

# 7

## PSYCHOLOGICAL TESTING IN THE LEGAL ARENA

### Child Custody in High Conflict Divorce

#### LEARNING OBJECTIVES

- Explain why psychological tests used in forensic settings require strong psychometric foundations
- Describe how forensic psychologists can show that the tests they used in a specific case were valid for the purpose they were intended to serve
- Identify the chief differences between a clinical and forensic evaluation
- Define Daubert criteria and explain how Daubert criteria are relevant to psychological testing in legal contexts
- Discuss the importance of considering the context of the evaluation when interpreting test findings in child custody disputes
- Explain why psychologists use both computer and evaluator generated interpretations of test results in child custody evaluations

Psychological tests are employed in many different legal contexts. A plaintiff in a civil suit alleging psychological harm, such as posttraumatic stress disorder or a traumatic brain injury, might be tested by a forensic psychologist to help determine the merits of the case. Psychological tests also might be employed in the evaluation of a criminal defendant who pleads not guilty by reason of insanity and in the evaluation of a teenager involved in the juvenile court

to determine her treatment and rehabilitation needs. They can also contribute to determining whether a defendant is competent to stand trial.

In the forensic setting, that is, in settings that involve the law, it is imperative that psychological tests have strong psychometric foundations. The decisions that psychological tests contribute to in forensic settings can have a significant impact on individual liberties and the outcome of civil suits. In addition, in an adversarial climate, such as a legal dispute, attorneys on both sides very closely examine the evidence, including psychological tests that were used in the case and the findings resulting from them.

The forensic psychologist needs to provide strong evidence that the tests he or she is using are reliable and valid for the purpose they are intended to serve. In this chapter, the use of psychological tests in divorce-related child-custody disputes is examined to demonstrate some of the many challenges of employing psychological tests in legal decision making.

## PSYCHOLOGICAL TESTING IN CHILD CUSTODY DISPUTES: MR. AND MRS. KELLY

When a couple with children divorce, they have to agree on financial issues, a parenting plan, and decision-making responsibility for their children. Most couples work out an agreement that is entered in court, but some couples cannot come to an agreement, even with the help of mediators or a collaborative divorce process. For couples in this situation, a judge might order a child custody evaluation by a mental health provider.

This is the case for Mr. and Mrs. Kelly (a fictitious couple). They are getting divorced after 10 years of marriage, and they are fighting bitterly over custody of their two children, a two-year-old girl and an eight-year-old boy. They worked with a mediator for more than a year and could not agree on a parenting plan. Mr. Kelly made allegations that Mrs. Kelly was a negligent parent. Mrs. Kelly made allegations that Mr. Kelly was emotionally abusive to the children. They each accused the other parent of saying terrible things to the children—specifically, terrible things about each other. The children still live in the family home with both parents, neither of whom will move out for fear of losing the home and custody of the children.

Neither of the children are doing well. The two-year-old, Jessica, is clingy, has frequent tantrums, and is not adding to her meager vocabulary. The eight-year-old, Sean, gets into fights with other children at school, and nobody invites him to playdates or birthday parties. He is having problems with reading and math, and his grades and test scores are poor.

The family law judge ordered Mr. and Mrs. Kelly to undergo a child custody evaluation with Dr. Lissette, a psychologist who specializes in child custody evaluations in high-conflict divorce. Child custody disputes that are so extreme that they are decided in court are extremely complex and contentious, and psychologists who

conduct evaluations related to child custody disputes must have special expertise. Ideally, as in the Kelly case, the child custody evaluator is a neutral party appointed by the court. Mr. and Mrs. Kelly reluctantly agreed to the evaluation, splitting Dr. Lissette's very high fee.

Child custody evaluations are ordered by family law judges in a small subset of high-conflict divorce cases, those in which parents cannot agree on custody issues and parenting plans. Specific decisions need to be made on where the child will live (physical custody), when and where the child will see each parent (parenting time), who can make decisions about the child (legal custody), and child support (financial support of the child).

How can Dr. Lissette help the court determine a parenting plan for this family? In every state, the current standard for making decisions about child custody issues, including parenting time and other matters, is to develop a plan based on *the best interests of the child*. There are no general standards that define the best interests of the child, although some states identify factors that should be considered in making the determination (Zumbach & Koglin, 2015).

Couples in such high conflict that they can't agree on a parenting plan are challenging for psychologists tasked with evaluating them. Each parent is heavily invested in his or her own point of view and believes strongly in the rightness of his or her cause. Mr. Kelly knows *for sure* that Mrs. Kelly is a terrible parent who will put their children at risk of harm. Mrs. Kelly knows *for sure* that Mr. Kelly is a terrible parent who does emotional damage to their children every day. There may be significant financial ramifications as well. Both parents will do everything they can to maintain custody and decision-making ability, and neither can afford to be open and honest about their own parenting challenges, if they are even aware of them.

Dr. Lissette knows all about these kinds of couples. He has years of experience. He also relies on guidelines for child custody evaluation put forward by the American Psychological Association (APA) and Association of Family and Conciliation Courts (AFCC). To conduct the evaluation, he gathers information about each member of the family. He contacts the children's pediatrician and teachers and observes the children with each parent separately, once at home and once at his office. He interviews both parents using a semistructured interview format, and he carefully records their responses and his observations. He administers the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Rorschach Inkblot Method to both parents, and he has them complete the Child Behavior Checklist (CBCL) for the children. He is cautious in his interpretation of test results, paying attention to the normative data for child custody litigants and related problems with defensive responding. He compiles the data from interviews, observations, and testing, and he prepares a comprehensive report that describes the strengths and weaknesses of each parent, the children's needs, and how the children's best interests fit with the parent characteristics he identified. Then he prepares to testify in court, knowing that attorneys for one or both parents will question his findings.

## A BRIEF HISTORY OF CHILD CUSTODY EVALUATION

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In early American history, children were economic assets in a family, and custody was always given to the father as head of the household. As families moved away from farms, mothers were given preference in custody disputes unless they were deemed unfit, under the belief that mothers were better and more natural caretakers, especially for young children. This changed in the last half of the 20th century, when courts determined that mothers were not necessarily better qualified to provide care than fathers, and the notion that custody decisions should be made on the basis of the best interests of the child, rather than on meeting the needs of either parent, became part of the legal code in most states. This has remained the rule for the past several years, despite a lack of clarity about how to determine a child's best interests.

Child custody evaluation in divorce cases began in earnest in the 1970s, following legislation that allowed courts to order professional consultation for custody matters. The role of custody evaluators has been controversial ever since, and child custody evaluation has also been fraught with ethical challenges. What should an evaluator who is trying to be impartial do if one parent refuses to be evaluated? What kinds of recommendations should be made if research does not support one decision or another regarding child custody and visitation? What are reasonable methods to obtain data? These kinds of ethical concerns were noted 30 years ago (see Karras & Berry, 1985) and continue to be relevant. Questions about the evaluator's decision-making process, the kinds of custody arrangements that are feasible and helpful to children, and many other matters have also been posed for years. The answers to these questions initially tended to be based on opinions, with little research support to back them up (Keilin & Bloom, 1986). To some extent, that is still the case.

The APA came out with its first set of guidelines for child custody evaluation in 1994. The guidelines reference concerns about the misuse of psychologists' expertise in some child custody cases, and they provide direction to evaluators in order to enhance their proficiency and minimize the likelihood of ethical lapses. The 1994 guidelines indicate, for example, that the psychologist should develop specialized competence, strive to maintain impartiality, and make custody recommendations that are in the best interest of the child, focusing on the fit between the needs of the child and parenting capacities. The guidelines were revised in 2010, and they are discussed below.

## THE FORENSIC NATURE OF CHILD CUSTODY EVALUATIONS

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Much of the time, psychologists conduct evaluations to help individuals. In the case of child custody evaluations, the role of the evaluator is to help the court make decisions about custody of one or more children in a family. The client is the court. Forensic evaluations provide guidance to court personnel on both civil and

criminal matters. They require a higher standard of evidence than clinical evaluations because the stakes are so high and the process is adversarial. If the evaluator does not support his or her findings with strong evidence based on scientific research, the findings can be dismissed.

In forensic work, there are two standards for admissibility of evidence in court. Daubert criteria for admissibility of evidence stem from a 1993 case, *Daubert v. Merrell Dow Pharmaceuticals*, that was decided by the Supreme Court. In that case, the Court decided that expert witnesses must provide evidence based on a reliable foundation, that is, the expert's conclusions must be based on adequate scientific methodology. Furthermore, the judge in the case must serve as a gatekeeper in determining whether expert testimony is based on scientific knowledge. The judge evaluates the validity of the science in special hearings (Chin, 2014).

Daubert criteria are required in federal courts, but some states have not adopted the Daubert criteria for admissibility of evidence and rely on an earlier standard for admissibility, the Frye standard. The Frye standard requires that the scientific procedures relied on for providing evidence are generally accepted by the scientific community. Thus, for states relying on the Frye standard, it is the scientific community that is the gatekeeper, not the judge (Ackerman & Gould, 2015). In either case, testimony of expert witnesses is not admissible if it is based on clinical opinion rather than scientific evidence. As Ackerman and Gould (2015) state, "Expert testimony can no longer be admissible when the opinions are based on the clinical experience or intuition of the witness. Expert testimony must have its basis in peer-reviewed literature and/or data that have been drawn from scientific methods" (p. 431).

Thus, the evaluator serving as an expert witness must ensure that the evidence he or she provides is derived from sound science, or to meet the requirements of the Frye standard, derived from procedures generally accepted by the scientific community. In other words, to present evidence as an expert witness, the evaluator must use credible scientific techniques to gather information.

In addition, in child custody evaluations and other forensic work, the process is adversarial. The evaluator must be unbiased and make every effort to evaluate both parties in the dispute. Ideally, the evaluator is appointed by the court rather than hired by one of the parties.

The evaluator in a child custody case and in other forensic contexts serves as an *expert witness*. He or she provides information that others don't have, by virtue of his or her special expertise in the area in question. A child's psychotherapist, in contrast, can serve as a fact witness but not an expert witness in a custody case. The therapist as fact witness describes events and observations. It is very important that the roles of an expert witness and a fact witness not be confused. A therapist may have an opinion about a parenting plan, even a very strong opinion, but he or she was not hired or appointed by anyone to make recommendations, or provide findings, regarding custody issues. The therapist was hired to provide treatment. Furthermore, the therapist is not likely to be objective and unbiased.

Should the evaluator offer a recommendation about custody at the conclusion of the evaluation? This is an ongoing controversy among psychologists. Some psychologists

provide information so the court can make informed decisions, while other psychologists make specific recommendations about custody and other aspects of parenting plans. Many psychologists are concerned that the scientific basis for making specific recommendations regarding parenting plans is inadequate (Symons, 2010).

As noted above, APA established guidelines for child custody evaluations in 1994, and these were revised in 2010. The purpose of the guidelines is to “promote proficiency” in child custody evaluation; the guidelines are aspirational (APA, 2010, p. 836). They do not set standards or mandate activities.

According to APA guidelines, the psychologist’s job is to “identify the psychological best interests of the child” taking into account a variety of factors, such as family dynamics, strengths and weaknesses of all parties, the child’s needs, and cultural and environmental issues (2010, p. 864). The court uses this information in making decisions about child custody. The guidelines do not go as far as advising psychologists not to make specific recommendations about a parenting plan, but they advise that if the psychologist chooses to make recommendations they must be based on sound data.

The guidelines also recommend that the focus of the evaluation is on the child’s needs, not the parents’ needs, throughout the evaluation. Specifically, the guidelines recommend that the evaluation focuses on the child’s needs, parent characteristics, and the fit between them based on scientifically reliable information. They further advise evaluators to use multiple methods of gathering information.

In addition to APA guidelines, Ackerman and Gould (2015) list 24 current standards and guidelines for child custody evaluations, noting first that child custody evaluations are forensic evaluations.

## THE PROCESS OF CHILD CUSTODY EVALUATIONS

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Dr. Lissette is the right person for the job of identifying the psychological best interests of the Kelly children and how to meet them. He is very familiar with child custody evaluation and has served as an expert witness in similar cases several times. He is knowledgeable about child development, family dynamics, the impact of divorce and separation on children, psychopathology, assessment in custody cases, and legal proceedings in divorce for his state. He has kept up with research in the area and revised his procedures over the years to provide the most scientifically sound findings. He is well versed in the ethics of assessment in child custody cases, the need to remain unbiased, and the importance of carefully obtaining informed consent. He is skilled at writing a report to document his findings, and he is well prepared to testify in court as an expert witness. He will not be providing a recommendation about custody, a decision he made recently, because he does not want to state more than the science will support.

Most of his clinical time with the members of the Kelly family is taken up by interviews and observations, both of which he carefully documents. He also obtains collateral information, such as reports from school and the pediatrician,

and statements from Mr. Kelly, Mrs. Kelly, Mrs. Kelly's therapists, and a marriage counselor who worked with them briefly.

Then he administers psychological tests. The purpose of the tests, in his view, is to generate hypotheses about Mr. and Mrs. Kelly's parenting strengths and weaknesses that can be borne out by interview and other data. Rather than providing a generalized assessment, he focuses on Mr. and Mrs. Kelly's capacities to parent and to coparent, that is, to work together as parents in the best interest of the children. He is specifically looking for signs of mental health problems, substance abuse, and/or cognitive and learning deficits that could interfere with parenting or coparenting, and he is also interested in learning more about their personality characteristics, for the same reason. His goal is to inform the court about strengths and challenges in these areas for each parent.

He knows that Mr. and Mrs. Kelly are likely to respond to psychological tests defensively, given the context of the evaluation and their need to be seen in a favorable light. He therefore uses tests that have both standard normative data and normative data from child custody litigants, in order to make the most informed interpretations of test data. He uses computer generated reports as well as his own interpretations of the data. The computer generated reports are less susceptible to bias, but he cannot access the algorithms behind the reports because they are proprietary and therefore he cannot readily defend them in court.

He also asks the court to order an evaluation of the older child, to be completed by a psychologist who has expertise in evaluating young children with learning and emotional problems. He could not determine from the available data, including evaluations completed at school, whether Sean had a learning disability or emotional problems or whether his challenges were due to the stress of his family situation. He wanted to understand Sean's needs so he could factor them into his findings about parenting capacities. He relied on pediatrician reports and developmental testing completed by the pediatrician's office to understand the younger child's needs.

After he gathers all of the data, Dr. Lissette writes a comprehensive report that outlines his findings. He focuses on parenting strengths and weaknesses as well as how to improve each parent's ability to coparent and each parent's effectiveness with the children. He focuses on both parenting and coparenting because he knows that the children will do best if they have strong relationships with each parent and if their parents can work together on childrearing with minimal conflict. This is what he is hoping for the Kelly family.

## PSYCHOLOGICAL TESTS USED IN CUSTODY EVALUATION

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The most important consideration in choosing psychological tests to use in custody evaluations is to ensure that the tests have strong research support. Each test must have strong evidence of reliability and validity in regard to the specific questions



under consideration (Ackerman & Gould, 2015). The tests should also have separate normative data for male and female custody litigants (Ackerman & Gould, 2015) because of the special nature of the context of the evaluation. If the evaluator uses tests that have inadequate research support, his or her findings could be contested by one of the parent's attorneys. Equally important, if he or she relies on unreliable data or data that lacks validity in determining parenting strengths and weaknesses, the evaluation would be grossly unjust to the children, whose needs are not being met, and to the parent on the losing end of the custody battle.

Another important issue in choosing and using psychological tests in custody disputes is that the context of the evaluation needs to be factored in when interpreting results. Custody disputes are extraordinarily stressful, and the level of stress custody litigants are under can impact test results. Anger about being evaluated can also impact results. Thus, the custody litigant is more distressed than he or she would be otherwise and may seem more maladjusted. Most common, however, is that custody litigants respond to psychological tests in a very defensive manner, portraying themselves in as favorable light as possible. They may even be coached to do so by their attorney (see Victor & Abeles, 2004). Paying attention to the context can mitigate the effect of either of these problems in test interpretation.

In choosing tests, the primary goal is to measure attributes that are relevant to the specific questions posed by the court, and, more generally, to measure attributes that are relevant to parenting effectiveness. Parents who have untreated mental illness, substance abuse, or neuropsychological deficits that may affect impulse control and judgment can engage in poor or even destructive parenting practices. Another goal for evaluation might be to assess personality and coping characteristics that can interfere with, or support, coparenting. Psychological tests can be used to generate hypotheses in all of these areas. Hypotheses are then substantiated, or not, by interview, observational, and collateral data. Tests add an important layer of data, one that is objective and standardized, but they are not the final word.

No psychological test is perfect for use in custody disputes. The MMPI-2 comes closest and is considered the "gold standard" (Ackerman & Gould, 2015, p. 436; King, 2013). The MMPI-2 has a tremendous amount of research behind it and includes scales that measure defensive responding. In addition, MMPI-2 norms for custody litigants were first published in 1997 (King, 2013). Most custody litigants underreported negative attributes and overreported attributes that made them look good, understandable given that the test was administered to determine if the test taker should be awarded custody of his or her children. The custody litigants as a group looked psychologically healthier than the normal population based on MMPI-2 results, due to defensive responding (Bathurst, Gottfried, & Gottfried, 1997). Some evaluators manage the defensive responding of custody litigants by making corrections or adjustments to how the test results are usually interpreted, but the research does not yet support these efforts (King, 2013). Other evaluators might use elevated scores, rare in the custody litigant population, to generate hypotheses about problems one of the parents might have, such as antisocial



behaviors. They don't make too much of scores in the normal range, other than to note that they are typical of custody litigants and likely reflect defensive responding that is appropriate to the context.

The newest version of the MMPI, the MMPI-2 RF, is less widely used than the MMPI-2 in custody evaluations because the data collected on the MMPI-2 does not generalize to the MMPI-2 RF, and there is less research on the newer test. There are other specific weaknesses of the test for assessing custody litigants, such as a lack of separate norms for men and women (King, 2013).

The Rorschach Inkblot Method, a projective test, is more controversial among psychologists than the MMPI-2, but there is good evidence for its utility in measuring psychosis and related signs of serious psychopathology (Mihura, Meyer, Dumitrascu, & Bombel, 2013), and it is not infrequently used in custody evaluations (King, 2013).

Standard measures of cognitive functioning, such as the Wechsler Adult Intelligence Scales-IV (WAIS-IV), can be useful in situations where there are questions about cognitive functioning for one or both parents. These kinds of tests are not prone to defensive responding, but results can be impacted to a mild degree by anxiety, and that should be taken into account given the assessment context. Similarly, measures of academic achievement such as the Woodcock Johnson Tests of Achievement-IV (WJAI-IV) can be helpful in ruling out learning disabilities. Tests of cognitive functioning and academic achievement should be considered methods of learning what parents need to do their job effectively, to help develop a parenting plan that is in the best interest of the child, rather than as a means of determining who should have custody.

Use of both computer and evaluator-generated interpretations for all tests are recommended, computer interpretation because of its thoroughness, grounding in research findings, and lack of bias, and evaluator-generated interpretation because computer interpretation is based on algorithms that are proprietary and therefore cannot be readily defended in court.

In addition to psychological tests to make hypotheses about parent functioning, it can be helpful to have parents complete rating scales about the behavior of their children. There are several very well researched measures, such as the Achenbach Child Behavior Checklist (CBCL) or the Behavior Assessment System for Children (BASC), although there are no specific norms for children whose parents are in a custody dispute about them. These kinds of tests can be useful in gaining insight into each parent's view about a child's behavior, especially when examined in comparison to other data about the child.

Although there are a few measures of parent effectiveness, most are not well validated or have limited normative data. The Parenting Stress Index (PSI), a self-report measure of stress in parenting, is a useful test in some circumstances, but it has limited normative data and is prone to defensive responding in custody litigants (King, 2013). There are also some measures that have been developed specifically for use in custody litigation, such as the Bricklin Perceptual Scales, but none of these have adequate research support.

## HOW DO PSYCHOLOGICAL TESTS CONTRIBUTE TO DR. LISSETTE'S OPINION ABOUT WHAT IS IN THE BEST INTEREST OF THE KELLY CHILDREN?

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For the Kelly family, psychological testing of the parents using the MMPI-2 and the Rorschach provided Dr. Lissette with hypotheses about each parent's personality characteristics, parenting strengths, and parenting limitations. Both parents responded to the MMPI-2 defensively, in a manner typical of custody litigants, and all scores were in the normal range. They also responded to the Rorschach defensively, providing a minimal number of responses but enough to score the test in accordance with Exner scoring criteria (Exner, 1986). Rorschach results suggested each parent had limitations in coping skills, with Mr. Kelly likely to have temper outbursts when stressed and Mrs. Kelly likely to have mild perceptual distortions, seeing the world other than as it is in stressful circumstances. Dr. Lissette's observations and interviews with Mr. and Mrs. Kelly and their marriage counselor supported these notions. Both parents would be more effective if they had mental health counseling to improve their coping and parenting skills as well as their capacity to coparent.

CBCL results suggested Mrs. Kelly minimized Sean's behavior and learning problems, while Mr. Kelly tended to exaggerate them. They both would benefit from education about child development and consultation with a counselor and the school psychologist to more accurately understand Sean's needs. Results of Sean's testing, completed by a different evaluator, indicated he had a reading disorder in addition to emotional problems related to the stress of the divorce. As a result, he would need to be monitored for an individualized education plan and special education services as he got older. He would also need more immediate help at school to improve his reading skills and capacity to pay attention during the school day.

Dr. Lissette included the test findings and his interpretations in the comprehensive report he made to the court. When he took the stand as an expert witness, attorneys on both sides asked questions about the tests he administered and the findings they generated. Dr. Lissette was able to respond to them easily. All of the tests he used have strong scientific support and meet both Daubert and Frye criteria for admissibility in child custody cases. He is well qualified to conduct child custody evaluations. His interpretations of test results served as hypotheses rather than conclusions. They were based on normative data from custody litigants as well as a normal population, and his findings were based on computer-generated interpretations as well as his own interpretations of the data. He took into account the likelihood of defensive responding and the stressful nature of the circumstances for the parents and children. He focused on identifying the psychological best interests of the children and both parents' capacities to meet them. He made recommendations about how to improve the capacities of the parents to meet their children's needs, but he refrained from making a parenting plan for the family, leaving that to the court.

## CONCLUSION

Psychological tests play a role in most court-ordered child custody evaluations. They provide objective, standardized data in a complex, adversarial situation. When used wisely, by a psychologist with expertise in the area and as part of a more comprehensive assessment to address specific concerns, psychological tests provide important hypotheses that can be substantiated through historical records, interviews, and observations. It is essential that the tests used in these matters have strong psychometric foundations. If not, they will not only be contested in court, they can provide misleading data to guide very important legal decisions, an unjust outcome for all concerned.

### Discussion Questions

1. Should child custody evaluations conclude with recommendations about the specifics of parenting plans, such as how much time children should spend with each parent and how holidays should be handled? Why or why not?
2. If you were an evaluator in a custody dispute, how would you decide which tests to administer?
3. What do you think were the challenges for Dr. Lisette in the case described above?

### Research Ideas

1. Review the literature on at least two measures that are used to assess the risk for future violence, such as the Structured Assessment for Violence Risk in Youth (SAVRY) and the Psychopathy Checklist-Revised (PCL-R). How were these tests developed, when is it appropriate to use them, and what is the evidence that supports their use?
2. Discuss the use of psychological testing in determining competency to stand trial.
3. Review the literature on the assessment of malingering, or the exaggeration or faking of illness for secondary gain, for example, to claim disability or to avoid legal or other consequences. Are there tests that are successful at identifying malingering? What is the evidence for or against their effectiveness?

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