

Court Implementation of Mental Health Professionals' Recommendations in Contested Child Custody and Visitation Cases

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A judge deciding a contested custody case today faces a very different decision from his or her counterpart of a decade ago. Divorce laws have undergone major changes. No-fault divorce is becoming the norm. The "tender years presumption," which guided judges to award custody routinely to mother, is being replaced by a sex-neutral "best interests of the child" test.¹ Yet, the best-interests test, even when factors are specified by statute, remains a murky concept that is often difficult to apply. Furthermore, instead of a limited choice between two sole custodians, courts now additionally must consider varying forms of joint custody. These changes in the law have left the courts fewer simplifying rules with which to approach a contested custody case, and so have left judges with more discretion. Whereas previously a judge could routinely grant custody to the mother, now he or she must consider a wide variety of facts and possible outcomes before reaching a judgment.

Social scientists, especially since the publication and wide discussion of *Beyond the Best Interests of the Child* (1973),² increasingly have offered expertise in defining the child's best interests. Given judges' wider discretion under the law, the emotional difficulties in making such profound choices affecting children, and the offering of new information about child development by social scientists, courts have (not surprisingly) looked increasingly to the mental health professions for guidance. Such guidance is often less definitive than is hoped for, however, because current limits of psychological theories, the wide variety of differing theories, and the difficulties in making valid predictions leave the application of general psychological theories to a particular case an uncertain business at best. Mnookin³ discusses this awkward position of the courts as functioning "in the face of indeterminacy."

In the midst of this flux, the role of the mental health expert to the court has come in for both attack⁴ and for redefinition.^{5,5-13} Under traditional adversarial procedures, the contending parties (typically parents) to a custody dispute each retain their own expert to conduct an evaluation and make recommendations to the court. Not surprisingly, the testimony of such party retained experts serves the interest of the party who calls the expert, and the experts for the opposing party typically reach opposing conclusions as to the child's "best interests." Some commentators in the mental health professions^{5,7,8,13} cogently argue that mental health professionals who become involved as experts in the child custody contests are most effective and useful to the resolution of these disputes if they serve as impartial experts offering nonpartisan recommendations to the court, in effect

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acting as witnesses for the court rather than witnesses retained by one or the other party.

By serving as a nonparty expert, the mental health professional is free to focus the evaluation on the best interests of the child without concern for the difficulties that arise when one must present testimony adverse to the interest of the party who pays the bill. Courts, too, are coming to prefer the "expert-to-the-court" approach as an alternative to a battle of the experts in matters affecting child custody and visitation. The nonpartisan expert is often welcomed by attorneys as well since it relieves them of the burden of "winning" or possibly "losing" a custody fight in whose outcome they have little stake.

While a court-appointed expert carries the mantle of impartiality, questions remain regarding the validity of expert recommendations in contested custody cases. Diamond¹⁴ suggests that a psychiatric expert provides a professional viewpoint, rather than neutral expertise. General questions such as how to assess a child's attachment, whether a child's attachment should be weighed more than a differential in parenting capacity, whether visitation should be left to the judgment of the custodial parent, and whether joint custody should be imposed over one parent's objection, are not questions about which there is general agreement. While in many cases particular details would lead most experts to similar recommendations regardless of their theoretical orientation, there are clearly cases in which different experts, judging the same data, will draw differing conclusions. An example from our clinical experience illustrates this point.

Two parents were ending an eight year marriage and contesting the custody of their four-year-old son and six-year-old daughter. Each parent wanted sole custody. Prior to the divorce, the father ran the family business, a "Mom-and-Pop" grocery store above which the family lived. The mother worked full-time as a keypunch operator, a job she had had throughout the marriage. Both parents were involved in the early care of the children; however, the father's proximity to the home while at work afforded him greater time with and access to the children during their early years. Two years before the divorce, the father suffered a brain injury during a robbery of the store that left him with a partial paralysis, an impairment of abstract reasoning, and moderate memory deficit. This injury forced him to give up working in the store. During the last two years, the father carried out the bulk of day-to-day child care responsibilities despite the limitations of his disability. Upon evaluation it appeared that the children's strongest attachment and most positive affection was directed toward their father. It also was evident their mother was better able to plan for the children and anticipate their future needs. She was the more consistent disciplinarian and after the divorce would be in a better position to provide financially for the children.

Although a group of mental health professionals were in agreement as to the above clinical findings they disagreed as to which parent should have custody. Some evaluators afforded greater importance to the mother's efficiency as a manager, planner, and provider and believed the father's cognitive impairment would interfere significantly with his ability to foster his children's psychological development. Their recommendation was to award custody to the mother.

Other evaluators concluded the father was the "psychological parent," the one

Implementation of Recommendations

to whom the children had the strongest bond, and thought the father's disability, though limiting to the children, could be compensated for by regular and frequent visitation with their mother. Those evaluators concluded the children's best interests would be served by awarding sole custody to the father. The difference between the two conclusions came down to the different weights evaluators afforded to the children's attachment as against each parent's capacity to parent effectively.

In the face of uncertain theories regarding how to assess and weigh competing factors of a best-interests test, attitudes and values strongly influence decisions. Studies using questionnaire surveys of the attitudes judges and mental health professionals bring to the decision-making process have generally found high levels of agreement between disciplines.¹⁵⁻¹⁷ Studies of differences tend toward the finding that judges emphasize readily measurable behaviors (for example, length of custodial environment, the child's wishes, preferences for biological parent) while mental health professionals emphasize the nature of interpersonal relationships (psychological parenthood, maintenance of sibling relationships).^{12,16} Of particular interest are ratings of a "tender-years presumption" for mother. Lowery¹⁶ found that judges rate this factor significantly higher than do mental health professionals, while Woody¹⁷ found the two groups to be about equal.

When outcomes, rather than attitudes, are surveyed, a clear preference for mothers having custody remains evident. Weitzman and Dixon¹⁸ studying custody awards in California found the frequency of custody awards to mother was essentially the same in 1977, after adoption of no-fault divorce and sex-neutral presumption for custody, as it had been in 1968. They did find that of fathers who asked for custody, a larger percentage in 1977 obtained joint or split custody of their children. However, the frequency of sole custody to father did not change significantly over the time period studied. Pearson *et al.*,¹⁹ comparing custody awards in Colorado in 1966 and 1976, found the frequency of sole custody decreased for both mothers and fathers, while awards of split and joint custody increased commensurately.

The impact of a mental health recommendation on the judicial decision of custody and visitation has been much less well studied. Lowery¹⁵ found in a questionnaire survey that judges rated professional recommendations as being more important than the child's wishes and the parents' physical health but less important than the parents' sense of responsibility to the child, mental stability, and affection for the child. A number of authors^{8,9,20} have discussed the use of mental health expert testimony using case examples. Brun *et al.*²¹ reported that of recommendations in 121 custody evaluations conducted in Denmark, all but six were implemented by the Danish courts. We could, however, find no reports published by the end of 1982 of a comparable series of the utilization by American courts of mental health reports in contested custody cases. This article reports such a study of 119 child custody/visitation evaluations conducted by mental health professionals serving as impartial experts to Michigan courts.

Method

The child psychiatry service at the University of Michigan has for some years conducted evaluations in contested custody/visitation cases. In conducting such evaluations, the following ground rules are used: (1) the evaluation must be court ordered or stipulated to by the parties; (2) the reports and recommendations are sent to the court and attorneys for both sides (in effect, a waiver of confidentiality); (3) all parties to the litigation (parents, children, other litigants) must participate; (4) each party pays for their own interviews and the report according to an ability-to-pay scale, unless other agreements for payment are made in advance; and (5) the evaluator formulates a written report with recommendations expressly in the best interests of the children.

Selection of Cases One hundred nineteen consecutive cases, beginning in October 1978, in which a child custody evaluation was completed and the court subsequently entered an order as to custody and visitation, were selected for study. Excluded were cases in which a full report was not sent to the court (such as when participation of one of the parties did not occur), cases that were judicially dismissed, and cases that were still before the court at the time this study was undertaken. The sample includes four postdivorce cases in which a petition for change of custody was dropped after the evaluation was completed.

Referrals Referrals for child custody evaluations stemmed from stipulation by the parties in 11 percent of the cases and by court order in the remaining 89 percent. Court orders come about in several ways, and it often was not evident which judicial procedure resulted in a particular referral. The most common procedures appeared to be: at the judge's initiative, by agreement of the parties' attorneys who presented a stipulation to the judge to be signed as an order, or on the recommendation of the Friend of the Court, an adjunct agency of the Michigan circuit courts whose legislatively mandated responsibilities include making recommendations to the court in child custody/visitation disputes.

It is also difficult to know why a particular case was referred. In general, cases were referred because someone found them especially "difficult." Most cases exhibited at least one of the following features: intense conflict between the parties (often including violence), allegations of child abuse, allegations of one party's having a severe (psychotic or suicidal) mental impairment, one party was a VIP, and, rarely, both parents looked very good and the case appeared "too close to call."

Seventy-nine percent of the referrals were from the county in which the University is located; the remainder came from other counties in the state. For the local county, the rate of referral was approximately 8 percent of the contested custody/visitation cases before the court. Of the cases in this study, 59 percent arose during the pendency of a divorce action, 41 percent were postdivorce. Seventy-seven percent of the cases involved both custody and visitation, while 23 percent were solely visitation disputes. This last statistic is a bit misleading since many "custody" disputes include a motion for a change of custody to use as a bargaining chip in obtaining expanded visitation or other concessions without much expectation that a custody change will be seriously contemplated.

Implementation of Recommendations

At the time of our evaluation, 48 percent of the children had been in the joint possession of their parents at least some time in the preceding three months (most usually when parents had been living together prior to or during the pendency of the divorce), 29 percent had been in the sole possession of their mother, 18 percent in the sole possession of their father, 1 percent with other relatives, and 4 percent in other placements, such as foster care, under court jurisdiction. The median number of children referred in a case was two. In this report, the children will be discussed as a child custody unit and not distinguished by age. Relatively few adolescents were referred for evaluation because a stated preference of an adolescent in Michigan is the most significant factor affecting the outcome of a custody dispute, and relatively few contested custody cases involving adolescents reach the court or the mental health profession.

Evaluations Since the referrals came to a teaching program, 43 different evaluators participated in conducting these evaluations. Psychology graduate students were the primary evaluators of 4 percent of cases, psychiatric residents in 16 percent, staff social workers in 25 percent, staff psychologists 34 percent, and staff child psychiatrists in 21 percent. The evaluators had different approaches to conducting cases, different conceptual bases on which they formed recommendations, and varying amounts of training. In general, our teaching program has a strong psychodynamic emphasis. All evaluations were conducted following the general guidelines cited above. Most evaluators attempted to ascertain the possibility of the parties agreeing to a resolution of their dispute, and, if such agreement appeared possible, encouraged the parties to reach agreement. When parents did agree, their agreement was reviewed by the evaluator.

Seven percent of couples reached agreement during the evaluation, and those agreements were endorsed by the evaluator in all cases. A further 7 percent of couples expressed verbal agreement with the evaluators' recommendations but did not go on to work out a formal written consent agreement. Evaluations differed in number of interview hours and generally continued until the evaluator felt convinced that he or she had sufficient information to formulate an appropriate recommendation. The average evaluation consisted of from 8 to 12 interviews and always included individual interviews with each parent and each child over age three, joint interviews of each parent with the children, and, almost always, final interpretive interviews in which our recommendations were discussed with the parties.

Evaluations frequently included a joint interview with both parents or interviews with other knowledgeable persons such as relatives and stepparents. Written reports to the courts and attorneys were generally extensive, and included not only recommendations but also presented clinical evidence that was gathered and the reasoning used to move from the evidence to the conclusions. The Michigan custody statute²² enumerates specific factors that comprise the child's best interests, and the evaluators' reports were prepared with those factors in mind. Evaluators were available to appear in court and testify as to their recommendations but were asked to do so in only 5 percent of cases.

Court Determinations Seventy-eight percent of all cases were distributed

among five judges in the local county. The remaining cases were distributed among 21 other judges (out-county judges and visiting judges). The median time from date of the evaluation report to date of a court judgment was five months. After the parties were told of the evaluators' recommendations, 62 percent who had not previously agreed reached an agreement that was then entered as a consent order by the court. The remaining cases went to hearing or trial. Evaluators were called to testify in only 6 (5 percent) cases. The results presented here of the court judgments were coded from information publicly available in county courthouse files.

Results

The results of custody recommendations are summarized in Table 1.

Sole Custody Of 92 custody cases (63 predivorce, 29 postdivorce) sole custody was recommended in 83 cases. In sole custody cases, the final court disposition followed the mental health professional's recommendation in all but 8 cases, for an agreement of 90 percent. The following variables did not distinguish cases in which recommendations were followed from those in which recommendations were not followed: pre- versus postdivorce; who had possession at time of evaluation; sex of evaluator; or to whom (mother, father, or other) custody was recommended. Recommendations of trainees were less likely to be followed by the court than recommendations of staff evaluators, but the difference was not statistically significant.

The reasons for the court not following the mental health professionals' recommendations were various, and it was not easy to ascertain the judge's reasoning from a reading of his written decision. In two cases the parents reached an agreement subsequent to hearing the mental health professional's recommendation, which the court then implemented. In another two cases, the court ordered joint custody over the objections of one of the parties. In the fifth case, the court entered an interim order in which physical possession was changed, as the mental health professional had recommended, but legal custody was not (although the court held a rehearing six months later and at that time adopted the mental health professional's recommendation to change legal custody). In the sixth and seventh cases, the court, on the recommendation of another mental health professional, did not implement a psychiatric resident's recommendation to change custody of the child from an established custodial environment. In the eighth case, the men-

Table 1. Custody Recommendations

Placement	Mental Health Professional's Recommendation		Court Disposition Percent Agreement with Recommendations
	N	Percent*	
Sole—mother	49	53	91
Sole—father	29	32	83
Sole—other relatives	3	3	100
Foster care	2	2	100
Joint—equal possession	3	3	100
Joint—unequal possession	6	7	67
Total	92	100	89*

*Total includes 4 cases in which petition was dropped after evaluation.

Implementation of Recommendations

tal health professional had recommended continuing custody with mother despite the child's preference, but the court allowed the child's preference to control and changed custody.

Joint Custody Joint custody is becoming increasingly popular. Four years ago, Michigan revised its child custody law²⁷ establishing a presumption to the effect that if divorcing parents agree to joint custody, joint custody is in the child's best interest. The great majority of the cases referred to us were characterized by high levels of conflict between the parties, and joint custody is not likely to be workable under such conditions. In our sample, joint custody was recommended in nine cases (10 percent of custody recommendations). In three of these cases, the evaluator's recommendation was for an equal sharing of physical possession, and the recommendation was followed by the court. In an additional six cases, legal joint custody was recommended, but with physical possession unequally apportioned between the parents. In four cases the recommendation was adopted. In two postdivorce cases in which father had physical possession (although not sole custody) at the time of evaluation, the mental health professional recommendation was for joint custody with a majority of possession to mother. The court in these cases ordered sole custody of at least one child in the family to father. In one of these, the court found mother's new husband to be immoral and a bad influence on the children, and in the other, the court split two siblings between their parents.

Visitation The results concerning visitation recommendations are summarized in Table 2.

In 106 of the total of 119 cases, mental health professionals made visitation recommendations. "Liberal-and-reasonable" visitation was defined as at least a weekend every two weeks and included overnight visitation. "Limited" visitation was defined as some visitation, not supervised, but less than "liberal and reasonable." The court made different determinations in eight (7 percent) cases. In only two was the court's final disposition more restrictive than that recommended by the mental health professional: in one case the parents had reached an agreement for more restrictive visitation, in the second the reason was not clear. Given the small number of cases in which the courts reached a different disposition, the courts' tendency to be more liberal was not statistically significant. The rate of agreement was not distinguished on the basis of pre- versus postdivorce; who had

Table 2. Visitation Recommendations

Amount	Mental Health Professional's Recommendation		Court disposition Percent Agreement with Recommendations
	N	Percent*	
Liberal and reasonable	78	74	97
Limited	12	11	50
Supervised	7	7	100
At custodian's discretion	8	7	88
Mixed (different for different siblings)	1	1	100
Total	106	100	92*

*Total includes cases in which petition was dropped after evaluation.

possession of the child; professional discipline, sex, or level of training of the evaluator; or to whom custody was recommended.

Psychiatric Treatment The mental health professional in no case recommended that the court *order* psychiatric treatment (although in two cases it was recommended that visitation be made contingent on the noncustodial parent obtaining treatment and follow-up psychological evaluations regarding whether she was stable enough to visit). Nevertheless, at the conclusion of the evaluation, parents were advised to consider treatment for either themselves or their children in 37 percent of cases. The courts in no instance ordered psychotherapeutic treatment, although such treatment was mentioned in the court decisions in 15 cases. Six of these were cases in which treatment had not been recommended by the mental health professional.

Discussion

The court dispositions concurred with mental health professionals' recommendations a high percentage of the time: 92 percent for custody recommendations and 89 percent for visitation recommendations. In about one third of cases in which the court reached a different disposition, the difference reflected the parties' reaching an agreement after hearing the recommendation of the evaluator. Concordance between the judgment and recommendations does not demonstrate that the evaluator's recommendation was determinative of the court's judgment (the court might have reached the same judgment independently), but since cases were usually referred because a fact finder had questions, the high level of concordance suggests the evaluations had a major impact.

Such a high rate of concordance implies a heavy responsibility for the mental health professional conducting the child custody evaluation. Few, if any, mental health interventions conducted over such a limited number of sessions have as much impact on a child's life as does making a recommendation that affects by whom a child will be raised. Experiencing such a heavy responsibility is likely a factor in accounting for why trainees find conducting such evaluations valuable in their training as well as for why many mental health professionals prefer not to do such evaluations. (Another major factor in accounting for evaluators' feelings about doing custody evaluations is the strain of usually disappointing at least one of the contesting parties.)

A mental health professional's opinion is often sought precisely when a judge is unsure how to decide a case. From this perspective, it becomes clear that a judge would need strong reason *not* to adopt the recommendation of a mental health professional, especially one who has structured his or her position so as not to be the agent of just one side and who has spent considerable time evaluating the parties and their interactions with each other and their children. In our series, reasons that sometimes led the courts not to follow mental health professional recommendations appeared to be a different weighting of best-interests factors (such as the child's preference), strong views the judge had about behavior of parents outside the direct arena of interactions with their children, and the testimony of a more persuasive mental health professional. This last factor demon-

Implementation of Recommendations

strates limits to the weight given to an impartial expert. In two cases in which a psychiatric resident testified in a distant county and advocated a change of the existing custodial environment, the advice of a local expert hired by one side was followed. This is consistent with the trend that recommendations of experienced evaluators were more likely to be followed than recommendations of trainees.

An interesting finding relates to the courts' attitudes toward fathers having custody. Judges in our sample did not differ significantly from the mental health professionals' recommendations in the frequency of awarding custody to father. In cases where mental health professionals' recommendations were not followed, judges were equally likely to order custody to father as to mother. This is consistent with Weitzman and Dixon's finding¹⁸ that while mothers more frequently receive custody, in those cases in which the father actively seeks custody, his chances are good.

A trend in the data was that courts were less likely to restrict visitation than were mental health professionals. The courts' tendency not to limit visitation may reflect a judicial view, not spelled out in statutes, that visitation is a parental right that needs to be balanced against less certain determinations of what is best for the child. Courts were reluctant to limit visits unless there was a clear showing of significant detriment to the child. Those mental health professionals who have been persuaded by the views set forth in *Beyond the Best Interests of the Child*,² which recommends leaving visitation solely to the discretion of the custodial parent, would be much more likely than judges to recommend limiting the non-custodial parent's right to visit.

An evaluation by a mental health professional, as one element of a complex sequence aimed at resolving conflict, has effects on the process of reaching a resolution that go beyond providing a recommendation for a judge to consider. Despite the fact that, by the time a case was referred for evaluation, both parties (but perhaps not their attorneys) thought they could not agree, 14 percent of the parties came to an agreement during the course of the evaluation, an additional 62 percent entered a consent or a default agreement after they were informed of the recommendation, and 7 percent dropped petitions for modification of either custody or visitation. Three factors appear to contribute to this result. First, the evaluator, focusing on the best interests of the children, was sometimes able to help parents move from focusing on their individual needs to focusing on the children's needs. From this new perspective, parental agreement could be contemplated. Second, as a parent was being evaluated and asked to put plans and feelings clearly into words (and frequently having the practicality of plans or the appropriateness of feelings confronted by the evaluator), some parents were better able to understand, and change, their positions. Third, after a recommendation was submitted to the court, both parties had a new perspective on how the judge was likely to decide, which could change their incentive to negotiate. This last factor is probably the most important in promoting agreement. Many parties during the evaluation expressed the view that the judge would follow the mental health professional's recommendation. We hypothesize that in the face of an adverse recommendation, many parents wished to avoid the costs of trial and to bargain on issues of visitation, child support, and property in exchange for agree-

ing to the other party's obtaining custody. The report of an impartial expert likely alters the process of resolving a custody conflict, as the "fact finding" by the evaluator comes to replace the fact finding of a trial.

Few cases went on to a full trial in which testimony was taken on issues related to custody. We were surprised to find that evaluators were required to testify in only 5 percent of cases. While we do not have direct information as to how a parent and attorney decided not to call an expert to testify, a significant number of disappointed parents, in the interpretive interview, appeared to think they had at least been afforded a chance to express their cases and be heard, and possibly were better able to accept the outcome. The detailed nature of our evaluation reports was another likely factor in obviating the need for a personal court appearance. Finally, and probably centrally in many cases, the anticipated weight of the expert's opinion led the disappointed party and his or her attorney to conclude that the likelihood of overcoming the expert's opinion was not worth the costs, both financial and emotional, of going to trial. The parties were, of course, free to solicit their own experts, impartial or otherwise, but rarely (three cases) made use of this opportunity. The wish to avoid testifying in court is frequently cited by professionals who do not wish to become involved in contested custody evaluations. Our experience suggests that an evaluator who carefully defines his or her role as impartially representing the best interests of the child can largely avoid the anxiety of testifying in court.

Evaluation by a mental health expert is usually conceptualized as an element in a judicially based decision-making process wherein the expert provides testimony to a fact finder who renders the ultimate decision. In our cases, relatively few of the highly adversarial cases ever reached the finder of fact for decision. This appears to reflect an important trend that has been developing during the last several years: the development of alternative forums for resolving divorce-related conflicts. Another aspect of this trend is the increasing use of domestic relations mediation as an alternative to adversarial proceedings to resolve custody and visitation disagreements. Advocates for mediation emphasize that it offers several advantages: it allows the parties to play an active role in taking responsibility for and working out their differences, it encourages cooperative rather than competitive problem solving, and it is less time consuming and expensive than judicially based conflict resolution. Evidence of the growing popularity of mediation as an alternative forum is found in the enactment of legislation that mandates an attempt at mediation of custody and visitation disputes in some states (including California, Alaska, Delaware, Montana, and Iowa) and allow or encourages mediation in others. In mediation, the role of the mental health professional explicitly shifts from that of "expert witness" to that of conflict resolver, assisting the divorcing parents to reach an intrafamily agreement on custody and visitation issues.

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Implementation of Recommendations

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