

**COMMENTARY ON TIPPINS AND WITTMANN’S “EMPIRICAL
AND ETHICAL PROBLEMS WITH CUSTODY
RECOMMENDATIONS:
A Call for Clinical Humility and Judicial Vigilance”**

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Although in substantial agreement with Tippins and Wittmann’s analysis, their call for a moratorium on the practice of custody evaluators making recommendations to the court does not solve the many problems that they have raised, and may have unintended consequences which place families at even greater risk. This commentary reflects our agreement with some of the authors’ major points of contention, focuses on several points of disagreement, and suggests alternative remedies for the shortcomings and ethical problems described in child custody evaluations.

Keywords: *child custody evaluation; custody recommendations; child adjustment and divorce research*

Tippins and Wittmann (this issue) have written a thoughtful, well-researched, and provocative article that merits response. We fully agree with them that the custody evaluation and related judicial decision has the potential to change the entire course of children’s lives, including the extent and meaningfulness of their parent–child relationships, emotional and social adjustment, school functioning, and economic well-being. While their article focuses on psychologists as custody evaluators, in many family courts mediators, counselors, and guardians ad litem provide judges with opinions and recommendations as to custody and access, sometimes after spending only one to two hours with the parents. Tippins and Wittmann’s concern and caution are warranted, and should serve as a clarion call to the entire family law field involved in custody and access determinations.

The authors’ four-level conceptual model for stratifying data and clinical inferences provides a helpful framework for mental health and legal professionals to examine the evaluation process, whether or not one agrees with their conclusions. Custody evaluators without sufficient scientific training are unaware of the serious limitations of the data they collect, the validity of the testing instruments they use, or the rigor needed to make inferences and draw conclusions from this information. Instead, the authors contend, such custody evaluators are more likely to make inferences and recommendations from unsubstantiated theory, personal values and experiences, and cultural and personal biases. Our own observations and reviews of evaluations over several decades lead us to the same conclusion. Common examples include unexamined strong beliefs in the primacy of mothers (or essentiality of fathers) regardless of the circumstances, biased perception of their clients derived from their own negative marital and divorce experiences, or a conviction that joint physical custody benefits (or harms) all children.

Too few custody evaluators are well acquainted with, and make use of, the existing body of empirical literature on divorce, parenting, child development, and children’s emotional

and social adjustment for purposes of formulating questions to guide the collection of data, and for making inferences and recommendations. Too often simplistic research, replete with outdated findings and formulations is used in the area of divorce and attachment theory and its effects on children's adjustment; overgeneralizations from empirical data are also especially common. Parental conflict, for example, is often treated as an undifferentiated variable without awareness of the different effects on children; the intensity and content of conflict; whether conflict is expressed in avoidance, angry words, hostility, or physical violence; whether parents protect or expose their children to their differences and unresolved disputes, and whether buffers exist that ameliorate the potentially negative effects of high conflict.

In their discussion of Level III inferences arising from Level I and II observations, Tippins and Wittmann are correct to infer that too many evaluators state as "facts" certain conclusions without disclosing that some of these issues or conclusions are the focus of considerable disagreement if not raging controversy in the field, or that these "facts" are not supported by well-designed, replicated, empirical research. A common example is the position that if overt alienating behaviors are identified in one parent when a child resists visitation, custody should be shifted to the other parent. The controversy in the field regarding overnight visits for very young children is another example. Without reference to any empirical data that supported his or any other viewpoint, one evaluator stated, "This five-year-old child will be irreparably damaged were she to spend even one overnight away from her mother."

The immediate and obvious implication of Tippins and Wittmann's valid concerns is that more stringent ethical, professional, and scientific standards of practice should be required of custody evaluators with respect to drawing clinical inferences. This surely requires higher standards for initial training and certification to perform custody evaluations, as well as ongoing professional development to update the evaluators' knowledge base in social science and law at regular intervals. It is striking that the AFCC Standards of Practice for Child Custody Evaluations (1994) do not mention knowledge of relevant research as an important aspect of the process, nor does it raise issues of reliability or validity. Hopefully, this will be remedied in a revision of the standards currently being prepared by the AFCC Task Force.

The contribution of evaluators involves collecting Level I data and these behavioral observations are especially valuable when guided by key concepts and variables abstracted from relevant research. For example: "With respect to this child's ability to separate from one parent and transition to the other, it was noted that at each of the four interviews the child clung to her mother and resisted entering the room where her father was waiting." Level II data—conclusions about the psychology of the parent, child, and family—can be made, provided that the custody evaluator can support these clinical inferences by citing relevant research studies from the literature within the custody report. For example "According to criteria developed by Main, Kaplan, and Cassidy (1985), this six-year-old child has an ambivalent attachment to her mother (marked by clinging dependency and intermittent hostility) and a disorganized attachment to her father (marked by a mix of fear, avoidance and passive compliance)."

POINTS OF DISAGREEMENT

Tippins and Wittmann take the position that few statements can be made at Level III that are within the requisite ethical and scientific parameters. By this they mean, conclusions based on Level I and II data relevant to custody and access questions, such as a particular

child's functioning and needs, or the fit between a child's needs and parental abilities. They concede that clinicians can be useful to the court at Level III when they summarize important psychological risks or advantages regarding certain parenting plans, but only if they provide "clearly articulated qualifications, cautionary statements to the court, and references to the limitations of the evaluation methods used" (Tippins & Wittmann, this volume).

In support of their argument, the authors cite the absence of predictive validity for such constructs as parent-child fit, different parenting plans, and future child outcomes. They also cite the fact that empirical research related to Level III conclusions is quite limited. We take issue with this latter point, and suggest that, provided the appropriate precautions are taken with respect to Level III summaries and conclusions, the authors are more conservative than they need to be. There is far more empirical research describing specific factors associated with risk and resiliency in children following divorce than the authors appear to indicate. While it is true that most empirical research was designed to assess the various impacts of separation and divorce on children's adjustment, rather than test predictive statements about custody or access plans, the results of three decades of increasingly sophisticated research has provided a more complex understanding of variables associated with risk and resilience following divorce to guide the well-informed evaluator.

Well-designed empirical studies point to the negative impact of parental depression, anxiety, mental illness, and personality disorders on child adjustment during marriage and after divorce. Diminished parenting following separation and the importance of postdivorce parenting characterized by warmth, emotional support, adequate monitoring, authoritative discipline, and age-appropriate expectations have been widely reported. Risk and protective factors associated with attachment processes, loss of relationships, long-term parent-child relationships, academic functioning, school drop-out, and higher education have been described. Access frequency, shared physical custody, quality of father-child relationships, father-child closeness in relation to different access patterns, children's resistance to visitation, children's views of their access patterns concurrently and retrospectively, and more recently, overnight visits for young children, all in relation to children's adjustment, have received substantial research attention. Multiple dimensions of the effects of high conflict and parent violence on child adjustment, and protective buffers against conflict have been reported, as have the various impacts of remarriage and re-partnering. Articles and books reviewing the empirical literature on children and divorce contain descriptions of and citations to such relevant variables and studies (Amato, 2000; Barber, 2002; Emery, 1999; Hetherington, 1999; Hetherington & Kelly, 2002; Kelly, 2000; Kelly & Emery, 2003; Maccoby & Mnookin, 1992; Pruett, Williams, Insabella, & Little, 2003; Waxler, Duggal, & Gruber, 2002), and evaluators should search out updates regarding newer empirical research on such controversial variables as overnight visits for young children (Pruett, Ebling, & Insabella, 2004), child alienation (Johnston, 2003; Johnston & Kelly, 2004), and shared physical custody and conflict (Bausermann, 2002; Lee, 2002). Research reviews of various clinical, mediation, and arbitration interventions can inform the evaluator as to the effectiveness of the services they suggest (Johnston, 2000; Kelly, 2002, 2004; Pruett & Johnston, 2004).

Hence, we suggest that to the extent that available research can be cited that includes studies of variables pertaining to child custody and access, circumscribed inferences at Level III might be drawn. Following our example of the six-year-old child who had difficulty transitioning between parents, the evaluator could state:

Research studies show that hostility and unresolved parental conflict undermines parenting capacities and negatively impacts the child (Cummings & Davies, 1994; Krishnakumar &

Beuhler, 2000; Tschann, Johnston, Kline, & Wallerstein, 1989), and that following divorce, expressing anger in the presence of or through the child is associated with children's depression and anxiety (Buchanan, Maccoby, & Dornbusch, 1991; Hetherington, 1999). In this family, the father's expressed anger toward the mother, in the presence of the child appears to contribute to the mother's distress and emotional unavailability to the child as well as the child's fear of him. Without remedying this family dynamic, shared physical custody arrangements that require parents to communicate will probably be detrimental to this child.

In more complex cases, the custody evaluator must draw upon a number of different studies and weigh the beneficial buffers that are present (like a good parent-child relationship) with the risks that are posed (like ongoing parental conflict and parental psychopathology) together with the resiliency of the child (age, temperament, etc.) in order to support Level III conclusions regarding beneficial access patterns. Thus, for example, if the evaluator observes a close, supportive relationship between a father and his nine-year-old son, but also notes a high level of interparental conflict, the following could be stated:

Traditional access of every other weekend is experienced as insufficient time and distressful for most children and is likely to erode the child's relationship with the nonresidential parent over the long term (Kelly & Emery, 2003). In contrast, more frequent access between children and fathers when the relationship is positive is associated with better behavioral adjustment and academic performance in children (Amato & Gilbreth, 1999), especially when fathers are more involved in children's school activities and projects and provide authoritative discipline and emotional support (Amato, 2000; Menning, 2002; Nord, Brimhall, & West, 1997; Simons, 1996). Studies point to the benefits of substantial time with both parents even in the presence of parental conflict provided that parent-child relationships are positive, with diminishing benefits of shared residential arrangements in the presence of very high and sustained conflict (Bausermann, 2002; Lee, 2002). In this family, the warmth and support in both parent-child relationships appears to buffer this bright and adaptive boy against the potential negative effects of his parents' conflict (Emery, 1999; Kelly, 2000). This is a fairly recent separation and the parents have no significant psychopathology. It is therefore unlikely that these parents will be among the 8-15% of parents who continue in high conflict several years after divorce (King & Heard, 1999).

Such references to the research can form the basis for the evaluator's comments at Level III that "the customary jurisdictional guideline of four days per month would be depriving and unsatisfactory for this particular child, and has the potential to cause more negative adjustment problems."

Tippins and Wittmann have taken a strong position—based on the American Psychological Association Ethical Principles of Psychologists and Code of Conduct (2003)—that it is unethical for evaluators to make recommendations to the court (Level IV inferences) because of the limitations of the data collected, and the lack of empirical knowledge that links data to specific parenting plans and outcomes for children. Moreover, they back up this position by a legal objection, arguing that recommendations to court amount to the custody evaluator usurping the role of the judge as trier of fact.

In cases where trained and experienced evaluators have collected data systematically, used valid and reliable testing instruments, and linked their Level I and II observations and data to Level III conclusions, citing empirical research to support these conclusions, then we believe it is ethical to make recommendations as to custody and access that provide the trier of fact with some options for parenting plans that might benefit this particular child. The contribution at Level IV could involve the custody evaluator offering a series of

alternative hypotheses, predictions about the future functioning of the child under different custody and access scenarios, also backed by research findings. To return to our example of the six-year-old girl, the evaluator could state:

According to Maccoby and Mnookin (1992) and Hetherington (1999), it is rather unlikely that highly conflicted parents will develop a cooperative co-parenting relationship within the next few years. Hence, primary residence with one parent and a specific, clearly structured access plan with a neutral place of exchange is likely to be more supportive of this child's security. Alternatively, if parents, especially the father, successfully complete psycho-educational parenting counseling, then a more shared parenting arrangement might be warranted (Arbuthnot, Kramer, & Gordon, 1997).

More definitive recommendations at Level IV might be made in the case of the nine-year-old boy described above: "While no research exists to support one specific parenting plan, the research cited suggests this child would most likely benefit from liberal access to the father during some part of each week, including a stable pattern of school days and weekend time." Requiring the custody evaluator to document knowledge claims and to present clinical inferences and hypotheses that are conditional would ensure more accountability. It would also allow appropriate challenge from competing facts, theories, and research findings.

While we have indicated our agreement with many of the arguments made by Tippins and Wittmann, we disagree with the authors' call to place a moratorium on making recommendations because the alternatives are dismal, even destructive, and may cause even more harm to families and parent-child relationships. We do not agree that judges should be left to make the final decision without any input from custody evaluators or others about what is considered to be "in the best interests of the child." In the face of this vague legal mandate, judges are even less qualified in training and experience than are mental health professionals to address this question without undue influence of their personal biases.

In the absence of recommendations by custody evaluators who have considered each child and family situation in great depth, judges and legal advocates will probably rely more and more on prescriptive guidelines (like primary residence with one parent and every-other-weekend with the other). It is even more likely that judges' decisions will be governed by presumptions that will increasingly be cast into statutes by political and professional interest groups with access to the state legislatures (like the American Law Institute's approximation rule, or a primary parenting presumption advocated by women's lobbyists, or joint parenting presumptions touted by fathers' rights groups). These prescriptive rules and presumptions are not research based and they do not consider the individual needs of children and variations in parent-child relationships. Rather, they are simplistic answers, a one-size-fits-all substitute for the vexing question of what is in the best interests of each child.

A promising alternative is the development of parenting plans that could provide judges (and parents) with a range of possible alternative dispositions on custody and access. Such model parenting plans would be based on the empirical literature to date, and offer choices for the court that address the needs of different kinds of family situations and developmentally appropriate options for different age groups. Some states (like Arizona) have piloted this approach, using an interdisciplinary task force, with promising results (Arizona Supreme Court, 2001). It is indeed true that custody arrangements are based on a mix of tradition, law, science, untested theory, and prevailing cultural values about child rearing. For this reason, local task forces of community members made up of

interested citizens, and mental health and legal professionals, could participate in the development and updating of these parenting plan models for the use of judicial and parental decision making.

THE OVERUSE OF CUSTODY EVALUATIONS

Acknowledging the serious deficits in custody evaluations, particularly the flimsy grounds (ethically, empirically, and legally) for making recommendations on the ultimate issue, leads one to question the appropriateness of this tool for developing clarity and dispute resolution for many cases in family court. Clearly, evaluations can be more solidly grounded when they are investigating serious allegations of physical abuse, sexual abuse, and neglect of the child as well as mental illness, substance abuse, and domestic violence on the part of parents. In these domains, community standards and values are more clearly defined and the empirical research literature is more extensive and robust in its findings of what is *not* in children's best interests.

In the absence of such serious concerns about family abuse and neglect, mental illness, or substance abuse, too often custody evaluations must focus on who is and who is not more emotionally healthy and "the better parent." Personality testing is undertaken with no solid basis for concluding how the findings might impact parenting (Brodzinsky, 1993; Roseby, 1995; Tippins & Wittmann, this volume). Particularly in those cases where angry, hurt, but "good enough" parents are contesting custody or the allocation of time sharing, there is generally no basis in psychology or law for choosing between parents. Evaluators split hairs to make a case for one parent or the other, and the evaluator's personal values and cultural biases are likely to be more prominent in this decision making. This may also be the case when both parents have demonstrated significant character or psychological problems and parenting deficits, and it is impossible to argue for a preference between parents without relying on subjective reactions and biases.

In this quest, custody evaluations may have inadvertently produced de facto double standards, where those held up for parents in family courts are far more stringent than those faced by parents in dependency courts. The result is that custody evaluators are now producing exhaustive, intrusive, negatively biased assessments, psychological testing, and written reports in which separating parents are scrutinized and held to a higher standard of accountability than those in nondisputing divorces and intact families. This seems unfair, unnecessarily stressful for already vulnerable families, and may even constitute grounds for claiming violation of parents' civil rights. It is in the search for the elusive "better or best parent" that personal values and cultural beliefs are likely to infiltrate and contaminate what is supposed to be a scientifically defensible investigative process and report.

ALTERNATIVE REMEDIES

A better policy would be for forensic custody evaluations to be reserved for serious allegations of child abuse, neglect, and molestation, as well as contested claims of parental psychopathology, substance abuse, or domestic violence, where standards for parental behavior in family court would be more on a par with those in dependency court. Where parents have extremely discrepant views of their child's needs, difficulty making decisions together in a timely manner, and co-parenting disagreements that do not rise to the level of abuse allegations, the use of extended interventions such as confidential child-inclusive mediation and therapeutic mediation (Kelly, 2002; Pruett & Johnston, 2004; Sanchez &

Kibler-Sanchez, 2004) and child-focused psychological and family assessment might suffice (Johnston, 2000; Roseby, 1995). In these confidential assessments of the child's needs, and the parents relative capacities to meet those needs, more attention could be paid to prescribing how the family can resolve its impasse, the ways in which children can have access to the positive contributions of each parent, and how the children's development can be protected, which can be the basis for further mediation, counseling, or a recommended settlement. It is important to note, however, that this information from a mental health professional could not be admitted as evidence in litigation because it would not meet the higher standards of expert testimony required in court. Instead, these kinds of assessments are educational and advisory tools to be used in alternative conflict resolution forums and to promote change in parents.

It is important to note that it is quite feasible to undertake the kind of research that would address many of the predictive dilemmas in custody recommendations, including those relevant to Level IV clinical inferences. However this will involve commitment to longitudinal studies. The virtual absence of long-term outcomes of custody decisions made by family courts is indeed an embarrassment, if not a scandal, in the field. Recent surveys of psychologists who undertake custody evaluations show that data are being collected in a fairly standardized manner, a trend that will increase if standards of practice are mandated (Bow & Quinnell, 2002). It would be relatively straightforward to create central databanks to store coded data, ensuring confidentiality and appropriate protections for human subjects, thereby creating a database for follow-up studies that could eventually make predictions based on actuarial data. In jurisdictions where judges choose among a range of parenting plans for families, long-term research on the various outcomes for children of different plans could be initiated, providing data for the next generation of better trained evaluators.

In summary, our proposals for dealing with the serious problems described by Tippins and Wittmann are: first, for better training of forensic custody evaluators and adoption of more specific guidelines for practice from professional organizations like APA and AFCC, ensuring more stringent standards with respect to making clinical inferences. This includes evaluators delineating the limitations of their data and conclusions, documenting their knowledge claims by citing relevant research, and critiquing the pros and cons of different custody and access options, rather than recommending specific arrangements. Second, the greater use of parenting plan options would serve to guide judges in making custody decisions and obviate the need for them to rely upon simple presumptive rules that do not consider the developmental needs of children and specific family situations. Third, forensic custody evaluations should be reserved for serious allegations of family abuse, domestic violence, substance abuse, mental illness, and severe character pathology. When parental disputes do not rise to this level, the use of advisory confidential assessments and feedback to parents would aid in settlement through alternative dispute resolution forums of mediation and negotiation. Finally, we advocate for research on long-term outcomes of child custody decisions, building databases in order to make predictions on what is in the best interests of the child that are based on actuarial data.

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