

## The Deer-Does in Mediation

Neither John nor Jane Deer-Doe entered mediation with a sense of optimism, let alone a desire to be in the same room with one another. Their mediator, Dr. Cynthia Barnes, who also was a clinical psychologist and family therapist, was pleasant, calm, and clearly in control of the meeting, but she could not prevent the Deer-Does from erupting into an angry argument after only about 20 minutes. A tense discussion concerning their disagreements about the children exploded when John accused Jane of using the children to meet her own, limitless need for attention. Jane shot back, “It wasn’t me who had an affair.” In an angry, loud voice, John was retorting, “I never would have had to go outside the marriage if you . . .” when Dr. Barnes interrupted to ask to speak with each parent alone.

At first, Jane fumed during her caucus alone with Dr. Barnes, but she found herself in tears within a few minutes. “I just can’t believe I’m losing my marriage,” she said, “and now he wants me to lose my kids too.” She talked about her feelings of loss, grief, fear, hurt, and anger, not about problems with the custody arrangement. At one point, Jane even confessed that at times she longed to get her marriage back; John had, after all, been a good father and husband. But this revelation quickly led Jane back to John’s affair and the pain it caused her; she was becoming angry again when Dr. Barnes interrupted her.

Dr. Barnes offered that she recognized that Jane was in great pain in response to losing so many things, and that she needed to grieve. In fact, Dr. Barnes recommended a therapist for Jane to consult in order to discuss these issues. Yet, Dr. Barnes also pointed out that the goal of mediation was to preserve and protect the best part of Jane’s relationship with John—their children. She wanted Jane to think about ways they might be able to try to do that.

John was far less emotional when he met with Dr. Barnes alone. He clearly was very frustrated, but kept saying that all he wanted was to have time with his children and get on with his life. Dr. Barnes acknowledged John’s feelings, but suggested that maybe Jane—and maybe Isabella and Carlos too—were not as ready to move on as he was, especially in regard to his new relationship. She also obliquely suggested that John might want to slow down his current romantic relationship a bit for his own sake, as well. Her strong advice to John was to work on taking small but positive steps forward with the kids, and to focus on first rebuilding his relationship with them alone before including his new girlfriend in his time with them.

When the Deer-Does and the mediator got back together toward the end of their two hours, Dr. Barnes again acknowledged everyone’s difficult emotions, but pointed out how mediation was focused on trying to solve problems. She repeated her theme about taking small but positive steps, and to the parents’ surprise, they took one by arranging a plan for Carlos and Isabella to spend time with John for an overnight during the coming weekend. They agreed on very explicit details, not only for timing and transportation but also on what to tell the children about the plan and what to do if one of them grew distraught.

Jane and John did not work everything out in one mediation session, but they did discover a forum where they could bring their conflicts and try to sort them out. Mediation offered them an environment that accepted their painful emotions but simultaneously

encouraged them to put their own feelings on hold and focus on a plan for their children. Jane and John did not realize it, but this is exactly what they needed to do in a much bigger way, in order to move forward as parents and also as people in the coming months and years.

### **RECOMMENDATION 2: ADOPT A CLEAR CUSTODY STANDARD LIKE THE APPROXIMATION RULE**

Our primary recommendation is to continue to develop practices and policies that encourage parents to reach their own, hopefully reasonably amicable decisions about residence and parenting, even when they are in the midst of separation and divorce. We view mediation as only one of a range of options designed to facilitate that goal. Our second recommendation is that state legislatures move to enact clear guidelines for determining custody in cases where the parents cannot reach an agreement. A fair standard that results in more predictable outcomes should reduce the number of contested custody cases, alter the need for and nature of custody evaluations, and as a result, we believe, help to reduce or at least not exacerbate conflict between separating parents. In short, a clear, determinative custody rule is likely to serve the children’s best interests in separation and divorce.

There is one proposal for a clear custody guideline whose potential we find particularly hopeful. The “approximation rule” suggests that parenting arrangements after divorce should approximate, as much as is possible, the respective involvement of the parents in childrearing during marriage (Scott, 1992). Parents who had equal or near-equal involvement during the marriage would maintain some form of joint physical custody after separation. Parents who divided their childrearing roles disproportionately during the marriage also would continue that arrangement. Parents who had agreed to change their roles over time, or who wanted a different postdivorce custody arrangement for whatever reason, would be encouraged to negotiate their own arrangements according to the primary, private settlement recommendation of those who have advocated for the approximation rule.

In our view, the most important advantage of the approximation rule is that it is a clear, determinative standard. Parents and their lawyers would know what to expect of the courts, and this knowledge would promote settlement. In custody disputes that are nevertheless litigated, the approximation rule would sharply limit the scope of the legal inquiry, as well as any custody evaluations that might occur. Rather than assessing children’s future best interests, under the approximation rule judges and custody evaluators would focus on the far clearer and far narrower question of each parent’s past involvement in childrearing.

No state has implemented the proposed approximation rule, so there is no evidence on its effectiveness. We note, however, that the American Law Institute (2002), whose model statutes

often become the basis for state law, has endorsed the approximation rule in its proposed reforms of divorce and custody law (along with the principle of parent self-determination, consistent with our first recommendation).

We also should be clear that our support of the approximation rule is motivated more by the problems created by the ill-defined nature of the current best-interests standard than by the approximation rule itself. We would be open to any clear and determinative rule for deciding children's best interests, but favor the approximation rule over its two major rivals: (a) a primary-caretaker parent standard, which would award sole legal and physical custody to the parent who did most of the childrearing; and (b) a presumption in favor of joint physical custody. We view the approximation rule as a pluralistic hybrid of these two alternatives.

We find the approximation rule appealing because it is a clear and determinative alternative but not a "one size fits all" solution. At the same time, we are aware that the approximation rule is not without problems. Parents' involvement changes over time and as children grow older (for example, fathers' involvement in childrearing tends to increase). In addition, parents and their lawyers certainly would debate circumstances like the Deer-Does, in which parents agree that one parent will temporarily become more involved in childrearing. We also would not expect the approximation rule to end strategic maneuvering. For example, an unhappily married parent might quit work or even get fired in order to be home with the children—and have an advantage in a future custody dispute.

We do not propose solutions to these possible difficulties, but again note that the best-interests standard is itself fraught with problems—some similar, and some much bigger, in our view. We believe that the benefits of a clear rule potentially far outweigh the costs and that implementing the rule is a social experiment well worth undertaking. In fact, divorce policy already has witnessed the success of moving from vague to specific guidelines. In the early 1980s, the rules governing child support were unclear, and this uncertainty encouraged conflict and poor enforcement. Federal legislation used financial incentives to encourage states to adopt clear child support guidelines by 1986 (National Institute for Child Support Enforcement, 1986). Despite struggles with initial implementation—and many continuing problems with child support—two decades later, all agree that the clear guidelines are a vast improvement for families, legal professionals, and the child-welfare system. We expect the same outcome when legislatures finally move to adopt a clear child custody rule.

### **RECOMMENDATION 3: LIMIT EXPERT TESTIMONY AND CLARIFY STANDARDS OF PRACTICE**

As long as the best-interests principle remains in place as an ill-defined standard, our third and final recommendation is to utilize existing evidence law, professional ethics codes, and

practice standards to limit the expert testimony of mental health professionals in child custody cases to the presentation of scientifically supported evidence. Until far stronger scientific support is forthcoming, this recommendation specifically includes the suggestions (reviewed earlier) to (a) abandon use of all custody-specific "tests" that purport to measure children's best interests directly or indirectly, (b) prohibit testimony about PAS or any other "syndrome" that lacks scientific support, (c) identify the specific nature and sources of inference based on unstructured interview and observational assessments, and (d) apply appropriate caution in interpreting established measures and integrating information across different areas of assessment.

### **Rules of Evidence**

Our recommendation to limit expert testimony may seem radical, but our proposal simply urges the application of established rules for expert testimony to such testimony in custody cases (Shuman, 2002). Expert testimony in all legal proceedings is guided by rules of evidence that identify the circumstances under which such testimony is appropriate (Ewing, 2003; Shuman, 2000; Shuman & Sales, 1998). A key problem for courts and legislatures is determining exactly what makes testimony scientific and expert. Historically, the testimony of experts was admitted if it passed a legal test developed by a United States district court. In *Frye v. United States* (1923) the court wrote that

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to determine. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle for discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs (p. 1014).

The *Frye* test, however, has been criticized on a number of grounds (Shuman, 2000). Some have argued that it is too conservative and may result in exclusion of testimony based on novel-yet-valid techniques and approaches; others say it is too liberal and allows for testimony based on techniques that have gained general acceptance despite being invalid. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), the United States Supreme Court ruled that the general-acceptance test developed in *Frye* "is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence" (p. 2799). The Court ruled that the trial judge should ensure that the opinion is based on an "inference or assertion . . . derived by the scientific method" and determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology can be applied to the facts in issue" (p. 2796).

The Court went on to identify four factors that judges could employ when considering specific testimony, including (a) the