

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

“testability” of the theoretical basis for the opinion; (b) the error rates associated with the approach, if known; (c) whether the technique or approach on which the opinion is based has been subjected to peer review; and (d) whether the technique or approach is generally accepted in the relevant scientific community.

The guidance provided by *Daubert* could be used to examine whether the expert opinions offered by mental health professionals in custody disputes are science based, but there is no evidence indicating that trial judges have actively done this. Those offering anecdotal accounts or personal impressions, however, are essentially unanimous in their impression that evidence offered by experts in custody cases is rarely objected to and even less frequently excluded (Shuman, 2002). Similarly, a review of appellate cases also suggests that the opinions of mental health experts are rarely excluded on the grounds that the basis for the expert opinions offered does not meet required scientific standards. Our view is that the low scientific standards for expert testimony again can be traced to the vague best-interests principle and the impossible dilemma it creates for judges. For this reason, and because individual trial judges rarely have the time or the expertise to evaluate the scientific status of psychological measures, we believe that it is incumbent upon the mental health professions to develop clear professional standards regarding expert testimony in child custody cases.

Professional Standards and Guidelines

The American Psychological Association (APA; 1994), Association of Family and Conciliation Courts (AFCC; 1995), and American Academy of Child and Adolescent Psychiatry (AACAP; 1997) all have developed guidelines for professionals conducting custody evaluations. All of these guidelines recommend an assessment of childrens’ needs, parents’ abilities to meet these needs, and parents’ abilities to provide for future needs. The APA and AACAP guidelines also identify a number of factors considered to be integral to child custody evaluations, including assessment of parenting abilities, assessment of capacity to provide a stable loving home, identification of inappropriate behavior that negatively influences the child (e.g., substance use/abuse), consideration of parental psychopathology as it affects parenting ability or the child directly, and consideration of the child’s wishes.

Despite broad agreement about factors that should be assessed, there is little agreement about how to assess them. For example, the AFCC guidelines (which are currently undergoing revision) do not provide assessment guidelines, while APA and AACAP both generally advocate a multimethod approach combining clinical interviews, direct observation, and psychological tests. Guidelines promulgated by AACAP question the value of psychological testing, while suggesting that collateral information be obtained from school personnel, healthcare providers, childcare providers, family, friends, and other indi-

viduals who may provide information germane to child custody placement. The lack of consensus begs the question: What accounts for the variability in recommendations? We conclude that much of the variability is the result of a lack of requisite knowledge. There is not enough scientific evidence (and legal guidance) about how evaluations should be conducted and about what type of evaluation is most helpful. Accordingly, we urge professional organizations to develop very clear guidelines concerning acceptable, scientifically based practices and what inferences can appropriately be drawn from them. We have offered our review of the literature on these measures as a starting point to these discussions and negotiations.

We also urge professional organizations to adopt clear ethical standards for mental health professionals to follow in custody evaluations. For example, professional organizations have failed to take a clear stand on principles of practice that are widely embraced by those with extensive professional experience in the custody context. We suggest three such principles are worthy of becoming standards of practice: Evaluators should

- Show preference for evaluations conducted by mutually agreed-upon or court-appointed experts
- Promote settlement and other steps that will facilitate a degree of parental cooperation in childrearing and authoritative parent–child relationships—for example, by providing concrete, private feedback to the parties about the evaluator’s opinion before submitting a final report
- Acknowledge that custody is ultimately a legal decision and thus avoid offering “expert opinion” on legal matters—such as who should enjoy primary legal or physical custody and under what conditions—despite considerable pressure to do so within the legal system

CONCLUDING COMMENT: A QUESTION OF VALUES

A clear custody rule—whether the approximation rule, the primary-caretaker-parent standard, a presumption in favor of joint physical custody, or some other law—would necessarily take a stand on values concerning family life, values that often are contested in our changing, pluralistic society. Custody laws once did take a clear and strong stand favoring fathers as property holders, and later, mothers as nurturers. Today, there is no social consensus about the appropriate family roles for men and women, and we believe this is one reason why legislatures have failed to adopt a clearer and more determinant custody standard. The “children’s best interests” standard seems to embrace a laudable value, the well-being of children; yet as we have seen, the standard actually encourages uncertainty and parental conflict that is contrary to children’s interests.

No matter what the goals or actual effects of the best-interests standard, it is impossible to sidestep the values issue. Beaber (1982) provides some illustrative examples of key value questions raised by child custody disputes: