

# **THE BENEFITS AND RISKS OF CHILD CUSTODY EVALUATORS MAKING RECOMMENDATIONS TO THE COURT: A Response to Tippins and Wittmann**

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In their article, Tippins and Wittmann articulate a strong position against custody evaluators making specific custody recommendations to the court. This response will focus on my thoughts about their concepts and my belief that recommendations can be useful and appropriate some of the time, even though there may be significant problems with certain types of recommendations and problems with some evaluators.

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In their article, “Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance,” Tippins and Wittmann strongly discourage custody evaluators from making recommendations related to child custody and the ultimate issue to the court. They describe four levels of data and inferences that evaluators gather and work with. They articulate that evaluators can collect Level I and Level II data and make conclusions, and they believe that those observations and conclusions are appropriate to share with the court. They acknowledge that Level III inferences about custody-specific variables are potentially relevant, as long as the evaluator limits him/herself to statements of risk associated with those variables. They are adamant that the evaluator should not make recommendations about Level IV conclusions, which they refer to as “custody-related shoulds.” They argue that this is unethical, given the lack of empirical evidence to support that evaluators are capable of making such Level IV conclusions. While I agree with some of their concerns, I do not support their conclusion about avoiding recommendations or their statement that such conclusions are unethical.

Tippins and Wittmann articulate that there is a lack of scientific research sufficient to allow custody evaluators to make such recommendations. They say that a lay person can provide the same observational data that the expert evaluator can provide, suggesting that the expert evaluator has little more to offer the court. In contrast, because there is a twenty-five-year history of research related to the effects of divorce on children, the effects of high conflict on children, parenting skills and styles that promote healthier outcomes in children, domestic violence, custody and access, attachment, children’s resiliency, and children’s coping, I believe there is sufficient research to allow evaluators to make such recommendations. This research exists in both the divorce and child development literature.<sup>1</sup> Lay persons would not know about or be able to integrate that knowledge base into their understanding of a particular family being studied. Experts who know this research and who are trained in doing child custody evaluations will understand how to integrate that research into their analysis and recommendations. This is certainly consistent for what Tippins and Wittmann refer to as Level III statements and I believe it gives much greater latitude than they do for well-trained child custody evaluators to make such analyses. Of course, the psychological research related to these issues is in its infancy, sometimes controversial, and continues to evolve over time. Hence, it is critical for custody evaluators to stay up-to-date and current with the research in the field.

In addition, over the last ten or more years, there has been a growth in the literature about how to conduct child custody evaluations. There have been several books written on conducting child custody evaluations. *Family Court Review*, the new *Journal of Child Custody*, and various psychology journals have taken the lead in publishing relevant articles to assist child custody evaluators in understanding relevant issues related to performing child custody evaluations.<sup>2</sup> There has been a growing emphasis on both the science and the art in this work. While Tippins and Wittmann articulate that there is no place for the art of child custody evaluations, I disagree. The art of doing an evaluation refers to the ability to utilize a scientific style in gathering data while understanding how to integrate that data into sensible and well-articulated recommendations to the family and the court. Child custody evaluation literature has raised the standard for custody evaluators to use a scientific approach, gather relevant data from multiple sources, and integrate that data into the analysis and recommendations. I believe that this allows well-trained and competent evaluators to make Level III analyses and Level IV recommendations to the court.

Before addressing when it is appropriate for a custody evaluator to make recommendations, I want to point out that custody evaluators have an obligation to inform the clients that recommendations will be made to the courts, and that the clients may not agree with those recommendations. This is critical so that the client understands before agreeing to participate in the evaluation that such recommendations will be made. Once that is clear, I believe that there are many reasons why it is appropriate for well-trained child custody evaluators to make recommendations to the court. Reasons for this include:

- The evaluator is best able to understand all dynamics from a neutral, unbiased position;
- The evaluator is the person most trained to understand the needs and functioning of all family members;
- The evaluator is the person who is best able to think conceptually and abstractly and then apply that thinking concretely to the children and their psychological best interests;
- The evaluator is best able to put children's needs above those of the adults and/or the courts;
- The evaluator is in the best position to integrate the knowledge base from the literature into the specific needs of the children and family;
- Most judges prefer to have the input of the evaluator's recommendations, and recommendations often help families settle without a trial;
- Recommendations help give the judge a starting point to consider various options for the family; and
- Recommendations help everyone stay focused on the psychological best interests of the child.

Along with the above, while Tippins and Wittmann discuss what they believe to be problems with recommendations on the ultimate custodial issue, there are certain spheres in addition to the ultimate issue in which recommendations can effectively be made in working with families that are typically seen in child custody evaluations. These areas include:

- For medium-conflict families:
  - A parenting plan that can include a recommended time share and schedule for parents and their children;
  - Suggested plans for holidays and vacations; and
  - Recommendations related to the primary focus of the dispute for a given family.
- In high-conflict families, all of the above plus:
  - A decision-making hierarchy;
  - Conflict resolution recommendations;
  - Specialized issues such as drug testing or substance abuse counseling;

- Issues regarding a special needs child; and
- Domestic violence interventions.
- Other useful areas of recommendation can include:
  - Therapy, with specific goals for parents and/or children;
  - Modifications as children get older and developmental needs are expected to change;
  - Educational needs of the children; and
  - The need for minor's counsel and/or parent coordinator.

Having outlined the reasons why I believe recommendations are important and useful and the areas where I believe they make sense, I agree with some of the concerns raised by Tippins and Wittmann. For example, I worry about poor quality child custody evaluations and the lack of standards in the field. While California has set an excellent example with Rules of Court governing procedures and ethics in child custody evaluations (CA Rule of Court 5.220<sup>3</sup>) and continuing education and experience requirements for child custody evaluators (CA Rule of Court 5.225<sup>4</sup>), few states have any such rules or established guidelines. Rather than take the evaluations that set a bad example and decide that all recommendations are unethical, I would support a call for improved national standards (see, e.g., ABA Wingspread report<sup>5</sup>) as a way to reduce the poor quality evaluations and recommendations based on limited information. AFCC has established a new task force designed to revisit and update the Standards<sup>6</sup> drafted ten years ago, when the field was in relative infancy.

I also agree that the judge needs to exert judicial influence when making a determination. Judges should be encouraged to consider recommendations as *advisory* only, recognizing the limitations of applicability of social science research to a particular family being evaluated. Evaluators are urged to put such cautionary language in the body of their report. At the same time, a neutrally appointed evaluator is the one person who knows the family best and the judge should be the one to determine how much confidence to have in the evaluator's report, analysis, and recommendations.

While there is a growing problem with the rotation of judges in and out of family court, and there is always a need for judges to have adequate training in all relevant areas of family law, in particular child development, domestic violence, high-conflict divorce, custody, and access, this does not mean that evaluators should not make recommendations. Rather, judicial officers need to be better informed about the kinds of information they will be receiving and about what constitutes good and bad evaluation data. It may be the poorly trained judge who benefits the most from informed recommendations, while he/she gets the necessary judicial education. Two national organizations (National Judicial College and the National Council of Juvenile and Family Court Judges) sponsor programs for judges in family law that include information on custody evaluations and experts in the curriculum. Many state judicial education programs sponsor similar courses and workshops.

I also agree that many custody evaluators have significant problems with their recommendations. Reasons for such difficulties can include:

- The evaluator does a poor or limited job of gathering data. If the data is unreliable, the recommendations are also likely to be unreliable;
- The evaluator goes beyond the limits of knowledge gained in the evaluation;
- The evaluator bases his/her recommendations on personal biases or philosophy rather than on the family data and the research;
- The evaluator makes recommendations about anyone not seen as part of the evaluation;
- The evaluator makes recommendations that are inconsistent with the data gathered;
- The evaluator does not explain how the evaluation data leads to particular recommendations;

- The evaluator does not report on data which does not support his/her recommendations;
- Recommendations appear to be form rather than tailored to the specific family and data;
- Recommendations provide little room for negotiation and settlement; and
- The evaluator becomes rigid and does not consider data that would support different recommendations.

Along with this, I believe that certain issues are more likely to lend themselves to specific types of recommendations, or perhaps no recommendation at all. For example, in cases where there are allegations of domestic violence, safety issues and perhaps anger management or batterer's treatment will be paramount factors in the recommendations. With substance abuse cases, treatment will be important. In relocation cases, where one parent wishes to move with the child and the other parent wants the child to remain, it will be important to fully understand statutory or case law before making a recommendation. Depending on state law, the evaluator may need to help the court in assessing whether or not there is a primary parent and whether or not the move will prejudice the welfare or best interests of the child. Such cases may need multiple recommendations, depending on whether or not the move with the child is or is not allowed by the court.

Finally, I also believe that there are times when an evaluator is wise to avoid making any recommendations at all. These may include:

- When the data does not support making any recommendations;
- When there is no psychological research to support potential recommendations or when the research is quite controversial;
- When the data between choices is relatively even;
- When the risks/benefits of various options are relatively even; and
- When the court does not want specific recommendations.

In these instances, I would recommend doing what Tippins and Wittmann recommend in all evaluations, that is, take the courage to refrain from making recommendations, even if the court is asking for specific recommendations.

In conclusion, I believe that the position that Tippins and Wittmann take is like throwing the proverbial baby out with the bath water. There are problems with untrained and inexperienced custody evaluators making recommendations, especially if they do a poor job and receive inadequate consultation and/or supervision. There are problems when custody evaluators use psychological tests as the basis for their custody recommendations, rather than as information to help in the generation of hypotheses. There are certainly problems when custody evaluators use their biases or personal agendas to take custody away from a parent due to alleged parental alienation or domestic violence and recommend supervision without good data. There are problems when evaluators use few rather than multiple sources of data and do not have a scientific approach to the process. There are also problems when judges are either too rushed due to a heavy caseload or too new to family law and do not understand the issues of child custody. It may be difficult for them to make informed decisions based on the data of the report. Instead, they simply rubber-stamp a custody evaluator's recommendations without the necessary scrutiny to determine if it qualifies as an expert opinion.

I agree with the call for humility, for both judges and custody evaluators. I agree with the call for caution in recommendations and for evaluators to make an affirmative statement in the report suggesting that the court and the parents need to understand the limitations of an evaluator's recommendations. In my workshops I have called for increased care in our

analysis and in the presentation of all relevant data, including data that does not support the conclusions reached. However, while these problems warrant improvements in the manner in which child custody evaluators do their job, and improvements in the way judges utilize custody evaluator recommendations, it does not warrant the cessation of evaluator recommendations.

Furthermore, I am concerned about Tippins and Wittmann's statement that making recommendations is unethical. While I have no problem with anyone challenging the appropriateness of making custody recommendations, to call it unethical when neither the American Psychological Association nor any licensing board has ever done so is potentially quite damaging. In my opinion, such statements will only increase the burden that psychologists face when asked to perform child custody work and could inadvertently lead litigious and angry clients to file frivolous licensing and/or ethics complaints against any psychologist who makes recommendations about the ultimate issue in child custody work. Unless and until the American Psychological Association or a licensing board makes an affirmative statement that the giving of recommendations about the ultimate issue is unethical, I am against practitioners or researchers, regardless of their stature and beliefs, making such a claim, preferring that they be as humble as they want custody evaluators to be.

Finally, I am in agreement with the Florida statute<sup>7</sup> that states "[i]t is a conflict of interest for a psychologist who has treated a minor or any of the adults involved in a custody or visitation action to perform a forensic evaluation for the purpose of recommending with which adult the minor should reside, which adult should have custody, or what visitation should be allowed." While therapists for children and parents might have valuable information to add to the court's understanding of a family, they should not be making custody recommendations, because they have not evaluated all parties to the case.

## NOTES

1. See, e.g., Kelly, J., & Emery, R. (2003). Children's adjustment following divorce: Risk and resilience perspectives. *Family Relations: Interdisciplinary Journal of Applied Family Studies*, 52(4), 352–362; Center for the Future of Children (1999). *The future of children: Children and divorce*. Los Altos, CA: The David and Lucille Packard Foundation; and Kelly, J., & Lamb, M. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family & Conciliation Courts Review*, 38(3), 297–311.

2. See, e.g., Stahl, P. (1994). *Conducting child custody evaluations*. Thousand Oaks, CA: Sage; Stahl, P. (1999). *Complex issues in child custody evaluations*. Thousand Oaks, CA: Sage; Gould, J. (1998). *Conducting scientifically crafted child custody evaluations*. Thousand Oaks, CA: Sage; Bow, J., & Quinnell, M. (2001). Psychologists' current practices and procedures in child custody evaluations five years after American Psychological Association guidelines. *Professional Psychology: Research and Practice*, 32(3), 261–268; Gould, J., & Stahl, P. (2000). The art and science of child custody evaluations: Integrating clinical and forensic mental health models. *Family & Conciliation Courts Review*, 38(3), 392–414.

3. Court-Ordered Child Custody Evaluations. California Rules of Court, Rule 5.220 (2004), available from <http://www.courtinfo.ca.gov/rules/titlefive>.

4. Education, Experience, and Training Standards for Court-appointed Child Custody Investigators and Evaluators. California Rules of Court, Rule 5.225 (2004), available from <http://www.courtinfo.ca.gov/rules/titlefive>.

5. Wingspread Conferees. (2001). High-conflict custody cases: Reforming the system for children—Conference report and action plan. *Family Law Quarterly*, 34, 589.

6. Association of Family & Conciliation Courts. (1994). *Model standards of practice for child custody evaluations*. Madison, WI: Author.

7. Florida Business and Professions Code, 64B19—18.007. Requirements for Forensic Psychological Evaluations of Minors for the Purpose of Addressing Custody, Residence or Visitation Disputes.

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