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Two Views on the Use of Psychological Testing in Child Custody Evaluations

Robert A. Simon, Ph.D. and
Daniel B. Pickar, Ph.D.

Child Custody Evaluations are forensically informed evaluations of families in which the best interests of children are at issue before the court. When properly done, child custody evaluations employ a multi-method, multi-modal approach to gathering data and making inferences. This approach is essential in forensic work because one of the hallmarks of forensic work is looking for convergence of data of different types from different sources, or, the lack of such convergence. Psychological testing is a data source that is quite frequently used by custody evaluators as a part of their data gathering. For example, Bow and Quinzel,¹ found that 91% of evaluators use psychological testing as a part of their data gathering practices.² Quinzel and Bow³ report on which tests are used and how often they are used. Clearly, the use of psychological tests is a common practice in child custody evaluations even though no practice standards or guidelines mandate the use of testing. Further, because it is commonly used, does not mean that they should (or should not) be used so broadly.

Recently, Garber and Simon⁴ published a call for careful and clear thinking about psychological testing in custody evaluation and advised that if tests are to be used at all, their use should be strictly limited to the generation of hypotheses. They advised that tests should not be used to reach conclusions, nor should they be used as part of a converging data base. In response, Rappaport, Gould and Dale⁵ wrote a rebuttal article in which they advocate for



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the inclusion of testing and argue that the proper use of testing is primarily a training issue, not an issue related to the nature of contemporary tests and testing as Garber and Simon argue.

This article, written by Robert A. Simon, Ph.D. and Daniel Pickar, Ph.D., both highly regarded California custody evaluators, condenses the debate into a single collaborative article.

Dr. Simon: Psychological Testing in Evaluations: The Case for Very Cautious and Limited Use

In the world of forensic psychology, it is often noted that child custody evaluations are the most complex and the most challenging type of forensic assessment that exists. Because of this, it makes sense that evaluators wish to gather as much information as possible. It also makes sense that evaluators wish to gather information of various types. Indeed, one of the hallmarks of forensic psychological assessment is the use of a “multi-method, multi-modal” approach to data gathering. Child custody evaluators are tasked with a complex task, perhaps the most complex task in all of forensic psychology. This is because custody evaluations are complex family systems evaluations rather than evaluations of an individual which is normally the case in other fields of forensic psychological assessment. The evaluator is charged to examine the “fit” between parental limitations and capacities and the children’s needs,⁶ we address the “fit” between these instruments’ limitations and capacities and the needs of CCE. We conclude that the fit is poor and, therefore, that individual adult psychometrics have little or no place in the process of evaluating family dynamics.

The subject of a child custody evaluation is the dynamic and developing family system, not the individual and, on this basis, that measures of individual functioning are largely irrelevant. This paradigm shift requires most evaluators to retool and reconsider process, product and presentation. A CCE report that includes intimidating and invalid means, percentile ranks and alpha coefficients risks misleading consumers and harming the children whom we intend to serve.⁷⁸ This risk is compounded when evaluators blindly rely exclusively on computer-generated scoring and interpretations.^{9 10} Indeed, the AFCC Model Standards for Custody Evaluations caution that “... Evaluators shall recognize that test data carry an aura of precision that may be misleading...”

Finally, it is an error to mistake common practice for correct practice, Keeping in mind that common practice may meet admissibility standards under *Frye*, but not under *Daubert* as discussed below. The fact that a majority of today’s custody evaluators include individual psychometric adult instruments in CCEs¹¹ thereby establishing a “community standard”¹² is not reason to do the same. We recommend instead that pending the development of reliable and valid measures of systemic functioning, custody evaluators eschew the

use of individual adult psychometric tests in favor of cautiously and carefully crafted, systemically-informed, empirically-grounded, and child-centered *qualitative* observations, inferences and recommendations.

What are individual adult psychometric instruments (tests)?

Tests must be distinguished from questionnaires.¹³ Whereas tests are subject to formal interpretation and may generate diagnoses, questionnaires can be standardized, economical and time-efficient means of collecting data and generating hypotheses.¹⁴ Tests share certain properties:

1. Norms. Tests are typically developed by developing specific empirically-derived norms for distinct samples of people. Thus, tests “target” a particular population, be it broad, narrow or in between. Stahl and Simon¹⁵ advise that, “... psychological tests are best used with the reference population with which the test was normed.” The APA explicitly requires that psychologists must, “... use assessment instruments whose validity and reliability have been established for use with members of the population tested.”¹⁶

The fact is that we don’t know, a priori, who child custody litigants are until they become litigants. We can’t accurately predict who is more likely to be a child custody litigant. Experience suggests that they come from all socio-economic strata, all racial, religious, language and cultural groups, and span the full range of ages, IQs, sizes, shapes and colors. They obviously share the experience of parenting (although some are not biological parents) and typically a contentious (if not antagonistic) attitude toward a former parenting partner. Any family law practitioner surely recognizes that people involved in child custody disputes are a population of people who are uniquely and idiosyncratically impacted by the custody dispute. Therefore, how they portray themselves on psychological tests is also unique. Unless and until this population is better understood and instruments are developed that represent its normative thinking, feeling and behavior, it is simply misleading to make statements about a custody litigant by

comparison to the responses of other entirely distinct normative groups on which tests are developed and for whom they are intended.

2. Reliability. Test data are meaningless until they have been shown to be stable across time, contexts and/or administrators. Reliability describes these indices.

Of particular relevance to the question of test reliability among custody litigants is the larger question of the stability of the population in general. Assessing people in the midst of crisis tends not to capture their typical functioning. The intense social, emotional and financial pressures associated with contested custody litigation can induce or exacerbate acute and reactive anxiety, anger and regression among otherwise healthy and high functioning adults.¹⁷ Thus, it remains to be seen whether a properly normed test could demonstrate test-retest reliability across the period before, during and after the close of litigation.

Validity. A test that is reliable, must still be shown to actually measure what it purports to measure. Even given a properly normed and reliable instrument, professionals who conduct CCEs are still faced with the mountainous problem of criterion validity. That is, if the criterion against which a test is to be validated is the ‘best interests of the child,’ but this criterion cannot be generically defined, then the task would appear to be impossible.

What is Child Custody Evaluation (CCE)?

CCE is the assessment of the psychosocial variables that characterize a family system and are relevant to the well-being of the child or children. CCE is usually conducted under court order when parents litigate the future allocation of their parenting rights and responsibilities.

CCE is an empirically-driven, child-centered examination of the family system. It serves to provide the court with an understanding of how best to serve the unique needs of each child and each family. Contemporary standards and guidelines relevant to the conduct of CCE call for the evaluator to employ multiple and diverse methods so as to consider, “... alternative plausible

hypotheses....” (e.g., AAML, 2011, item 4.3[a];¹⁸ see also AFCC 2006, item 5.4;¹⁹ APA, 2010, item 10²⁰). Survey research demonstrates that evaluators commonly include individual adult and child interviews, individual, dyadic and/or systemic observations, a review of relevant historical documents, personal references, and individual adult psychometric testing (Keilin and Bloom, 1986;²¹ Ackerman and Ackerman, 1997;²² Ackerman and Pritzl, 2011;²³ Quinnell and Bow, 2001²⁴). Bow and Quinnell²⁵ report that 91% of surveyed evaluators commonly include individual adult psychometric instruments in CCEs. Ackerman and Pritzl²⁶ observed among CCE evaluators that, “... more testing is [being] performed more frequently and a wider variety of tests are [being] administered than was the case ten years ago.

This apparent trend toward more universal and varied adult testing is despite the fact that none of the relevant CCE standards or guidelines explicitly require the inclusion of testing and despite the fact that psychologist-evaluators are responsible to be aware of the psychometric qualities of the instruments they administer (e.g., Gould, Martindale & Flens, 2013).²⁷

Testing as hypothesis-generation and bias-checking

The debate among professionals about the use of tests in CCEs can become almost as intense as the conflict between the parents we are tasked to assess. On one hand, some professionals take the position that testing is a necessary component of an adequate CCE.²⁸ On the other hand, there are those who recognize the limitations of the use of tests in CCEs and their associated potential to do harm.²⁹

Perhaps the most common reason given for using psychometric tests is their use as a “double check” or “backseat driver” rather than using the tests to establish psychological diagnoses. In this view, individual adult psychometric measures help the evaluator to keep his or her eyes on the road by generating, “...hypotheses, which then must be subjected to verification from alternative data sources”.³⁰ Without tests, CCE evaluators are thought to be more vulnerable to their inevitable blind spots and biases. For example, Bow et al., 2006³¹ argue that failing to test/generate hypotheses creates potential for confirmatory biases and confirmatory distortion.

Despite the logical but misleading appeal of the objectivity of quantitative data, the fact that testing generates quantitative data does not make it more

objective, more valuable, or a better check or balance. The numbers are only as useful and valuable if they are accurate numbers and quality numbers. If the numbers are the result of tests that do not produce valid and reliable data, they are of little value even though the data takes on an objective look and feel given that it is quantitative. This risk is due to the fact that testing creates the (false) impression of precision, clarity and certainty and because testing, when properly used, assists in arriving at diagnosis.

Best practice advises that CCEs not report individual psychiatric diagnoses.³² This is in part because psychiatric diagnoses have no clear meaning for parenting or co-parenting capacity. McCurley et al.,³³ opine, for example, “It is impossible to determine from test results alone if a parent’s measured response patterns are related, either directly or indirectly, to parenting competencies”. Birnbaum, Fidler and Kavassalis³⁴ similarly observe that, “No psychological tests have predictive validity relating to parenting capacity, specific parenting time schedules, and/or sole custody compared with joint custody.” Finally, Luftman, Veltkamp, Clark, Lannacone and Snooks³⁵ report that, “... traditional psychological tests do not address parenting ability, the nature of the parent-child relationship, and the parent’s abilities to communicate or foster the child’s relationship with the other parent.”

Moreover, when CCEs generate diagnoses via inclusion of tests, custody litigation can become, “a pathology hunt”³⁶; a competition to identify the parent with more or worse labels as unworthy of parenting. Also, diagnosis is individualistic, reductionistic and static whereas a well-done CCE reports reflect the dynamic and systemic nature of families.

Despite these common observations, one national survey found that child custody evaluators “... viewed the major purposes of testing as ruling out psychopathology and assessing personality functioning...”.³⁷ Such questions are best seen as secondary or tertiary parts of CCE, if they are addressed at all. Tests are more often than not expensive and time-consuming distractions. They speak to labels and pathology, not functional capacities, strengths and solutions. They are far afield from the primary question that CCE seeks to answer, that is, how can this particular family system best be understood so as to serve the best interests of the child?

The UMDA, CCEs and testing.

The Uniform Marriage and Divorce Act (UMDA)³⁸ underlays child custody laws in most jurisdictions’ The UMDA establishes that the court shall determine the best interests of the child on the basis of “... all relevant factors, including ... the mental and physical health of all individuals involved.” (While jurisdictions have their own language, definition and criteria for what constitutes the best interest of children, the language generally makes reference to elements of the mental and psychosocial health of all individuals involved. Thus, to a reasonable extent, a best interest determination must account of mental, emotional and psychosocial factors.) While some have taken this clause as sufficient reason to administer individual adult psychometric tests to adult custody litigants, nowhere in the text of the UDMA is there a mandate to use psychological testing. Moreover, in every day clinical practice, mental health professionals regularly reach opinions about the psychological functioning of clients without the use of tests. Simply put, there is no standards or guidelines with regard to mental health determinations that requires the use of tests. Therefore, we submit that the application of the UDMA to child custody evaluation requires careful interpretation and application.

Admissibility

In order for an evaluation to have value in the courts, it must fulfill the criteria for admissibility for the jurisdiction in which the proceeding is taking place. Kelly Frye standard³⁹ is the evidentiary standard for expert scientific testimony in California. This standard emphasizes a general acceptance standard. While hurdling this standard is easier than the more restrictive Daubert standard⁴⁰ used in many states, meeting *only* a general acceptance standard leaves many of the relevant ethical and practice concerns discussed above unsatisfied, and the evaluator vulnerable to associated criticisms and complaints. More recently, the landmark *Sargon* case⁴¹ has been touted by various commentators as a “game-changer” in California jurisprudence. It was to be a decision ushering in *Daubert* “gatekeeper” functions, to enable trial courts to protect juries against junk science experts who could otherwise create unjust results. While it may not have had the immediate overwhelming effect for which some had hoped, it has filled a glaring void in California jurisprudence. Many California trial courts

are now regularly flexing their *Sargon*-empowered discretion, and *Daubert*-like scrutiny of expert evidence has become part of California law. In the post *Sargon* era, not only must scientific methods be generally accepted, they must meet tests of reliability and validity. More than a decade ago, Flens⁴² cautioned that,

“When psychologists select tests whose reliability and validity have not been established for use with members of the population tested, it is possible that legal standards of reliability and relevance would not permit testimony drawn from those tests to be admitted. The use of a test that has no demonstrated reliability and validity in the population for which it is being used may be viewed as an unreliable methodology.”

Summary and recommendations:

The logical, empirical analysis of the use of individual adult psychometric tests in child custody evaluations presented here is sufficient to caution against the practice. These tests are not appropriately normed, have yet to demonstrate reliability, and cannot demonstrate criterion validity for inclusion in CCEs. They are not necessary to satisfy the criteria of practice standards, practice guidelines. The *Kelly-Frye* or the *They* are unlikely to withstand the intense scrutiny of a proper *Daubert* challenge. Above and beyond these technicalities, we posit that the issues implicitly addressed by these test instruments about individual adult functioning are the fundamental and central issues to be addressed in child custody evaluations. This is because child custody evaluations are not about individuals. Child custody evaluations are first and foremost about family systems.

However, it is acknowledged that the practice of including individual adult psychometric tests in CCEs is substantially ingrained in child custody evaluators, particularly those who are trained as psychologists. Also, psychometric testing is, central to the livelihood of many mental health professionals, and far too familiar to the courts to be abruptly discontinued. With this reality in mind, we recommend instead that evaluators and consumers approach test data with well-informed caution and in view of the cautions and essential limitations articulated in this article

Tippins and Wittman⁴³ provide precisely this degree of well-informed caution with regard to the conduct of CCEs in general. They advise that the data obtained

in the course of conducting a child custody evaluation should be understood at four distinct levels. At level I, the evaluator reports direct observations (e.g., Mother told Billy to clean up). At level II, the evaluator ties direct observations to established scientific constructs (e.g., Mother is authoritarian). At level III, the evaluator ties these inferences to the question before the court (e.g., Billy will benefit from an authoritarian parent’s care). At level IV, the evaluator leaps from inference to address the ultimate question, that is, the future allocation of parenting rights and responsibilities (e.g., Billy should be placed primarily in his mother’s care). (We note several responses to Tippins and Wittman’s 2005 position (Ackerman & Pritzl, 2011;⁴⁴ Bala, 2005;⁴⁵ Dessau, 2005;⁴⁶ Gould & Martindale, 2005;⁴⁷ Kelly and Johnston, 2005⁴⁸) and the authors’ rebuttal (2005b)).

Borrowing from Tippins and Wittman, it is strongly recommended that testing data be understood similarly. It is perfectly reasonable to report direct observations about how a parent behaved when taking a test and his or her specific responses (level I). It may even be reasonable to generate hypotheses about those behaviors as they may be relevant to relevant generic constructs such as parenting or co-parenting (level II). This review suggests that leaping from these generic constructs to draw inferences about how the child’s needs might best be served (level III) and how the ultimate question before the court should be resolved (level IV) is statistically, empirically, and ethically untenable.

Thus, one might reasonably report the content of a parent’s responses to MMPI items (level I). One might even cautiously report the associated validity and clinical scaled scores (level II), although doing so without sliding down the slippery slope into diagnosis and inferences based on diagnosis about parenting (level III) and placement (level IV) likely requires the high wire balance of a Wallenda. Doing so without tripping over critical issues associated with norming, reliability and validity and thereby admissibility may simply be impossible.

The best answer to the problems of psychometric testing in child custody evaluation calls for conducting such evaluations absent the use of psychometric tests, strictly limiting their use to a hypothesis generation function (with the hypotheses generated to be tested using other types of data) or calls for the development of forensically normed measures of system functioning. Unless and until such instruments are validated for use

in CCEs, evaluators are cautioned that if the shoe doesn't fit, be careful when you wear it.

Dr. Pickar: Benefits and Cautions Regarding the Use of Psychological Testing in Child Custody Evaluations

Psychological testing has been used for many years in family court as one basis for the testimony and opinion of forensic psychologists in child custody matters. While the most commonly used psychological tests meeting *Daubert* admissibility criteria⁴⁹ are not tests of parenting per se, psychological testing can address a number of psychological factors that are relevant to the assessment of parenting skills. These include, among others, stability of mood, impulsivity and associated judgment, ability to modulate and regulate emotions, capacity for empathy and emotional attunement to a child, coping capacities under stress, and reality testing and the corresponding ability of a parent to assist a child to make sense of the world.⁵⁰ The latest survey research to date on the practice of child custody evaluations (CCEs) indicates that the MMPI-2 is used 97% of the time, the MCMI-3 is used 71% of the time, and the Rorschach is used 52% of the time by experienced child custody evaluators.⁵¹ However, the use of psychological testing in family law evaluations remains controversial.⁵² While child custody evaluations have been criticized for having an inadequate scientific basis, the use of valid and reliable psychological tests, especially those that have child custody reference data, can strengthen the scientific foundations of such evaluations. Psychological testing, when utilized though, should be used responsibly, competently, and according to ethical standards.⁵³

The most widely accepted and comprehensive standards and guidelines for child custody evaluation are those published by the Association of Family and Conciliation Courts,⁵⁴ but the "Guidelines for Child Custody Evaluations in Family Law Proceedings," published by the American Psychological Association⁵⁵ are also relied upon by evaluators and the courts. The AFCC standards do not require that psychological testing be administered in child custody evaluations, but rather, note that the use of formal assessment instruments is within the discretion of the child custody evaluator (Standard 6.1). Furthermore, AFCC standard 6.1 further cautions that when formal psychological assessment instruments are not used by those who are legally permitted to administer them, then psychologists "recognize that

they may be called upon to articulate the basis for that decision." The AFCC standards also emphasize other important cautions regarding the use of psychological testing in CCE's, such as not overly relying on computer-generated test interpretations (Guideline 6.6). I have noted elsewhere⁵⁶ that computer-generated tests often emphasize pathology, so clinical judgment and skill are necessary when deciding what to include and what not to include from such computer-based interpretive reports. Both the AFCC and APA standards for child custody evaluation specify that evaluators should use multiple methods of data gathering to "enhance the reliability and validity of psychologist's eventual conclusions, opinions, and recommendations" (APA, Standard 10). Many state statutes make reference to psychological functioning as a relevant factor in child custody determinations. For example, the California Rules of Court, Rule 5.220 (c) (5)⁵⁷ state that the custody evaluation should include an assessment of "psychological and social functioning." The Uniform Marriage and Divorce Act (UMDA)⁵⁸ also indicates that the mental health of all relevant parties is a factor to be considered in custody determinations. Thus, given that psychological testing is one of the most empirically validated means for evaluating psychological functioning, one could even argue that such testing should be incorporated into every child custody evaluation in which the mental health functioning of a parent is at issue, but only as such test findings relate to a parent's ability to provide for the health safety and welfare of a child.

The forensic model of conducting child custody evaluations⁵⁹ emphasizes the importance of using multiple methods of data that are grounded in current science and research. This practice is also central to meeting standards of admissibility in the courtroom. Why should psychological testing be used with parents in a child custody evaluation? Personality tests bring to custody evaluations a kind of scientific anchoring which contrasts with the subjectivity of clinical judgment. Personality tests also use standardized methods for gathering information, have standardized norms, and use scientifically validated rules for interpretation that provide the evaluator (and by extension, the trier of fact) a means of comparison with subjective impressions. Psychological testing can also yield important information about personality characteristics that underlie sound or ineffective parenting, which may not be evident from interview of parent-child observations alone. While the

use of psychological tests in parenting plan evaluations has its' critics, the fact remains that psychological testing may be the most empirically based aspect of a multi-method approach to CCEs.

What are the reasonable expectations of test data as used in a CCE? Psychological test results should be seen as only one source of information for generating hypotheses about parental functioning, to be confirmed or disconfirmed by other sources of data, such as interviews, observations, collateral sources, and historical evidence. Consistent with this approach, it is important to clarify the difference between psychological testing and psychological assessment.^{60 61} Psychological tests produce scores, and the meaning of such scores are typically based upon the comparison of a particular individual's score with data obtained from a normative group, which then allows the evaluator to formulate opinions concerning the psychological strengths and weaknesses of examinees compared to a relevant group of peers.⁶² Consistent with the concept of "psychological assessment,"⁶³ specific psychological test data and scores should never be viewed in isolation, but rather, should only be examined within the context of historical information, interview data, observation, and collateral information. The CCE, in fact, is first and foremost a specialized application of psychological assessment.⁶⁴ In numerous jurisdictions across the county, it is expected that private CCE's will provide meaningful descriptions of the psychological functioning of parents, along with an analysis of the fit between their personality features and the needs of the child. It bears mentioning however, that because a parent has significant mental health problems, does not necessarily mean that they will be an impaired or ineffective parent. Diagnosis is not the primary role psychological testing should play in family law evaluations. Rather, psychological testing, when used competently, can provide an empirically-grounded, normatively standardized methods for generating inferences about psychological constructs which impact parental functioning.

What are appropriate psychological tests to use in a child custody evaluation? This is an important question, given that both the AFCC and APA guidelines offer cautions about the use of psychological testing for parents in child custody evaluations, as the most commonly utilized methods of psychological testing with adults were not specifically developed to evaluate parenting, nor

normed with parents undergoing divorce or child custody litigation. While some promising and potentially useful tests have been developed specifically to assess parenting abilities, such as the Parenting Stress Index⁶⁵ or the Parent-Child Relationship Inventory,⁶⁶ these tests must still be used with caution, with appropriate limitations noted, regarding their applicability to parents involved in child custody disputes.⁶⁷

Frequently, one of the main referral questions for a CCE or Brief Focused Assessment (BFA) is that the court wants assistance in ascertaining the safety of a child in the care of a parent who is suspected to have a serious psychiatric or substance abuse disorder, or who has been a domestic violence perpetrator. The most commonly used psychological tests in CCE's are "objective personality measures" (i.e., MMPI-2, MMPI-2-RF, PAI, MCMI-4) which rely upon self-report. The results of such tests can provide information about personality traits that might fluctuate according to the stress of one's current life situation, but they also measure characterological traits that might be consistent with certain types of psychological dysfunction, substance abuse disorders, or chronic personality disorders. Criticism of the use of objective tests most often focus on the fact that the most commonly used measures of adult psychological functioning were not normed on parents undergoing child custody litigation.^{68 69} However, there have been many advances in the use of psychological tests in CCE's, because now, some of the most frequently used psychological tests which possess excellent validity and reliability, also have context-specific normative data for child custody litigants available. Such normative reference data on child custody litigants are highly useful in enabling an evaluator the ability to compare the score pattern of a particular parent with other male or female custody litigants, rather than only comparing them to general normative data found in the test manuals.⁷⁰ For example, there is normative data on child custody litigants for the Minnesota Multiphasic Personality Inventory-2 (MMPI-2),^{71 72} the MMPI-2 Restructured Form (MMPI-2-RF),^{73 74} and the Personality Assessment Inventory (PAI).⁷⁵ In general, the normative samples of child custody litigants in these studies revealed only mild scale score differences between child custody litigants and the original standardization samples of the tests. Another advantage of these tests of adult psychological functioning is that there are validity scales examining response style, which is crucial in evaluating

child custody litigants, who very frequently may deny the presence of any psychological problems in order to look as healthy as possible to the evaluator. Thus, having child custody litigant norms enables the evaluator to interpret a parent's score in light of the most relevant comparison sample, and have confidence that such reference data are applicable to their cases. Another commonly used and well-validated measure of adult psychological functioning is the Millon Clinical Multiaxial Inventory-IV (MCMI-4), but this test's use in CCE's is somewhat controversial, as it was developed and normed using a group of psychiatric patients, as well the instrument tends to over-pathologize women. Therefore, it's use may not be appropriate in CCE's.⁷⁶

The APA (2010) and AFCC (2006) guidelines for child custody evaluations emphasize the importance of using multiple methods in conducting CCE's. A critical issue in the use of a multi-trait/multi-method approach is the extent to which assessment methods provide independent rather than redundant information.⁷⁷ While objective tests can often yield very useful information, such tests (i.e., MMPI-2, PAI, MMPI-2-RF) are limited by a reliance on self-report, and an examinee's willingness to share information about themselves in an honest manner. Ample research has shown that child custody litigants tend to elevate on the validity scales measuring defensiveness on these objective tests. Therefore, a multi-method approach to psychological testing also entails the use of valid and reliable methods that are not entirely dependent on self-report. One such method is the Rorschach Inkblot Method, specifically when utilized with the Rorschach-Performance Assessment System.⁷⁸ While the Rorschach has traditionally been called a "projective technique," this label is misleading and the Rorschach is now more appropriately referred to as a "performance based" measure of personality.⁷⁹ Performance-based tests address how people actually behave, not just what they say about themselves. Utilizing a performance-based measure such as the Rorschach, along with the MMPI-2 or other objective personality test, provides far greater incremental validity than using two objective tests alone,⁸⁰ because performance-based measure do not share method variance with self-report based tests. Also, objective tests are far more susceptible to positive impression management than the Rorschach.

Past criticism of the Rorschach has centered around inadequate psychometric properties of the test, as some

of the Exner Comprehensive System⁸¹ variables were not empirically supported in research studies. The Rorschach-Performance Assessment System (R-PAS) has tremendously improved the scientific status of the test, which began with an exhaustive meta-analysis of all the Exner Rorschach scoring variables.⁸² This research led to the development of the R-PAS system, an improved scoring system in which only the Rorschach Exner Comprehensive System variables that had solid empirical support were retained, while eliminating those variables that did not have empirical support. Much of the past criticism of the Rorschach has been retracted since the advent of R-PAS.⁸³ Among the advantages of the R-PAS is a new administration system which reduces the occurrence of extremely short or overly long profiles, the use of standard scores allowing for easier normative interpretation, and fewer scoring categories, making it considerably easier to score. Also, recently, R-PAS child custody litigant norms have been published⁸⁴, revealing that the custody litigant norms are quite similar to the standard non-patient R-PAS norms, with only some mild differences. Another advantage is that the R-PAS normative sample includes protocols from 12 non-American countries. Moreover, it has been reported that there is no reliable evidence to date that the basic cognitive and perceptual task of the Rorschach results in cultural or gender differences⁸⁵, making this test one of the most valid for cross-cultural use. Among the questions that the R-PAS method can contribute to an understanding of parenting skills include: 1) what happens to a parents thinking and behavior when they are in highly charged emotional situations; 2) In a disciplinary situation, can a parent effectively use reason or forethought prior to action, or might they tend to be impulsive in how they provide discipline?; 3) Does the parents have a good capacity for empathy and can they accurately perceive emotional states in others, which is relevant when examining a parent's emotional attunement to their child?; 4) Can a parent model effective interpersonal skills for their child in how they deal with conflict?, and; 5) If a parent is suffering from depression or a significant psychiatric disorder, do they still have the emotional and psychological resources to effectively and safely take care of their child?

While this article has primarily focused on adult psychological testing, understanding the psychological and developmental functioning of children is vital to the

assessment of parent-child fit. Thus, in addition to child interviews, parent-child observations, and collateral information from teachers, child care providers, and therapists, psychological tests, such as multi-dimensional questionnaires that parent complete on their children, often serve an important role in a multi-method evaluation. Two of the most commonly used tests that parents complete regarding their children are the Achenbach Child Behavior Checklist (CBCL) and the Behavior Assessment System for Children (BASC-3).⁸⁶ While there is no custody-specific normative data as yet for these instruments, they still can be of tremendous value is not only understanding the current psychological, emotional, behavioral, and adaptive functioning of children and adolescents as seen by parents and teachers, but there are also self-report versions for children and adolescents to complete. The BASC-3 also has advantages over the CBCL, as it has validity scales measuring response style.⁸⁷ The BASC-3 also has comparative multi-rater reports, so an evaluator can analyze similarities or differences in parents' or teachers' view of a child's functioning and attempt to understand why such discrepancies may exist. For example, major discrepancies in reporting by parents could suggest that a child behaves differently in each home, or that one parent may be far more attuned to a child psychological difficulties or adaptive strengths or weaknesses, than the other. Of course, such hypotheses regarding discrepant report by parents or teachers should be confirmed or disconfirmed with other forms of data collected in the CCE.

In sum, appropriately selected psychological tests can be of tremendous value in completing multi-method family law evaluations. However, because unreliable assessment methods may provide inaccurate data potentially contributing to erroneous opinions and recommendations, psychologists must be very careful in their selection of well-validated and reliable tests, while remaining aware of a test's limitation in use with child custody litigant samples. Because psychological tests may be the most empirically sound method used in CCEs, evaluators may run the risk of assigning to test data, greater weight than is warranted. The competent evaluator remains mindful that test findings should only be interpreted in the context of all the information gathered from multiple sources in a CCE. The particular selection of psychological tests should have a clear connection to the referral questions to be addressed by the

CCE, and evaluators should be able to state their rationale for the use of a particular test.

Endnotes

- 1 Bow, J. N., & Quinnell, F. A., *Psychologists' current practices and procedures in child custody evaluations: Five years after American Psychological Association guidelines*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 32(3), 261 (2001).
- 2 Note that this does not mean that testing is necessarily used 91% of the time. Rather, this means that 91% of evaluators have used testing at some time in their child custody evaluations.
- 3 Quinnell, F. A., & Bow, J. N., *Psychological tests used in child custody evaluations*, BEHAVIORAL SCIENCES & THE LAW, 19(4), 491-501.
- 4 Garber, B.D., Simon, R.A., *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, JAAML, Vol. 30, No. 2 (2018).
- 5 Rappaport, S.R., Gould, J.W., Dale, M.D., *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the "Anti-Testing, Anti-Individual, Pro-Family Systems" Woozle*, 30 JAAMLNo. 2 (2018).
- 6 American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, AMERICAN PSYCHOLOGIST, 49(7) 677-680 (1994).
- 7 Erickson, S. K., Lilienfeld, S. O., & Vitacco, M. J., *A critical examination of the suitability and limitations of psychological tests in family court*, FAMILY COURT REVIEW, 45(2), 157-174 (2007).
- 8 Hart, S. D., Michie, C., & Cooke, D. J., *Precision of actuarial risk assessment instruments: Evaluating the 'margins of error' of group v. individual predictions of violence*, THE BRITISH JOURNAL OF PSYCHIATRY, 190(S49), s60-s65 (2007).
- 9 Flens, J. R., *The responsible use of psychological testing in child custody evaluations: Selection of tests*, JOURNAL OF CHILD CUSTODY, 2(1-2), 3-29 (2005).
- 10 Bow, J. N., Flens, J. R., & Gould, J. W., *MMPI-2 and MCMI-III in forensic evaluations: A survey of psychologists*, JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE, 10(1), 37-52 (2010).
- 11 Flens, *supra*, note 9.
- 12 Gould, J., *Use of psychological tests in child custody assessment*, JOURNAL OF CHILD CUSTODY, 2(1-2), 49-69 (2005).
- 13 Hagan, L. D., & Hagan, A. C., *Custody evaluations without psychological testing: Prudent practice or fatal flaw*, J. PSYCHIATRY & L., 36, 67 (2008).
- 14 GARBER, BENJAMIN, TEN CHILD-CENTERED FORENSIC FAMILY EVALUATION TOOLS: AN EMPIRICALLY ANNOTATED USERS' GUIDE. ARIZONA (2015).
- 15 Stahl, P. M., Simon, R. A., & American Bar Association, *Forensic psychology consultation in child custody litigation: A handbook for work product review, case preparation, and expert testimony*, ABA, SECTION OF FAMILY LAW (2013).
- 16 APA, principle 9.02[b]; <https://www.apa.org/ethics/code/>.
- 17 Sears, M. S., Repetti, R. L., Reynolds, B. M., Robles, T. F., & Krull, J. L., *Spillover in the home: The effects of family conflict on parents' behavior*, JOURNAL OF MARRIAGE AND FAMILY 78(1), 127-141 (2016).

- 18 AAML, item 4.3[a] (2011); <http://aaml.org/library/publications/child-custody-evaluation-standards-doc>.
- 19 Martindale, D. A., Martin, L., Austin, W. G., Drozd, L., Gould-Saltman, D., Kirkpatrick, H. D., ... & Siegel, J., *Model standards of practice for child custody evaluation*, FAMILY COURT REVIEW, 45(1), 70(2007).
- 20 APA, principle 9.02[b]; <https://www.apa.org/ethics/code/>.
- 21 Keilin, W. G., & Bloom, L. J., *Child custody evaluation practices: A survey of experienced professionals*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 17(4), 338 (1986).
- 22 Ackerman, M. J., & Ackerman, M. C., *Custody evaluation practices: A survey of experienced professionals (revisited)*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 28(2), 137 (1997).
- 23 Ackerman, M. J., & Pritzl, T. B., *Child custody evaluation practices: A 20-year follow-up*, FAMILY COURT REVIEW, 49(3), 618-628 (2011).
- 24 Quinnell, F. A., & Bow, J. N., *Psychological tests used in child custody evaluations*, BEHAVIORAL SCIENCES & THE LAW, 19(4), 491-501 (2001).
- 25 Bow, J. N., & Quinnell, F. A., *Psychologists' current practices and procedures in child custody evaluations: Five years after American Psychological Association guidelines*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 32(3), 261 (2001).
- 26 Ackerman, *supra* note 23.
- 27 Bow, J. N., & Quinnell, F. A., *Psychologists' current practices and procedures in child custody evaluations: Five years after American Psychological Association guidelines*, PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE, 32(3), 261 (2001).
- 28 Hagan, *supra* note 13.
- 29 Stahl, *supra* note 15.
- 30 McCurley, M. J., Murphy, K. J., & Gould, J. W. *Protecting children from incompetent forensic evaluations and expert testimony*, 19 J. AM. ACAD. MATRIMONIAL LAW. 277 (2004).
- 31 Bow, J. N., Gould, J. W., Flens, J. R., & Greenhut, D., *Testing in child custody evaluations—Selection, usage, and Daubert admissibility: A survey of psychologists*, JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE, 6(2), 17-38 (2006).
- 32 Martindale, *supra* note 19.
- 33 McCurley, *supra* at 299-300 note 30.
- 34 BIRNBAUM, R., FIDLER, B. & KAVASSALIS, K., CHILD CUSTODY ASSESSMENTS: A RESOURCE GUIDE FOR LEGAL AND MENTAL HEALTH PROFESSIONALS 62 (2008).
- 35 Luftman, V. H., Veltkamp, L. J., Clark, J. J., Lannacone, S., & Snooks, H., *Practice Guidelines in Child Custody Evaluations for Licensed Clinical Social Workers*, CLINICAL SOCIAL WORK JOURNAL, 33(3), 327-357 (2005).
- 36 Roseby, V., *Uses of psychological tests in a child-focused approach to child custody evaluations*, FAMILY LAW QUARTERLY, 29(1), 97-110 (1995).
- 37 Bow, *supra* note 31.
- 38 *The Uniform Marriage and Divorce Act of 1980*, 5 FAMILY LAW QUARTERLY 205 (1981).
- 39 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *People v. Kelly*, 17 Cal. 3d 24 (1976).
- 40 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- 41 *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012).
- 42 Flens, *supra* note 9.
- 43 Tippins, T. M., & Wittmann, J. P., *Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance*, FAMILY COURT REVIEW, 43(2), 193-222 (2005).
- 44 Ackerman, *supra* note 23.
- 45 Bala, N., *Tippins and Wittmann asked the wrong question: Evaluators may not be "experts," but they can express best interests opinions*, FAMILY COURT REVIEW, 43(4), 554-562 (2005).
- 46 Dessau, H. L., *A short commentary on Timothy M. Tippins and Jeffrey P. Wittmann's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance"*, FAMILY COURT REVIEW, 43(2), 266-269 (2005).
- 47 Gould, J. W., & Martindale, D. A., *A second call for clinical humility and judicial vigilance: Comments on Tippins and Wittmann (2005)*, FAMILY COURT REVIEW, 43(2), 253-259 (2005).
- 48 Kelly, J. B., & Johnston, J. R., *Commentary on Tippins and Wittmann's "Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance"* FAMILY COURT REVIEW, 43(2), 233-241 (2005).
- 49 *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- 50 D. Medoff, *The scientific basis of psychological testing: Considerations following Daubert, Kumho, and Joiner*, 41 FAMILY COURT REVIEW 199 (2003).
- 51 M. Ackerman & T.B. Pritzl, *Custody evaluations practices: A 20-year follow-up study*, 49 FAMILY COURT REVIEW, 618 (2011).
- 52 R.E. Emery, R.K. Otto & W.T. O'Donahue, *A critical assessment of child custody evaluations: Limited science and a flawed system*, 6 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1 (2005).
- 53 J. Flens, *The responsible use of psychological testing in child custody evaluations: Selection of tests*, 2 JOURNAL OF CHILD CUSTODY 3 (2015).
- 54 Association of Family and Conciliation Courts (AFCC), *Model standards of practice for child custody evaluation* 45 FAMILY COURT REVIEW 70 (2007).
- 55 American Psychological Association (APA), *Guidelines for child custody evaluations in family law proceedings*, 65 AMERICAN PSYCHOLOGIST 863 (2010).
- 56 D.B. Pickar, & R.L. Kaufman, *The child custody evaluation report: Towards an integrated model of practice*, 10 JOURNAL OF CHILD CUSTODY 17 (2013).
- 57 CAL. CT. R. 5.220e(2)(C)(v).
- 58 UMDA, *supra* note 38.
- 59 J.W. GOULD & D.A. MARTINDALE, *THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS* (2007).
- 60 J.W. GOULD, D.A. MARTINDALE & J.W. FLENS, J.W., *Use of psychological tests in child custody evaluations* in, *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*. (R.M. Galatzer-Levy, L Kraus, & J. Galatzer-Levy eds. 2d ed. 2009).

- 61 G. J. Meyer et al., *Psychological testing and psychological assessment: A review of evidence and issues*, 56 AMERICAN PSYCHOLOGIST 128 (2001).
- 62 J.W. GOULD., S.R. RAPPAPORT & J.W. FLENS, *Use of psychological tests in child custody evaluations: Effects of validity scale scores on evaluator confidence in interpreting clinical scales*, in CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (R. Rogers & S.D. Bender eds 4th ed., 497 2018).
- 63 G.J. Meyer Finn et al., *Psychological testing and psychological assessment: A review of evidence and issues*, 56 AMERICAN PSYCHOLOGIST 128 (2001).
- 64 R.E. Erard & D.J. Viglione, *The Rorschach Performance Assessment System (R-PAS) in child custody evaluations*, 11 JOURNAL OF CHILD CUSTODY 159 (2014).
- 65 R. R. ABIDIN, PARENTING STRESS INDEX (4th ed. 2012).
- 66 A.B. GERARD. PARENT-CHILD RELATIONSHIP INVENTORY (PCRI) MANUAL (1994).
- 67 R.R. ABIDIN, W.G. AUSTIN & J.R. FLENS, *The forensic uses and limitations of the Parenting Stress Index*, FORENSIC USES OF CLINICAL ASSESSMENT INSTRUMENTS, 346 (R. P. Archer & E.M. Wheeler eds. 2013).
- 68 Garber, *supra* note 4.
- 69 C. Valerio & C.J. Beck, *Testing in child custody evaluations: An overview of issues and uses*, 14 JOURNAL OF CHILD CUSTODY 260 (2017).
- 70 J.W. GOULD, S.R. RAPPAPORT, S. R. & J.W. FLENS, J.W., *Use of psychological tests in child custody evaluations: Effects of validity scale scores on evaluator confidence in interpreting clinical scales*, in CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 497 (R. Rogers & S.D. Bender eds. 4th ed. 2018).
- 71 R.M. Bagby et al., *Defensive responding on the MMPI-2 in family custody and access evaluations*, 11 PSYCHOLOGICAL ASSESSMENT 24 (1999).
- 72 K. Bathurt, K., A.W. Gottfried & A.E. Gottfried, *Normative data for the MMPI-2 in child custody litigation*, 9 PSYCHOLOGICAL ASSESSMENT 205 (1997).
- 73 E.A. Archer, et al., *MMPI-2-RF characteristics of custody evaluation litigants*, 19 ASSESSMENT 14 (2012).
- 74 C. Kauffman, R. Stolberg & J. Madero, *An examination of the MMPI-2-RF (Restructured Form) with the MMPI-2 and MCMI-III of child custody litigants*, 12 JOURNAL OF CHILD CUSTODY 129 (2015).
- 75 D.J. HYNAN, CHILD CUSTODY EVALUATION: NEW THEORETICAL APPLICATIONS AND RESEARCH (2014).
- 76 Hynan, *supra* note 41.
- 77 Id.
- 78 G.J. MEYER ET AL., RORSCHACH PERFORMANCE ASSESSMENT SYSTEM: ADMINISTRATIVE, CODING, INTERPRETATION AND TECHNICAL MANUAL (2011).
- 79 G.J. Meyer & J.E. Kurtz, J.E., *Advancing personality assessment terminology: Time to retire “objective” and “projective” as personality test descriptors*, 87 JOURNAL OF PERSONALITY ASSESSMENT 223 (2006).
- 80 J.L. Mihura, et al., *The validity of individual Rorschach variables: Systematic reviews and meta-analyses of the Comprehensive System*, 139 PSYCHOLOGICAL BULLETIN 548 (2013).
- 81 J.E. EXNER, THE RORSCHACH, A COMPREHENSIVE SYSTEM: BASIC FOUNDATIONS AND PRINCIPLES OF INTERPRETATION (4th ed. 2002).
- 82 Mihura, *supra* note 46.
- 83 J.M. Wood, *A second look at the validity of widely used Rorschach indices: Comment on Mihura, Meyer, Dumitrascu, & Bombel*, PSYCHOLOGICAL BULLETIN, 236 (2015).
- 84 R.E. ERARD, J.S. SINGER & D.J. VIGLIOINE, D.J., *The Rorschach in multimethod custody evaluations*, , THE RORSCHACH IN MULTIMETHOD FORENSIC ASSESSMENT 210 (R.E. Erard & F. B. Evans eds. 2017).
- 85 J.L. MIHURA & G.J. MEYER, *Introduction to R-PAS*, in USING THE RORSCHACH PERFORMANCE ASSESSMENT SYSTEM 3 (J.L. Mihura & G.L. Meyer eds. 2018).
- 86 Ackerman & Pritzl, *supra* note 17.
- 87 Gould, Rappaport & Flens, *supra* note 26.