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How Should the Child's Voice Be Heard When Parental Rights and Responsibilities Are Contested?

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Legal doctrine concerning the post-divorce allocation of parental rights and responsibilities (hereafter PRR) has gradually evolved from the one-size-fits-all formula toward ever-more individually determined outcomes (Carbone, 1995). It is certainly for the best that we have abandoned the once-popular idea that child and wife belong to father/husband like so many cattle or sheep.[1] We might also agree to eschew the "Tender Years' Doctrine," that standard which granted mothers *de facto* custody based on the belief that the female is necessarily the better nurturer (Strong, 1995). These generic rubrics succeeded in limiting court dockets as well as the time and expense and stresses associated with contested custody hearings, but routinely did so at the cost of the children's well-being.

This article will examine how, since those frontier days, forensic theory has moved toward recognizing each child as an individual functioning within a unique family system. This child-centered position calls for an individualized allocation of PRR. Initial efforts toward this end tended to be based upon the *quantity* of parenting time prior to separation. The "Psychological Parent Rule," for example, presumed placement with the primary pre-separation caregiver at the cost of almost all contact with the other parent (Buehler & Gerard, 1995). The "Approximation Rule" modified this rigid position to allow that a child's post-separation contact with each parent should be proportionate to his or her[2] pre-separation contacts (American Law Institute, 2002; cf., Bartlett, 2002).

Today, child-centered professionals across disciplines have come to view a quantity-based allocation of post-separation/post-divorce PRR as clinically invalid and legally untenable (Krauss and Sales, 2000). Instead, a genuinely child-centered outcome is now understood to require an assessment of the child in the context of his or her family relationships. Toward this end, the Uniform Marriage and Divorce Act (UMDA; 1973/1975) recommends that the following criteria must, at a minimum, be considered in allocating PRR:

(a) The wishes of the child's parents;

(b) The child's own wishes;

(c) The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to home, school, and community;

(e) The mental and physical health of all individuals.

The UMDA has been adopted by "a majority of jurisdictions explicitly in their child custody statutes and implicitly in their judicial determinations" (Krauss & Sales, 2000, p. 848). New Hampshire has adopted the UMDA in very general form under RSA 458-A, The Uniform Child Custody Jurisdiction Act. Massachusetts, as one contrasting example, has adopted very explicit directives[3] as to the conduct of custody evaluations consistent with the UMDA.

For all of its broad acceptance and intuitive appeal, the UMDA has been criticized on two grounds. The most common concern emphasizes the absence of weightings or priorities among the UMDA criteria. This issue arises when, for example, the two parents' respective wishes and/or the child's wishes are diametrically opposed. The UMDA is also subject to criticism to the extent that it fails to identify how relevant data are to be gathered and by whom.

THE CHILD'S WISHES

If post-separation PRR are no longer determined by default or as an actuarial calculation, then the court faces the time- and cost-intensive responsibility of assessing each child's needs and wishes within the context of his/her unique family system. This necessarily raises the question of when and how a child's wishes should be heard.

Who better to address the child's needs and wishes than the child? The State of New Hampshire allows that if "a minor

child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature minor child as to the determination of parental rights and responsibilities'' (RSA 461-A:6II). Unfortunately, neither the law nor developmental science offers a clear definition of the concept of ''maturity.''

In psychology, maturity is neither a singular nor a reliably quantifiable state.[4] In the extreme, obvious differences of maturity *between* children can be reliably referenced, as when one observes cognitive maturity differences between a three- and a ten-year-old. Differences *within* an individual can also be recognized, as when one observes that a child appears to be socially precocious despite cognitive and emotional delays. Such differences of relative maturity within an individual are referred to as ''horizontal decalage'' (Piaget, 1972).

Much as horizontal decalage is common among children, one particular pattern of developmental asynchrony may be characteristic of children whose parents are highly conflicted (regardless of marital status). These children often appear ''adultified'' in that the experience of functioning as dad's new best friend and/or as mom's confidant fosters a veneer of social sophistication. At the same time, these children's experience of strong emotion as destructive can prompt repression and denial and internalization, primitive coping mechanisms which are characteristic of very young children. The result is a chameleon-like child who may appear quite mature on the outside but who is not at all prepared for the tremendous burden of choosing between his or her parents.

Indeed, to choose between one's parents amounts to a kind of ''Sophie's Choice[5]'' in reverse, the kind of impossible dilemma which can traumatize a child who is already burdened with the powerful emotions which accompany any family's break-up (Flin, 1993; Goodman, Quas, Bulkley & Shapiro, 1999; Goodman et al., 1992). Even for children who have been verbally, physically and/or sexually abused by one parent—children for whom one might expect the choice to be simple—the choice can carry with it devastating guilt and anger and sadness.

This is not to say that third party, child-centered professionals cannot delicately explore a child's experience of his or her parents and their homes using methods (as noted in re: American Professional Society on the Abuse of Children [APSAC], 1999; Hardy & Leeuwen, 2004; Hewitt, 1999) and tools (Garber, in press) intended for this purpose. In fact, this is very likely the best way to approach the custody dilemma, always keeping in mind the question of validity.

Validity refers to the extent that an individual's statement genuinely represents his or her feelings and experience. As one example, the typical response, ''Good'' following the rote question, ''How are you?'' is arguably invalid in most instances. ''Good'' completes an implicit social script which we all share even though it offers little or no valid information.

In the same way, children often say what they believe is expected of them. This may be an innocent and well-intended wish to please the examiner or a wish to comply with a third party's covert manipulations. The former refers to suggestibility, an interviewee's tendency to respond compliantly with an interviewer's verbal and non-verbal cues (Gilstrap & Ceci, 2005; Gilstrap & Papierno, 2004; Walker, 2002). The latter refers to the dynamics which are variously referred to as scripting, programming and/or alienation.

How valid is Billy's statement, ''I want to live with Mommy''? No matter Billy's age or ''maturity'' and quite apart from the trauma that may accompany this statement, the interviewer must be able to distinguish among the following possibilities:

(a) This is Billy's valid wish and a genuine reflection of the quality of his attachment with each parent;

(b) This is Billy's valid wish but due at least in part to otherwise incidental factors as when, for example, a child fears that living with one parent leaves the other parent at risk for substance abuse, abandonment and even suicide (e.g., Garber, in review);

(c) This is Billy's valid wish but results from one parent's efforts to contaminate Billy's feelings for the other, co-parental alienation (Garber, 2004);

(d) This is an invalid statement prompted by Billy's learned chameleon-like effort to say what he believes is expected of him, i.e., suggestibility, programming or scripting.

"WHO YA GONNA CALL?"

If a child's self-report is potentially a source of trauma, may be invalid, subject to suggestion, circumstance and manipulation, how is the court to make a decision with regard to each child's post-divorce PRR?

Parents and their allies are always eager to offer their own strong opinions regarding their child's best interests. Certainly these reports must be heard and factored into the criteria recommended under the UMDA with all due caution given that these parties have a powerful emotional (and often financial) interest in the PRR outcome. It is axiomatic that those parents who are the most child-centered and valid informants tend not to require court assistance in determining post-separation and post-divorce PRR.

As an alternative, the child's therapist often appears to be an ideal informant. This professional (regardless of degree or guild affiliation) is, after all, child-centered, has developed a working relationship with the child and is presumably neutral with regard to the parents' conflict. Nevertheless, the treating therapist who naively accepts any responsibility for the custodial process may be committing grievous clinical and ethical errors. In its simplest form, this represents a dual role conflict.

Unfortunately, such dual role conflicts are ever more common. In one instance recently reviewed, Mrs. Parent

hired Dr. Biased to work with her nine-year-old daughter, Suzie. Dr. Biased proceeded to meet with the child and communicate with Mrs. Parent while making little if any effort to reach out to the child's father, Mr. Parent. When Suzie began to refuse contact with her father, Mr. Parent's attorney requested a hearing and the court assigned the therapist authority to regulate Suzie's contact with her dad. In accepting this assignment, Dr. Biased reasoned that his weekly meetings with the child, his "neutral" position with regard to the parents' conflict and his expertise qualified him to make these judgments.

In fact, Dr. Biased is *not* neutral by virtue of his tacit oversight of the father's role and the extent to which he has compromised his primary responsibility to the child's therapy. This may constitute unethical practice (Garber, 2006), is directly contrary to established policy in New Hampshire (New Hampshire Board of Mental Health Practice, 2004) and—to the extent that the co-parents share a presumption of joint legal decision-making authority—may be trespassing on the father's rights. Further, it puts Dr. Biased in the untenable situation of simultaneously serving the needs of the child and the needs of the court (Greenberg & Shuman, 1997).

Perhaps more to the point, Dr. Biased has accepted a dual role in direct violation of most mental health professions' ethical codes. The dual role needlessly confounds Suzie's access to support by communicating to her that anything said or done in therapy may bear on her contacts with her father. A subtle but destructive self-confirming tautology ensues: Aware of Dr. Biased's new decision-making authority, Mrs. Parent has new impetus for sharing all of her "bad dad" stories. In the absence of Mr. Parent's participation in the therapy, Dr. Biased is at risk for subtly endorsing mother's self-serving view in therapy with Suzie. Suzie hears quite clearly that both her mother and her therapist sound cautious (at least; explicitly demeaning at worst) about her relationship with her father and, as a result, her anxiety about seeing her father escalates. As a perceptive, trained professional, Dr. Biased recognizes that Suzie's distress is associated with her father and, exercising his new court-given authority, limits or otherwise advises against their meetings.

To the extent that outpatient psychotherapy may be the only port for a child caught up in the storm of his or her parents' conflict, the legal system should declare such relationships sacrosanct. With the exception of matters of safety, a child's therapy must be partitioned out of divorce litigation. Certainly, Berg[6] is a step in that direction. In lieu of the child therapist's contribution, the court can appoint a third party professional who is child-centered and family-systems trained to investigate the UMDA criteria and advise the court accordingly.

This role is presently filled in one of two ways. On the one hand, the court can appoint a guardian *ad litem* (GAL), noting both extant criticisms of this role[7] and the state's recent efforts to respond to such concerns.[8] On the other hand, the court (occasionally at the request of the court-appointed GAL) can request that a specially trained mental health professional conduct a child-centered family systems evaluation or "custody evaluation," noting the longstanding and recently reinvigorated debate regarding this practice (Tippins & Wittman, 2005 and rejoinders, including Kelly & Johnston, 2005).[9] Thorough, child-centered and unbiased investigation of the UMDA criteria under any one of three resulting scenarios (evaluation by the GAL, evaluation by an independent custody evaluator or evaluation by an independent custody evaluator subcontracted to the GAL), promises to provide the court with the highly individualized data upon which child-centered post-separation and post-divorce PRR allocations can be determined. Even given time and cost constraints, these professionals attempt to establish the child's needs and wishes within the unique dynamics of his or her family. They use their special tools and bring their expertise to bear to minimize the child's stress.

SUMMARY

Dedicated as we are to helping children out of the middle of their parents' conflicts, the road toward this goal remains rocky. Certainly, we agree that a view of the child as the property of the parents is unacceptable. Perhaps we can even see beyond the overly simple assignment of post-divorce rights and responsibilities proportionate to pre-divorce parenting. But we risk compounding the problem we hope to solve by giving the child's voice inordinate weight. Rare is the child of any age who has the social and emotional maturity to bear the burden of choosing between his or her parents. Fortunately, we are now beginning to develop a combination of professional roles and child-centered tools which together can serve the child's best interests.

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ENDNOTES

1. Noting, of course, that this notion of chattel yielded the idea of "alienation of affections," the law still on the books in a handful of states which allows that any party who separates a man from his spouse would be guilty of the crime of "alienation."

2. No pronoun, reference or illustration in this paper is intended as gender-specific.

3. STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS Commonwealth of Massachusetts The Trial Court Probate and Family Court Department Hon. Sean M. Dunphy, Chief Justice Effective: January 24, 2005; particular items under 6.0, " INVESTIGATION SOURCES AND METHODS."

4. The implicit assumption being that the law does not intend to refer to physical maturity, an attribute which can be more reliably and validly assessed.

5. In William Styron's novel, Sophie's Choice (Knopf, 1992 [ISBN 0679736379]) a mother must choose which of her children to sacrifice.

6. New Hampshire Supreme Court: IN THE MATTER OF KATHLEEN QUIGLEY BERG AND EUGENE E. BERG Argued: July 13, 2005 Opinion Issued: October 18, 2005. Available online at: http://www.nh.gov/judiciary/supreme/opinions/2005/berg112.htm.

7. Ducote (2002) writes, for example:, "Guardians ad litem must be abolished in private custody cases for well- established reasons: 1) the role is not subject to definition in any way consistent with appropriate judicial proceedings; 2) there is no documented benefit from their use; 3) they undermine and compromise fact finding by usurping the role of the judge and depriving parents of due process; 4) they undermine parental authority and privacy; 5) the costs and fees resulting from their use ultimately deprives parents and children of resources that would actually benefit the child; 6) in child abuse and domestic violence cases, they routinely advocate against the child's safety and protection and directly contravene the child's interests; and, 7) they are unaccountable for their actions.

8. New Hampshire established a Guardian ad litem Board under RSA 490:C in May, 2002.

9. Readers are referred to the Family Court Review (volume 43, number 2) for Tippins and Wittman's incisive and provocative article and a number of thoughtful rejoinders. In short, Tippins and Wittman argue that mental health professionals engaged in addressing custody matters can make valid contributions to forensic process at the level of direct observation and perhaps at the level of case-specific inference, but may be on a slippery slope to infer further about custody and are well-beyond valid science to speak to the ultimate issue of parenting rights and responsibilities. Clearly, others disagree.

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