

Protecting the Rights of Children in Disputed Custody Cases:

Mental Health and Legal Considerations

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Determining the best interests of the child during a disputed custody case has been difficult for both the legal and the mental health professions. When divorcing parents or separating partners cannot agree on custody, mental health professionals have been called upon to evaluate each parent to determine the best possible home environment for the child(ren) and to ensure continuity and stability in the child's daily activities. Judges also have to make those decisions, sometimes in the absence of a formal custody evaluation. Choosing the optimal home for a child is not a simple matter of just looking at each parent's adequacy in providing food, shelter, and appropriate medical and educational opportunities, but involves more intangible qualities such as nurturance and attachment (Gardner, 1982; Kelly & Lamb, 2000). It is the difficult job of custody evaluators to assess those intangible psychological qualities and explain them in a manner that family courts can utilize.

The decision about where children should grow up if their parents' relationship ends has not always

been based on the child's needs and best interests. Starting in the days of the Roman Empire and continuing through the 19th century, children were the property of their father, whatever the cause of the marital dissolution. It was not until the last century that courts adopted the 'Tender Years Doctrine,' or the notion that young children under three or four were presumptively better off living with their mothers, though older children were still placed with their father. Gardner (1982) notes that there were strong economic traditions that encouraged this outcome for children. The first was that few women could support children after a divorce unless they had independent sources of wealth; the second was that children were regarded as economic assets once they could start work.

However, with the passage of child labor laws and the advent of women's rights, mothers of older children were no longer denied custody. Laws initiated in the 1920s required the courts to award custody to the most fit parent, regardless of gender. Applying this standard for several decades, and in the absence of exceptional circumstances, custody of children of all ages almost exclusively went to the mother. Mothers were viewed as the nurturing parent and the most fit because of their closer involvement with child rearing. It was only in those cases where a father could prove the mother's immorality that he would obtain custody.

In the last 30 years, however, the question of which parent is most fit to raise the children has not had a foregone conclusion. There is increasing recognition that many fathers are as closely involved in their children's lives as the mothers, that they are equally emotionally and psychologically attached to their children, and that in the absence of any severe problems, the only way to determine where a child will live and who will make decisions for and about that child is to do a thorough assessment of involvement and attachment factors (Kelly & Lamb, 2000).

A custody evaluation should not be an adversarial process in which parents hire separate expert witnesses to argue one parent's virtues and the other parent's vices. Formal custody evaluation is done of each parent and the children by a neutral and expert third party, whose goal is to distill all that is embodied in the concept of "best interests of the child" into a custody and visitation decision. Psychologist and mediator Joan Kelly (1997) reinforces the view that best interests of the child during the divorce process should not be an adversarial term, but should be looked at in psychological and developmental terms. She defines best interests as the "combination of factors a child needs in a custody and/or access arrangement that will sustain his or her adjustment and development" (p. 378). These factors are not static, but change as the child's developmental needs change. In addition, the child's best interests will vary depending on the child's pre-divorce adjustment in the family. Kelly notes that for-most children, who are well adjusted before the divorce, best interests would consist of fostering the same emotional and intellectual resources the child has already experienced.

However, if the child has emotional and behavioral problems that pre-date the divorce, Kelly argues that a misguided emphasis on continuity and stability does not make psychological sense, and the child's best interests must be evaluated individually.

The basic legal guidelines for determining the best interests of the child, contained within the Uniform Marriage and Divorce Act of 1970, specify assessment of the following general areas: parental wishes; child's wishes; parenting skills; relationship of the child with each parent, with siblings and with other important figures; the mental and physical health of all parties; and the child's adjustment to home, school and community. It does not give any guidance on prioritizing these factors. In addition, while the guidelines are meant to be gender neutral, and contain no presumption of either paternal or maternal preference, they are not always interpreted that way. Kelly (1997) reports on a survey given to judges, attorneys, and custody evaluators with a series of divorcing parent scenarios. When the same scenario was presented with the parents' genders reversed, the custody recommendations from all three professions were different. In spite of its problems, however, Kelly believes the best interest standard should not be abandoned, as it:

represents a willingness on the part of the court and the law to consider children on a case by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical need..... Even though time-consuming, it is society's way of acknowledging that children's needs are important and unique. We pursue this course in dependency cases and should, as well, with separation and divorce. (p. 385)

There are many difficult issues in deciding

custody arrangements for children. Child custody evaluation has been characterized as "the most complex and difficult type of forensic evaluation" (p. 312) by Otto, Edens, and Barcus (2000), and it generates the most complaints against psychologists (Stahl, 2000). This article will explore four of the difficult issues facing child custody evaluators and family court judges:

Who has legal standing to participate in the custody determination of a child?

What is attachment and how can it be fairly assessed?

How valid are abuse and neglect accusations raised by one parent against the other during custody proceedings?

In the absence of compelling reasons to choose one parent over another, should there be a legal presumption of joint custody?

One of the first things a court must decide is who has a right to request custody or visitation time with children. Historically, parents have been the only individuals who could participate in custody proceedings. In addition, legal policy in favor of preserving the family unit legislated against the rights of third parties to request custody unless both parents had died. However, in today's society, the fragmentation of the 'traditional family' and parental delegation of traditional caretaking duties to third parties requires a less rigid and formalistic application of traditional custody law. The reality for many children today is that they have been cared for by adults other than their parents since infancy. These caretakers may be childcare workers at private or public day care settings, live-in nannies, neighbors, grandparents, aunts and uncles, even older siblings. With approximately 50% of first

marriages and even more second marriages ending in divorce, many children have established close attachments with extended family members, particularly grandparents, as well as step- and half siblings, which do not vanish simply because parents decide that they can no longer live together. In fact, it is predicted that by the year 2000, stepfamilies will be the predominant family type (Boos Hersberger, 1998).

Yet, the legal system has created and, by and large, continues to support a body of law that recognizes legal rights and obligations that are premised on the traditional "first-marriage family model". Boos-Hersberger (1998) argues that although a child's best interests may not be served by staying with the biological or legal parent (even if an adequate parent), parent's rights take precedence over the best interests of the child. In many jurisdictions, the 'best interests' standard, enacted to protect the rights of children with a focus on stable and secure attachment relationships, has been supplanted by rights which attach by virtue of biology. However, some states, such as Minnesota, have made the assessment of nurturance and attachment an explicit part of their best interests standard.

Continued application of this older model in custody determinations fails to acknowledge the formation of nontraditional family units and the need to reevaluate the definition of parents. The premise of the legal status of a parent not only requires a biological connection to the child or legal adoption, it also presumes that a child has one parent of each sex. However, technology has now made it possible for life to be formed from the union of genetic material in a test tube, then

implanted in a surrogate mother's womb until birth. This child has no biological connection to the mother and in some cases, will only ever know one 'parent'. State courts have also begun to legally acknowledge same-sex unions, either by the granting of marriage licenses to same-sex couples or adopting domestic partner acts (France, 2000). Partners in same-sex relationships, whether legally acknowledged or not, may adopt a child or themselves give birth. Children born into either of these family forms may not be biologically related to the 'parent(s), may have only one parent or may have a parent of each sex.

Nevertheless, some jurisdictions have acknowledged the right of certain third parties, or individuals other than the natural parent, to participate in proceedings involving the custody of a child. This right is referred to as *standing*. In some jurisdictions, a third party's right to participate in a custody proceeding is established by proving an *in loco parentis* relationship with the child. In other words, the third party will have to demonstrate that he or she has become the child's nurturing parent and primary caretaker despite the existence of the natural parents. This doctrine, in effect, abandons a parent's prima facie right to custody and permits the court to consider the physical, emotional, intellectual, moral and spiritual well-being of a child. However, the application of this doctrine is limited by the significant weight the courts continue to give to parenthood and the heavy burden of proof required of the third party (*Rowles v. Rowles*, 1995). Other courts have applied the equitable parent doctrine to show that a nonbiological parent has the same status as a natural parent (*Atkinson v. Atkinson*, 1987). This doctrine may be useful in

cases involving a stepparent or a husband who subsequently learns that the child born to his wife during their marriage is not his biological child, yet wishes to maintain a relationship with that child.

Conversely, there are states that make it impossible for a husband to disprove biological parentage if his wife, during their marriage, gives birth to a child. Although DNA evidence may exclude the husband as the child's father, there is a presumption, dating back to 16th century English common law, "that a husband is presumed to be the father of a child born to his wife - unless he shows that he was sterile, impotent or 'out of the kingdom' at the time of conception" (p. 30) (Smith, 1999; see also *Miskovich v. Miskovich*, 1998). Application of this presumption raises serious issues of best interests of the child, depending on the attitudes of all parties.

The courts are now also faced with petitions filed by older step- and half-siblings seeking custody or visitation time with their younger step- and half siblings. The courts have been reluctant to acknowledge standing of these third parties to participate in custody. Although the courts in some states recognize that a lesbian wife partner may seek partial custody of a child of her former partner, they have not been willing to allow a minor half-sister to seek visitation with her siblings (*V.P.L. v. E.M.*, 1996; *Ken. R. v. Arthur Z.*, 1996). Whether or not you have standing to bring a custody action seems to depend on whether there is evidence which suggests that there is a parent-like relationship between parties and the child in question. The rationale is not unlike that recently offered by the United States Supreme Court in upholding the Washington Supreme Court's denial of the request of paternal

grandparents to have visitation with their 8- and 10-year-old grandchildren (Troxel et vir v. *Granville*, 2000). In Troxel, the United States Supreme Court supported the Washington State Supreme Court's finding that, "A parent's constitutionally protected right to rear his or her children without state interference has been recognized as a fundamental liberty interest. Parents have a right to limit the visitation of their children with other persons,"

Underlying these legal requests for custody or visitation from third parties is an acknowledgment of a relationship with or attachment to a child. At the same time that attachment has received increasing recognition as a factor in children's development, it has also received increasing recognition as important to a custody decision. Beginning with work by Bowlby and Ainsworth, child psychology professionals have observed many infant-caregiver interactions and differentiated between normal and disturbed attachment. Childhood attachment is the process of bonding between caregivers and a child and is fostered by providing "sensitive and responsive care from familiar adults in the course of feeding, holding, talking, playing, soothing, and general proximity" (Lamb & Kelly, 2000, p. 298). The securely attached child comes to trust that his/her needs will be met consistently, and in trusting begins also the process of developing a sense of self-efficacy and self-confidence. Between the age of 7 and 24 months, infants demonstrate attachment by seeking out their preferred caregivers and protesting when separated. While most early studies of attachment focused on the mother-child bond, Lamb and Kelly refer to a growing body of evidence that infants also form meaningful attachments to their fathers. Attachment can be

disturbed if the parent is unavailable emotionally, neglectful, abusive, or separated for long periods from the child. The insecurely attached child may be avoidant (showing little distress when separated and ignoring the parent when reunited), -resistant (angry and aggressive after a separation) or disorganized (seemingly disoriented, or showing contradictory behaviors after a separation). Lamb and Kelly report that approximately 65% of middle class American infants are securely attached, 20% are insecure avoidant, 10% insecure resistant, and the remaining 5% are insecure disorganized. They also recognize that even a child who has been securely attached to both parents prior to a divorce may become insecurely attached for a period of time during the conflictual stages of a divorce, but that as parents reduce their level of conflict, secure attachment is reestablished. Clearly, for the custody evaluator, the time at which an evaluation is done may be one of the most conflictual times, and the assessment of attachment must be framed in the context of parental conflict.

Another extremely difficult issue arises when one party brings up allegations of child abuse or neglect during disputed custody proceedings. Especially if these allegations have not been brought to fight before the filing for custody, they may be seen as vindictive, manipulative, and almost automatically false. However, the reality is much more complicated. In the case of divorce, it could be that one parent had noticed neglectful or physically abusive tendencies in the other parent before the divorce, but had been able to step in to protect and care for the child. The divorce process itself can create new stressors on parents and new problems in relating to children. There are fathers

who only began sexually abusing a daughter after a marital separation (Schuman, 2000). But in some cases, a mother who brings up allegations of sexual abuse during the divorce period is seen as crazy. Rosen and Etlin (1996) refer to a North Carolina study done jointly by the Committee for Justice for Women and Orange County North Carolina Women's Coalition, which examined court records of contested custody cases from 1983 to 1987. This study showed that fathers seeking sole or joint custody were awarded custody in 84% of cases, even with a history of spousal battering or physical child abuse. When sexual abuse allegations were alleged, fathers were awarded custody 100% of the time. Rosen and Etlin feel that there has been a movement to discredit mothers in such cases, and that in fact, if these mothers appear to be anxious or even hysterical, there is a logical reason for their distress.

Empirical evidence looking at the incidence of false allegations of sexual abuse during divorce in Australia (Brown, Frederico, Hewitt, & Sheehan, 1998) suggests that the rate of false allegations during divorce is very similar to the rate of false allegations at any other time, which is around 9%. Schuman (2000) cites research from several studies in the U.S. and Canada that have looked at both mistaken allegations and deliberately false allegations. The incidence of false or mistaken allegations of sexual abuse ranged from 14% to 21%, with the incidence of deliberately false reports ranging from less than 1% to 5%. However, some child protective services departments, both in the U.S. and in Australia, rule out investigating sexual abuse allegations during divorce proceedings (Zorza, 1995; Brown, Frederico, Hewitt, & Sheehan, 1998). It is clear from the relatively low incidence

of deliberately false allegations found across studies that allegations of sexual abuse during divorce proceedings require the same standards of investigation as any other abuse allegations. Schuman (2000) does provide, however, a discussion of some of the dynamics of those parents who bring false sexual abuse allegations or are preoccupied with constantly checking a child for evidence of abuse.

A family need not go through the process of bringing abuse charges in order to have a related constellation of issues, with alienation from the noncustodial parent, specifically at the instigation of the custodial parent. While there may be disagreement and bad feelings between divorced parents of which the child is aware, 'parental alienation syndrome' implies a systematic attempt to turn the child against the other parent. A study by Racusin, Copans, and Mills (1994) attempted to find some of the factors associated with a child's refusal to visit a non-custodial parent. In a sample of 100 children of divorce referred for therapy, 12 were refusing visits. When children refused to visit a father, it appeared to be due sometimes to the child's wish to take care of the mother (some of whom were clearly depressed) and sometime to the father's violence towards the mother. When children refused to visit a noncustodial mother, it was usually because of the mother's drinking. The study did not look at the degree to which the children were or were not coached by the custodial parent, however, and the records showed that in some cases the children's negative descriptions of the parent were accurate. Stahl's (2000) chapter on evaluating alienation during custody proceedings contains a balanced discussion of how the custody evaluator can

determine whether a child has initiated the alienation from one parent (in which case it is called alignment) or whether one parent has turned the child against the other. Unlike custody evaluators, he does not recommend awarding sole custody to alienated parents, even when they have clearly been wronged. While it is not fair at the adult level, Stall feels it is usually in the child's best interests to stay with the alienating parent. The child is often closely attached to that parent, and would continue to fight with, not grow closer to, the alienated parent if forced to change custody by the courts.

As part of a movement to reform the adversarial process of divorce proceedings, some jurisdictions adopted a presumption of joint legal custody, or joint decision-making. In the absence of any evidence that a parent could not be entrusted with the care of the child, the parents were given joint legal custody. California initiated the presumption of joint legal custody in 1980, and while it seemed to work well for divorcing couples who had chosen it, there were questions about how well it would work for couples fighting for sole custody (Cohen, 1998). Earlier research found that joint custody both reduced relitigation and increased compliance with child support payments, but this was complicated by the fact those parents studied had chosen joint custody. Cohen also found that joint custody, even when imposed by the courts, did not seem to increase relitigation, though in those cases where the couple did return to court, it was for a change in custody arrangements, not for child support enforcement (the most common cause of relitigation for other custody arrangements).

Questions about joint residential custody follow automatically from a consideration of joint legal

custody, for if custody is shared, should a child's time in each parent's household also be equally shared? in an effort to be fair, for example, some courts have ordered that children spend equal time with each parent. How does that work for children of different ages? This question returns us to a consideration of attachment, and whether attachment can be fostered and maintained with frequent changes in primary caretaker and household. In one of the only studies to empirically measure the effects of overnight visits for infants on attachment, Solomon and George (1999) found that infants with overnight visitation could be just as securely attached to both parents as those without overnights or those in two-parent homes. However, their results confirmed the fact that parental conflict, particularly when it was made overt at the time of the infant's transfer from one parent to the other, was associated with resistant and disorganized attachment behaviors. Whiteside (1998) has also looked at the issue of visitation for children younger than five, reviewing hundreds of studies carried out for the court system of California. Like Solomon and George, Whiteside found that a wide variety of parenting arrangements could work well for young children, and that problems arose not from changes in residence, but from the manner in which parents approached the arrangements:

Neither the shape of the caregiving network nor the time-sharing schedule has the most potent effect on children's development; rather, it is the quality of the parental alliance and the parents' warmth, sensitivity, and discipline style that make the difference between a well-adjusted child and a child who is angry, scared, or limited in cognitive and social skills. (p. 495)

While courts and mental health professionals continue to struggle with the definition of best interests of the child, there is increasing recognition that these best interests must involve emotional factors and attachment over both biology and historical precedent. Attachment can occur with a nonparent as well as a parent and with a father as well as a mother. John Bowlby widened our understanding of attachment by noting that "the factors that create the relationship of parent and child are not biological, but social" (from his 1969 book, *Attachment and loss*, cited in Boos-Hersberger, 1998). Parenting can no longer be defined only in terms of biological entitlement. A child's genetic link to a gene pool cannot be the presumptive determining factor of his or her best interests'. The potential importance of a nonparental relationship to the emotional and psychological well-being of a child is recognized by the Federal Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which addresses custody disputes between parents who are residing in two different states, and which permits a court to take jurisdiction of a custody matter if the child lived with 'a parent or a *person acting as a parent*, for at least six consecutive months' before the custody action is filed (UCCJEA Section 201 (a) (2)). This Act supports the developmental concept that "a child's healthy growth depends, in large part, upon the continuity of his or her personal relationships" (p. 248) (Boos-Hersberger, 1998). A child's best interests may not be served by staying with the biological or legal parent even though that parent may be fit. In evaluating custody arrangements, consideration must be given to the emergence of stepfamilies as the Associate predominant family type in the 21st century, the Services and

evolution of rights of partners in same sex relationships, and the delegation of child rearing to third party caregivers.

There is also growing evidence that one of the primary parental dynamics that is clearly not in a child's best interests is ongoing, bitter conflict that is communicated verbally and non-verbally to the child. This does not mean that parents or partners disputing custody must always get along or must silence legitimate concerns about the other. In fact, when there is reason to believe a parent in a custody dispute is abusing a child, the protective parent should report, and the legal and child welfare systems should act to investigate and protect that child. But when there are not concerns about a child's safety, and when the child has been well adjusted before the custody dispute, each party should act to foster the child's relationship with the other caregiver. As more divorcing couples choose joint custody, and as a variety of household arrangements are recognized as viable for a child's well being, the focus of custody evaluation may also need to broaden.

There is already a recognition in the field of custody evaluation that "today, the expert who determined degree of parental fitness has been largely supplanted by the expert who determines arrangements for optimal functioning of the [family] system" (Pfeffer, 1999). Both the legal and the mental health professions can benefit from ongoing dialog about the nature of the best interests of the child as these new arrangements become more common.'

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Notes

- 1 See in this issue Shelley Burt's philosophical analysis of this topic: "Genetic Kinship and Children's Rights: Do Children Have a Right to be Raised by their Biological Parents?" - Ed.
- 2 Professionals interested in an interdisciplinary of judges, counselors, court evaluators, mediators and lawyers may want to contact the Association of Family and Conciliation Courts, 329 W. Wilson St., Madison, WI 53703. www.afcnet.org.

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