The Concise Child Custody Evaluation: An Alternative Methodology

by Eric G. Mart, Ph.D.

One of the most common functions in which mental health practitioners interact with the courts, the child custody evaluation, is also arguably one of the most poorly researched and developed specialties of forensic psychology. To quote Melton et al.,1 “Indeed, there is probably no forensic question on which over-reaching by mental health experts has been so common and so egregious. Besides lacking scientific validity, such opinions have often been based on clinical data which are, on their face, irrelevant to the legal question in dispute.”

In comparison, other forensic psychology specialties, such as the evaluation of criminal competency, are better developed and more rigorous. This discrepancy can be explained, in part, by the fact that criminal competency evaluations are undertaken in courts where higher standards of evidence are required. This places a higher demand for precision on the clinician and also limits the extent to which the clinician can rely on inferences and conjectures that are not based on reasonably reliable and valid data. In contrast, the laxer rules of evidence in divorce courts allow the clinician much more leeway in introducing information of limited or unknown reliability and validity, based on experience and conjecture. In such cases, objections about the scientific nature of the evaluator’s conclusions go to the weight of the material rather than the admissibility.

A related contributing factor to the lack of rigor in custody evaluations is the vagueness in most states of the statutes governing child custody cases. The “child’s best interest doctrine,” which began in the 1920’s to supplant the “tender years doctrine” which preceded it, was well intentioned but vague. Past attempts to clarify the meaning of “best interest” have included the Uniform Marriage and Divorce Act of 1979. However, while this standard clarified some elements of the term, it was also vague and was not based on empirical research about the relationship between the factors delineated and the outcomes for children.

PREVAILING METHODOLOGIES, INSTRUMENTS AND TECHNIQUES

Perhaps in part because of the unusual discretion and power which has been accorded to custody evaluators, many mental health professionals use no explicit methodology for custody evaluations, instead relying heavily on experience and clinical judgment. This approach runs counter to a formidable body of scientific literature which indicates that clinical judgement is unreliable and that experience does not necessarily add validity to a clinician’s conclusions.2

Nevertheless, those evaluators who rely on clinical judgement are not necessarily less accurate in their conclusions than those who use the various methodological approaches that have been developed for conducting custody evaluations. This is because most of the methodologies which are used most frequently either lack empirical support or are predicated on explicit theories which have not been empirically tested, such as family systems or psychodynamic personality theory. Many of these theories, although they may have utility in a clinical setting, cannot be falsified or empirically tested. This fact was noted by the U.S. Supreme Court in Daubert v. Merrill Dow,3 which specifically referenced Karl Popper’s4 description of psychoanalytic theory as unscientific because its assumptions could not be empirically tested.

Further, not only are many child custody evaluation methodologies based on shaky or nonexistent theoretical foundations, but many of the evaluation techniques which they employ are seriously flawed. In a recent article, Thomas Grisso5 reviewed a number of the commonly used custody assessment instruments in terms of their psychometric properties. According to his analysis, many of the instruments which are used frequently by mental health professionals have serious psychometric flaws, including low reliability and very questionable validity.

The practice of observing parent and child interactions either in the home or office, for example, is recommended by

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many psychology texts and articles. Further, some authorities suggest a need for the organization of data, such as the Uniform Child Custody Evaluation System developed by Munsinger and Karlson. This system is fairly typical in suggesting that the evaluator observe parent and child in a free play situation and then have the parent and child engage in a structured problem-solving situation such as assembling a puzzle or playing checkers. While this technique has a certain amount of face validity, no research exists regarding its reliability or validity in elucidating anything about the parent-child relationship.

**THE ISSUE OF COMPREHENSIVENESS**

Many professional writers on the subject of custody evaluations call for far-reaching data collection, including observations, home visits, multiple interviews with family members, interviews of relatives, neighbors and teachers, and record review. As a result, the expense of custody evaluations, always high, has increased in recent years. A study by Ackerman surveying the custody evaluation practices of 201 experienced mental health professionals across the country found that the average price of a custody evaluation was $2,645.96, and prices ranged as high as $15,000.00. This expense creates a situation in which custody evaluations are often out of the reach of divorcing parties, and information which would assist the fact finder is not elicited due to the expense.

Furthermore, more information is not necessarily better. While many evaluators claim to rely on the totality of the data, a substantial body of research indicates that most, if not all, practitioners rely and base their conclusions on a few salient pieces of data. While it is certainly important to gather and confirm relevant information when performing child custody evaluations, there should be a rationale for data collection and a prioritization of issues to be explored. This approach helps to spare the family unnecessary expense and intrusions into their private lives.

Excess information may also make the evaluator's report more difficult for the court to decipher. Clinician's evaluations and testimony in custody cases are often a melange of data derived from tests, observations of parents and children, interview data, and conclusions drawn from clinical judgement. Consequently, it is frequently difficult for the fact finder to discern a connection between the mental health professional's opinion and the basis for that opinion.

It is not clear whether the conclusions of expert witnesses in child custody cases are required to have an explicit logical connection to the data upon which they are based. However, in State of New Hampshire v. Cressey* and State of New Hampshire in re Gina D., the New Hampshire Supreme Court ruled that this logical nexus was required. Specifically, in Gina D., the Court stated:

An opinion that is impenetrable on cross-examination due to the unverifiable methodology of the expert witness in arriving at the conclusion is not helpful to the court in its search for the truth. If the court, as the trier of fact, cannot determine and assess the bases for the expert's opinion, it also cannot accord the proper weight, if any, to the testimony.

While the strict rules of evidence do not apply in divorce cases, the New Hampshire Supreme Court makes it clear that the formal rules of evidence should be used to direct and inform marital courts in regard to the admissibility of different forms of testimony, including testimony from psychological experts. It is reasonable to suggest that the same requirement for a logical connection between conclusions reached and data relied upon be applied to custody evaluations.

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ETHICAL AND LEGAL BASES FOR A CONCISE APPROACH

These ethical standards and guidelines strongly suggest that psychologists and other mental health professionals performing custody evaluations have an obligation to use assessment techniques with the best reliability and validity available.

In addition, the evaluator must be able to inform the court regarding the reliability and validity of the techniques utilized in the evaluation, and to explain the relationship between the data elicited and the conclusions proffered. Ethics for Psychologists: A Commentary on the APA Ethics Code makes it clear that this duty to inform the court is an affirmative obligation. This means that the ethical custody evaluator does not have to wait for limitations in the data brought out through clever cross-examination, but rather is obligated to present these limitations as part of the report or testimony.

OVERVIEW OF THE CONCISE MODEL

A number of changes in focus and emphasis would characterize this alternative custody evaluation methodology.

1. It is an axiom of this custody methodology that the child custody evaluation should closely follow the applicable state statute or standard.

Section 7.02 (Forensic Activities) of the APA Ethical Principles states:

(a) Psychologist’s forensic assessments, recommendations and reports are based on information and techniques (including personal interviews of the individual, when appropriate) sufficient to provide substantiation for their findings.
(b) Except as noted, psychologists provide written or oral forensic reports or testimony about the characteristics of an individual only after they have conducted an examination of the individual adequate to support their conclusions.

Finally, the Specialty Guidelines for Forensic Psychologists, Section VII (F), states:

Forensic psychologists are aware that their essential role as expert in the court is to assist the trier of fact to understand the evidence or to determine a fact in issue. In offering expert evidence, they are aware that their own professional observations, inferences, and conclusions must be distinguished from legal facts, opinions, and conclusions. Forensic psychologists are prepared to explain the relationship between their expert testimony and the legal issues and facts of an instant case.

Table 1

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<tr>
<th>LEGAL ISSUE</th>
<th>RECOMMENDED METHOD OF PSYCHOLOGICAL ASSESSMENT</th>
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<tbody>
<tr>
<td>Legal Custody</td>
<td>Best evaluated by the GAL or fact finder</td>
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<tr>
<td>Primary psychiatric examination</td>
<td>Assess family for characteristics associated with various adjustments to primary custody versus joint custody arrangements.</td>
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<tr>
<td>Visit or interview time</td>
<td>Assess family for characteristics associated with various adjustments to visitation and custodial time arrangements.</td>
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<tr>
<td>Special needs of the children</td>
<td>Assess children for psychological disorders or cognitive limitations requiring special attention.</td>
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<tr>
<td>Counseling for family members</td>
<td>If family assessment reveals clinical level symptomology, recommend therapeutic method with demonstrated efficacy.</td>
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<tr>
<td>Psychological evaluations of plaintiff/respondent</td>
<td>Evaluate individuals for general psychological profile using interviews, objective testing and collateral data.</td>
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<tr>
<td>Parenting skills of plaintiff/respondent</td>
<td>Evaluate parents for skills competency or gross incapacity, assess ability to articulate appropriate parenting knowledge and attitudes.</td>
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<tr>
<td>Appropriateness of the home environment</td>
<td>This is usually assessed by the GAL. However, if so directed the evaluator may assess, through home visits and collateral data, whether the home environment is safe and supports normal child development.</td>
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<tr>
<td>Substance abuse</td>
<td>Assess co-occurring use of alcohol or drugs at levels consistent with DSM-IV diagnosis of substance abuse or dependence.</td>
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<td>Violence, physical abuse, emotional abuse</td>
<td>Assess documented or suspected parental violence or abuse through review of collateral information. Psychological tests should not be used to determine whether a parent has the psychological characteristics of a harasser or abuser; use of testing is inappropriate and unethical. Evaluate children for trauma related symptoms.</td>
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<tr>
<td>Sexual abuse</td>
<td>Usually investigated separately by law enforcement or child protective personnel, but if so directed the evaluator may conduct a comprehensive child sexual abuse evaluation. Video or audio taping is essential. An affirmative report should not be evaluated for rule out of findings, if a diagnosis is not appropriate and unethical.</td>
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<tr>
<td>Supervision of visitation</td>
<td>Best evaluated by the GAL or fact finder given evidence of danger, incapacity or harmful behavior.</td>
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<tr>
<td>Rights of grandparents to visit</td>
<td>The issue of rights is best evaluated by the GAL or fact finder. However, the evaluator may assess the psychological stability and appropriateness of the grandparents or behavior with the child.</td>
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<tr>
<td>Influence of companions of either party on the children</td>
<td>Assess psychological status, skill development or dependency, ability to articulate appropriate parenting knowledge and attitudes, and substance abuse. Behavior is determined by course of events to the court.</td>
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<tr>
<td>Maturity of child(ren) entering into preference</td>
<td>Evaluate intelligence and other cognitive or emotional characteristics which might affect child related to custody arrangements.</td>
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<tr>
<td>Child arrangements</td>
<td>Best evaluated by the GAL or fact finder.</td>
</tr>
<tr>
<td>Time, place and manner of exchanges for visit</td>
<td>Evaluated by the GAL or fact finder.</td>
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Assessment of bond between child and each parent or between siblings. While 'bond' is an empirically derived or scientific concept, attitudes and feelings can be assessed through child and parent interviews and through psychological testing of both. There are few well designed tests for children's attitudes toward parents or siblings.

* Psychological assessment techniques should conform to recognized methodology and to APA's or AACP guidelines, and should employ standardized psychological instruments with known reliability and validity.

In cases where the issue is a legal or factual rather than a psychological concept, the evaluator should either refrain from giving an opinion about the issue, or should set measurable criteria by which to evaluate the issue and explicitly state the rationale behind the choice of criteria.

2. Evaluations should be concise and circumscribed rather than comprehensive. Evaluators should not volunteer opinions that are not specifically related to the questions being asked by the court, but should focus on issues and questions which are relevant to the purpose of the evaluation. To do so constitutes overreaching and runs the risk of usurping the role of the fact finder. Evaluation techniques and conclusions should, to the extent possible, correspond to the questions posed by the court. While important data needs to be confirmed from another source where possible, there should be an explicit rationale for the collection of data.

3. The evaluator’s conclusions, stated in reports and testimony, should be based on objective data gathered in the evaluation, and should have an explicit logical connection to this data. While clinical impressions and other data drawn from non-objective methods have a role in child custody evaluations, such data should generally be used only to generate hypotheses that can be scientifically tested.

4. Issues in child custody that do not lend themselves to assessment with known reliability and validity should generally not be part of a child custody evaluation. If the guardian ad litem or fact finder can assess a particular issue as well as the evaluator (i.e., cleanliness of the family home), then the assessment of that issue should be left to those parties. To do otherwise can be misleading to the court, since it gives the illusion that the conclusion being rendered is an expert opinion.

5. Conclusions in child custody evaluations should be made at the lowest inferential level possible.

**THE CONCISE MODEL AS APPLIED TO THE N.H. ORDER ON APPOINTMENT OF THE GUARDIAN AD LITEM**

In New Hampshire custody cases, the prevailing justice issues a document called the “Order on Appointment of the Guardian Ad Litem,” which includes a list of custody-related issues. The justice indicates which of these issues the GAL is to investigate in order to make recommendations to the court. Mental health professionals frequently assist the GAL by assessing those areas which lend themselves to psychological testing and evaluation.

Table 1 lists each of the potential evaluation issues listed on this document, along with a suggested method of evaluating each issue if it falls within the evaluator’s sphere. As indicated in Table 1, mental health professionals using the concise model of child custody evaluation would evaluate only those issues ordered by the court, and would make maximal use of those instruments with the highest reliability and validity for assessing each issue. In states other than New Hampshire, evaluators would refer to their state’s controlling statute.

**BENEFITS OF THE CONCISE MODEL**

The concise model has several advantages over what might be called comprehensive methodologies.