The Assessment of Bonding in Child Custody and Dependency Cases

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Determination of the best interests of children before custody and dependency courts is a complex process that challenges the expertise and knowledge of those charged with this task. Every day in custody, child abuse, adoption and termination-of-parental-rights cases, judges, Guardians ad litem and attorneys struggle to balance a multitude of factors in making recommendations and judgements regarding what types of care and custody arrangements best serve children before the court. Many of these issues are difficult to assess and even more difficult to prioritize. For example, does the moderately superior parent/child fit between a mother and her children over that of the children with their father outweigh the disruption of a move out of the children’s accustomed neighborhood and school district? Or in the case where the children have a close relationship with each other, but the son appears to relate better to his father while the daughter does the same to her mother; does the advantage conferred by placing one child in each household outweigh the disadvantages caused by splitting the siblings?

Such issues are part and parcel of family law where there are no easy answers. The New Hampshire statute which governs the awarding of custody provides little help. RSA 458:17 indicates that custody is awarded based on a consideration of the following factors: (1) preference of the child; (2) the education of the child; (3) any findings or recommendations of a neutral mediator; and (4) any other factors. The only other specific guidance offered to the court is that no preference is to be given to either parent on the basis of the parent’s sex and that the court may now consider repeated and unwarranted interference by the parent with primary custody with the visitation rights of the other parent as a factor in modifying a custody arrangement. Clearly, courts have wide discretion in determining which factors to consider in making custody and visitation decisions. Issues that are commonly taken into account include the nature of the relationship between child and parent/caretaker, moral fitness, capacity to provide love and affection, stability of the living situation, mental/physical health of the parties, and the nature of the emotional bond between the children and their adult caretakers.

Perhaps no single issue in child custody/dependency cases is more complicated and ill-defined than that of bonding. Courts often place considerable importance on establishing the nature of children’s psychological attachments and using these relationships to determine the best disposition for the children. Unfortunately, the terms “attachment”, “bond” and “psychological parent” are often used in these cases without any clear definition as to their meaning in these types of cases. Expert witnesses often complicate this issue for the court almost as much as they explicate it, because it is frequently difficult to know what a particular psychologist, social worker or counselor means when they talking in court about a child’s bonds and attachments.

This article will provide a brief overview of these concepts. In addition, it will describe in general the best practices in the assessment of children’s bonds and attachments, as well as common errors committed by mental health practitioners in such assessments and testimony. Finally, this article will provide an analysis of the evidentiary status of experts’ assessments of attachment and bonding in the light of Daubert and provide suggestions regarding the utilization of such testimony in child custody and other dependency proceedings.

The concept of attachment is primarily associated with the work of John Bowlby (1969, 1973, 1980), who was one of the first experts to focus on the adverse effects of inadequate maternal care in early childhood. He saw the development of a psychological bond between the infant and the maternal caretaker as a biologically determined survival mechanism designed to maximize the infant’s chances of survival. This psychological bond was seen as fundamentally different from other positive or affectionate relationships in that it is integral to the child’s fundamental sense of security. According to Bowlby and later attachment theorists, children bond to a particular individual when they seek closeness and physical proximity to that person when they perceive serious
internal or external threats to their well-being. Milchman (2000) points out that the child’s perception of threats will change and develop across his life span. Early internal threats such as hunger, illness and fatigue will give way to more abstract threats to emotional equilibrium, while early perceptions of external danger such as loud noises will change over time into more differentiated fears of kidnapping, gunshots or social rejection. However regardless of the nature of the perceived threat, the child turns to the bonded caretaker for comfort and protection.

Not all relationships in which a child is nurtured by an adult constitute attachment in this sense, even if the care of the child is competent, affectionate and attuned to the child’s individual needs. Children may have many relationships which are friendly or even affectionate, but that is only part of attachment as the term is used by Bowlby and other attachment theorists. Even in parental relationships, the day-to-day support, care and nurturance provided by the conscientious parent is not, in and of itself, equivalent to attachment. One of the best and most succinct definitions of attachment is provided by James (1994) who describes attachment as “a reciprocal, enduring, emotional and physical affiliation between a young child and a care giver.” Based on this definition, it is clear not all friendly or positive relationships between adults and children constitute bonded relationships.

Researchers have also pointed out that there are different types and styles of attachment. Because human infants are utterly dependent on adult caretakers, they will attach and form bonds even with individuals who cannot provide appropriate nurturance. While it is not possible to explore all of the vicissitudes of attachment in this article, several types of bonds can be outlined as examples. First, attachments can be secure; these provide children with the psychological support and security necessary for them to develop internal resources, self-reliance and adaptability. However James (1994) and other authors have described traumatic bonding, which can occur in the context of an abusive relationship. In these tragic cases, the child’s attachment to the parent or care giver is based, not on nurturance and acceptance, but on fear. James compares the trauma bond to the attachment which develops between hostages and their captors (also known as the Stockholm Syndrome) in which the victims develop a strange sense of gratitude toward their captors for not killing them. In many of these cases, children develop mechanisms of numbing, dissociation and self-blame as a way of coping with their fear of an abusive parent. James also points out that traumatic bonding should not be confused by evaluators with normal attachment, particularly when children express a desire to have contact with an abusive parent. In addition, he recommends that in these cases the child’s stated preference for remaining with the abusive parent should be given no more weight than a desire to remain in any other dangerous situation.

Problems in attachment can also be seen in cases not involving the severe traumatization of children. Ainsworth et al (1978) developed a system of classifying attachment patterns that included a third concept of insecure attachment. In some situations the primary parental figure is not abusive but rather emotionally unavailable. Ainsworth described the mothers of these children as being rejecting, for example by denying their infants’ requests for close bodily contact. Insecurely attached children are described as not demonstrating typical proximity seeking behaviors after separation from the parent and may develop a variety of problems in later life, including deficits in empathy or inappropriate aggression.

A concept which has become closely associated with bonding and attachment is the idea of the psychological parent which was formulated by Goldstein, Freud and Solnit, in their seminal work “Beyond the Best Interests of the Child” (1979), which has had an enormous influence on both the law in relation to child dependency matters and to child protection and social service agencies. A central idea in this treatise is that divorce and child dependency courts should give considerable priority to protecting the relationship between the child and his/her primary attachment figure, which these authors termed the psychological parent. This conceptualization of the psychological parent is different from the term “attachment” as it is generally used in that it is more black-and-white; there are no degrees of intensity or multiple psychological parents. In addition, Goldstein et al believed that there would be dire consequences if the bond between the child and the psychological parent were broken by even short interruptions or placement outside the family home. While this interval could be extended as the child matured, these authors suggested that irreparable damage can occur to children two years old or younger in a matter of a few days of separation. Goldstein et al also made it clear that in cases where a young child is placed with surrogate parent(s) for periods approaching a year, these caretakers should automatically be considered the psychological parents.

This conceptualization of the parent-child attachment has been criticized over the years. First, a number of authors have suggested that while there is a good deal of support for the idea of disruption of attachment being associated with adjustment problems in the child, there is not the same kind of support for the proposition that short separations or disruptions will inevitably produce severe and permanent damage. There has also been a growing recognition that children can have multiple significant psychological attachments that can vary in intensity; the issue is not thought to be as dichotomous as suggested by Goldstein and his colleagues. However, the concept of a child having one psychological parent has been absorbed into the legal culture and continues to be influential in
internal or external threats to their well-being. Milchman (2000) points out that the child’s perception of threats will change and develop across his life span. Early internal threats such as hunger, illness and fatigue will give way to more abstract threats to emotional equilibrium, while early perceptions of external danger such as loud noises will change over time into more differentiated fears of kidnapping, gunshots or social rejection. However regardless of the nature of the perceived threat, the child turns to the bonded caretaker for comfort and protection.

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custody and placement decisions. These conceptualizations of attachment and bonding have become important issues in divorce-related custody cases and in proceedings to terminate parental rights. Unfortunately, the assessment of these issues is much more abstract and difficult to quantify than other important issues which courts also consider in these types of cases. It is relatively easy to assess concrete caretaker behaviors (or the lack thereof) by a particular parent, but the qualitative aspects of the relationship between parent and child are extraordinarily subjective. Because courts are sensitized to the potential impact of the disruption of children’s important psychological relationships, it is common for courts in New Hampshire and many other jurisdictions to order “bonding assessments” between children and their caretakers. These assessments can be ordered when the court has concerns about the merits of competing placements: for example, when there is a choice to be made between placement with a long-term, highly competent foster care provider and a less competent natural parent. The difficulty is that such assessments are likely to be complex, time-consuming and highly subjective. Further, it is difficult to evaluate many of these assessments in terms of their reliability and scientific validity. Even more important, putting aside for the moment the question of the scientific status of attachment theory, it is common for mental-health professionals to present opinions regarding the child’s psychological relationships and attachments which are inconsistent with the assumptions of attachment theory.

It is not uncommon for the bonding assessments presented to the court to consist of interviews with caretakers, a general review of case documentation, and observations of the child interacting with parents or caretakers in the mental-health professional’s office. With younger children, these observations often take the form of having the adult engage the child in some type of play activity and observing the interaction between them. The mental-health professional notes whether or not the parent’s interactions with the child are appropriate, supportive and responsive to the child’s requests. However, Milchman (2000) has pointed out that the majority of professionals conducting bonding assessments base their conclusions on a fundamental error by equating affectionate or friendly interactions with evidence of attachment. Milchman correctly points out that this is wrong, because a positive interaction in a play situation is not evidence of psychological attachment. Children have many affectionate and friendly relationships; they may enjoy their association with daycare teachers, coaches or uncles, but this does not make these associations bonded relationships with psychological significance. As previously mentioned, attachment relationships are specifically defined as those which provide the child with a sense of security when the child is faced with insecurity and threat. Observations that a child plays well and enjoys contact with the caretaker in a mental-health professional’s office are not evidence of such attachment. Despite this, such observations are commonly presented to the court as evidence of psychological bonding. However this is not to suggest that such observations are unnecessary or cannot provide useful information. Dyer (1999) suggests that a number of procedures be used when collecting data about attachment. He recommends that a bonding assessments should include:

1. An interview with the parents and/or caretakers of the child to provide background information and to assess the adult’s attitude towards the child.
2. An observation of the child with the adult(s).
3. An individual interview with the child (in the case of children who are capable of meaningful verbal communication).
4. A thorough review of all available information concerning the child’s history.

Dr. Dyer suggests that evaluators attend to certain behaviors during bonding assessments of young children, including frequency and nature of touching between child and parent, comfort-seeking behavior by the child, and capacity of the parent to engage the child effectively and to respond to the child’s expressed needs in an appropriate manner. Other indicia of attachment include eye contact and mutual smiling, as well as the child’s reaction to
brief separations in the course of the joint interview. Dyer also indicates the importance of utilizing information to determine whether the child has any significant bonds at all, which unfortunately can be the case when the child has a history of multiple placements. He suggests that if the child is observed playing with a parent or foster parent, it is often useful for the mental-health professional to attempt to engage the child in the same manner. If the child responds in the nearly the same way, it is possible that their behavior with parents or foster parents is simply evidence of diffuse, nonspecific attachments and a lack of capacity for psychological closeness.

In addition to the components of bonding assessment suggested by Dyer, Milchman makes further recommendations designed to prevent confusion of affectionate relationships with bonds. She suggests records which document the initial behavior of a child on separation from a caretaker are especially important for a number of reasons. For example, while the child’s level of distress immediately upon removal from a parent may provide information, the distress may be related to situational factors (child’s reaction to domestic violence or parent’s screaming at a caseworker) as opposed to the removal itself. The child’s behavior subsequent to removal may often be more important; although bonded children will be extremely upset and demonstrate distress, the child who was easily soothed after removal by caseworker may lack close bonds to the biological parent.

In the same way, children who return to foster parents in an agitated state subsequent to brief visitation with a parent are often thought to be upset by the contact with someone with whom they lack close attachments and have negative associations. While it may seem counterintuitive, it is often the case that instead this is evidence of strong bonding to the biological parent. Well-bonded children do not handle visitation well, and anxiety engendered by reintroduction to and removal from the birth parent can be manifest itself in a variety of ways. Such children may express anger at the parents or they may ignore them. Observations that children are calm and happy and have an apparently positive experience during the visits may in fact be an example of a weak or tenuous psychological bond.

Review of records can also provide useful information regarding bonding and attachment. Records of child protection agencies may provide information regarding the child’s adjustment relative to benchmark events in the course of their case. Such documents can provide information about evidence of bonding or difficulty developing attachment to foster parents. Children’s reactions to separation from foster parents for overnight visitation to the biological parent should be noted. Reports that they are distressed or ask when they are returning to foster parents can be important, as well as expressions of relief at being “home”. In contrast the absence of distress upon both leaving and returning may be evidence of damaged capacity for psychological bonding. One critical point made by Milchman is that while behavioral observations from child protection workers can be quite important in assessments of attachment, the conclusions reached by such personnel about the nature and intensity of children’s psychological bonds should generally be given little weight, because such personnel are usually untrained in the assessment of attachment and bonding.

All of this being said, an important caveat must be raised about the limitations of data drawn from even the best and most thorough assessments of attachment and bonding in children. While a great deal of literature has been produced related to these issues, there is a serious disconnection between the voluminous empirical literature on the concept of attachment per se and the assessment of attachment in forensic contexts. There is a great deal of support for the proposition that children do form important psychological bonds with caretakers and that the disruption of these relationships can have a deleterious effect on development. The idea that there are different types of attachment also has empirical support. However, the reliability and validity of assessments of bonding and attachment by mental-health professionals is much more tenuous, due in part to the nature of the issue being assessed. After all, children cannot be systematically separated from their caretakers and allowed to develop psychopathology in order to test these hypotheses any more than children can be systematically abused to determine the psychological effects of maltreatment. As a consequence, theories about the effects of disrupted attachment on children must of necessity be observational and longitudinal. Therefore it is an open question as to whether these assessments of bonds and predictions about adjustment in the light of attachment would weather a Daubert test. The criteria for evaluating the scientific basis of expert testimony laid out in Daubert are: (1) whether the theory has been subjected to peer review; (2) whether there is a potential error rate for of procedures based on the theory (and what that error rate may be); (3) whether standards and procedures govern assessments based on a particular theory; and (4) whether the theory has been accepted and the acceptance of the theory in the relevant field. The practical assessment of attachment is reviewed in the light of Daubert criteria as follows:

1. Has the mental-health professional’s ability to make accurate determinations about the nature and quality of children’s attachment and bonds to caretakers in forensic contexts been tested and subjected to peer review? The reliability and validity of the judgments of mental-health professionals about attachment in forensic contexts has not been rigorously tested. There are no large-scale studies of agreement between qualified professionals making such determinations based on the same data in such cases. From
a scientific standpoint, it is a fact that the validity of a construct or procedure cannot be greater than its reliability; because there is no established reliability in these mental-health professionals assessments of attachment and bonding, the ability of mental health professionals to make valid and accurate assessments in this area has not been established.

2. Has the known or potential error rate been established for mental health professionals in the assessment of attachment and bonding? Because of the paucity of empirical data, no reliable estimates have been established concerning the potential error rate of these judgments regarding children's attachments.

3. Do standards and controls govern the methodology of such assessments? Psychologists performing any activities which could be reasonably considered to be forensic in nature perform such evaluations under standards outlined in the Ethical Principles of Psychologists and Code of Conduct (1992). The standards are enforceable and contain requirements for impartiality, thoroughness and an awareness of the special requirements imposed on experts performing evaluations for the court. In addition, the American Psychological Association provides aspirational standards in its Guidelines for Psychological Evaluations in Child Protection Matters (1998). The standards make clear that psychologists performing custody-related assessments, including assessments of bonding and attachment, must be familiar with the local statutes governing court's decisions in these matters. However, all of the standards are general and make no specific recommendations for the assessment of attachment.

4. Is the ability of mental health professionals to make accurate assessments of bonding and attachment accepted by mental health professionals? As previously stated, there is a voluminous literature on attachment theory as well as a number of influential treatises which discuss the assessment of attachment and bonding [Dyer (1999); Goldstein et al (1979); Milchman (2000); James (1994)]. A review of the literature on custody assessment generally reveals that some methodologies address the assessment of attachment in psychodynamic terms while others appear to view attachment more in terms of parenting behaviors and the nature of the parent-child relationship generally, without recourse to psychodynamically oriented theory. Additionally, there is an influential methodology which conceptualizes parenting assessments more in terms of evaluating parenting skill competencies and parent/child fit without utilizing the more dynamic concepts of attachment and bonding as such (Grisso, 2003). Consequently, there is some disagreement in the mental-health community regarding the ability of professionals to make accurate assessments of bonding and attachment in child custody and dependency cases.

As can be seen by the above review, it is questionable whether the assessment of attachment and bonding of children and parents as performed by mental-health professionals would satisfy the requirements laid out by Daubert. However, it is also the case that the rules of evidence are not strictly applied in child custody and dependency matters, and presiding justices generally take a liberal view of the admissibility of expert testimony in these venues. Justices and marital masters utilize information elicited through cross-examination and their own judgments about what weight to give such testimony, rather than relying on strict adherence to Daubert and Frye criteria. This leaves courts with the unenviable task of making sense of testimony regarding attachment and bonding when there is substantial disagreement among mental-health professionals about the nature of attachment and the absence of a standard assessment protocol. Making matters even more difficult is the lack of “hard” research in this area and difficulty of applying what data exists about children in general to the specifics of the instant case. This being the case, the following recommendations which may prove helpful to courts dealing with these matters:

1. The court should require experts performing assessments of bonding and attachment to clearly explicate their conceptualization of these terms. It is important to know whether the expert is utilizing terms such as “attachment,” “bond” and “psychological parent” in a manner consistent with the meaning suggested by the classic attachment literature, or whether they are utilizing the terms in more general, nonspecific ways.

2. It should be remembered that mental-health experts have an affirmative ethical obligation to inform the court of limitations in their data and methodology. In terms of attachment and bonding assessments, this requires the experts to clearly inform the court of the theoretical underpinnings of their conclusions. In addition, they should clearly state the relationship between the conclusions they reach about bonding and assessment in a particular case and the data they relied on in
reaching these conclusions. The New Hampshire Supreme Court has made it clear that experts cannot merely rely on the totality of their data or present their findings in a manner which cannot be followed by the court [State v. Cressy, 628 A. 2d 696, (N.H. 1993)]. From a practical standpoint, the court should expect experts to provide information to back up their conclusions and demonstrate a logical nexus between the data and recommendations.

3. While experts may have their own formulations of the best interests of children generally as well as the specific child before the court, it is the province of the court to weigh all of the information presented and determine the child's best interests. Courts sometimes place too much weight on the ultimate issue testimony of mental-health professionals, whose global assessment of best interests is no better (and often worse) than that of the fact-finder. Attachment is only one factor in child dependency matters; therefore it is both the prerogative and responsibility of the court to decide which factors in a particular case take precedence in the decision-making process. As a consequence, it is recommended that courts pay careful attention to the data collected by those performing bonding and attachment assessments, but give considerably less weight to expert's ultimate issue testimony.

In summary, the assessment of attachment and bonding in child dependency matters is a complex and often misunderstood process. Experts performing such assessments should be clear about their definitions of these terms and avoid making the common error of equating friendly or affectionate relationships with the presence of a psychological bond. Courts should note the presence of these common errors and require that mental-health professionals' conclusions about these issues be rigorous, fully explicated and supported by good data.

REFERENCES:


Frye v. United States, 293 F.1013 (D.C. Cir. 1923)


