questions at the outset of an evaluation (Gould & Martindale, 2009). Included in the development of these specific questions are operational definitions of each concept intended to be assessed (Gould, 1999; Gould & Martindale, 2007; Martindale & Gould, 2004). The more tailored the hypotheses are to the specific needs of the court, the more likely that the evaluator's focus will be on gathering information relevant to the needs of the particular family under scrutiny (Amundson, Duda, & Gill, 2000).

Another limitation of the APA Child Custody Guidelines is the relative lack of focus on assessment of the larger family system. The Child Custody Guidelines read: "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" (APA, 2010, p. 864).

We have previously raised concerns that neither the initial nor the revised child custody guidelines sufficiently emphasized the importance of *assessing and understanding the child within the context of the family from the child's point of view* (Gould & Martindale, 2007). It is critical for the evaluator to generate hypotheses concerning the family/relational contextual variables that may have fueled the custodial dispute and may be preventing an out-of-court resolution. It is also critical for the evaluator to understand family/relational variables from multiple perspectives, one of which includes learning to view the family landscape through the eyes of the children (Gould & Martindale, 2009; Parkinson & Cashmore, 2008; Smart, 2002).

As Bronfenbrenner and Crouter (1983) noted over a quarter century ago, a comprehensive understanding of the ecology of family functioning requires an assessment of how family members may be affected by other interpersonal events and processes within that family system. Evaluators need to think about divorced families as composed of two separate but intersecting families. Ahrons (1987) referred to this as a binuclear family. When evaluating divorced families, evaluators may need to assess multiple levels of family functioning. Assessment of multiple family levels may include, but will not be limited to, the parent-to-parent unit, the parent-to-child unit, the sibling-to-sibling unit, the parent-to-grandparent unit, the child-to-grandparent unit, and the child-to-parent-to-grandparent unit. When parents remarry, additional factors are added to the possible units for analysis, and when parents remarry and step-parents bring stepchildren into the family system, yet other potential units of analysis are added. Each of these units may need to be understood as independent elements. Each unit may need to be understood as elements that together constitute subsystems that are reciprocally interrelated (Belsky, Rovine, & Fish, 1989).

## **AFCC Model Standards**

In 2005, Grisso observed that calls for reform have been heard for years but “[t]he real world will not yield to logic until some practical dilemmas are faced and resolved” (p. 224). Grisso pointed out that professional organizations representing specific disciplines are torn by competing responsibilities—an obligation to the public and accountability to their members. Grisso opined that there would be no “a serious impact on practice until [standards and guidelines] can be developed through interdisciplinary collaboration” (p. 225). It is such collaboration that made development of the Model Standards possible.

Work on the *Model Standards* was begun in October, 2004, by a Task Force that included evaluators from the fields of social work and psychology, employed in court-connected facilities and in private practice; a reviewer of evaluations, consulting to evaluators, attorneys and regulatory agencies; an attorney; and, a judge. The group was charged with developing a set of model standards that would guide the practice of evaluators with different professional backgrounds and operating in different contexts, and would also be useful to attorneys, judges, and others involved in the adjudication of disputes concerning custody and access.

In its earliest discussions concerning its objectives, the AFCC Task Force was determined to create a document that would serve the needs of families in distress and courts charged with the responsibility of adjudicating custody and access disputes. Providing protection for forensic mental health professionals was not among the goals. Model standards, as defined by the Task Force Reporter are, most simply put: *ideas for standards* (Martindale, 2007). The model standards were developed with the hope that legislators and others charged with the responsibility for developing enforceable standards would be constructively influenced the AFCC's ideas for standards.

The authors of the Association of Family and Conciliation Court’s (AFCC) *Model Standards* (Task Force for Model Standards of Practice for Child Custody Evaluation, 2007) wrote,:

The child custody evaluation process involves the compilation of information and the formulation of opinions pertaining to the custody or parenting of a child and the dissemination of that information and those opinions to the court, to the litigants, and to the litigants’ attorneys. Child custody evaluators shall secure from the court and/or attorneys reasonably detailed information concerning their role and the purpose and scope of the evaluation” (p. 5).

Departing from the previous *Model Standards* (AFCC, 1995) and the APA Child Custody Guidelines (APA, 1994; 2010) in which specific criteria were identified, the current AFCC *Model Standards* provide a detailed definition of the evaluative task,

The scope of the evaluation shall be delineated in a Court order or in a signed stipulation by the parties and their counsel. . . .(a) Evaluators shall establish the scope of the evaluation as determined by court order or by a signed stipulation by the parties and their attorneys. If issues not foreseen at the outset of an evaluation arise and if it is the evaluator’s professional judgment that the scope of the evaluation must be widened, the evaluator shall seek the approval of the court or of all attorneys prior to going beyond the originally designated scope of the evaluation. Any changes in the scope of the evaluator’s assigned task shall be memorialized in writing and signed by the court or by all attorneys, as applicable. . . .(b) Evaluators shall employ procedures that are most likely to yield information that will meet the needs of the court and shall conduct the data gathering phase of their evaluations in a manner consistent with state, provincial, or territorial statutes, or with judicial rules governing such evaluations. When circumstances demand that an evaluation be limited in scope, evaluators shall take steps to ensure that the boundaries to the evaluation and the evaluator’s role are clearly defined for the litigants, attorneys, and the court” (pp. 13–14).

We find it difficult to identify criticisms of the Model Standards, in part, because we recognize our bias in favor of the document. Martindale was the reporter who penned the document for AFCC (Task Force for Model Standards of Practice for Child Custody Evaluation, 2007) and the model articulated in the Model Standards is consistent with that which Gould has written about since 1998 (i.e., Gould, 1998). In addition, we are unaware of any peer-reviewed literature that has offered criticism of the AFCC Model Standards upon which we would ordinarily rely when summarizing scholarship on a particular issue.

## **Brief History of Evaluation Concepts and Models that Have Informed Current Practice**

During the 1980s and early 1990s, the literature describing how to conduct child custody evaluations was in its infancy. Texts and peer-reviewed articles describing the evaluation process identified no particular underlying model to guide an evaluator’s behavior or methodology. Some authors suggested clinical evaluation models be applied to child custody assessment (Skafte, 1985; Stahl, 1994) and other introduced an evidence-based approach to child custody evaluations (Ackerman, 2006; Schutz, Dixon, Lindenberger, & Ruther, 1989). Through the 1990s and 2000s, authors encouraged evaluators to employ forensic methods and procedures (Gould, 1998; 2006) and urged evaluators to be guided by the forensic model applied to child custody evaluations (Gould & Martindale, 2007; Martindale & Gould, 2004). In this section, we present a very brief summary of the literature that has guided the development of the field of child custody assessment.

## Griggs v. Duke Power Company

In 1971, the U.S. Supreme Court handed down a decision in a matter only remotely related to custody evaluations (*Griggs, et al. v. Duke Power Company*), yet the ruling contained an admonition that custody evaluators would be wise to heed. The *Griggs* case focused on tests used in industry for purposes of guiding decisions regarding employment, placement, or promotion. The Griggs court declared that our assessment “devices and mechanisms” must be demonstrably reasonable measures of job performance (at 436) and “what Congress has commanded is that any tests used must measure the person for the job and not the person *in the abstract*” (at 436, emphasis added). These italicized words are critical. Individuals who employ psychological tests must “measure” and describe only those aspects of the person that relate directly to the job for which the person is being evaluated.

The lesson that custody evaluators can take from the *Griggs* decision is that our attempts to assess the characteristics that bear directly upon parenting are more likely to meet with success if we conceptualize parenting as a job and focus our attention on those attributes, behaviors, attitudes, and skills that are reliably related to the demands of the job. Examining an attribute in the absence of evidence of its connection to parenting effectiveness leaves an evaluator open to criticism on several fronts.

## Grisso’s Competency-Based Model

Grisso (1986; 2003) wrote that forensic evaluations should focus on functional abilities. Applying this concept to child custody evaluations, a custody evaluation should be an evaluation of functional parenting abilities. The first step is to examine state statutes and case law to determine if and how functional parenting abilities have been defined. If an evaluator is practicing in a state that has outlined specific statute and case law for parenting abilities in custodial placement disputes, the primary objective of the evaluation is to assess those abilities. When these have not been articulated, it is the evaluator’s task to clearly identify the functional parenting abilities being assessed and offer research support for his or her contention that these parenting abilities are related to effective parenting.

The next step is to obtain information that sheds light on the causes of any observable deficits in competency abilities (Grisso, 1986). The evaluator examines the parent within a specific context or role. Knowledge of the law is particularly important with regard to this component of the evaluation. In some jurisdictions, the causes of parenting deficits are not deemed pertinent, and evaluators are discouraged from offering recommendations that presume that certain deficits can be addressed therapeutically.

The third step is to assess the degree of practical significance of each parent's parenting strengths and deficits in light of the specific demands linked to the best interests standard. Only rarely do evaluators find, either in statutes or in case law, terminology that suggests the weight to be assigned to the various factors that collectively define the best psychological interests of the child or definitions of the best interests of the child. In preparing their advisory reports, evaluators should address the weight assigned to the various factors that were considered and articulate the rationale for the decisions.

## **Elaborating Upon the Competency Model**

Otto and Edens (2003) elaborated upon Grisso's (1986, 2003) functional abilities model by including an analysis of functional components, causal components, and interactive components in a parenting evaluation. Functional components were defined as a parent's characteristics and abilities to care for children. The focus of a child custody evaluation was defined as an examination of the caretaker's child-rearing abilities. Otto and Edens (2003) wrote that "forensic assessments that describe only diagnoses, personality characteristics, or general intellectual capacities of parents and fail to assess the caretaker's child-rearing abilities are of little value" (p. 250).

The competency concept requires assessment of the caretaker's knowledge, understanding, beliefs, values, attitudes, and behaviors pertaining to parenting each child. Otto and Edens (2003) argued that, to adequately complete a competency-based evaluation, the evaluator must be clear about the specific functional abilities being measured and how an assessment of those abilities relates to this particular parent's parenting competencies. They provide a list of parenting tasks for the evaluator to consider. We see in Otto and Edens's call for clarity about the specific functional abilities being measured a call for evaluators to operationally define each of the specific functional abilities to be measured.

Otto and Edens (2003) also provided an integration of custody and child protection literature in their discussion of parenting factors. For example, drawing on Barnum (1997), they described "two basic responsibilities of parents: advocacy/protection and socialization" (p. 251), and drawing on Azur, Lauretti, and Loding (1998), they described "five broad domains of parenting" (p. 251) which include an assessment of parenting, social, self-control, and stress management skills. To this list, Otto and Edens (2003) added the need to assess parenting style. When parenting deficiencies are identified, Otto and Edens (2003) recommended that the evaluator identify the cause(s) of these parenting deficiencies.

The final component of a competency-based analysis is the interactive component, or what APA Child Custody Guidelines (2010) refer to as the "goodness of fit" criterion. Children vary in their needs and differ in their developmental readiness. Parents also vary in their abilities to adequately parent

children at different stages of the child's development. Goodness of fit refers to the specific functional abilities of each parent to meet the unique developmental needs of each child.

Otto and Edens (2003) reminded us that “[D]eficiencies in certain parenting abilities may have greater or lesser significance in various cases, depending on the needs of the specific child in question” (p. 255).

Among relevant variables that they recommend be assessed are the parents’:

1. Prior and current relationship with the children;
2. Historical and current responsibility for caretaking;
3. Communication with the children about
  - i. the divorce;
  - ii. the parents’ attitude toward each other;
4. Goals for visitation and decision making should she or he be awarded custody;
5. Parent-child interactional style;
6. Current and anticipated living and working arrangements;
7. Emotional functioning and mental health;
8. Child’s preferences;
9. Child’s description of relationship with each parent; and
10. Child’s emotional, social, academic functioning and mental health prior to and during the divorce process.

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## Integrating Literature with Evaluation Results: The Seeds of a Scientifically Informed Model

Many authors have extended the forensic assessment model used in other areas of criminal and civil forensic evaluation practice to child custody work (Galatzer-Levy, Kraus, & Galatzer-Levy, 2009; Gould, 1998; 2006; Gould & Martindale, 2007; Rohrbaugh, 2008; Schutz e tal., 1989). Gould (1998) argued that the criteria articulated by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals* were relevant and should be considered when crafting a child custody evaluation. Whether or not a particular state adopted the Daubert criteria or a Frye standard for expert testimony, he suggested that the Daubert criteria, stressing reliance on scientifically derived knowledge and crafting of evaluation procedures that emphasized scientific process would likely result in a more reliable, relevant, and helpful work product for the court, thereby reflecting the usefulness of the psychological sciences as applied to child custody decision making.

Conceptual differences between a scientifically-informed model and a clinical judgment informed model of child custody assessment began to be examined. Gould and Stahl (2000) argued that a child custody evaluations should employ the scientific process as articulated in the literature on forensic methods and procedures (e.g., Melton et al., 1987, 1997, 2007) and the application of empirically based research findings to development of developmentally appropriate parenting plans. They also opined that science without context provides a meaningless report. Scientific process and empirical findings drawn from peer-reviewed literature need to be integrated into an advisory report through the judicious use of clinical judgment,

Although competent and well-intentioned practitioners may differ in how they conduct a proper child custody evaluation, it is necessary that each practitioner logically, coherently, and competently defend his or her approach to a child custody evaluation from within the framework of the behavioral science literature (Gould & Stahl, 2002, p. 398).

Gould and Stahl (2002) also challenged custody evaluators to be intellectually honest both with themselves and with the courts when offering expert testimony,

It is one thing for unsuspecting but well-intentioned judges to allow as evidence clinical opinions that are believed by the mental health practitioner to be an admissible scientific work product but are in fact data and recommendations based on clinical rather than forensic standards (Footnote not cited). However, it is quite another to deliberately use a quasi-forensic methodology that, as an *a priori* assumption, deliberately excludes scientific methods and procedures that are precisely designed to both increase the reliability and validity of the gathered data and meet minimal standards of admissibility as scientific evidence (p. 410).

Their focus on the art and science of child custody evaluations also acknowledged the need to help families maintain their dignity through the custody evaluation process. Towards this end they recommended “providing a thorough evaluation with sensible recommendations, staying focused on the children and their needs, and avoiding the temptation to join the ‘he said/she said’ battle of the parents. . . . without becoming advocates of settlement, without switching roles and mediating a settlement, and without advocating for either parent, evaluators can thereby indirectly assist in efforts toward the settlement and encourage parents to reduce their litigation and conflict with one another” (Gould & Stahl, 2002, pp. 408-409).

They concluded that the art of conducting a child custody evaluation lies in the integration of the scientific method with clinical acumen. They argued that a robust evaluation model includes careful attention to the totality of the evaluation data and careful application of current behavioral science research to those data. It

also should include the evaluator's clinical assessment of family dynamics, the child's functioning and needs, and the ability of each parent to meet the needs of each child. The art of crafting recommendations in child custody evaluations is to integrate current research with clinical experience to develop creative solutions for each unique family configuration. Although science informs clinical judgment, the evaluator is never a technician applying research results without understanding the context of each family system, nor is the evaluator an experiential therapist applying clinical intuition without considering relevant research. There is no standard parenting plan protocol that fits all families. There is no "one-size-fits-all" solution to child custody disputes. A competent custody evaluator never paints only by the numbers (Gould & Stahl, 2001).

## **The Forensic Model as Applied to Child Custody Evaluations**

Schutz et al. (1989) began the movement of using scientifically informed procedures to assess child custody matters, and they called attention to the importance of integrating and building upon discussions of peer-reviewed research literature. Gould (1998; 2006) extended this by asserting the need to employ reliable procedures consistent with rules for admissibility of expert evidence. He stressed the importance of defining specific questions to guide the investigative focus, employing reliable psychological tests and measures, and investigating only those factors relevant to the questions posed at the beginning of the evaluation. Gould (1998, 2006) also asserted that child custody evaluators have an ethical responsibility to limit their opinions to those for which there is empirical support and to explain the relevant research and its limitations, and to provide citations to such scholarly work within the body of their reports so that others may retrieve and review it (Martindale & Gould, 2007).

Until 2004, no one had taken the separate ideas in the custody literature that addressed the evaluation process as a whole and articulated a comprehensive model. Martindale and Gould (2004) integrated the components of a forensic model applied to child custody assessment, which addressed the relationship between psychological ethics and scientifically informed methodology that is critical to a competently crafted child custody advisory report. The forensic model applied to child custody evaluations was articulated by Martindale and Gould (2004). As applied to child custody evaluations, the essential components of the forensic model are as follows:

1. The evaluator's role, the purpose of the evaluation, and the focus of the evaluation are defined by the court;
2. Where possible, the evaluator obtains (at the outset) a list of specific psycho-legal issues concerning which the court seeks advisory input;
3. The evaluator conducts all professional activities in accordance with



- regulations and/or guidelines promulgated by state regulatory boards;
4. The procedures employed by the evaluator are informed by the psychologists' Ethics Code (APA, 2002), the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines, 1991), APA's Custody Evaluation Guidelines (APA, 1994), and similar documents developed by organizations that conceptualize the child custody evaluation as an inherently forensic psychological activity
  5. The selection of assessment instruments is guided by the 1985 and 1999 editions of the *Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 1985, 1999) and particular attention is given to the established reliability and validity of instruments under consideration (Heilbrun, 1992, 1995; Otto, Edens, & Barcus, 2000);
  6. Detailed records of all aspects of the evaluation are created and preserved and are made available in a timely manner to those with the legal authority to inspect or possess them; and
  7. All professional activities are performed with a recognition of the investigative nature of the task:
    - a. an acknowledgment of the limitations inherent in our evaluative procedures;
    - b. an understanding of the distinction between psychological issues and the specific psycho-legal questions before the court; and
    - c. an appreciation of the need not to engage in therapeutic endeavors before, during, or after the evaluation.

The Forensic Model, as applied to child custody evaluations, served as a foundation for AFCC's *Model Standards*. The Forensic Model is premised, in part, on the integration of legal and scientific principles in crafting a child custody evaluation. In their summary of changes in the child custody arena over the past 50 years, Elrod and Dale (2008) argued that the work product of child custody evaluators needs to meet the requirements of expert testimony, "Many argue that if society and courts wish to use mental health evaluators as experts and to make child custody cases into truly interdisciplinary endeavors, then law and science should demand rigorous scrutiny so that courts are informed consumers of expert evidence" (Elrod & Dale, 2008, p. 417).

## **Changes in Methodology Based Upon The Forensic Model**

In the Preamble to the *Model Standards* (AFCC, 2007) the following admonition appears: "Evaluators shall perform their professional activities with a recognition of the investigative nature of the task. . . ." (p. 71). This perspective is also reflected in the writings of Austin and Kirkpatrick (2004), Kirkpatrick and Austin (2006), Galatzer-Levy et al. (2009), Gould (2006), Gould and Martindale

(2007); Rohrbaugh (2008), and Stahl (2010), all of whom emphasize the importance of the evaluative tasks actively pursuing avenues of third-party information relevant to the issues before the court.

The Forensic Model is now the dominant model used by child custody evaluators across disciplines (Ackerman & Kane, 2010; 2011). The most recent research findings suggest that psychologists who conduct child custody evaluations follow the procedures identified in the 1994 APA Child Custody Guidelines (Bow, 2006; Bow & Quinnell, 2001; 2004). Ackerman and Kane's (2010; 2011) summary of current research supports the view that custody evaluators across disciplines embrace the methodological elements that comprise the Forensic Model, though psychiatrists and social workers place less value on the role of psychological testing in the evaluation process. As of the writing of this chapter, no research has been published examining the degree to which psychologists conducting child custody evaluations follow the procedures recommended by the 2010 Child Custody Guidelines (APA, 2010).

Kirkpatrick (2004) identified 26 evaluation-related custody evaluation practices that constituted a set of minimal practice standards that went beyond the aspirational goals of existing "guidelines" and "parameters." He asserted that these 26 evaluation-related practice ideas constitute a floor rather than a ceiling for conducting child custody evaluations that reflected "a consensus about where the field is now" (p. 67). Today, there is a consensus in the mainstream forensic literature about which methods and procedures should be included in a competently conducted examination (Ackerman & Kane, 2010; Bow & Quinnell, 2002; Heilbrun, 2002; Kirkland, 2002; Gould, 2006; Otto et al., 2003; Rohrbaugh, 2008; Stahl, 2010):

1. formulating questions that guide the evaluation (Amundson et al., 2000; Austin, 2000; Gould, 1999; Gould & Bell, 2000; Gould & Martindale, 2008; Gould & Stahl, 2000);
2. collecting forensic interview data using a semistructured interview format (Bow & Quinnell, 2002; Gould, 2006);
3. obtaining self-report data (Ackerman & Ackerman, 1997; Ackerman & Kane, 2010; Gould, 2006);
4. administering and interpreting psychological tests and self-report measures that have appropriate foundation and relevance to the psycho-legal questions posed (Gould, Martindale, & Flens, 2009; Flens & Drozd, 2005; Otto, Edens, & Barcus, 2000); and
5. obtaining relevant collateral interview data and reviewing relevant records (Austin, 2002; Kirkland, 2002; Kirkland, McMillan, & Kirkland, 2005).

There has also been increased awareness on the part of evaluators that their work product must meet legal standards for admissibility of scientific evidence (Elrod & Dale, 2008; Gould, 2004, 2006; Gould & Martindale, 2007).

## **Applying the Forensic Model of Assessment to Child Custody Evaluations**

In this section, we discuss the procedures used in a child custody evaluation that are informed by the Forensic Model. A competently conducted child custody evaluation must be based upon data gathered by reliable methods and procedures (Gould & Bell, 2000). The obtained data must be gathered in a manner that complies with sound scientific methods, and the techniques used to evaluate the data must be valid. Additionally, information about parental behavior, child behavior, or parent-child interaction should have a reasonable expectation of assisting the fact finder in determining a fact in issue.

A child custody evaluation should follow the scientific process which, at its most elementary level, involves three steps: Observation, inference, and hypothesis generation. Observation is the act of recognizing or noting a fact or an occurrence. Inference is a conclusion based upon observation. A hypothesis is a proposed explanation or interpretation of the conclusion derived from the observation, and can be tested through further investigation. We recommend using this three-step process when recording data obtained from face-to-face or telephonic interviews, parent-child interactions, and record review.

Model Standard 12.2 of the AFCC's *Model Standards* (2007) directs, "In their reports and in their testimony, evaluators shall be careful to differentiate among information gathered, observations made, data collected, inferences made, and opinions formulated" (p. 89). Neither emotions, motives, perceptions, nor thoughts are observable. . When need to clarely label as inferences any statements that they make about litigants' emotions, motives, perceptions, and thoughts. Far too frequently, evaluators make statements concerning litigants' motives as though they were explicitly stated. Evaluators also need to be reminded that they do not possess an impressive ability to detect deception, so statements made by litigants concerning their emotions, motives, perceptions, or thoughts may or may not be truthful.

A global assertion as to what is or is not in a child's best interests has little probative value unless empirical data indicate that the specifics upon which that opinion is based have predictive value. Unlike commonly accepted methods used in a therapeutic context, forensic methods and procedures are designed to produce a trustworthy set of data that allows an expert to offer a reliable opinion.

The degree to which independent sources of information converge to support a hypothesis is a measure of the consistency of the data. When each of the four data-gathering sources leads to similar inferences about parenting practices, an increased probability exists that the opinions drawn from these data are accurate. Reliability decreases as fewer of the independent sources of information support a particular hypothesis.

## **Semistructured interview format.**

Interview formats may be defined along a continuum from unstructured to structured. In the unstructured format, the interviewer asks open ended questions and the interviewee is permitted the freedom to respond in any way that the answer may take him or her. A structured interview is the polar opposite of the clinical interview. A predefined set of questions are asked and the interviewee is expected to provide specific answers to specific questions. Often such interviews are used when attempting to gather data in an effort to make rule out and rule in a specific psychiatric diagnosis. A semistructured interview is a hybrid of the unstructured and structured interview formats. A semistructured interview format allows the same set of questions to be asked of each parent as would occur in a structured interview. The evaluator may inquire into additional areas specific to the parent or to the context of the particular evaluation, but the initial set of information obtained from both parents should be based upon the same set of general questions (Gould, 1998; 2006). Although no research findings have been reported in which the reliability of semistructured interviews has been examined using a population of parents undergoing child custody assessment, it has been generally reported in the forensic psychology literature that information gathered through semistructured interview formats have higher levels of reliability than information gathered through unstructured interview formats (Rogers, 2001). “The versatility of clinical interviews, which allow the full exploration of case-specific information, is achieved at the expense of standardization. Particularly when interviews are not coupled with structured interviews, the potential for biased evaluations increases” (Rogers & Shuman, 2000, pp. 151 – 152). Semistructured interview formats allow for development of interview questions directly related to the content areas identified by the court, the parties, or the attorneys as relevant areas of investigation. That is, questions can be asked of both parents regarding psychologically relevant areas of parental or family functioning.

Too many child custody evaluators focus the attention of their parent interviews on historical information about relationships and marital behaviors. Often, there is little information gathering about areas relevant to parenting, the parent-child relationship, parent-to-parent communication history, parent-to-parent cooperation, parent-child attachment, sibling relationships, and other child and parenting related issues.

In reviewing reports prepared by evaluators, it becomes clear that an evaluator’s focus is lost when there is extensive coverage of each litigant’s strengths and deficiencies *as a spouse*, rather than on each litigant’s strengths and deficiencies *as a parent*. When, in the course of pretrial discovery, an evaluator’s records are produced and reviewed, it is not at all that uncommon to encounter records that clearly reflect that more information was gathered about marital interactions than parent-child dynamics and issues.

An evaluator can also lose focus when recommendations reflect attentiveness to the needs of one or both of the parents and relative inattentiveness to the best interests of the children. In *Ford v. Ford* (INSERT DATE), the U.S. Supreme Court, confirming an earlier opinion by the Supreme Court of Appeals in Virginia, declared that “the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate [citation omitted]” (at 193). In *Palmore v. Sidoti*, the U.S. Supreme Court ruled that “the goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause” (at 433). Both in *Ford v. Ford* and in *Palmore v. Sidoti*, the Court asserted that children’s best interests are elevated above the interests of their parents.

We too often observe that evaluators provide little relevant information about how children experience life in their binuclear family units (Ahrons, 1987). Often, little, if any, information is provided in custody reports about each child’s experiences with issues relevant to the investigative questions before the court. The writings of Smart (2002) provide a useful framework for developing a child-centered interview format aimed at gathering information about each child’s experiences with each parent.

Evaluators should consider the weight they assign to interview data in a particular assessment. Considerable literature in the behavioral sciences illustrates the imprecision with which FMHPs can judge credibility based upon interview data (DePaulo, Charlton, Cooper, Lindsay, & Muhlenbruck, 1997; Ekman & O’Sullivan, 1991; Feely & Young, 1998; Frank & Feeley, 2003). In a forensic context such as a child custody evaluation, it is critical that interview data be checked against other sources of information such as data from psychological tests, collateral informants, and direct behavioral observations. It is virtually impossible for an evaluator to determine the forensic value of interview data without the support of information from independent sources (Gould, 2006; Martindale & Gould, 2004).

In a forensic context such as a child custody evaluation, it is critical that interview data be checked against other sources of information such as data from psychological tests, collateral informants, and direct behavioral observations. It is virtually impossible for an evaluator to determine the forensic value of interview data without the support of information from independent sources (Gould, 2006; Martindale & Gould, 2004).

Courts are best served when evaluators focus their inquiries on issues relevant to the matters before the court. To do so means asking, “Were specific questions about particular areas of concern in this family asked in a direct manner?” For example, if there are concerns about domestic violence, did the interviewer use a peer-reviewed domestic violence interview protocol in

conducting the interview? Was each family member interviewed about each event of concern to the court?

If there are concerns about parental discipline techniques, did the evaluator ask questions about parenting style, discipline style, parenting philosophy, religious affiliation and philosophy, corporal punishment, anger expression, impulsivity, alternate disciplinary strategies and other relevant factors that contribute to an understanding of a parent's disciplinary style? Were the children asked about these behaviors of concern? Were the children interviewed more than once to examine the consistency of their responses over time? Did the evaluator carefully note similarities and differences between children's statements after having been transported by one parent versus the other? Were the children and the parents interviewed together in an effort to talk about allegations of concern?

Among the more recent changes reflected in the literature is an increasing awareness that some children are eager to participate in some ways in decision making about residential placement (Gould & Martindale, 2009). There is a myth about children's reluctance to participate in legal proceedings regarding their custodial placement (Parkinson & Cashmore, 2009). Recent studies have shown that children want their opinions to be known and taken seriously; however, they do not want to be the decision makers. Research findings have shown that children's acceptance of the decisions made about their custody are better accepted when they perceive the decision-making process as fair, even if the outcome is not desirable. In other words, when children perceive that decision makers have taken time to listen and take their ideas seriously, children report higher levels of satisfaction with the residential placement outcome (Parkinson & Cashmore, 2009).

We have written elsewhere about the growing awareness of the need for evaluators to spend more time interviewing and assessing children's views of their lives with each parent (Gould & Martindale, 2007; 2009). We have called on evaluators to focus increased attention on exploring children's wishes, preferences, and descriptions of the day-to-day life at each parent's home.

Child accounts of family life frequently are overshadowed by their parents' interpretation of family events (Smart, 2002). When evaluators interview children about their experiences in each family, child accounts of life in each parent's home often vastly differ from their parents' accounts (Smart & Neale, 2000). Smart (2002) states:

It is not that children's accounts obliterate or correct the parents' accounts; nor is it the other way around. Rather, it is to acknowledge that people stand in different relationships to one another, have access to different resources, and regard different things as important" (p. 309).

Taking children's stories seriously means giving legitimacy to their experiences on the same level as that given to parents' experiences. One is not

necessarily more important than the other. Each experience needs to be thoroughly understood (Gould & Martindale, 2009).

Questions that might be useful in examining the relevance and reliability of this method include:

1. Did you operationally define the specific behaviors to be investigated/observed?
2. Did you describe how each behavior was assessed?
3. Did you describe the reliability and validity of the assessment measures and their limitations?
4. Did you obtain interview data from each parent/child about the specific areas of functioning that are the focus of the court's concern?
5. Did you explain how credibility of interview data was assessed?
6. Did you interview each parent about the other parent's allegations?
7. Did you interview each child about his or her experiences within the family?
8. Did you interview each child and each parent together and observe how they talked/interacted with each other?
9. Did you interview the parents together and observe how they talked with each other?
10. Did you describe your observations in behavioral terms?
11. Did you employ open-ended, nonsuggestive interviewing methods?
12. Did you identify the hypotheses drawn from the interview data?
13. Did you examine the support from other, independent data sources for each of these hypothesis?

## **Psychological tests.**

The purpose of psychological testing in child custody evaluations is to provide a set of data that can be used to compare each parent's scores against those from a normative population. The construction of a psychological test is based upon one or more theories held by test developers. The test manual should provide information about the test's underlying theory of science, established reliability and validity statistics, normative data, and other measurement-related criteria. Examination of the psychometric integrity (e.g., reliability and validity) of the measurement tools used in a child custody evaluation goes to the heart of the question of reliability. If the tools used to measure a factor do not have adequate reliability and validity, the data upon which the interpretations, conclusions, and recommendations are based are seriously flawed.

Evaluators should consider the reliability and validity of the measurement tools they use in a child custody evaluation. Child custody evaluators need to examine whether the measurement tool has an appropriate level of reliability and validity with regard to the specific issue in dispute (*see* Gould et al. 2009; Otto et

al., 2000 for a discussion of criteria needed for a test to be used in a forensic context.) Evaluators need to ask whether the test has context-specific normative data for male and female custody litigants. More and more, researchers have reported data revealing how male and female custody litigants score on psychological tests commonly used in child custody assessment (Bathurst, Gottfried, & Gottfried, 1997; McCann, Flens, Campagna, Colman, Lazzaro, & Conner, 2001). There is also an increasing awareness of the limitation of some psychological tests used in child custody evaluations (Hynan, 2004).

Interpretation of any psychological test requires an understanding of several variables that may affect the test data and their interpretation. It is important for custody evaluators to include a discussion of the interpretation of each parent's validity scales, addressing, at the very least, their possible effects on the certainty and usefulness of the test data (Gould et al., 2009).

The APA Ethics Code (APA, 2002) addresses the need for psychologists to be aware of threats to the reliability of test data and interpretations:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (p. 24).

Among the more relevant situation variables in custody litigation is the stress placed on the parents by the divorce, litigation, personal living arrangements, and the changes in the relationship with their children. Though responses to stress vary among individuals, the presence of stress is almost universal in divorce.

The stress that results from involvement in custody litigation can be enormous. Litigants often believe that the most important elements of their lives, their relationship to their children, and their sense of self-worth, are at stake (Galatzer-Levy et al., 2009). During the course of the legal dispute, many parents live under a microscope where day-to-day problems become the bases for emergency *ex parte* motions, or at least seem likely to become factors in litigation. The resulting intense pressure and scrutiny may affect how parents respond to questions on psychological tests (Gould et al., 2009).

Some parents react negatively to having their parenting abilities investigated. Other parents become angry over the idea that someone outside of the family may influence whether or when they may spend time with their children. Such negative reactions may affect how a parent responds to questions on psychological tests. Many parents' scores on psychological tests may reflect how they are responding to the context of the custodial dispute or to the pressures involved in custodial assessment. Psychological test scores may reflect the



influence of situational or contextual variables. Interpretation of test data must include discussion of how these situation or contextual variables may affect interpretation of test scores ( Gould et al., 2009).

Questions that might be useful in examining the relevance and reliability of a child custody evaluator's selection, administration, scoring, and interpretation of psychological tests include:

1. Upon what theoretical or rational basis was the test selected for use in the present evaluation?
2. Did each objective test possess the psychometric characteristics suggested by Otto and Edens (2003)? If not, why not?
3. Did you explain in the body of the report why each test was chosen and how its results would be used?
4. Have you reviewed and referenced in your report the peer-reviewed literature describing the use of this test in child custody assessment?
  - i. What literature supports its use?
  - ii. What literature does not support its use?
5. Was each psychological test administered in a manner consistent with ethical standards and professional practice guidelines?
6. Was the specific test administered in a manner consistent with its standardized administration as described in the test manual?
7. Did you explain how test response style/bias was interpreted?
8. Did you seek external support from collateral sources to lend support to your interpretation of test scores?
9. Was the choice of each objective test clearly relevant to answering the psycho-legal questions that are the focus of the evaluation? [This may include explaining how one or more tests were chosen for the purpose of obtaining information concerning the test-taker's general mental/emotional functioning, as opposed to obtaining information that bears specifically on the psycho-legal questions identified either in the court order or in the pleadings.]
  - i. If not, what is the justification for this choice?
10. Was the indirect relationship between choice of objective tests and the psycho-legal questions clearly explained in the report?
11. Did you clearly identify the hypotheses drawn from the psychological test data?
12. Did you examine the support from other independent data sources for each of these hypotheses?
13. Did you compare discrete sources of data drawn from the objective test data and compare them to information obtained from third-party collateral sources?

## **Questionnaires and Self Report Inventories**

Custody evaluations often include questionnaires, self-report inventories, and other measures of parenting or parent-child behavior that appear relevant to the questions at hand (Dies, 2007). Self-report measures are a peculiar type of measurement tool. Some have well-established reliability and validity and have been supported for use in child custody evaluations. Some have well-established statistical properties, but have no support in the literature for use in child custody evaluations. Others have no published reliability or validity information and have been used for years in child custody evaluations, despite the lack of a proper scientific foundation. Still others have no published statistical information, and no historical use in child custody evaluations, yet are included in an evaluation because of an evaluator's personal preference, unsupported by the literature (*See Gould, 1998 for a discussion of advantages and limitations of self-report measures used in child custody evaluations*).

How the evaluator uses the information obtained from self-report measures is critical in understanding the relative weight assigned to the information. One might use information obtained from self-report measures in a manner similar to that attained from interview data. Evaluators may choose to examine the degree to which information obtained from a self-report measure is consistent with information obtained from other independent data sources. Results from self report measures should be treated like information attained from face-to-face interviews.

Questions that might be useful in examining the relevance and reliability of these methods include:

1. Did you explain how credibility of self-report data was assessed?
2. Did you obtain self-report data from each parent/child about the specific areas of functioning that are the focus of the court's concern?
3. Was the choice of each self-report measure clearly related to the psycho-legal questions that are the focus of the evaluation?
4. If not, was the indirect relationship between choice of self-report measure and the psycho-legal questions clearly explained in the body of the report?
5. Did each self-report measure possess adequate psychometric characteristics for use in a forensic context?
6. If not, what limitations are imposed on these data as a result of their reduced psychometric integrity?
7. Did you describe the rationale for choosing each questionnaire and how its results would be used?
8. Did you identify the hypotheses drawn from the self-report measures?
9. Did you examine the support from other independent data sources for each of these hypotheses?

## **Behavioral observations of parent and child.**

The fourth area of data collection is the evaluator's behavioral observation of each parent with each minor child and, if appropriate, behavioral observation of each parent with all minor children (Lampl, 2009). When no restraining orders or other legal impediments to face-to-face contact would make such observations unwise or potentially dangerous, direct observation of parent-to-parent communication may also be an important source of information.

Currently, there is no standard in the field of child custody evaluations that addresses how to conduct the observational component of the evaluation. The *AFCC Model Standards* direct evaluators engaged in observational tasks not to become participants in the observation. Model Standard 10.1, addressing the awareness of an observer effects, states: "Evaluators shall be mindful of the fact that their presence in the same physical environment as those being observed creates a risk that they will influence the very behaviors and interactions that they are endeavoring to observe." If the simple fact of their presence has a distorting effect, becoming an active participant increases the distortion exponentially and most importantly, the "direction" of the distorting effect cannot be discerned, and therefore, cannot be factored or accounted for in some manner.

The evaluator should be minimally involved in any participation during the parent-child observations. During the parent-child observation, the evaluator should create a context that as closely as possible represents how the parent and child interact. The more that the evaluator interacts during the parent-child observation, the less the observation is a measure of what the parent and child do when alone. It is a valid criticism that the act of observing during a home visit creates enough change for the parent-child interactions to be deemed unrepresentative. We suggest minimizing evaluator-imposed behaviors.

Similar concerns apply to parent-child observations occurring in the evaluator's office. The office is not an environment with which the child is familiar. Additionally, the office context is not representative of the child's natural environment.

Evaluators need to consider how the type of environment may affect the parent's behavior, the child's behavior, and their interaction. Upon completion of the parent-child observation, we encourage evaluators to speak with each parent and child about the ways in which the observed interaction was or was not similar to their typical means of interacting.

During the parent-child observation, the evaluator should not talk with the parent, nor should he or she talk with or engage with the child. The evaluator should observe, not participate. When such observational distance is not possible, the evaluator needs to take steps to minimize his or her involvement in the parent-child interactions. Evaluators are wise to set ground rules for the observation. One

important ground rule is to advise that the evaluator will not engage in conversations with the parent or children during the observation. Another important ground rule is that the evaluator will not accept documents or other materials that would otherwise be provided during an interview. It has been our experience that parents try to engage in conversation when ground rules are not clearly articulated. A third ground rule is that only parents and/or caretakers who are parties to the litigation can attend and participate in the observations. The ground rules should clearly indicate that the observation time is for observation and not for the exchange of documents and not for the imparting of information about the other parent.

Knowing the degree of evaluator involvement in the observation may significantly alter how family members relate to each other. It is important that the evaluator describes how the observation was conducted and his or her degree of involvement with different family members during the observation. It is important to note that we are not suggesting that the evaluator describe the *impact* of his or her participation in the interactions.

Another important area of examination is what specific aspects of parent-child interaction are targeted for assessment and how they were assessed. It is essential for the evaluator to take contemporaneous notes or to make an audio recording of parent-child observations. These observational data should be descriptive rather than interpretative. For example, the data should reflect behavioral descriptions such as:

“The parent sat next to the child, looking at the child and smiling. The child responded by smiling and reaching toward the parent. The child hugged the parent and placed her head on mother’s shoulder. The parent responded by hugging and kissing the child on her head. Both parent and child kissed each other on the cheek. The child let go of the parent and asked to be placed back on the floor. The parent placed the child on the floor and the child returned to the dolls.”

By contrast, an interpretive statement is,

“The parent was loving toward her child.” Little useful information is conveyed to the reader when labels such as “loving” are provided. Different people have different definitions of what defines “loving.”

Providing behavioral descriptions of observed interactions allows the reader to make independent judgments of the meaning of the behavior.

Questions that might be useful in examining the relevance and reliability of this method include:

1. How did you record the observational data?
2. When did you record the observational data? (e.g., during the observation, immediately after the observation, one day after the

- observation, etc.).
3. How did you determine what behaviors to observe and record and what behaviors to ignore?
  4. Did you operationally define the specific behaviors to be investigated/observed?
  5. Did you describe the behavior interactions between parent and child?
  6. Did you describe the behavior interactions between or among the children?
  7. Did you use similar method of recording parent-child interactions? If not, how did the methods differ?
  8. What hypotheses did you develop based upon the observed parent-child interactions?
  9. Did you examine the support from other independent data sources for each of these hypotheses?
  10. What steps did you take to minimize your involvement in the parent-child interactions?
  11. Did you describe how your physical presence and participation might have affected the observed parent-child interaction?
  12. If non-family members were present for the observation visit, why did the parent violate the ground rules set for the observation?
  13. Were there opportunities for observation of parent-child observation in the natural environment? If yes, was this option used?
  14. Were these observational data described in behavioral terms?
  15. Did you discuss the comparative data about each observed parent-child interaction?
  16. Did you observe parent-child interaction for more than one observational period to obtain information about consistency of observed behavior over time?

## **Collateral record review and collateral interviews.**

Acquisition of reliable and relevant collateral information is arguably among the most important components of a child custody evaluation (Austin & Kirkpatrick, 2005; Gould, 2006; Kirkland et al., 2005). A critical component of a child custody evaluation is obtaining information from third-party observers about parent-child interactions. The idea is to obtain information about parent-child interactions that is representative of day-to-day parent-child experiences from people outside the immediate family (Austin, 2002; Gould, 2006; Kirkland, 2002; Kirkland et al., 2006). Any competently conducted custody evaluation must include information from third-party sources about how the parent and child have been observed in their daily lives outside the artificial and contrived circumstances of the evaluator's office. Obtaining information from people who have observed he parent and child interact in different situations is often the most important data

obtained in a child custody evaluation. Similarly, obtaining historical records may shed light on important aspects of parental cooperation and conflict, parenting challenges, difficulties, or triumphs, as well as historical components to the parent-child relationship. Several authors have described limitations and cautions associated with the use of collateral informants (Austin, 2002; Heilbrun, 2002).

Austin and Kirkpatrick (2004) pointed out that those most emotionally distant from the custodial dispute are likely to be the most objective. Information obtained from them is therefore likely to be of greater accuracy than is information obtained from people such as relatives or close friends. This leads some evaluators to eliminate lists containing the names of people who are indisputably allied with one of the litigants from collateral sources. We believe this to be a mistake.

Our use of the term “collateral source information” has an unintended and unfortunate consequence. Far too many evaluators conceptualize the input from collaterals only as *information* and fail to recognize its incalculable value as stimulus material in subsequent interviews with the litigants. Some of the most useful information obtained from the litigants emerges when they respond to statements offered by collaterals.

Questions that might be useful in examining the relevance and reliability of this method include:

1. Did each parent provide a list of collateral interview sources knowledgeable about each parent’s relationship with the minor child?
2. Were the collateral informants interviewed in a consistent manner, asking a common set of questions from which the evaluator could compare responses across information sources?
3. Were additional questions asked? If yes, what were they?
4. Were the questions asked of the collateral informants focused on specific questions of concern in this specific evaluation as well as more general questions about parenting skills?
5. What hypotheses were generated as a result of the collateral information?
6. How did you examine similarities and differences across interviewee data (convergence of data )?
7. How did you assess the credibility of collateral informants’ information?
8. Did you obtain names of other people to interview from the collateral sources? Were these people interviewed?
9. Were the choices of collateral interview sources representative of people involved in the child’s life across a wide range of activities, compared with limiting interviews to family and friends?
10. Were the limitations of the obtained collateral data described?

## **Integrating Peer-Reviewed Research with Evaluation Findings**

With only rare exceptions, the information imparted by custody experts in their reports and testimony is not information that they uncovered. Experts are, in reality, perpetual students. Good experts devour the professional literature, critically examine published research, and draw upon the knowledge base of an entire profession each time they conduct an evaluation. The task of the skilled evaluator is to decide what research is applicable to the specific family that is the focus of the court's attention, to apply the research, and to explain how the cited research sheds light on the particular issues in dispute (Martindale & Gould, 2007).

The position of the AFCC, as reflected in its *Model Standards*, is seen in Model Standard 4.6 (b):

Evaluators are strongly encouraged to utilize and make reference to pertinent peer-reviewed published research in the preparation of their reports. Where peer-reviewed published research has been alluded to, evaluators shall provide full and accurate references to the cited research. (p. 78)

Our position concerning citations to scientifically informed research finds support in Standard 2.04 of APA's Ethics Code (APA, 2002, p. 1064), which directs psychologists to base their work "upon established scientific and professional knowledge of the discipline. . . [and] established scientific and professional knowledge" found in peer-reviewed literature.

Judge Alex Kozinski, writing for the Court [*Daubert v. Merrill Dow Pharmaceuticals, Inc.* (on remand) 43 F.3d. 1311 (9th Cir. 1995)], declared that "[s]omething doesn't become 'scientific knowledge' just because it's uttered by a scientist. . . ." (at 1315-16). The Court's task, Kozinski wrote, "is to analyze not what the experts say, but what basis they have for saying it." (at 1316).

It is worthy of note that this was not the first time that a respected jurist emphasized the importance of experts articulating the bases for their opinions. In 1967, David Bazelon, in his opinion in *Washington v. United States* [390 F.2d 444 (1967)], declared that the court was "deeply troubled by the persistent use of labels and by the paucity of meaningful information" presented by experts (at 447). He added that in the case at bar, the experts had provided "only the conclusions without any explanation of . . . what facts . . . [were] uncovered, and why these facts led to the conclusions" (at 447). Judge Hjelt (2000) has presented a perspective with which no one can disagree: "[D]eference paid to poor testimony logically creates poor judicial outcomes" (p. 9). In our view, both in preparing their reports and in offering testimony, evaluators should integrate case-specific facts with the knowledge base of the mental health fields (Gould & Martindale, 2008; Martindale & Gould, 2007).

Questions that might be useful to consider when writing a child custody report include:

1. Have I cited relevant research that supports my opinions?
2. Have I discussed relevant research that does not support my opinions?
3. Have I explained the basis for my opinion, describing the strengths and weaknesses of each hypothesis considered and why the hypotheses chosen are the best fit for the current family system?

## **Summary**

In this section, we provided a description of the procedures used in a child custody evaluation. We explained the relevance of each procedural step in developing a comprehensive data set. We provided a list of questions to guide evaluators when examining the thoroughness of the work product. In the following section, we discuss several areas of child custody assessment that require specialized knowledge beyond that provided in general training programs aimed at teaching child custody methods and procedures.

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## **Complex Issues in Child Custody Assessment**

The field of child custody evaluations has no shortage of challenging and complex issues to consider. Some issues involve writing a report in terms of the appropriateness of including diagnostic labels. Other issues involve specialized knowledge including relocation, domestic violence, child sexual abuse, alienation dynamics, and gatekeeping analysis. In this section, we provide a brief overview of some of the complex issues that may require an evaluator's attention.

Many of the complex issues that are examined in a child custody evaluation are related to allegations of child maltreatment and the potential risk such behavior poses to the child. When there are allegations of child maltreatment, a rival hypothesis must be simultaneously considered:

“Is the person alleging the maltreatment attempting to interfere with or thwart the child's relationship with the alleged perpetrator? Similarly, when there is a request to relocate to a geographically distant community, a rival hypothesis that must be examined is: “Is the person requesting the court to allow the minor child to relocate attempting to interfere with or thwart the child's relationship with the non-moving parent?”



## **Gatekeeping**

Research findings have generally supported the proposition that children are best served when they have strong and healthy relationships with both parents (Kelly & Emery, 2003). These relationships develop through children's frequent and continuous contact with each parent, especially during children's early years (Kelly & Lamb, 2000; Lamb & Kelly, 2001, 2009). In child custody disputes, among the most frequently occurring assessment issues is how to develop and maintain a child's unfettered access to each parent. Many child custody disputes concern the extent of paternal involvement in parenting children. The study of gatekeeping within a child custody context should provide useful ideas to be applied in development of parenting plans.

Over the past decade, several scholars have begun examinations of a gatekeeping framework applied to child custody matters (Austin et al., 2006, 2010; Pruett et al., 2003, 2007). Gatekeeping includes one parent's attitudes and behaviors toward the other parent and his or her parenting abilities and the other parent's involvement with and access to their children (Adamson, 2010). It is a bidirectional or mutual influence process that occurs both in intact families and in postseparation and never-married family systems (Adamson, 2010; Trinder, 2008).

A distinction must be drawn between caretaking and gatekeeping. Caretaking refers to those parental activities that address daily health, safety, security, and other similar functions in the lives of children. Gatekeeping refers to the process by which one parent controls the ability of the other to function as an effective caretaker. In particular a restrictive gatekeeper does not allow the other parent to participate in meaningful parenting activities, by limiting access to the child. With limited access to the child, there can be no meaningful parenting activities that facilitate the development in the child of a perception of both parents as effective caretakers.

When conducting a child custody evaluation, it is important to investigate the role of parental gatekeeping from the child's birth forward. Examining the ways in which the primary caretaker provided access to the other parent to their newborn child may help to inform the evaluator about the role of gatekeeping during the marriage. The evaluator also needs to examine the degree to which the other parent took advantage of opportunities to engage in child care provided by the primary caretaker.

Investigating the historical and current role of gatekeeping in each family is an important component of a child custody evaluator's assessment of family functioning. Research findings have shown that the extent and the quality of parental involvement are among the main factors in predicting children's adjustment and future development (Galatzer-Levy et al., 2009; Kelly & Emery, 2003).

## **Relocation Analysis**

Among the most difficult challenges facing divorcing families is the decision by one parent to relocate with the children to a geographically distant community, leaving the other parent behind. Nearly half of children of divorce relocate after the divorce is finalized. Some of these relocations entail residential changes within the former family community, while about one third of these relocations entail residential changes out of the geographic area within two years postseparation (Braver & O'Connell, 1998).

Evaluators need to be familiar with jurisdiction-specific statutory requirements and case law decisions pertaining to relocation (Stahl, 2010). Many states have statutes that address factors to be considered by the court when determining whether a child may relocate with his or her parent (Elrod, 2006).

Several current child custody texts include extensive discussions about assessment of requests to relocate (Ackerman, 2006; Ackerman & Kane, 2005, 2010; Gould, 2006; Rohrbaugh, 2008; Stahl 2010). Several models guiding evaluation of requests to relocate are presented in the forensic psychological literature. Shear (1996) has argued that evaluators must appreciate that a move within the context of divorce is one factor in a long line of events, experiences, and changes that may have a significant impact upon a child. A request to move away must not be examined in isolation but as part of the larger story of a child's emerging life. How the child has coped with previous changes, that is, the manner in which the child adjusted to stressors and other change agents, informs us of the tolerance the child may have to another significant change.

Weissman (1994) suggested a three-factor test for custody evaluators to guide evaluation of the psychological components relevant to move-away cases. These three areas of examination are drawn from case law involving move-away issues and represent a set of factors commonly assessed in relocation cases. The first inquiry investigation of the potential advantages and disadvantages of the proposed move and the likelihood that it would substantially improve the quality of life for the custodial parent and child? The second inquiry is examination of the genuineness of the motives for and against the move, providing that the move is not motivated to frustrate the visitation rights or development of a healthy relationship between the child and noncustodial parent? The third inquiry is examining whether there can exist a realistic, substitute visitation arrangement which will adequately foster an ongoing relationship between the child and the noncustodial parent?

A more contemporary perspective focuses attention on empirically determined risk factors to the child (Austin, 2000; Austin & Gould, 2006). Relocation presents a significant number of risk factors for children (Austin, 2008a, 2008b), including

- 1. *Developmental age of the child.*** The younger the child, the more likely

the risk to the child's relationship with each parent (Austin, 2000a). Research has identified two groups of children who appear more likely to be harmed by relocation: Children 6 and under and children 12 and older. The 6- to 12-year-old children appear to be the group to incur less detriment (Austin, 2008a). However, research also shows that relocation, in general, presents a risk to children of all ages, thereby increasing the likelihood of emotional and behavioral problems by about 25 percent (Austin, 2008b). Children relocating with intact families have a 25 percent increase in experiencing emotional and academic problems. Children relocating after divorce have about a 38 percent increase in experiencing emotional and academic problems, about 13 percent more than children in intact families (Austin & Gould, 2006).

2. ***The geographic distance of the move.*** The farther the move, the more likely the risk to the child's relationship with the non-moving parent (Austin, 2008a, 2008b)
3. ***The degree of prereslocation involvement of the noncustodial parent in the child's daily activities.*** The higher the degree of prereslocation involvement, the greater the risk to the child's relationship with the nonmoving parent as well as the greater the risk to the child's psychological well-being (Austin, 2000a, 2008b).
4. ***The history of parental conflict.*** The higher the level of interparental conflict, the greater the risk to the child. Some moves tend to exacerbate parental conflict, which adversely affects the child's psychological well-being (Austin, 2000a, 2008a, 2008b) while other moves reduce parental conflict (Austin & Gould, 2006)
5. ***The sex of the child.*** Boys have decreased opportunities to learn from their biological fathers about sex role identification. Girls have decreased opportunities to learn from their biological fathers about socializing behaviors (Austin, 2000a; Gould, 2006).
6. ***Prereslocation involvement of each parent in the child's extracurricular activities.*** The greater the noncustodial parent's prereslocation involvement, the greater the risk to the child's psychological well-being (Austin, 2000a; 2008b).
7. ***The child's temperament.*** The more difficulty children have adjusting to change, the more difficult will be the child's adjustment to the move (Gould et al., 2010)
8. ***The relative contribution of each parent to each child's life.*** Fathers and mothers tend to bring different parenting resources and opportunities to their children. Children are at greater risk when the unique contribution of one parent is diminished due to the relocation (Austin, 2009b; Austin & Gould, 2006)
9. ***Loss/gain of social capital resources.*** Relocation may involve losing or gaining interpersonal, social, familial, and community resources that

have an influence on a child's life (Austin, Flens, & Kirkpatrick, 2010; Austin, Gould, Kirkpatrick, & Eidman, 2006). Among the factors to be examined are loss of extended family involvement, loss of peer-group involvement, loss of community involvement, and so forth (Austin et al., 2010; Austin & Gould, 2006).

We recommend that when evaluators explain their evaluation results, they organize the data obtained during the evaluation around two criteria: the behavioral science model such as Austin's factors, and the the specific factors articulated in the state statute or case law decision from the state in which the evaluation is being conducted.

## **Never-Married and Parents in Short-Lived Relationships**

A significant minority of children are born out of wedlock (Emery, Otto, & O'Donahue, 2005). Increasingly, custody disputes between two never-married parents lead to a child custody evaluation. Although the evaluation methodology remains unchanged in the assessment of relevant variables, there may be unique factors to consider when making recommendations to the court about custodial placement and parental access.

Parents of short-lived relationships may differ from married parents in a number of ways (Raisner, 1997). Never-married parents often have not established a separate family unit, and they may not know each other very well, particularly if the pregnancy occurred during a short-term relationship.

A second difference is that often the child has had little or no contact with the non-residential parent. Some of these children have been raised with a parent-substitute. This often adds another important dimension. The parent-substitute, or step-parent, may have been identified to the child as his biological father or taught that his biological father does not care and therefore has no legitimate right to visit.

Under such circumstances, visitation plans may be necessary to provide for increased time for the child to learn about and to adjust to the concept of his biological parent. Time may also be necessary for the child to become accustomed to the participation of the biological parent in his life. Similar concerns are focused on the child's need to adjust to new siblings (stepsiblings and half-siblings), stepmother, grandparents and other extended family members (Gould, 2006).

Children may also have significant emotional reactions to the knowledge and understanding of the role of the biological father. Some of these children may need to participate in counseling, family therapy, or some other form of intervention. The respective parents may need to attend counseling sessions or

some type of mediation through which they can negotiate unresolved issues that may interfere with the healthy establishment of a parent-child relationship.

Particularly with younger unmarried parents, there may be a need to educate them about the purpose and focus of psychological or psychoeducational interventions. Never-married parents "have extra anger, resentment, suspicion, or fear if they are being forced - by a court - into renewing a relationship with the other parent" (Raisner, 1997, p. 92). The educational focus may be, in part, to assure them that they need not repair their former relationship, but instead focus on ways to develop a working relationship through which their child can enjoy the support of each parent in encouraging their child's relationship with the other.

Besides concerns about how the child can learn to incorporate a new parent or extended family into his or her life, there is also the concern that some never-married parents have had their child reared by other relatives. Thus, the introduction of the biological father into the child's life may result in feelings of displacement on the part of those who raised the child. These people and their feelings also need to be addressed in some respectful way.

A final factor is unique to same-sex relationships. Gay and lesbian parents who never married but lived within a structured, committed relationship in which parental roles were defined may struggle with their parental roles after the love relationship dissolves. In the case of the nonbiological parent, there is seldom, if ever, any legal status for the nonbiological parent, homosexual partner who wishes to maintain an ongoing relationship with the child.

A similar situation occurs when the never-married parent eventually marries and then divorces the stepfather after many years. This is not unique to never married parents, of course, as these issues are also problematic when birth parents have married, divorced, remarried, and when biological mothers subsequently divorce the stepfather after many years.

The stepfather may have had significant influence in the child's life, and the continuing relationship with the stepfather may significantly affect either positively or negatively the child's best psychological interests. Often the legal status of the stepfather was never clarified through formal adoption. At some point, the biological father reenters the picture. The evaluator may need to consider not only the visitation issues related to the biological father, but also the child's need to maintain an ongoing relationship with the stepfather.

Useful parenting planning may include a focus on educational information about child development for the parent who has had little contact with the child. There is also a need to spend time helping the parents create a workable communications system. This may include a stepparent or the primary caretaker who may feel displaced. The intervention needs to focus more on problem solving and conflict resolution skills than on exploration of feelings and introspection. As Raisner (1997) states, "Teach parents how to make and respond to a request, how

to structure a discussion, and how to use solution-based decision making techniques" (p. 99).

## **Assessing Sexual Abuse Allegations within the Context of a Child Custody Evaluation**

Current myths about children and sexual abuse suggest that sexually abused children act in certain ways that make easy and reliable the identification of those who have been abused. Some states have case law that supports this unfounded notion.<sup>10</sup> The behavioral science literature provides little, if any, foundation upon which to make clear, consistent statements about our ability to identify who has been abused, who has done the abusing, and when the child has been abused (Kuehnle, 1996; Kuehnle & Connell, 2009). Custody evaluators are often asked to offer opinions to the court about whether a child is at risk of sexual abuse within the context of custodial determinations.

There is some empirical support for the notion that professionals believe that allegations occurring within a custody context are less likely to be true. Evaluators have been found to view abuse as more likely when there are multiple rather than single episode reports. Reports in which there was a prior allegation were seen as more likely than those with no prior report (U.S. Department of Justice, 2000a; 2000b).

For many years, it was believed that certain statements or behaviors made by children enabled one to discriminate between abused and nonabused children. Among the most popular was the display of age-inappropriate sexual knowledge. The assumption was that sexually abused children would possess developmentally advanced concepts about sexuality and sexual behavior as a result of their exposure to sexually exploitative or abusive behavior. Research has demonstrated that both abused and nonabused children display sexual behaviors, with sexually abused children revealing significantly higher frequency of sexual behaviors in certain categories (Friedrich, Fisher, Broughton, Houston, & Shafran, 1998; Friedrich, 2002). Making matters more difficult for evaluators, only a minority of sexually abused children exhibit sexual problem behavior, while some children who have not been sexually abused act out sexually (Friedrich, 2002). Another commonly held belief not supported by research is that sexually abused children are hesitant to talk about the experience of abuse. The assumption was that sexually abused children feel ashamed or will have been threatened or bribed not to disclose the abuse. It is just as likely that a child may tell adults who have been supportive and

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<sup>10</sup> See *State of North Carolina v. Ronnie Lane Stancil*, 559 S.E.2d, 788 (2002)] in which the Supreme Court of North Carolina declared that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith."

helpful, thus increasing the likelihood that the child will talk openly about the abuse (Ceci, Kulkofsky, Klemfuss, Sweeney, & Bruck, 2007; Ceci, Papierno, & Kulkofsky, 2007; Kuehnle & Connell, 2009; Pipe et al., 2007).

There are many different models describing how to conduct an evaluation of alleged child sexual abuse within the context of a custody determination. We believe that the most comprehensive books guiding such evaluations is Kuehnle's (1996) book, *Assessing Allegations of Child Sexual Abuse* and Kuehnle and Connell's (2009) book, *The Evaluation of Child Sexual Abuse Allegations*

Among the most comprehensive models guiding the assessment of alleged sexual abuse is the APSAC's (1990) *Guidelines for Psychosocial Evaluation of Suspected Sexual Abuse in Young Children*. Another useful approach to the evaluation of child sexual abuse is offered by the American Academy of Child and Adolescent Psychiatry's (1988) *Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse*. APA's *Guidelines for Psychological Evaluations in Child Protection Matters* (Committee on Professional Practice and Standards, 1999) is a useful professional practice guideline for psychologists involved in conducting evaluations in child protection matters. A final resource is the suggestions of your state professional association. Different states have different laws surrounding the reporting of child sexual abuse during a custody evaluation. It is wise to know your state laws and ethical obligations under those laws.

The evaluator must be familiar with the considerable behavioral science literature involving directly relevant aspects of investigating allegations of child sexual abuse. We recommend that evaluators have the following references: Kuehnle and Connell (2009); Pipe, Lamb, Orbach, and Cederborg (2007); and Kuehnle and Drozd (2005).

We also recommend that the evaluator become familiar with the multiple hypotheses framework articulated by Kuehnle (2006). We encourage evaluators to address in the body of their report the support for or against each of these hypotheses.

1. The child is a victim of sexual abuse, and the allegation is credible and accurate.
2. The child is a victim of sexual abuse, but due to age or cognitive deficits, does not have the verbal skills to provide a credible description of his or her abuse.
3. The child is a victim of sexual abuse, but due to fear, will not disclose his or her abuse.
4. The child is a victim of sexual abuse, but due to misguided loyalty, will not disclose his or her abuse.
5. The child is not a victim of sexual abuse and is credible but has misperceived an innocent interaction. [A variation of this hypothesis might be that the child is truthful, but has misperceived an ambiguous or

- innocent situation, or has misidentified an alleged suspect.]
6. The child is not a victim of sexual abuse but has been unintentionally contaminated by a concerned or hypervigilant care taker or authority figure.
  7. The child is not a victim of sexual abuse but has been intentionally manipulated by a care taker or authority figure into believing that he or she has been abused.
  8. The child is not a victim of sexual abuse but knowingly falsely accuses someone of sexual abuse because of pressure by care takers or authority figures who believe the child has been abused.
  9. The child is not a victim of sexual abuse but knowingly falsely accuses someone of sexual abuse for reasons of personal aggrandizement or revenge.<sup>11</sup>

## **Child Alienation**

Over the past 25 years, considerable discussion has focused on the dynamics and processes of child alienation. Several different models describe child alienation.

The first professional writings about child alienation were offered by Reich (1949), who wrote about parents who seek “revenge on the partner through robbing him or her of the pleasure in the child” (p. 265). Wallerstein and Kelly (1980) were the first to identify, in a population of divorced families, a child’s irrational rejection of a parent and her resistance or refusal to visit the parent. The initial formulation of an alienated child posited a pathological alignment between an angry parent and an older child or adolescent that sprang from the dynamics of the separation, including the child’s reaction to the divorce (Wallerstein & Kelly, 1980). It was Gardner who developed a more elaborate and detailed description of this alienation process. He also offered a series of criteria for assessing this alienation process and described a continuum of alienating behaviors ranging from mild to severe. Parental Alienation Syndrome (PAS) was first defined by Gardner (1985) as a conscious or unconscious attempt by one parent to behave in such a way as to alienate the child or children from the other parent. In his initial writings, Gardner identified the mother as most often the parent engaged in systematic attempts to alienate a child from the other parent (Gardner, 1992). In his later writings, Gardner (2002) indicated that fathers were becoming as likely as mothers to engage in the process of alienation.

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<sup>11</sup>Although preadolescent and adolescent children may be capable of knowingly falsely accusing someone of sexual abuse for secondary gains (i.e., escape from the family, revenge, removal of an adult from the family, etc.), preschool and young school-age children are probably not cognitively sophisticated enough to initiate a false sexual abuse allegation.



According to Gardner, the purpose of PAS is to align the child with one parent by forcing the other parent out of the child's life (Gardner, 1985). PAS includes, but is not limited to, conscious, intentional programming techniques. Time is the alienating parent's most powerful ally. The longer the alienating parent has direct control over the child, the greater will be the alienating influence. As the alienating parent is able to dominate the child's time, the target parent is unable to spend time with the child. The result is a widening of the gap between the child's strengthening alliance with the alienating parent and the child's weakening alliance with the target parent. Eventually, the child adopts the malicious, intolerant, rejecting attitude of the alienating parent toward the target parent, resulting in a belief system in which the child views the target parent with hatred and fear (Gardner, 1992). Several authors have argued for the usefulness of the PAS concept, most notably Dunne and Hedrick (1994), Rand (1997a; 1997b), and Warshak (2000b, 2001a, 2002, 2010).

Another concern is what Cartwright (1993) terms virtual allegations. "They refer to those cases in which the abuse is only hinted, its real purpose being to cast aspersions on the character of the noncustodial parent in a continuing program of denigration. For the alienator, virtual allegations avoid the need to fabricate incidents of alleged abuse with their attendant possibility of detection and probability of punishment of perjury" (pp. 208-209).

Bruch (2001) criticized Gardner's PAS, citing several areas of concern. She noted that "Gardner confounds a child's developmentally related reaction to divorce and high parental conflict (including violence) with psychosis. In doing so, he fails to recognize parents' and children's angry, often inappropriate, and totally unpredictable behavior following separation" (p. 530). She further criticized Gardner for positing that PAS occurs primarily in young children, suggesting that the current literature does not support the notion that young children are most vulnerable to alienation pressures. Another concern voiced by Bruch is how the use of PAS focuses attention away from potentially dangerous or abusive behavior on the part of the parent seeking custody to that of the custodial parent.

In 2001, Kelly and Johnston published a reformulation of alienation dynamics and proposed a continuum of child-parent relationships after separation and divorce. Kelly and Johnston provided a road map for evaluators to use in distinguishing the alienated child (who persistently refuses and rejects visitation because of unreasonable negative views and feelings) from other children who also resist contact with a parent after separation based upon a variety of normal, realistic and/or developmentally predictable reasons.

At the healthiest end of the continuum are the majority of separated children who have positive relationships with both parents. They value both parents and wish to spend significant (often equal) amounts of time with each parent.

The next step along the continuum describes children who have an “affinity” for one parent while also desiring continuity and contact with both parents. Affinity for one parent is characterized by the ways in which children feel closer to one parent than the other. It may result from temperament, gender, age, shared interests, sibling preferences of parents, and parenting practices. Such affinities may shift over time with changing developmental needs and situations. “Although these children may occasionally express an overt preference for a parent, they still want substantial contact with and love from both parents” (Kelly & Johnston, 2001, p. 252).

The third step along the continuum describes children who have developed an “alliance” with one parent. During the marriage or separation, these children demonstrate or express a consistent preference for one parent over the other. They often want limited contact with the nonpreferred parent after separation. Allied children generally do not fully reject the other parent nor do they seek to terminate all contact. They tend to express some ambivalence toward this parent, including anger, sadness, and love, as well as resistance to contact.

Kelly and Johnston (2001) noted that such alliances may have their roots in family dysfunction that preceded the divorce insofar as children may have been encouraged to take sides or carry hostile messages between the parents. Alliances appear to occur more often in older schoolchildren in response to the dynamics of the marital breakup. Older children tend to make moral assessments and judgments about which parent caused the breakup, who is most hurt, who is most vulnerable, and who needs and/or deserves the child's unfettered help and support.

A fourth step along the continuum finds children who are realistically “estranged” from one of their parents as a consequence of that parent’s history of family violence, abuse, or neglect, and they need to be clearly distinguished from alienated children. These children have taken sides in the family because of a fact-based history of violence or explosive outbursts of a parent during the marriage or after separation. Sometimes the children have been targets of violence and abusive behavior from this parent, and in some cases it has been other family members. These children may find that the only time they can feel safe enough to reject the violent or abusive parent is after the separation when the child is protected by the custodial parent.

These children do not have to be direct witnesses to violence. They may witness the aftermath of intimate partner violence or they may be traumatized by an act of violence that from an adult’s perspective may not have been very serious or injurious. Kelly and Johnston (2001) stated, “The mix of intense anger towards the abusive parent, and phobic reactions to that parent caused by subconscious fear of retaliation looks like alienation. But unlike alienated children, the estranged children do not harbor unreasonable anger and/or fear” (p. 253. Emphasis added).

Children who have suffered exposure to abuse or been victims of abuse generally suffer from some type of traumatic stress reaction. Evaluators need to assess for trauma reactions. If no trauma reaction is found, then the evaluator might wish to consider alienation among other possible alternative hypotheses.

Among the reasons children may become estranged from a parent include:

1. Severe parental deficiencies including persistent immature and self-centered behaviors;
2. Chronic emotional abuse of the child or preferred parent;
3. Physical abuse that goes undetected;
4. Characterologically angry, rigid, and restrictive parenting styles;
5. Psychiatric disturbance or substance abuse that grossly interferes with parenting capacities and family functioning.

Kelly and Johnston (2001) reminded us that, “Unfortunately, the responses of these realistically estranged children following separation are commonly and incorrectly interpreted and played out in custody disputes as PAS cases. The deficient, abusive, or violent parent frequently accuses the other parent of alienating the child against him or her. They vigorously resist any suggestion that marital violence or severe parenting deficiencies have negatively impacted the parent-child relationship” (p. 254).

At the extreme end of the continuum are children who are alienated from a parent after separation and divorce. They tend to express their rejection of that parent stridently and without apparent guilt or ambivalence. They also may strongly resist or completely refuse any contact with that rejected parent.

Often, the parent who has been rejected has been less involved in the child’s life than the other parent or possesses somewhat less robust parenting competencies. The child’s complaints and allegations about the rejected parent may reflect some true incident that has been grossly distorted and exaggerated, resulting in the child holding highly negative views and feelings. It is the gross distortion and exaggeration without a reality-based foundation that makes this a pathological response.

## **Systemic Processes that Potentiate Child Alienation**

Kelly and Johnston (2001) recommend an evaluation model based upon systems theory. They suggest two broad factors. Background factors are viewed as directly or indirectly impacting on the child. These may include, but are not limited to:

1. A history of intense marital conflict;
2. A humiliating separation;

3. Subsequent divorce conflict and litigation that can be fueled by professionals and extended kin;
4. Personality dispositions of each parent; and
5. Child-related factors such as age, cognitive capacity, and temperament.

They also identified several intervening variables that may moderate or intensify the child's response to these critical background factors,

1. Parenting beliefs and behaviors;
2. Sibling relationships; and
3. Child's own vulnerabilities within the family dynamics.

Kelly and Johnston (2001) suggest a set of "risk factors that may potentiate alienation" (p. 255):

1. Triangulation of child in intense marital conflict;
2. Child experiences separation as deeply humiliating;
3. Parents are involved in highly conflicted divorce and litigation; and
4. "Tribal warfare" or the contributions of new partners, extended kin, and professionals.

Drozd and Olesen (2004) proposed an assessment model to distinguish children who are abused from those who are alienated, arguing that a conceptual framework organizing multiple hypotheses is needed when assessing allegations and counterallegations of abuse and alienation. They proposed several hypotheses to examine when a child resists visiting one or both parents. The first hypothesis examines the child's resistance to visit a parent as a normal developmental variation in his or her development and/or the result of normal variations in family dynamics. A second hypothesis is that the child has been exposed to intimate partner violence and/or substance abuse in the home and/or is the target of direct abuse or neglect. A third hypothesis is that the child's resistance to visit a parent is the result of poor parenting on the part of one or both parents. Included in this analysis is investigation of one parent's parenting behaviors that are alleged to undermine the child's relationship with the other parent (alienation) as well as investigation of allegations of rigid or insensitive parenting on the part of the rejected parent. Drozd and Olesen have recently added an analysis of more complex interactions among four primary factors. These "hybrid" analyses include examination of complex interactions among some combination of poor parenting, protective parenting, alienating behaviors, and/or abuse (Drozd & Olesen, 2010).

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## Domestic Violence

The forensic assessment of allegations of domestic violence remains among the hot topics for research. It presents a unique challenge to evaluators not only because of the complexity of psychological variables involved in a comprehensive

assessment but also because of the political aspects to many issues involved in domestic violence (Gould & Martindale, 2007).

There are several reasons why a systematic exploration of allegations of domestic violence is critical in child custody evaluations. The first involves concerns about placing a child in a family context in which parental violence occurs. Children living in homes in which parental violence occurs are more likely to be targets of violence themselves (Jaffe, Lemon, & Poisson, 2003; Jaffe, Crooks, & Poisson, 2003). The second is that children living in a family context in which domestic violence occurs are psychologically affected by their exposure to parental violence (Bascoe, Davies, Sturge-Apple, & Cummings, 2009; Davies & Cummings, 2006; Davies & Sturge-Apple, 2007; Davies, Sturge-Apple, Cicchetti, & Cummings, 2007; Davies, Sturge-Apple, Winter, Cummings, & Farrell, 2006). A third concern is that parents involved in domestic violence tend to be poorer supervisors of their children's behavior. Typically, the victim of the parental violence tends to be more depressed and often focused on his or her safety issues rather than on the needs of the child (Gould & Martindale, 2007). Another concern is that children raised in homes in which domestic violence occurs often identify with the aggressor, resulting in children attributing less parenting legitimacy to the victimized parent (Bancroft & Silverman, 2002a; 2002b).

Recent research findings have strongly suggested that the population of those who allege domestic violence while undergoing custody evaluations are drawn from a different population than those who allege domestic violence and are living in domestic violence shelters (Dutton, 2005a, 2005b). Understanding differences between these populations on factors such as lethality risk, type of physical violence, frequency of physical violence, and intensity of domestic violence may be important for the evaluator to explore and the court to better understand (Dutton, Hamel, & Aronson, 2010).

## **Austin's Model of Assessing Allegations of Domestic Violence**

Austin (2000) suggested that there may be a strategic advantage in child custody disputes for one party to be viewed as the victim of marital violence and for the other party to be falsely accused of being a perpetrator. A high percentage of men and women in contested custody cases report being abused in their marriages (Newmark, Harrell, & Salem, 1995). Bow and Boxer (2002) reported that more than one third of custody referrals contain allegations of domestic violence, and that 57 percent of custody cases that included allegations of domestic violence were supported. That is, more than half of the cases in which DV was alleged were the allegations substantiated

Bow and Boxer (2002) also recommended that evaluators involved in assessing allegations of domestic violence utilize the Forensic Model described in this chapter by relying on interview data, test data, observational data, and collateral record review and interviews. Austin's model helps to further refine the specific steps needed to be taken by an evaluator in a competent evaluation of allegations of domestic violence.

Austin (2000) suggested a six-factor test of credibility to evaluate the plausibility of interspousal domestic violence when there is not a legal substantiation of marital violence,

1. Objective verification through record review;
2. Pattern of abuse complaints prior to the start of the custody dispute;
3. Corroboration by credible others such as former romantic partners;
4. Absence of disconfirming verbal reports by credible third parties;
5. Psychological profile and past history of abusive behavior by the alleged perpetrator of marital violence; and
6. Psychological status of the alleged victimized spouse.

These steps define the minimal number of investigative steps needed to conduct a competent evaluation.

## **Drozd et al.'s Model for Assessing Allegations of Domestic Violence**

Drozd, Kleinman, and Olesen (2000) suggested that investigators of allegations of domestic violence within the context of a custody and visitation dispute need to recognize the larger family system context. When an allegation of domestic violence is raised, evaluators should also examine rival hypotheses that include, but are not limited to, the motivation of the reporting party. A comprehensive evaluation should include at least the following:

1. Obtaining civil and criminal complaints and judgments from police, courts, and other relevant venues;
2. Obtaining work records;
3. Assessing for weapons access;
4. Examining substance and alcohol use;
5. Evaluating risk assessment;
6. Investigating collateral contacts including former romantic partners;
7. Examining power and control variables in relationship;
8. Examining how parents argued (type of interaction);
9. Examining how parents resolved the argument (methods of resolution);
10. Examining triggers for creating fights;
11. Investigating parents' understanding of the fight triggers and how to avoid them;

12. Assessing psychological variables that may contribute to propensity toward violence, for example, impulsiveness, low frustration tolerance, rigid versus flexible thinking, authoritarian worldview, and sex role perspective;
13. Evaluating parental insight into their anger and its management;
14. Evaluating parental insight into cycle of violence within their relationship, that is, how it starts and what attributions each parent makes about the other parent's motivation;
15. Examining psychological/emotional abuse variables;
16. Examining financial/economic abuse variables;
17. Examining sexual abuse variables;
18. Investigating exposure of child to forms of violence and conflict;
19. Examining child disciplinary techniques (what is used);
20. Examining deployment of child disciplinary techniques; and Assessing parents' awareness and use of multiple disciplinary strategies sans corporal punishment.

The Drozd et al. model provides a more complex and comprehensive list of factors to consider than does the Austin model. Both models would provide a competent set of data from which to address allegations of familial violence.

We encourage evaluators to employ a model similar to that offered by Austin or Drozd et al. to guide their information gathering and investigative procedures, as both include the most comprehensive set of variables to examine for forensic evaluation. The Drozd et al. model provides the most detailed set of factors and incorporates the factors suggested by Austin, while the Austin model points the evaluator toward data-gathering sources necessary to acquire for a competent evaluation.

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## Summary

Mental health professionals who conduct forensic evaluations are guests of the legal system because we offer specialized knowledge and analysis beyond the scope of the judge, the lay witnesses, and the attorneys. As invited guests, it is important to respect and play by their rules, particularly when it comes to the rules of evidence. It is also crucial to keep up with changes in case law relevant to their areas of practice. There is a rub, however. At times, judges and attorneys invite mental health professionals to opine on matters that are beyond the scope of their expertise. In these circumstances, it is incumbent upon us to politely refuse (Gould & Martindale, 2007).

Evaluators must also know the standards for admissibility in their jurisdictions in addition to practicing and appreciating the importance of using

reliable and valid techniques in forensic assessments. Each state has case law that helps to define the limits of expert testimony. We urge evaluators to read case law regarding the admissibility of scientific evidence. It is most preferable to obtain the original case that set the precedent in their jurisdiction and follow any clarifications or modifications that may have appeared in subsequent decisions. Then, evaluators should develop an investigative methodology that is consistent with the state's legal definitions of reliability and relevance.

Evaluators are also encouraged to be familiar with the laws and rules of child custody decision making in the states in which they practice. It is important to obtain state statutes that define the best interests of the child and other relevant parenting-related concepts and to examine case law that may have further defined the statutory concepts. For example, a state may have a statutory presumption allowing a custodial parent to relocate with the child. Case law decisions may have defined a set of factors that the court needs to consider when adjudicating relocation disputes. Factors derived from case law may give evaluators guidance about relevant psychological variables to investigate.

We discussed several concepts critical to competent, ethical practice. There is little, if any, disagreement among scholars and teachers in forensic psychology about the importance of scientifically informed methodology. This is exemplified by the substantial use of multiple interviews, psychological tests, direct behavioral observations, third party record review, and collateral interviews (Ackerman & Kane, 2005, 2010; Bow & Quinnell, 2001; Galatzter-Levy et al., 2009; Gould, 2006; Gould & Martindale, 2007; Kirkland et al., 2005; Rohrbaugh, 2008; Stahl, 2010).

Conducting a child custody evaluation is an inherently forensic endeavor. When we are acting as mental health experts on issues being adjudicated by courts (with definable foreknowledge), we are rendering a forensic mental health service (Committee on Ethical Guidelines for Forensic Psychologist, 1991). The primary goal is to assist the court. Child custody evaluators need to recognize that the court shall be conceptualized as the primary recipient of the evaluator's advisory report. This means that important information of identified parenting deficiencies cannot be omitted from our reports in order to protect the identified parent from the hurt of reading the report. It is unrealistic to believe that we can facilitate a family's postdispute adjustment by preparing reports in which we address parental strengths but neglect to mention any parental shortcomings.

Evaluators should create their records with the needs of the legal system in mind. As such, they should anticipate outside review, and in reasonable detail, all records should be carefully maintained and made available to those who are legally entitled to examine them.

Our primary concern is to focus on mental health professionals' obligation to present themselves and their custody cases as transparently as possible. Included in



this transparency is acknowledging the strengths and limitations of their opinions and conclusions (Mnookin & Gross, 2003), making available the full file for attorneys and the court to review, and knowing and abiding by rules of the court, evidence, and professional conduct.

There are several threats to the practice of child custody, one of which is proffering sweeping conclusions based primarily on years of experience and clinical judgment, intuition, or hunches. Evaluators need to move away from impressionistic testimony best captured by the phrases, “I know good parenting when I see it” or “My years of experience have taught me what good parenting is.” Although competent evaluators must demonstrate sound clinical judgment, it is reliance on reliable methods and relevant research that best informs our conclusions and opinions. Evaluators do a disservice to families in conflict, to the court system, and to the professional image of child custody evaluators when they confuse perceived helpfulness with actual helpfulness (Martindale, 2006).

A second threat is the presentation of personal beliefs under the guise of professional opinion (Gould, 1998, 2006; Mnookin, 2008a). When a custody evaluator testifies, the concepts and data that are the basis of the proffered opinion should reflect claims that are generally accepted in the field (Mnookin, 2008a). Evaluators need to continually ask themselves whether the substance of the opinion offered to the court has adequate indicia of reliability (Faigmen et al., 2002).

We do not suggest that there is only one way to interpret current peer-reviewed literature on any particular topic in our field. Scientific disagreements among learned colleagues are not uncommon (Mnookin, 2008a; 2008b) and is an integral component of scientific inquiry. The evaluator’s task is not to embrace partisanship in an effort to advocate for a legal or scientific position. Instead, the evaluator’s task is to provide a dispassionate explanation of the advantages and disadvantages of various scientifically -informed positions and to advocate for interpretations that best fit the family under scrutiny.

At the beginning of this chapter, we talked about the mercurial manner in which some courts have made custody determinations without consulting child development theories, research, and expert psychological opinions. An evaluator’s primary responsibility as a testifying expert is to present to the court scientifically informed opinions about children’s psychological best interests that are based upon the data and inferences developed during the assessment process. Judges may be more open to integrating behavioral science research and expert psychological opinions into their judicial determinations as they gain greater confidence in the scientific integrity of the child custody evaluation process (Gould & Lehrmann, 2002).

Knowledge is derived from inquiry, and professional activity stimulates inquiry. If child custody evaluators are to assist the legal system, evaluators must be mindful of their limitations and respond to the call for clinical humility (Gould

& Martindale, 2005; Tippins & Wittmann, 2005a). To do this, evaluators must not only articulate those limitations, but also work diligently to develop scientifically informed methods and procedures for child custody assessment and for advisory reports that more accurately reflect the experience and needs of children.

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