
INTRODUCTION

You are an attorney and a new client is telling you about her family, her husband, her children, and her concerns as she embarks on the process of divorce. You, the astute family law attorney, immediately recognize that this case has many of the signs of one involving a custody dispute. Based upon what she has told you, you worry that contentious child custody litigation seems all but inevitable. Perhaps she wants to relocate to another area and wants to take her children with her. Perhaps she is disputing a parenting plan with the father of her newborn infant. Perhaps she is describing a history of domestic violence with a pattern of being controlled and abused throughout their relationship. Perhaps she tells you that her husband abuses substances, which makes her worried about the children being with their father. Or perhaps she could not see her children for six months and she alleges that the father has alienated the children from her for the last several years. You as an attorney have gained some understanding of psychological and family issues during your years in practice. You realize that the outcome of this case is likely to turn on psychological and behavioral evidence and issues.

However, as a wise attorney, you realize that your understanding of the psychological/behavioral issues is well developed for a family law attorney. You also know that your knowledge base and feel for these issues are not as well developed as those of a qualified psychologist. You're concerned with organizing and establishing your case from the beginning in as effective and efficient a manner as possible. You know that having a clear sense of the psychological narratives is essential. You know that if you set your case up with these realities, narratives, and ideas in mind and if you carry these consistently in your case from the beginning, you'll have a clear advantage.

This leads you to realize that you and your client will benefit from additional assistance throughout the potential litigation. This is when you think of bringing in a forensic psychology consultant to assist you in your case.

The Role of Forensic Psychology Consultants

Depending on the complexity, the case history, and the psychological and mental health issues at hand, you may need forensic psychology consulting assistance in formulating your case theories. You might benefit from a more comprehensive understanding of the psychological issues and their impact on the children. You want to establish a useful, compelling, persuasive, and psychologically grounded narrative from the beginning of your case. You know that if you do this, you'll tell a more convincing story and therefore the children's interests are more likely to be fostered and protected. If a custody evaluation is done in your case, you may want help in educating and preparing your client for such an evaluation. When the report comes back, you may need help in ascertaining whether the work product was well done and followed the standards of practice in the field. You want an expert to help you assess whether the evaluation conclusions are supported by the data collected. You may need help understanding the strengths and weaknesses of the report so you can develop a complete and effective litigation plan regarding the report and its conclusions. You might need a consultant to assist in identifying helpful witnesses and developing questions for direct or cross-examination of witnesses. You may wish to have an expert witness opine in court about the forensic integrity of the custody evaluation, its strengths and weaknesses, the nexus between the data and the recommendations, the developmental appropriateness of the recommendations, and the way in which the recommendations are appropriate given the family and co-parental dynamics in the case. You may also find it helpful to have an expert offer didactic testimony that educates the court about specific issues in the case such as domestic violence, relocation, or resist/refuse dynamics.

Forensic Psychology Consultants Can Help You With

- Formulating case theories
- Developing and implementing the case narrative
- Expanding your understanding of the psychological issues in your case
- Preparing your client for a custody evaluation
- Reviewing/critiquing a completed child custody evaluation
- Developing direct and cross-examination questions for trial and/or deposition
- Expert witness testimony

When you choose to retain a forensic psychology consultant to work with you as a member of your litigation team under the attorney-client work product privilege, you may find it beneficial to you and your client to also retain an expert witness to testify in your case. If a child custody evaluation

was completed in your case, your expert might testify about the strengths and weaknesses of the evaluation, whether or not the evaluator explained the basis for the conclusions, and whether or not the conclusions logically follow from the data gathered by the evaluator. Your expert witness may testify about whether appropriate references to the literature were included in the report and whether the conclusions and recommendations are developmentally appropriate and consistent with the research in the field, not just the research cited by the evaluator, if any. You may need your expert to testify about the procedures used by the evaluator, whether they were proper forensic procedures, and whether they were balanced and comprehensive. You may ask your expert to offer testimony about the use of psychological testing in the evaluation and whether the tests were properly administered, scored, interpreted, and woven into the evaluation database. Even if a custody evaluation was not performed, when you have a complex matter (such as one involving relocation, domestic violence, alienation, or parenting plans with very young children), you might need an expert witness to testify about the psychological issues and the related research and answer hypothetical questions about how those issues might affect your case.

The Utilization of Forensic Psychology Consultants

Psychologists and other mental health professionals who have specific experience, interest, and expertise in family law and child custody matters can be utilized in a variety of roles benefiting you and your client. Working as behind-the-scenes consultants and expert witnesses, well-versed and properly trained psychologists can be significant assets. We hope that this book helps you recognize how consultants and experts can be an asset to you and how you can appropriately use forensic psychology consultants. The bottom line is this: If the work of your consultant is done in a child-centered manner and with a constant eye on benefiting the children (which we assert should *always* be the case), then forensic psychology consultants will also benefit the children. To make this even more clear, competent, expert, and effective forensic psychology consultants in family law matters are driven by a passion for the well-being of children and are constantly guided by a commitment to children and families. They are NOT guided by winning; they are NOT guided by not losing. They are guided by a steadfast commitment to and passion for healthy children and healthy families. If they are motivated by being powerful and influential, by maximizing their income, or by pleasing you, the retaining attorney, they will not be as effective as they might otherwise be.

When you encounter a scenario such as one described earlier (and we offer these scenarios as examples only—there are others in which consultants and experts can be helpful), this book serves as a guide and handbook for you. We

write this book to help identify and clarify the benefits and risks of working with forensic psychologists as litigation consultants and expert witnesses. In this book, we discuss the procedures for finding and hiring the right psychologist for the work. We focus on the ethical and professional issues that need to be considered along with the applicable legal rules for this work. We discuss the important and essential differences between clinical psychology and forensic psychology and how these differences inform the approach of the forensic psychology consultant. We help you to understand how forensic psychologists properly think about their work, make inferences, and come to conclusions within the legal environment. We differentiate various psychologists' roles, bringing clarity to which roles are more useful for clinical work and which are most useful for forensic work. When you have read this book, we trust that you will have a deeper understanding of how to use forensic psychology consultants as expert witnesses and behind-the-scenes consultants in these complex child custody cases. We also trust that you will know the attitudinal attributes to look for in a forensic psychology consultant. Great skill with an inappropriate attitude is nonoptimal, as is an appropriate attitude with limited skill.

The Context of Child Custody Litigation

This book will focus on forensic psychology consultants in litigated cases. Even so, we affirm and believe that whenever possible, litigation should be avoided. When parents can settle their differences, beneficial outcomes for children are more likely. When parents can settle their differences, they may be empowered. When parents can settle their differences, they avoid the helplessness that often accompanies litigation. When parents can settle their differences, they have the opportunity to build, strengthen, or otherwise benefit a positive co-parent relationship. When parents can settle their differences, they preserve more of their family resources for the benefit of the children and the family. When parents can settle their differences, they are the architects of their outcomes rather than giving this power to a stranger (the judge). Litigation is inevitable in some cases, and when this happens, we believe that the litigation will cause the least damage if it is handled in a child-centered, child-focused, and informed manner. Competent and right-minded forensic psychology consultants are steadfast in their commitment to protecting children and minimizing harm to them. We write this book largely because we want to promote the best outcomes for children and we believe that, if you have consultants who assist you in understanding the psychological issues in your case and who operate from a child-centered position, the best outcomes for children will be promoted even if the case ends up in litigation.

It is our thesis that using forensic psychology consultants and comprehensive reviews of child custody evaluations in child custody litigation increases

the likelihood that the outcome of such litigation, when it takes place, will benefit children. We assert that, when a case needs a judge to solve a complex custody situation, **effective, child-focused, and well-conceived litigation** produces better outcomes for children. This reduces the risks of harm to children from divorce and child custody disputes.

We are not naïve nor idealistic. Litigation itself is divisive and creates stresses and pressures that spill onto children. Litigation creates new wounds and deepens existing wounds. Sometimes, an outcome of litigation is wounds that cannot heal. Because of this, effective litigation and litigation guided by input from well-informed forensic psychology consultants can minimize the risks to children to their ultimate benefit. Ineffective consultation has a high potential to harm children because it can promote unnecessary litigation and litigation that creates even greater risk to children. Because it is best for most families to resolve their own custody and parenting disputes and because litigation is a final alternative, not every case should be litigated. Settlement possibilities should always be explored in child custody disputes. The effective use of forensic psychology consultants can help you distinguish cases that can settle from cases that cannot and can provide psychologically informed insight into maximizing the likelihood of settlement. Our desire to benefit children is what guides all of our professional work and what motivates us to write this book in the context of potential litigation.

The Well-Being of Children

The breakup of the family is unwelcomed, painful, difficult, confusing, and destabilizing, even when one or both parents believe it to be necessary. But divorce is a reality, taking place in approximately 50 percent of marriages with children. Family units once intact are now divided and must reconstitute as a dual-household entity. This requires significant adjustment for each member of the family along with a renegotiation of relationships and a reconfiguration of family and relationship dynamics. These changes are some of the most daunting and difficult challenges a person can face. If you think about how hard it is for the adults, imagine what it feels like to the children. When divorce involves children, parents typically wish to protect their children from the impact of the change, but while doing so, they must deal with intense emotions of their own. People usually lack experience with such complex transitions. Therefore, they often lack well-developed coping skills for these transitions. It is truly dizzying. On top of these factors, parents often must confront powerful forces such as the desires and beliefs of extended family and friends, their own beliefs about divorce, and their own feelings about having failed in the marriage. When parents disagree about the custody of children, it is never easy. And while you, as an attorney, advocate for the wishes of your clients, most professionals involved in child custody litigation (be they attorneys,

mental health professionals, judicial officers, or others) want the outcome to be in the best interests of the children.

Child custody litigation occurs in a family, in particular a family in transition. Change, instability, and at times profound confusion and even chaos are expected. Nowadays, some of our cases also contain elements that are not as familiar to us as are the issues of traditional divorce and separation. More and more, cases include issues such as

- Never-married parents
- Children of gay and lesbian parents
- Grandparent visitation issues
- Third-party custody or visitation issues
- Children and families involved in the dependency courts due to issues of abuse, substance abuse, or neglect
- Children being permitted to testify regarding their custodial preferences and what they have experienced in their family
- Children with gender confusion and gender dysphoria

Note that the common key ingredient in these circumstances is that there are *children* involved. While you as an attorney properly focus on advocating for your client, the *adult* parent, the laws pertaining to developing parenting plans and child custody orders place the best interests of children center stage. While all parties struggle during the breakup of the family and while there are risks to all concerned—children and adults—the children are at greatest risk for negative outcomes when parents separate and divorce. This is because children are young and developing and have not yet acquired the myriad mature coping skills that adults may have. Also, separation and divorce are decisions made by adults that impact children powerfully but without their involvement in or agreement with the decisions. Thus, children rarely have a voice in the decisions and may feel more powerless in the overwhelming change of separation and divorce.

Qualified forensic psychology consultants are concerned with the well-being of children at the same time as they focus on their role in your case.

Children are at risk of a range of negative outcomes from the separation of their parents.¹ Just as grandparents and friends get drawn into the litigation between parents, children can also be drawn into conflicts involving their

1. See, e.g., Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52(4) *FAM. RELATIONS: INTERDISC. J. APPLIED FAM. STUDIES* 352–62 (2003).

parents, extended family members, and family friends. The time of the initial separation is one in which the risk for damaging conflict is high. However, divorce- and custody-related conflict can take place for years after the actual marital dissolution. For psychologists such as the authors, experienced in working with families with protracted high-conflict divorce and child custody cases, the dramatic impact of long-term parental conflict about the children is well known. It is beyond the scope of this book to comprehensively discuss these risks. But qualified forensic psychology consultants, whether behind-the-scenes consultants or expert witnesses, will know this research, be very experienced with how it shows up in cases, and will be concerned with the impact on the children involved in your case. They can offer you advice regarding these risks and how the planned litigation may both increase and/or mitigate such risks.

Emotional Responses of Divorcing Parents

Parents involved in divorce and divorce-related litigation along with members of the extended families are likely to experience a range of powerful emotions in response to the change in the family and the conflict that is present. Powerful feelings such as shame, fear, guilt, anger, hatred,² self-reproach, regret, abandonment, externalized blame, resentment, and even relief are commonly observed. These emotions are part and parcel of the human experience and are particularly strong during divorce and during litigation. This is especially true for those adults whose personality style is one that generates and even seeks conflict.³ Divorcing parents often are confused and shaken by the reality that their former life partner—the person they previously turned to when life was difficult—is now their adversary. They struggle with the reality that the person who used to support them and was on their team when they had troubles is now the person they see as causing troubles. It is truly a paradigm shift for parents. Attorneys frequently refer clients struggling with these emotions to therapists to assist the client in processing such feelings, learning to cope with them, and understanding the circumstances that cause their discomfort.

Powerful emotions are typical for those in the midst of divorce. Forensic psychology consultants can help you understand your client's emotions and help you in your client management around these issues.

2. See, e.g., Bruce M. Smyth & Lawrence J. Moloney, *Entrenched Postseparation Parenting Disputes: The Role of Interparental Hatred?*, 55(3) FAM. COURT REV. 404–16 (2017).

3. For a further discussion of such personalities, we recommend Philip M. Stahl, *Personality Traits of Parents and Developmental Needs of Children in High-Conflict Families*, ACAD. CERTIFIED FAM. L., SPECIALISTS NEWSLETTER, Winter 1999, at 3, 8–16; BILL EDDY, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (2012).

While therapy can help the client with their struggles, help them cope with their complex emotions, help them be a better parent (especially at times of perplexing and overwhelming change), and help them deal with their emotions in a healthier way, therapy does not necessarily help the litigation or your ability to work effectively with your client around the litigation issues. Having retained a forensic psychology consultant—a professional who does **not** serve in a therapeutic role for your client—may help you and your client deal with the litigation in a more positive way with a better outcome on behalf of your client and, ultimately, the children. Put another way, your consultant (when working in a behind-the-scenes role) can use their psychological training, knowledge, and skill to assist with client management, client control, client education, and client decision making. This also allows you to do what you do best, which is to practice law rather than manage client reactivity.

Demands of Working as a Litigator

Another key ingredient is that the demands of working as a litigator, especially with higher-conflict parents, take a significant toll on you, the attorney. It is well known that family law is a complex and dynamic field of practice that requires knowledge and expertise in a wide range of issues. Many suggest that it is the most challenging (and potentially rewarding) area of legal practice. Issues related just to the psychological elements of these cases (putting aside for the moment the property, financial, and tax issues), include but are not limited to

- Child custody and the impact of various custodial options and parenting plans on children, especially with very young children or adolescents
- Impact of divorce on children
- Parental adjustment to divorce
- Child development
- Relocation law and the psychological risk and protective factors that might make the relocation either easier or harder for children
- The impact of relocating (or not relocating) on families and children
- Parental gatekeeping styles and their impact on child-centered parenting plans
- Dynamics of families evidencing a resist/refuse dynamic on the part of a child or children
- Dynamics of high-conflict parents and the impact of their parenting and co-parenting on children
- Parental identity and its interaction with gatekeeping and parenting plans

- The complex range of issues regarding domestic violence
- Remarriage or recoupling of parents after divorce

Besides these family-related issues, attorneys are confronted with understanding the strengths and weaknesses of child custody evaluations and, in some jurisdictions, recommending child custody mediation that may be undertaken on their cases. While some evaluation reports show obvious and plain evidence of bias or problematic procedures, even well-written reports, what we call “good reads,” may have significant problems that are not as easily detected by attorneys. A forensic psychology consultant trained and experienced in child custody evaluation, forensic psychology, forensic thinking/procedure, and applying social science research to legal situations is skilled at detecting these issues. While we strongly advise that you, the attorney, seek ongoing continuing legal education to help you better understand these issues, the assistance of a qualified and experienced forensic psychology consultant with specific expertise in family law issues helps increase your effectiveness as an attorney and the likelihood that you will more fully understand the issues and their nuances **specific to your case**. Also, that assistance helps assure that your case theory, case narrative, and case plan are effective and compelling. With a qualified forensic psychology consultant on your team, you are given the space to do what you do best while allowing the consultant to assist in the areas they do best.

Forensic Psychology: A Separate and Unique Discipline

Stop and think about the field of psychology for a moment. What comes to mind? We'll bet that you're thinking about therapists, therapy, emotional and mental health challenges, and professionals who help those who don't feel well emotionally. What do you see when you think about psychology? We bet you see the kind face of a warm therapist in a comfortable consulting room with big cushy chairs or a sofa and soft light. Most people think about the field of psychology as a helping profession in which psychologists provide assessment and treatment services to those voluntarily seeking assistance. Psychologists are thought of as helpers and as hands-on allies to people experiencing psychological distress. Their work is undertaken in a confidential setting where patients, of their own accord, seek the help of a healing professional. The work between the patient and the therapist unfolds in the context of a positive alliance between them that the therapist intentionally fosters. This characterization of psychology is accurate for clinical services. However, it is incomplete.

Psychologists have a range of areas of expertise in which they may practice. The authors, while trained in clinical work, are in the practice of forensic psychology, a distinct specialty. The forensic psychologist does not offer hands-on help to an individual, couple, or family in distress. When serving in a forensic role, psychologists do not provide psychotherapy and do not offer treatment of mental illness (although those who practice forensic psychology may also practice clinical psychology in which they do provide psychotherapeutic services). Forensic psychology is the application of the science and art of psychology to legal situations and legal matters. Even though many forensic psychologists have a clinical background, forensic psychology does not have a clinical focus. In forensic psychology there is no patient and there is no treatment.

Forensic psychology and clinical psychology, while similar in some respects, are distinct disciplines.

There has been significant growth in the field of forensic psychology. The American Board of Professional Psychology (ABPP), incorporated in 1947, has been the primary organization for specialty board certification in the broad field of psychology. The American Board of Forensic Psychology (ABFP) is a subspecialty board of the ABPP. In the fall of 2020, there are approximately 300–350 ABPP Board-certified forensic psychologists in the United States and an unknown number of psychologists specializing in forensic work who are not Board-certified. There are many psychologists who dabble in forensic practice, occasionally performing child custody or other types of forensic evaluations, engaging in forensic assessment, or being called to testify. Forensic psychology is a growing area of specialization.

In 1991, the American Psychological Association first promulgated Specialty Guidelines in Forensic Psychology, which were revised in 2011.⁴ In 2006, the Association of Family and Conciliation Courts promulgated revised Model Standards of Practice for Child Custody Evaluation.⁵ These Guidelines and Standards are aspirational in nature. They highlight, inspire, and motivate best practice in forensic psychology. The introduction to the APA's Specialty Guidelines for Forensic Psychology states that the goals of the Guidelines are to "improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practi-

4. *Specialty Guidelines for Forensic Psychology*, AM. PSYCHOL. ASS'N, <https://www.apa.org/practice/guidelines/forensic-psychology> (last visited Mar. 2, 2020).

5. ASS'N OF FAM. & CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION (2006). Their original Model Standards were published in 1994.

tioners to acknowledge and respect the rights of those they serve.”⁶ Psychologists providing forensic services are wise to take guidance from the Specialty Guidelines and Model Standards and to refer to them frequently while conducting this challenging work. The Specialty Guidelines and Model Standards can also guide consumers of forensic psychological services—specifically attorneys and judicial officers—to better understand what to expect from forensic psychologists.

Forensic psychology refers to

professional practice by any psychologist working within any sub-discipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of the Guidelines does not depend on the practitioner’s typical areas of practice or expertise, but rather on the service provided in the case at hand.⁷

Thus, while a psychologist may identify as a forensic practitioner, it is the nature of the work done by a psychologist that determines whether it is or is not forensic. For example, if a psychologist with a clinical practice is asked to report back to the court regarding the progress of the client in treatment, this psychologist is providing service with a forensic element to it. The psychologist’s work on that case is, therefore, at least partially forensic.

In our experience, the distinction between clinical practice and forensic practice is not fully understood by many attorneys and even by many psychological professionals. We will identify significant differences between the practices of forensic and clinical psychology in Chapter 2.

Best Interests and Gatekeeping

A critical subject facing those working in the field of family law, such as legal professionals, judicial officers, or psychological professionals, is the concept of the Best Interests of the Child. Even known experts differ regarding what it means, how it is to be determined, and what factors should be considered in determining it. Thus, this ubiquitous term, one often used as a colloquialism, escapes consensus and remains vague. Also, it is defined differently from state to state. Some states (such as Arizona⁸ and Minnesota⁹) have very clear sets of

6. *Specialty Guidelines for Forensic Psychology*, *supra* note 4, at 1.

7. *Id.*

8. ARIZ. REV. STAT. § 25-403 (2015).

9. MINN. STAT. § 518.17, <https://www.revisor.mn.gov/statutes/cite/518.17> (last visited Mar. 2, 2020).

factors and criteria, while other states (such as California¹⁰) define this concept in a vague manner. Even when there is a clear definition such as in Arizona, where there are nine statutory factors associated with the Best Interests of the Child, the meaning behind many of the factors is vague. Also, when psychologists refer to the Best Interests of Children, they are referring to a hierarchical set of factors that may have different meaning for different children in different families and that may be understood differently by psychologists with different backgrounds and different training. Not that psychologists are unique; so too do attorneys and judicial officers understand the factors differently depending on their background, training, proclivities, and so forth. Moreover, the sets of factors that comprise Best Interests in a jurisdiction are fungible so that they can be weighed differently and applied differently depending on the specifics of a given case. Because Best Interests is critical pragmatically and statutorily, understanding what each psychologist considers Best Interests becomes very important when a case goes to trial. The trial court may have a very different conceptualization of Best Interests than might the psychologist. Therefore, the authors believe that a vital aspect to the forensic psychology consulting role is one in which your consulting psychologist helps detail and explicate the relevant factors affecting the children's Best Interests in a given case. In this element of their role on your case, the forensic psychology consultant can help you consider how the relevant factors might be addressed and presented to the court, relative to both the facts of the case and the factors identified in statute or case law in your jurisdiction. The consultant can also assist by referencing the relevant social science literature that may support your understanding of a factor or factors and by explaining how you believe the various factors can be prioritized and weighed in each individual case. So, while we talk about the Best Interests of Children in a generic and general manner, in reality what this means in any given case is dependent on the jurisdiction and on the case-specific facts, situations, and issues. For example, some states have a so-called Friendly Parent factor in the Best Interests statute. Broadly speaking, this factor prefers the parent more likely to support the children's relationships with the other parent. The importance of this factor and where it belongs in the hierarchy of factors for a given case depends on the specifics of that case.

Within this context, many psychologists working in the child custody field find the concept of gatekeeping helpful in assessing parental attitude toward the co-parent's role and involvement in the lives of the children.¹¹ Briefly,

10. CAL. FAM. CODE § 3011, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3011 (last visited Mar. 2, 2020).

11. See, e.g., Liz Trinder, *Maternal Gate Closing and Gate Opening in Postdivorce Families*, 29 J. FAM. ISSUES 1298–1324 (2008); WILLIAM G. AUSTIN, LINDA FIELDSTONE, & MARSHA K. PRUETT, *BENCH BOOK ON PARENTAL GATEKEEPING IN PARENTING DISPUTES: UNDERSTANDING THE DYNAMICS OF GATE-CLOSING AND OPENING FOR THE BEST INTERESTS OF CHILDREN* (2012).

there are three types of gatekeeping: Facilitative, Restrictive, and Protective. While it is beyond the scope of this chapter to go into detail in this, Facilitative Gatekeeping refers to parenting and co-parenting practices that support the child's relationship with the other parent. Restrictive Gatekeeping refers to parenting and co-parenting practices that interfere with the child's relationship with the other parent. Finally, Protective Gatekeeping refers to parenting and co-parenting practices that support the safety and well-being of the child even if they limit the support of the other parent, usually due to issues of abuse, substance abuse, or domestic violence. Besides the three types of styles of gatekeeping, there are parenting/co-parenting domains in which gatekeeping is particularly relevant in custody disputes. These domains include

- Whether a parent is proactive toward the co-parent
- Whether a parent is inclusive of the co-parent
- Whether a parent does or does not boost the image of the co-parent in the eyes of the children
- Whether a parent makes ongoing efforts to communicate with the co-parent
- Whether a parent is flexible in time-sharing with the co-parent

It is our sense that the concept of gatekeeping is likely to be relevant in nearly every child custody dispute, but the weight given to it varies from case to case. Gatekeeping provides a framework in which to understand co-parenting and its impact on children. It also helps describe risk and protective factors regarding parents and their attitudes toward one another.

Your consultant can help adopt this nomenclature to the facts of your case, helping you more clearly and convincingly present evidence related to this factor to the court. However, no factor can be applied in a linear or formula-driven manner to a case. Each case is different and requires a unique and customized approach. For adapting psychological concepts, data, and facts to a case, an experienced and seasoned consultant is an asset.

For example, consider the observation of the renowned Judge James Garbolino of Placer County, CA.¹² In a workshop on judicial education, he described the benefit of using fuzzy logic in determining the weighting of different factors based on the particular facts of a case. Consider a family in which one or more children have special needs (e.g., a child on the autistic spectrum). In assessing the best interests of these children, Judge Garbolino argues that each parent's capacity and ability to help that child deal with those special needs would typically take precedence over gatekeeping issues. In a relocation

12. J. Garbolino, *Judging in the Gray Areas*, Presentation at the National Judicial College, Reno, Nevada (2001).

matter, however, gatekeeping may be a primary factor. Many states have case law or statutory law that identifies what factors need to be considered when the court decides.¹³ However, the weighting of those factors is unique to each family and potentially to each judge. Many judges reason and some case law requires that the decision should come down to whether the children should be primarily with Mother in one location or primarily with Father in the other location. They then figure out the child-sharing plan under those circumstances. In other jurisdictions, there is an initial burden on the moving parent to show that the move is necessary or will be of benefit to the children. Regardless of such burdens and expectations in your jurisdiction, your consultant or expert witness provides useful psychological information that helps either you or the court in the weighting of those factors. These ideas will be discussed more thoroughly throughout the book.

Legal Framework for Consultants and Expert Witnesses

Various legal authorities support the use of either a consultant or expert witness in your case. Federal Rule of Evidence 702¹⁴ allows for expert witnesses. Many states' similar rules are equally applicable. For example, in California, Evidence Code § 733¹⁵ allows a party to call an expert witness to rebut the conclusions of the court-appointed expert appointed under Evidence Code § 730.¹⁶ Evidence Code § 730 allows the court to appoint its own expert. Evidence Code § 733 permits either side to call its own expert in response to the Evidence Code § 730 expert. And in both California¹⁷ and Arizona,¹⁸ case law specifically supports that courts can or must allow a party to bring in a rebuttal witness if either side wants.

In 1985, in *Ake v. Oklahoma*,¹⁹ the United States Supreme Court recognized that a consultant could be a valuable member for one side of a case.

In 1985, the Supreme Court of the United States recognized the value and importance of consultants in litigation.

13. See, e.g., ARIZ. REV. STAT. § 25-408 (2015); *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

14. FED. R. EVID. 702.

15. CAL. R. EVID. 733.

16. CAL. R. EVID. 730.

17. *In re Marriage of Seagondollar*, 139 Cal. App. 4th 1116 (2006).

18. *Reid v. Reid*, 222 Ariz. 204, ¶ 16 (App. 2009).

19. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

From our experience, family law attorneys have increasingly used nontestimonial, behind-the-scenes consultants for several purposes, including but not limited to

- Help formulate case strategy
- Review another expert’s work without testifying
- Assist in formulating direct and cross-examination questions
- Identify and assist in retaining testimonial experts
- Help prepare witnesses
- Provide expert information about a particular area, such as domestic violence, relocation, and other cases, with or without testifying
- Review the relevant social science literature on factors at issue in a case
- Assist with client education and client management
- Be present in depositions and trial as a second chair or to caucus and discuss matters during breaks and recesses

These ideas will be explored further later in the book.

The Meaning of Opinion

Throughout this book, we refer to the opinion of your consultant or testifying expert. When we use the term in this context, we are referring to your consultant’s or witness’s expert opinion. So what is an expert opinion? As defined by Federal Rule of Evidence 702,

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Your consultant or testifying witness is an expert. They are not offering you **any** opinion—they are offering you an expert opinion. Expert opinions have certain important characteristics. Naturally, if your consultant is a testifying witness, you’ll seek to assure that your expert’s testimony conforms to these requirements. Likewise, we strongly recommend that you expect even your

nontestimonial consultant to offer you psychological opinions anchored in the same requirements as Federal Rule of Evidence 702 (absent items b and c).

Even though your nontestifying expert's opinions won't be tested at trial for their conformity to the rules for expert opinions, if your nontestifying expert offers you opinions that are conceptualized and developed with such rules in mind, the opinions will be more robust and will be more useful to you in developing your case. Throughout this book, as you see the word *opinion*, note we are discussing expert opinions, but, for readability, we do not want to be redundant.

The Bottom Line

We hope that this book will serve as an educational and pragmatic tool for the family law attorney and for others involved in child custody disputes. While this book is written primarily for the legal profession, we have designed it to be useful to psychologists and mental health professionals who occasionally, frequently, or exclusively work within the family law arena. It may also be useful to parents to help them understand more about what to expect from a custody evaluator or other forensic mental health professionals they encounter. We see forensic psychology consulting as a new and emerging field. In the first edition of this book, we wrote, "As of the writing, there are no specific standards or guidelines on how to do forensic consulting and expert witness testimony, though some have written about certain concepts of this work²⁰ and we hope that this book becomes a part of the body of literature addressing excellence in forensic psychology consulting."²¹ In 2020, there are still no such standards or guidelines. Therefore, readers using this book will probably disagree with some of what is said. We continue to welcome this dialogue since the emergence of any field demands open, wide-ranging, and spirited discussion of issues.

20. See, e.g., *Special Issue on Forensic Mental Health Consulting in Family Law: Part of the Problem or Part of the Solution?*, 8 J. CHILD CUSTODY 1–2; Andrew Schepard et al., *Mental Health Consultants and Child Custody Evaluations: A Discussion Paper*, 49(4) FAM. COURT REV., 723–36 (2011).

21. PHILIP STAHL & ROBERT A. SIMON, FORENSIC PSYCHOLOGY CONSULTATION IN CHILD CUSTODY LITIGATION: A HANDBOOK FOR WORK PRODUCT REVIEW, CASE PREPARATION, AND EXPERT TESTIMONY (2014).