

# INTRODUCTION

Child custody evaluations involve cases in which the residential schedules and decision-making responsibilities for the children of a family are contested. The parties are usually the parents, with some raising concerns about the other parent and sometimes the child(ren). It has become increasingly common for these concerns to include intimate partner violence (IPV) or abuse, child abuse, and/or substance abuse. Typically, neither party believes the other party should have much contact or access to the children. These situations generate divisive issues regarding parental rights and developmentally appropriate access and care of children. They require the careful assessment of parental fitness, the family circumstances, and the needs of the child(ren). The law in most states requires a judge, or jury in a few jurisdictions, to arrive at decisions about the best interests of the children in family law cases. To do so, the judge must weigh and balance multiple pieces of evidence about the child's circumstances that include the adjustment to the two different homes.

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*Family Evaluation in Custody Litigation, Second Edition: Promoting Optimal Outcomes and Reducing Ethical Risks*, by G. A. H. Benjamin, C. J. Beck, M. Shaw, and R. Geffner

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Family court judges, who aim for expedient and careful review of these family dynamics, have limited access and resources to examine the key components of family functioning. As a result, family court judges now regularly appoint mental health professionals, and in some states legal professionals, to evaluate the family dynamics and patterns, with a specific focus on protecting the physical and psychological well-being of the children. When done competently, parenting evaluations provide key psychological evidence that encourages parties to settle without litigation. If litigation does occur, the evaluations allow judges to adjudicate cases using the psychological evidence that directly addresses the legal criteria in their jurisdiction. The adjudication results in a court order that defines a residential schedule, parental decision-making authority, and other elements of parenting dictated by state statutes.

From a public policy perspective, having one neutral mental health professional conduct a court-directed, question-driven evaluation with the necessary family members supplants the duplicative efforts of multiple experts who are prone to act as “hired guns” for one side rather than as educators for the family and the judge. From the judicial perspective, contested custody cases require professional consultation to identify the nature and patterns of the family relationships and the needs and capacities of children and their caretakers.

Our first goal in writing this book is to describe an approach to conducting child custody evaluations that is consistent with the most recent guidelines and ethical standards promulgated by the American Psychological Association (APA), an approach that provides a transparent, fair, and respectful process for the families. These include the *Guidelines for Child Custody Evaluations in Family Law Proceedings* (APA, 2010, hereinafter referred to as the *Guidelines for Child Custody Evaluations*)<sup>1</sup> and the *Ethical Principles of Psychologists and Code of Conduct* (APA, 2017; hereinafter referred to as the *Ethics Code*).<sup>2</sup> The conceptual underpinnings of this evaluation process are founded on available psychological research. Examples of the research used include clinical and experimental research on healthy family processes, child development, child and adult emotional processes in custody and divorce cases, psychological testing, family forensics, adult and child psychopathology, parenting, and stress. We were particularly attentive to empirical studies published in peer-reviewed journals. Because only a handful of studies have focused on the process and outcome of custody evaluations, we also included reliable survey research data that may inform readers about proficient practice.

<sup>1</sup>Available at <http://www.apa.org/pubs/journals/features/child-custody.pdf>

<sup>2</sup>Available at <http://www.apa.org/ethics/code/index.aspx>

Our second goal in writing this book is to describe an assessment protocol that can minimize the risk of ethical infractions. Although current research reveals substantive information about dimensions of the best interest of the child, we are years away from using actuarial prediction to inform courts about the factors that ultimately predict successful child outcomes. As a result, competent custody evaluators continue to use informed and conservative clinical judgment in formulating conclusions and recommendations. Given the high stakes of custody proceedings, we suggest careful adherence to the standardized procedures presented in our protocol to generate ethical work, while always keeping in mind that our recommendations can affect children and adults for many years. We have revised this book with the hope of continuing to refine our child custody assessment approach that uses a transparent, fair, and consistent protocol and thus protects children, parents, and evaluators involved in this legal process. Survey research has shown that careful adherence to a standardized protocol and the ethical guidelines reduces the risk of licensing board complaints concerning custody evaluators (Bucky & Callan, 2014; Dyer, 2005; Gourley & Stolberg, 2000; Kirkland & Kirkland, 2001; Perrin, 2010; Thomas, 2005).

This book also outlines an evaluation process for child custody assessments while incorporating the evaluative criteria defined by legal standards. Child custody evaluations are essentially forensic psychological consultations for the court, addressing issues that protect and enhance the well-being of children caught in parental conflict and litigation. These legal criteria are included in state statutes and may include local court rules. It is essential that the evaluator know these legal standards well.

Since the first edition of this book was published in 2003, the custody evaluation arena has expanded to include many families who were never married. Nonmarried families come in many forms. Additional research concerning child abuse and IPV assessment and response has led to important changes in the evaluation protocol advocated in this book.

## EVALUATOR TRAINING

Conducting forensic evaluations in child custody cases is complicated, technically demanding, interpersonally challenging, and legally contentious. It is also highly satisfying for professionals confident that they have the necessary tools to do so. As we describe in this book, conducting child custody evaluations requires a foundation with graduate and professional education in many areas, including psychology, child development, family psychology, and law. Specialized clinical training in working with children, adolescents, families in crisis, and adult clients is also extremely helpful.

Specific training in IPV, child abuse, trauma, and substance abuse may also be required if these issues surface in the case.

Given the complexity of the law, the high stakes and money involved in these cases, and the specificity of some questions asked, it is professionally risky to begin a forensic evaluation without specific training and supervision concerning the scientific bases for such evaluations, the legal aspects of the judicial process, and the psychological issues regarding child and adult health and illness. Unfamiliarity with or disregard for the developing professional guidelines (APA, 2010, 2017) outlining the procedures for evaluating these families increases the likelihood of committing ethical and malpractice infractions. Moreover, incompetence in any of the areas increases the rate of errors in judgment, which introduces predictive uncertainty and potential injury to family members.

The pedagogy for doctoral training in psychology trains professionals to evaluate, write, and conceptualize well. Despite such readiness, most psychologists do not conduct evaluations of families caught in divorce because of fears of malpractice suits or licensing board complaints. APA and state licensing boards consistently report that custody evaluation work is one of the areas of practice with the highest risk for suits and complaints (Bucky & Callan, 2014; Dyer, 2005; Kirkland & Kirkland, 2001; Thomas, 2005). For instance, Dyer (2005), in a national sample ( $N = 222$ , 48% response rate) of mental health professionals, found that 50% ( $n = 110$ , 49.5%) reported they had either an ethics, regulatory board, or malpractice action in their custody work; over half who reported such an action had a second; and nearly a quarter incurred two or more. This book continues to provide a standardized and transparent evaluation protocol that helps to protect evaluators from malpractice litigation and ethics complaints. Only one of the several hundred graduates or associates of the program that has developed or used the protocol has reported a licensing board complaint being filed. The many steps of the program's comprehensive evaluation process lead the parties involved in such an evaluation to feel heard, respected, and treated fairly. The protocol discussed in this book has protected the interests of thousands of children caught in their parents' litigation. In addition, settlement-based evaluations support the public policy value of easing the burden that litigious family law cases place on the calendars of the courts.

In this book, we focus on custody cases and specifically exclude issues pertaining to dependency or child protection cases. We do this partly because the issues that arise from dependency or child protection cases differ from those involved in child custody cases. Moreover, the court assumes a different role in child custody cases than it does in dependency or child protection cases. For example, in custody cases, the legal system negotiates between caretakers, both of whom are assumed to be fit to parent the children. If

parents are unable to settle on a parenting agreement out of court, a family court intervenes and determines a resolution that is designed to cultivate each child's best interests. The *best interests standard* is a legal concept that attends to the child's general and specific needs to promote healthy development. Likewise, the court legally intervenes in child protection cases that may also include custody issues to protect children from abusive or neglectful behavior by a parent or guardian. These kinds of cases are different from custody cases because the focus is on adjudicating the parent's custodial rights to their children because the children have been put in dangerous or potentially dangerous situations or the mental and physical health of the child has deteriorated in the parent's custody.

## FOUNDATIONS OF OUR APPROACH

Our approach toward these evaluations embraces both the idea of "empirically derived" therapeutic jurisprudence (Wexler & Winick, 1996) and procedural justice (Lind & Tyler, 1988; Tyler, 2006, 2007).

### **Therapeutic Jurisprudence**

The concept of *therapeutic jurisprudence*, introduced in the early 1980s, refers to a process of addressing family-based legal and social problems through legal intervention to evoke changes that enhance psychological and family health. This concept is particularly relevant for litigating parents in custody disputes who both may be capable parents but require legal intervention to promote the welfare of their children. We embrace the idea that therapeutic jurisprudence with families in custody disputes should be based on a foundation derived from experimental psychological research and that addresses the long-term needs of children and families.

### **Procedural Justice**

The concept of *procedural justice*, also introduced in the 1980s, seeks to explain why people willingly comply with legal authorities (Lind & Tyler, 1988; Tyler, 2006; Tyler & Huo, 2002). The key finding of Tyler's research is that the manner in which people and their problems are managed when they are dealing with the courts has more influence on whether they accept and abide by decisions made than on the actual outcome of their cases (Tyler, 2007). A second important finding is that procedural justice influences how people evaluate judges, other court personnel, the court system, and the law (Tyler, 2007). Thus, the willingness to comply with authorities relies on a

strong sense that authorities are legitimate. Legitimacy, in turn, relies on beliefs that authorities follow procedures that are fair and that they do so predictably and in a trustworthy fashion (Herbert, 2003). Furthermore, if these elements were provided, people followed the law regardless of outcomes. The important elements of procedural justice found in the research include voice, neutrality, respect, and trust (Tyler, 2007).

*Voice* is related to people being listened to and heard before decisions are made. *Neutrality* is related to decisions being based on rules and objectivity, and not on personal opinions. Transparency in how the rules are being applied and decisions are made increases the perception of neutrality. *Respect* refers to how people are being treated by a decision maker. People want to feel that their concerns and problems are taken seriously, that they are treated with courtesy and politeness, and that they are provided with information concerning procedures that will be applied to their cases. *Trust* relates to an assessment of the character of the decision maker. The key aspects of this are sincerity and caring. These aspects are communicated through listening to and considering views, being honest and open about the basis for actions, and acting in the interests of the parties and not from personal biases and prejudices. These constructs have also been applied to the family law arena (Beck & Sales, 2001; Bryan, 2006; Kitzmann & Emery, 1993).

We endeavor to always embrace these constructs by providing a respectful process in which parties are provided up-front detailed information concerning the procedures to be used. Thus, the structured evaluation process is transparent; parties know at all times where they are in the process, and the process proceeds in parallel for both parties or the process stops. Parties are also provided multiple opportunities to be heard and the opportunity to correct any misunderstandings. The concerns raised by parents, their lawyers if any are involved, and the court within litigious family law cases require a thorough and fair evaluation process. At the end of the process, the parties are also provided the opportunity to review the findings and recommendations of the evaluator and to provide additional evidence if somehow it was not provided or considered earlier in the process. This occurs before a final report is reviewed with the parents' lawyers, if any are involved in the case.

The culmination of each evaluation process should result in a concisely written report that addresses each of the factors in the state custody statutes and clearly delineates the foundation for all the evaluator's findings. The foundation is established through using multiple method (e.g., psychological testing, interviews, observations, collateral reports) corroboration. Clear descriptions of the family dynamics will assist the parties, the lawyers if any are involved, and the judges in understanding the families. Integration of the data will lead to recommendations that address well-founded concerns and assist in the resolution of these cases.

Given the complications of such litigation and the risks attendant in working with the parties and lawyers involved, evaluators must be well prepared. In fact, according to APA's (2017) Ethics Code, psychologists are to "provide services . . . with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study or professional experience" (Standard 2.01, Boundaries of Competence, Section [a]). In addition, psychologists "undertake ongoing efforts to develop and maintain their competence" (Standard 2.03, Maintaining Competence). Clearly, such standards are critical to follow in conducting child custody evaluations.

## OUR APPROACH

The evaluation process discussed throughout this book emerged from a clinical research strategy beginning with the initial development of the protocol. The next step was to review several thousand hours of videotape of families being evaluated and using it to test fidelity in how the protocol was administered and to increase its effectiveness. During the development of the protocol and recent modifications based on more recent research on IPV and child abuse, the evaluator prepared a report that was then reviewed by a group of psychologist evaluators. The protocol has been adjusted to increase adherence to procedural justice principles and evolving research and techniques. It has been changed to reflect standards of fairness, objectivity, and transparency by adjusting parts of the process that led to parties feeling surprised, frustrated, or disrespected.

The resulting evaluation process relies on six detailed phases: Phase 1: preevaluation procedures; Phase 2: psychological testing and clinical interviews; Phase 3: observations of the parents and the children; Phase 4: collateral information, including home studies at times; Phase 5: closing interviews with the parents; and Phase 6: presentation of the report to the lawyers of the parents, and guardian *ad litem* attorneys for the children if applicable. Each phase will be presented in detail in chapters in this book.

## OVERVIEW OF THE BOOK

We have divided this book into three parts. Part I describes the preparatory material that should be understood before conducting evaluations. We discuss the context of divorce, nature of separation and divorce, and the tremendous impact of divorce on parents and children both before and after a divorce. We also review the kinds of cases that present for evaluation in

family litigation, as well as some of the key controversies that are relevant to child custody evaluations. To ensure adherence to the standards of practice, we discuss relevant ethical standards and guidelines and review how to achieve competence in documenting and conducting parenting evaluations.

Part II focuses on conducting either a court-appointed evaluation or an evaluation conducted through a stipulated agreement, which is one agreed to by both parties and their lawyers. To avoid both the appearance of or actual conflict of interest or perceived bias by the parties, we urge that the evaluator engage in clearly defined preevaluation procedures with the attorneys and parties. We also discuss the parameters of confidentiality and fee arrangements as part of the informed consent or disclosure process. We then outline the phases of the multiparty, multiple measure, and multiple method evaluation, offering practical advice about assessment strategies that lead to transparent, efficient, thorough, and fair data collection. We review the structure of parent–child observations, the review of collateral reporter records, and third-party collateral interviews. Finally, we discuss methods of data integration, report writing, and court presentation, if needed. We also outline practical information about data collection and data management strategies.

The entire comprehensive process provides an objective approach that enables fair, respectful, and transparent evaluations of all party concerns, including developmental and attachment issues, and culturally sensitive assessment of family dynamics and parenting practices. It also meets the APA (2010, 2017) ethical and legal requirements for this type of evaluation and the professionalism requirements for highly litigious parties and their lawyers.

Part III contains a sample case with a discussion and recommendation section so that readers can experience the scope of a comprehensive evaluation. This section provides the concluding aspects of a custody evaluation. Appendices are also included (Part IV), with the forms required for a comprehensive evaluation process.

## CONCLUSION

At the root of each evaluation remains this question: How does the evaluator conduct an ethically appropriate, scientifically valid, and reliable evaluation of a very troubled family for a court in their jurisdiction? The answer requires attention to research, ethical practice, continuing education in law and mental health disciplines, consultation with subject matter experts where appropriate, and expert consultation about local legal and mental health practices. It also requires the evaluator to remain open to alternative explanations and competing views regarding the data that emerge during each evaluation.

As a nation, we desperately need well-trained, thoughtful evaluators in this area of practice. Many experienced evaluators who used other evaluation approaches are no longer doing this work because of the contentiousness and traumatic circumstances of the families, a legal process that is sometimes slow and complicated, and fear of license board complaints. Younger, newly educated mental health professionals are frightened to do this work (Thomas, 2005). New psychologists will be more likely to do so if they learn to use a structured evaluation procedure, provided to families in a transparent and concise step-by-step manner, that leads to thoughtful, responsive recommendations for families and helps protect the psychologist from the risk of malpractice suits and licensing board complaints.