

Family Law Education Reform Project

Child Custody Evaluations

ABSTRACT

This guide discusses the current issues in child custody evaluation as they pertain to family lawyers. It explains when an evaluation is ordered and by whom it is ordered; the qualifications, and the limitations, of a child custody evaluator; what an evaluation is and is not; and what information is typically included in an evaluation.

ABOUT THE AUTHOR

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Leslye Hunter is a Licensed Professional Clinical Counselor, a Licensed Marriage and Family Therapist, a National Certified Counselor, a certified Stepfamily Counselor, a trained Collaborative Divorce coach and a Family Mediator.

She has been a therapist, Custody Evaluator, Parent Educator and Parenting Coordinator and was in private practice for almost 20 years. She has served as an expert witness in child custody, child development, divorce and separation, and family relations; was on the training faculty of the Family Mediation Council of Louisiana and Voices for Children; served as Vice-President of the Family Mediation Council of Louisiana, New Orleans chapter; chaired a subcommittee on Evaluator Standards and Guidelines for the Louisiana State Bar Association Family Courts Committee, and sat on the Louisiana State Board of Social Work Task Force for Child Custody Evaluation Standards. She was on the Steering Committee for the AFCC/Hofstra University Law School Family Law Education Review Project and is on the editorial board of *Journal of Child Custody*.

She was the President (2004-2005) of the Association of Family and Facilitation Courts (AFCC), an international and interdisciplinary organization of more than 3000 judges, attorneys, mediators, custody evaluators, parenting coordinators, other mental health professionals dedicated to the constructive resolution of family conflict. While President, Ms. Hunter appointed an international and interdisciplinary Task Force of AFCC to create Model Standards for Child Custody Evaluators, which were completed and adopted in 2006. She continues to serve AFCC as their Associate Director.

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Why this Topic is Important to Law Students

- High Conflict in separating and divorcing couples often leads to court intervention to decide the parenting plan under which the children will live. When the parents cannot agree on how their children will share their time with them, it is usually up to the Court to decide.
- When attorneys or judges need more data about a family and its functioning, they often turn to a mental health expert to perform a child custody evaluation for more information and, usually, recommendations. Unless the evaluator is working under the auspices of a court program, the evaluation is usually performed by a qualified mental health professional with specific training in forensic issues.
- A family attorney must know when to request a child custody evaluation; how to find a qualified evaluator; what information should be in an evaluation; how to read the report, share it with their client and use the information in it; and how to question (in direct and cross examination) the evaluator.

Current Relevant Issues

1. Lawyers' knowledge of the relevant statutory standards

- It is important for family attorneys to be familiar with any statutes in their state regarding the Best Interest of Children criteria. These are factors that the evaluator must consider when assessing a family and making parenting plan recommendations.
- Some factors that are common in many statutes include:
 - Ability of each parent to provide for the child's material needs – including educational needs,
 - Ability of each parent to provide for the child's emotional needs,
 - Mental and physical health of all parties- including the children,
 - Relationships between the children and each parent,
 - Physical proximity of parties to each other,
 - Family unit's permanence,
 - Adjustment of the child to home, school and community,
 - The child's wishes, if of sufficient age and maturity to consider,
 - Presence or absence of domestic violence and/or child abuse,
 - Willingness and ability of each parent to facilitate and encourage a close and continuing relationship with the other parent.

¹ Leslye Hunter is a marriage and family therapist and clinical counsellor. While in private practice she did hundreds of child custody evaluations. She is a former President of AFCC and is now its Associate Director.

- Some states also consider the parenting plan that was in effect prior to the separation, and may consider other factors specific to the local rules as well.

2. How is the evaluator selected

- Who decides on an evaluation and how the evaluator is chosen will vary depending on the situation and the jurisdiction.
- One parent might request a child custody evaluation, the two attorneys might agree that an evaluation is necessary or the judge might require one. The attorneys may agree on which mental health professional should be appointed by the judge or a list of court-approved evaluators may be used from which to make the selection.
- Regardless of who selects the evaluator, the judge should appoint him/her in a court order. The evaluator should be a neutral expert of the court, not someone hired by one side or the other.
- Many issues require special expertise and risk assessment; the family lawyer should inquire about the evaluator's special training and experience in any relevant special issues such as domestic violence, alienation, substance abuse, relocation or sexual abuse.¹

3. Qualities of a child custody evaluator

- Child custody evaluators should be able to be balanced and neutral.
- They should be knowledgeable about the normal development of a child, the dynamics of separation and divorce, forensic and therapeutic standards and guidelines, and local law and legal standards as they affect their work.
- They should know their own limitations, only answer the questions that the court asks, and only answer questions that they can reliably answer from the data that they have collected. If a question that the court asks, or one that arises during the evaluation process, lies outside their area of expertise, they should seek consultation with someone who is expert in that particular subject area. When they offer opinions, it should be very clear that they are opinions, not conclusions based on data.
- A good child custody evaluation can be both an educational and a settlement tool, and a bad one can cause more conflict and divisiveness. It should be neutral and balanced and discuss the strengths and weaknesses in both parents' parenting skills.
- CCE should be neutral and court appointed. The evaluator should not be a therapist for anyone in the family nor have been otherwise involved with any family member if at all possible. In rural locations, this sometimes becomes problematic, but neutrality is the mainstay of evaluation.

4. The evaluation report

- A child custody evaluation is not a therapeutic intervention and there is no confidentiality. The evaluator observes, assesses and reports his assessment in written evaluation report.
- Comprehensive custody evaluations include data from individual and joint interviews with the parents and their children, observations of each child (both alone and interacting with each parent), possibly a home visit, a history of the family and each individual, each parents and child's wishes about the parenting plan, perhaps psychological testing of each parent (and child if there is sufficient reason), a review of all relevant documents, and information from collateral sources.² The evaluation should also identify incomplete, unreliable or missing data.
- Brief, focused evaluations are designed to answer a specific question or two that the court might have (such as does the mental illness or substance abuse of one parent significantly affect their ability to parent), are more descriptive than analytic and would only include the components described above that are necessary to answer those questions.

5. Child's best interest

- Although family law practitioners are representing the interests of one of the parents, they must always be mindful that the children are the ones being affected by the decisions that are being made and their best interest should be paramount.
- The evaluator makes recommendations based on what might be in the child's "best interest". This phrase, "best interest", although partially defined in some state statutes, is ambiguous and has been examined in the literature.³
- The definition has changed over the years, and will, most likely, continue to evolve as research in the area of child development and the effects of separation and divorce progresses.

6. Controversies

- The largest current controversy centers on exactly how specific the evaluator should be in the evaluation's recommendations. Should the evaluator make a recommendation regarding the ultimate issue of custody?⁴
- Should the evaluator recommend specific parenting plans in an evaluation report? Many judges expect, or even require, a very specific parenting plan from the evaluator. A parenting plan should always be based on both the parents' capabilities and the child's developmental needs.⁵ Some states have published model parenting plans for different age groups of children.⁶
- Although the judge always makes the final decision when the parents can not agree, an evaluator's recommendation may be given enormous weight. Some believe that this is

giving too much power to the evaluator, who may base recommendations on clinical or personal opinion rather than scientific data.

- While conventional wisdom states that children do not know what is best for them, more recent trends have been to give the child a voice. Children have recently been consulted in various family law arenas and the child's wishes, particularly if the child is of sufficient maturity and/or age, have been given some weight by the judges making the decisions about custody and parenting plans. Although some still believe that children have no place in the court process, the current thought is more likely to include their opinions in the multiple points of data considered by the judge.

Additional References

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ENDNOTES:

¹ See the articles concerning evaluation of special issues: domestic violence (D'Ambrosio, 2008), alienation (Lee & Olesen, 2001), substance abuse (Schleuderer & Campagna, 2004), relocation (Austin, 2008) and sexual abuse (Kuehnle & Connell, 2008).

² See the AFCC Model Standards of Practice for Child Custody Evaluation (2006) for details about the child custody evaluation process including evaluator's training, education and competency issues, knowledge of law, record keeping and release of information, communication with litigants, attorneys and courts, data gathering, use of formal assessment instruments, the team approach to evaluation, role conflict and dual role issues, interviewing children, observational-interactional assessment, use of collateral source information and presentation and interpretation of data. See also the American Psychological Association Guidelines for Child Custody Evaluations in Divorce Proceedings (1994).

³ See Kelly, 1997 for a discussion of the concept of the best interests of a child.

⁴ See Tippins & Wittman, 2005 and Bala, 2005 for a discussion about evaluators making recommendations and offering opinions.

⁵ See Lamb & Kelly, 2001 and Pruett, Ebling & Insabella, 2004 for articles about developing parenting plans for small children.

⁶ Sample parenting plans from the Arizona Supreme Court (2001) and the Oregon Judicial Department (2008) are available for viewing or downloading in the Resources for Professionals section of the AFCC Web site (www.afccnet.org). A book for parents *Planning for Shared Parenting: A Guide for Parents Living Apart*, sponsored by the Massachusetts Chapter of AFCC in 2007, is available through AFCC.