American Psychiatric Association

Task Force Report

CHILD CUSTODY CONSULTATION

Report of the Task Force on Clinical Assessment in Child Custody

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Approved by the Council on Children, Adolescents, and Their Families; the Reference Committee; and the Board of Trustees, December 1981

Revised December 1988
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Publication of the revision of *Child Custody Consultation* is funded in part under grants from Timberlawn Hospital and Duke University Division of Child and Adolescent Psychiatry.

> "The findings, opinions, and conclusions of this report do not necessarily represent the views of the officers, trustees, all members of the task force, or all members of the American Psychiatric Association. The views expressed are those of the authors of the individual chapters. Task force reports are considered a substantive contribution of the ongoing analysis and evaluation of problems, programs, issues, and practices in a given area of concern." – APA *Operations Manual*.

Table of Contents

I. Introduction

Child custody problems related to divorce, abuse and neglect, foster care, termination of parental rights, and adoption are frequently encountered by psychiatrists in their practices. The purpose of psychiatric consultation is generally to facilitate the placement of children with the more familiar, committed, and capable of the available adults who wish to have custody of the child. However, many psychiatrists are reluctant to participate in the legal process in which these children and their families are involved. Yet, of all the areas where psychiatry and the law interact, consultation regarding these crucial issues probably has the potential to make the greatest contribution. This report seeks to: 1) encourage psychiatrists' participation as consultants; 2) orient the newcomer to this area to facilitate effective intervention and consultation; 3) offer practical guide lines for child custody consultations and 4) familiarize attorneys with the clinical issues of psychiatric consultation. The authors believe that quality child custody consultation can significantly contribute to the well-being of children, but realize that the necessary skills are not easily acquired. The ability to consult effectively in this area draws upon a good deal of what is taught in a child psychiatry residency. We suggest, therefore, that general psychiatrists who wish to enter work as child custody consultants engage an experienced child psychiatrist as a supervisor or consultant.

Every day the courts of this country make important decisions regarding the custody of children. These children include those who are experiencing parental separation or divorce and those who have been grossly abused or neglected. The lives of some of them have been continuously disrupted so that they have never experienced a sustained relation ship with a committed caretaker. Decisions to alter custody or visitation, to remove a child from a pa rental home to place him or her in foster care, or to disrupt forever the relationship between a parent and child by way of termination of parental rights are of as great a significance to the individuals involved as any made by the judicial system. Yet, these decisions are made in great numbers and, in some courts, with minimal deliberation regarding the importance and the risks for the young people involved. The authors of this report believe that psychiatrists can contribute significantly to the decision-making process and to the resolution of conflict in these types of cases. Psychiatrists should, therefore, make themselves available for consultation of this nature.

This report is intended to help psychiatrists feel less intimidated by custody consultation so that they can work relatively freely and creatively rather than feel bound to a narrowly defined course of action. Ideally, the first step in some disputes is to provide the parties involved with an opportunity to work on areas of conflict in a therapeutic or mediation frame work, thereby precluding litigation. It is evident that, where possible, collaborative parenting with both parents emotionally engaged with the child constitutes the optimal post-divorce environment for the child. Much can be gained for the child if the parents can be helped to construct a mutually agreeable plan. In many states, mediation to settle custody and visitation is now mandated by state law. If these efforts fail, an adversarial situation develops which may lead to a request for psychiatric consultation. Even at that juncture, the psychiatrist may be able to help the parents to negotiate custody and visitation. In almost all situations, the psychiatric consultant has more to offer than an opinion for the court as to which potential custodian would be the more helpful to the child. The psychiatric consultant can help the child to understand what is happening in terms of family relationships and the custodial issue itself. In some instances, the psychiatric consultant can help the child to consider decisions such as whether or not the child wishes to be adopted by a foster parent or stepparent In many cases, the psychiatric consultant can facilitate the child's sharing of emotional distress and can enhance the mourning process regarding the myriad losses and changes in the child's life. The psychiatric consultant may be helpful in similar ways to parents or other contesting adults.

Subsequent sections of this report will discuss the reluctance of psychiatrists to carry out custody consultations; the legal criteria for determining custody; the various ways in which a psychiatrist may become involved in a custody consultation; and issues for the psychiatrist to consider in carrying out clinical assessment, report preparation, and court testimony.

Psychiatrists' Reluctance to Engage in Child Custody Consultation

In some custody cases, there must be a "winner" and a "loser" among the contesting adults. The psychiatrist often is reluctant to make recommendations that may disrupt some relationships while fostering others, recommendations that may be emotionally devastating to the parent or other adult who is not awarded visitation, custody, or adoption of the child.

In consultative situations other than legal ones, the psychiatrist makes recommendations which may be carried out by others, or the patient may return if the need arises. In the clinical practice of child psychotherapy, even after the case is terminated there may follow occasional consultations or re quests for advice from parents. In child custody consultations, the psychiatrist must often make a recommendation which is clear, final, does not depend upon a number of contingencies, and is not something to be revised and refined later on the basis of further work with the child and family. While the psychiatrist has many difficult decisions to make in clinical practice, few are as far-reaching as those regarding child custody or leave so little opportunity for revisions on the basis of follow-up by the psychiatiist or by the agency with which the psychiatrist is consulting. This is a type of decision-making to which the psychiatrist is unaccustomed. However, what the psychiatrist decides constitutes a recommendation to the court; the final decision belongs to the judge.

Among the reasons advanced by psychiatrists for their reluctance in becoming involved in custody consultation is that clinical impressions in these types of cases are lacking in validity because: 1) the adults and children are often in the midst of one of the most difficult situations of their lives, so that little can be inferred about their normal functioning; 2) parents invariably attempt to present themselves in the best possible light and are so guarded that clinical impressions are of limited validity; 3) these evaluations are almost always too short to learn what one should from them; and 4) psychiatric skill in working with children and their families does not readily translate to an ability to evaluate a situation and predict possible outcomes. These limitations of child custody evaluations are all valid and require of the psychiatric consultant a cautious approach and an awareness of the circumscribed nature of the contribution the psychiatric consultant may be able to make to the court's decision.

The psychiatrist's feelings about the children and families involved in these types of disputes may also contribute to the reluctance to consult The anger that many divorcing parents have for each other is aversive, and its destructiveness to their children painful to observe. Feelings engendered by the plight of many of these children, and perhaps by the identification of oneself with one of the parents, may lead the psychiatrist to avoid such situations entirely. Not only has the past been painful and destructive for many of these children but, all too often, the alternatives realistically available to them in the future are far less than optimal as well. Goldstein, Freud, and Solnit[1] took issue with the traditional standard according to which custody cases are to be decided -- the "best interests of the child" -- suggesting it be replaced by the less euphemistic and more realistic "least detrimental alternative."

Although child custody consultation is difficult, it is a worthy activity. The legal system is designed to resolve conflict between at least two adults who understand what is at stake and are fully represented by counsel. Children, on the other hand, are generally unwitting and immature participants whose needs may be best understood and presented to the court by the psychiatric consultant.

II. Legal Background and Criteria for Determining Child Custody

Psychiatrists are called upon to act as consultants in two general types of child custody disputes. The first is a private dispute, usually between the parents in the context of divorce but sometimes between a parent and a grandparent or other long-term care taker. In these cases, the parties become involved in the legal system because they are not able to decide the issues of visitation, custody, or adoption themselves. If they could come to some agreement, the court would typically not intervene but would simply ratify the decision made by the parties. The other type of custody issue is one in which there has been an allegation of parental abuse or neglect, and the child is usually in foster care. In these cases, the state (usually in the form of a welfare department) is intervening in the family. Because this kind of case represents an intrusion by the state in the privacy and integrity of the family, the applicable law differs quite markedly from that governing private disputes. These distinctions will become apparent in the following narrative.

Divorce Custody Disputes

Criteria for decisions. Historically, divorce custody decisions followed rather rigid rules which gave little weight to the needs of the child. Until the late nineteenth century, there was a strong presumption favoring the father in custody decisions. This presumption was consistent with the generally superior legal status of men. As women began to obtain more equitable legal status, custody tended to be awarded to the "innocent" party in the divorce. Because a divorce could only be obtained by proving that one's spouse was at fault, this custody rule was clear-cut and easily applied. Then, in the early twentieth century, custody decisions (at least for pre-adolescent children) began to be governed by a presumption favoring the mother — the "tender years" presumption. This presumption was based on a belief that psychological ties between a young child and his or her mother are crucial and should not be disturbed. Under the application of this presumption, an interested and capable father would not be awarded custody unless the mother was found to be grossly unsuited or incapable of caring for the child.

In recent years, the law throughout the states has evolved towards a sex-neutral standard. The law has moved from providing fixed, predictable rules to a process that takes into account a number of factors. It has become much more possible for fathers to gain custody or primary physical residence, although the number of fathers doing so remains quite low. The judge may consider a wide range of issues in assessing which parent's custody will be in the best interests of the child. Factors which are frequently cited by courts as significant in this determination include: a parent's physical and mental health; the quality of a parent's relationship with the child; the degree to which a parent has been the caretaker of the child; the need to maintain the stability and continuity of an ongoing arrangement (where the child has been living with only one parent for some time); and the child's mental and physical health. Other factors also viewed as important are the child's preference, and the sex and age of the child (with mothers being more likely to be awarded custody of younger children and girls). The judge may also consider the physical accommodations which each parent can provide the child.

The parents' life style and behavior may strongly influence the outcome of a custody dispute. Courts may consider parents' job stability, sexual and other behavior, and religious preferences and practices for their relevance to the custodial issue. Of these, sexual behavior, in terms of homosexuality or of having an unmarried partner living in the home, currently seems to assume the greatest importance to courts. Some courts will favor the parent who provides the child with religious training, although too fervent or radical a belief may work against that parent Given the indeterminate nature of the standards for deciding which parent's custody or primary residence will be in the child's best interests, the judge's

decision may tend to be unduly influenced by his or her own life style or value system. One important function which a psychiatric consultant may have is to focus the court's attention on factors which relate to the child's psychological well being and to help the court consider the life style of a parent only as it affects the child. An area in which psychiatric consultants frequently can clarify issues is that of the sexual behavior of a parent. The psychiatric consultant, by taking a child's eye view and by being well-informed on child development and relevant empirical research, can readily address the question of whether or not the parental behavior is harmful to the child. In this way psychiatric consultants may defuse inflammatory, distracting issues and help to maintain the focus of the inquiry on the child's well-being.

Types of custodial disposition. The most common post-divorce custody arrangement probably remains the one which has been around for decades — one parent, almost always the mother, is awarded custody, and the father is awarded visitation. The general rule is that the non-custodial parent is entitled to visitation. Denial or severe restriction of the right to visitation is unusual but may occur in some cases. Factors such as a parent's alcohol or drug use, mental illness, immoral or criminal con duct, and attempt to alienate the child from the other parent have been taken into account in limiting or denying visitation. In a state with joint custody laws, a parent presenting such problems would be unlikely to be given joint custody. The court would probably decide upon custody to one parent and limited or even supervised visitation with the other.

Joint custody came to the fore in the late 1970s, and has had enduring popularity. About thirty states have laws specifying that joint custody can be awarded, and it can be awarded in most other states without such authorization. Roughly one-third of the states with joint custody laws indicate that joint custody is the preferred arrangement. States differ as to whether joint custody can be imposed against the wishes of one or both parents, with most states taking the position that joint custody should be undertaken only when the parties agree. An example of such a statute states: "The court shall order that the parental responsibility for a minor child be shared by both parents unless it finds that the shared responsibility would be detrimental to the child." Joint custody entails both parents' sharing responsibility and authority for their children regarding such issues as medical care and education. The physical arrangement may or may not include relatively equal time spent with each parent The term "custody" in this report, when used to describe the arrangement after divorce, will generally indicate either the traditional designation—custody with one parent, and visitation with the other—or primary physical residence, which indicates that parent who has the child for the greater part of the time in a joint custody agreement.

One of the goals of joint custody is to encourage both parents, especially the fathers, to remain involved with their children. Research[3-8] indicates that children fare best when they maintain contact with both parents unless the parental conflict is too unsettling for the child. Up to the time of this writing, the effectiveness of joint custody in ameliorating the detriments of divorce for children has not been established.* While joint custody may facilitate the child's maintaining strong relationships with both parents, such an arrangement appears likely to be successful for the parents, and thereby helpful to the child, if it is voluntary. It has been observed that, in practice, joint custody often ends with the onset of adolescence. A combination of the wish for a single base of operations to facilitate social contact with peers, and the increased assertiveness which comes with this age, leads many adolescents to gravitate to a pattern of living with one parent.

Custody Disputes Between Parent and Nonparent

When a custody dispute is between a natural parent and a third party—whether a relative, foster parent, or other person who has an established relationship with the child—there is a strong legal presumption that the natural parent should be awarded custody. The traditional rule, which generally prevails, is that the biologic parent, unless unfit, has the right to custody.

This strict adherence to parental tights that may in some instances operate to the clear detriment of the child has received a great deal of criticism in recent years. Among others, Goldstein, Freud, and Solnit[1] have argued that the relationship which the law should protect is the one between the child and its psychological parents, and that the biologic relationship per se should merit no special consideration, Influenced by these arguments, the rigid legal presumption favoring custody in natural parents has been relaxed in some states. These states no longer require a finding of parental unfitness to award custody to a third party. Such cases may cite "extraordinary circumstances," such as care by the third party over an extended period of time, to justify awarding custody to the nonparent where there is no finding of parental unfitness. A few states have moved even further and have focused on the child's needs in deciding these custody disputes. These cases arise most frequently when a foster parent or a relative or friend of the parent has had custody over a long period of time and refuses to relinquish custody to the parent. If the nonparent retains custody, the court almost always awards the biologic parent visitation. The psychiatric consultant may be able to make constructive contributions due to the latitude offered by the "best interest of the child" standard which is applied in some of these cases.

*Subsequent to the completion of this report, the California legislature passed a bill (SB 1306) that is likely to curb the practice of awarding joint custody. Proponents and opponents cited different opinions about the impact of joint custody on children.

Grandparent and Other Visitation Disputes

Under the English common law from which our domestic relations law is derived, a grandparent did not have a legal right to petition a court to consider whether that grandparent should be allowed to visit a grandchild. In the interval from 1977, when six states had laws permitting grandparents to petition a court for visitation upon the death or divorce of their adult child, to the late 1980s, every state has established legislation allowing grandparent visitation rights. As the question of visitation revolves entirely about the court's determination of what is in the best interests of the child involved, these cases constitute an important new area for psychiatric consultation. In the new climate of grandparent rights, some courts have awarded grandparents custody of children, even in the absence of a finding of parental unfitness. In addition to the new rights ac corded grandparents, legislatures and courts are ex tending visitation rights to include siblings, former stepparents, and others. Again, these are cases in which the considerations are not bound by relatively rigid issues such as fitness versus unfitness, but depend upon what the court deems to be in the best interests of the child.

Adoption

Children usually become available for adoption in one of two ways: 1) through voluntary consent of their parents, or 2) through judicial termination of parental rights. Most psychiatric consultation regarding an adoption will be at the request of a child placement agency and will relate to older and per haps handicapped and deprived children who are increasingly coming to adoption from the foster care system. The psychiatric consultant may be asked by the agency to help determine a child's attitude towards termination of parental rights and adoption by his or her foster parents. In most instances, the child is securely attached to the foster parents, the biologic parents have entirely disappeared from the child's life, and judicial termination of the relation ship with biologic parents is not overly threatening to the child. At times, however, the ties to biologic parents remain quite strong. When this is the case, the psychiatric consultant may be able to help devise a plan whereby the child achieves the permanence and stability that termination of parental rights and

adoption afford but, with the agreement of the adopting parents and the community social service department, the child continues to have some sort of contact with the biologic parents.

Adoptions that are interracial and cross-cultural have become relatively frequent in recent years. The adoption of non Caucasian children by white families has been increasingly protested among some groups with regard to the child's loss of a cultural heritage and related issues. The scientific literature has not adequately addressed these important issues. However, the literature that does exist[9-11] indicates that the adjustment of the children in such adoptions is indistinguishable from that of their Caucasian peers.

In a dispute between two nonparents (such as a current and a former foster parent) seeking to adopt a child, the psychiatric consultant may be asked to advise the court as to which adult should be allowed to adopt. In this type case, where no rights of biologic parents are involved, the court is charged simply with determining the outcome ac cording to the child's best interests.

Custody Disputes Where the State is a Party

Child abuse and neglect and foster care. Cases in which the state (i.e., a welfare department) intervenes in a family and gains custody of a child raise policy considerations which are different from those of divorce custody and other private disputes. In private disputes, the parents have, in effect, asked for the court's involvement, having been unable to resolve the dispute themselves. This is not the case in abuse or neglect cases, where the family's involvement with the court is usually involuntary and its adversary is the state. A number of U.S. Supreme Court cases' have established a constitutional right of family privacy that includes the right of parents to raise their children free from state intrusion. This right is not, of course, absolute, and the state has a responsibility to intervene under the *parens patriae* doctrine* when a child is abused or neglected.

The basic conflict between parental rights and a child's needs is not easily resolved, and the resulting stalemate too often leaves the child in foster care. Frequently, the courts find that a child's continued placement in foster care is justified by pa rental disabilities, yet these disabilities are not found to be sufficient to warrant termination of parental rights. This impasse—affirmation of parental rights coupled with a decision that the welfare of a child warrants ongoing custody in a foster home—is one which continues to ensure that a great number of children will remain in foster care, even if the quality of care in foster homes has been uneven or inadequate. In recent years various systems of foster care review have been instituted to keep track of children so that they do not slip into the interminable foster care that has occurred so much in the past There is evidence that this review has provided a stimulus both in returning children to their homes and in effecting termination of parental rights and adoption.

Termination of parental rights. As previously stated, termination of the right of a parent to the custody of his or her child is considered a grave step that courts are extremely reluctant to take. Termination permanently and irrevocably severs the relationship of the parent and the child. It frees the child for adoption and cuts off the parents' visitation rights.

These cases arise in several contexts: 1) when the welfare department has custody of a child who has been abandoned, abused, or neglected, and it is unlikely that the home situation will improve in the foreseeable future; 2) when a stepparent at tempts to adopt a spouse's child of a previous marriage; 3) when a child has been in the care of persons other than the biologic parents for an extended period of time and these persons wish to adopt contrary to the wishes of the parents; and 4) when a parent is mentally ill and unable to care for the child.

Most states have statutes which spell out in detail the criteria for termination of parental rights. These criteria include such items as: abandonment; neglect; perpetration of, or failure to protect a child from, physical or sexual abuse; commitment of a crime such as murdering a child's sibling or other parent; failure to maintain contact with a child in foster care; or failure to remedy with reasonable assistance the conditions which led to removal of a child. All states require a plan for the rehabilitation and reunification of families whenever a child is placed in foster care. Such a plan is an integral part of the state's foster care review system mentioned previously. The state's diligence in carrying out rehabilitative activities is often an import issue in a termination of parental tights trial: insufficient effort or poor documentation of attempts to work with the parents can result in failure to terminate their rights.

In 1982 the U.S. Supreme Court in *Santosky vs. Kramer* struck down the prevailing standard that required proof by "fair preponderance" of the evidence that a child was permanently neglected. This was found to violate the due process clause of the Constitution. The Supreme Court found that due process requires that allegations supporting termination of parental rights be proven by at least "clear and convincing evidence." This decision may be an unfortunate one for many children in need of permanent homes, as it acts to increase the judicial resistance to terminating parental rights.

Because of the strong emphasis on parental rights, the child's interests in a termination case are often not the focus of the proceeding. The courts are largely concerned with the question of whether the parent's right to a child is abrogated by the extent of the parents' abuse, neglect, or abandonment of the child, or by the parents' failure to take remedial steps. The judge's decision is usually based upon relatively concrete evidence: the frequency and extent of injury, neglect, or abandonment.

*According to the English Common Law doctrine of *parens patriae*, the Crown should protect those with no other protector.

The role of psychiatric consultants asked to participate in such cases varies. The court may ask the psychiatric consultant about the parent's diagnosis, prognosis, and likelihood of change in time for the child to benefit from such change. The psychiatric consultant may contribute importantly by clarifying that the central issue is not the parent's psychiatric diagnosis per se but rather the impact of that condition upon parenting skills. The psychiatric consultant may be asked for an opinion about parental fitness, but in the absence of overt mental illness or of a parent who openly discusses his or her mistreatment of and hostility to the child, the psychiatric consultant may have little to offer the court which is unique to psychiatric training or practice. Psychiatrist consultants tend to experience these cases as frustrating because the central issue in the law is often seen as whether or not the parent is culpable, and not as the child's needs for an able and committed caretaker.

III. Avenues to Consultation

When Both Parents Seek Psychiatric Consultation Prior to Having Sought Legal Advice

This type of situation offers the psychiatric consult ant the greatest opportunity for helping families experiencing divorce. Ideally, the custody issue can be handled on a mediation basis, and the psychiatric consultant, chosen by both sides, may remain in a position to provide help in the future should visitation problems develop. This is not properly designated a court consultation; in this type of case, no report is sent to the court and the psychiatrist does not appear in court. It is, however, a very constructive clinical activity which some divorcing parents seek.

Psychiatrists engaging in custody mediation may be asked for advice on legal matters. There is danger in the psychiatric consultant's downplaying the importance of the attorney due to a bias against the adversary system and the lawyer's part in it Some parents may passively allow their attorneys to dictate the terms of the ensuing relationship with their former spouse and children. Parents should be encouraged to participate actively in the legal negotiations and make their views known to their attorneys. A couple, in an attempt to effect the divorce with as little controversy as possible, may wish to have the divorce handled by a single attorney, often a friend. A single attorney for both parties is almost never satisfactory. In fact, most attorneys, fearing conflict of interest problems, will not represent both parents. If parents consult a psychiatrist prior to

contacting an attorney, the psychiatrist should refer them to two separate attorneys so that they may under stand better the legal and financial issues involved. It is possible for the custody and visitation settlement to be worked on and settled almost entirely in consultation with the psychiatrist, even though considerable disagreement may persist as to property issues. In such situations, the psychiatric consultant should usually be in communication with attorneys, even though the custodial issue will not be contested in court.

When One Parent Initiates a Psychiatric Consultation Prior to Having Sought Legal Advice

This type of psychiatric consultation is most likely to occur with problems of divorce custody or visitation and may offer opportunities for constructive clinical interventions. The psychiatric consultant may help the parent resolve a personal post-divorce problem of loss, anger, or identity that may have led to the consultation about custody or visitation. When the child is the actual focus of the consultation, the psychiatric consultant may be able to successfully involve both parties to effect a resolution of the custody or visitation problem by means of a clinical practice approach.

If a court proceeding on custody appears in evitable, self-referred parents may afford the psychiatric consultant the opportunity to arrange a consultation in which all the parties are seen. A problem that may arise in this situation is that the parent who did not initially consult the psychiatrist may be suspicious, viewing the psychiatrist as allied with the former spouse. When there is no court order, the psychiatrist must be careful to obtain from all parties written permission to communicate with the court.

Without a court order, it is likely that one of the parents will refuse to be interviewed, so the evaluation would be based upon interviews with the child and only one parent In the angry atmosphere of post-divorce disputes, it is difficult even for the psychiatric consultant to maintain clinical perspective in some cases. The refusal of a parent to participate may predispose the psychiatrist to look negatively upon that parent. The polarizing effect of post-divorce conflict may even induce the psychiatrist to become somewhat emotionally invested in the only parent with whom contact is maintained, so that the psychiatrist becomes inclined to take the role of advocate for that parent. Additionally, working with only one parent usually precludes the possibility of engaging the other parent in a collaborative manner, thereby diminishing the possibility of helping the parents to find an amicable resolution.

When the Court Has Designated the Psychiatrist as the Consultant or When the Attorneys for Both Parties Have Agreed Upon the Psychiatrist as Consultant

This is the situation in which the psychiatrist can make the most useful type of consultation to a court, as the evaluation by the psychiatrist has been agreed upon by both parents or has been ordered by the court, or both. Usually the psychiatric consultant requires that the court order the evaluation. A court order helps to dispel any notion that communication with the psychiatrist is confidential and ensures that the child and other persons important to the evaluation are available for it Generally, the psychiatric consultant meets with both attorneys in order to enhance understanding of the issues, and perhaps to nudge the attorneys towards a conciliatory approach, if that is possible. Clinically, the major ad vantage of an evaluation agreed upon by both parents and/or ordered by the court is that both parents are required to participate.

Most psychiatric consultants are of the opinion that their contribution to families and to the court has the greatest potential for benefit when the evaluation is court ordered and when the consultant is able to interview all the parties involved. This approach affords the psychiatrist the best opportunity to achieve a complete evaluation for the court, if not also the best opportunity to succeed in mediating or resolving some parental differences. The evaluation process described later in this report will pertain to this model.

When an Individual is Referred to a Psychiatrist by His or Her Attorney

This is probably the most common route by which a psychiatrist is contacted; most psychiatric consultants, however, carry out an evaluation of a child and just one parent only in unusual circumstances. Most clinicians either arrange to be designated as the psychiatric consultant by the court so that all the parties are available for the evaluation, or de cline any involvement in the case at all. The positive attributes of an evaluation in which all persons important to the child participate and some disadvantages of an evaluation in which only one parent participates are discussed in the prior section. Additionally, if the clinician agrees to conduct an evaluation for one parent or his or her lawyer yet another factor works to limit the usefulness of the evaluation: the psychiatric consultant's report may not find its way to court. The psychiatric consultant's evaluation will be used only if, in the opinion of a parent's attorney, it will advance that parent's case; it will be disregarded if it does not This and other issues mentioned in the prior section may exert subtle pressure upon the psychiatric consultant to support the cause of the parent who is bringing the child for evaluation. Although the psychiatric consultant is presumably the person most oriented to the needs of the child, the psychiatric consultant retained by and having contact with only one parent may have some difficulty in objectively focusing upon the child's needs. Many attorneys understand the limitations of a one-parent psychiatric consultation and seek it specifically for the advantage those limitations might provide their client.

The matter of consent for evaluation or treatment of a child is sometimes confusing to the psychiatric consultant Although joint custody agreements vary regarding many issues, it can be assumed that the decision to have a child seen by a psychiatric consultant must be a joint one. Occasionally, one encounters a parent or attorney who is insistent that a child be seen without the knowledge of the other parent This situation usually arises when a parent is seeking to alter the custody arrangement or to reduce or terminate the child's visitation with the other parent Sometimes the request is accompanied by allegations of physical or sexual abuse by the other parent. As indicated previously, an evaluation which would be made on the basis of contact with the child and one parent should generally be declined because of impediments to carrying out an adequate clinical evaluation. The unilateral evaluation can also be hazardous legally. If the psychiatric consultant wishes to proceed with an evaluation of which one of the parents is not informed, then he or she should insist upon being provided a copy of the custody agreement.

The one-parent consultation presents a challenge, but psychiatrists should not reject this type of consultation out of hand. An evaluation of a child and only one parent, despite its limitations, may allow the psychiatric consultant to provide the court with useful information. The psychiatrist may de scribe the nature of the relationship between child and parent, may report that the child does or does not have a gross mental disturbance, and may offer an opinion as to whether the parent interviewed appears to be a suitable custodian. In this type of evaluation, it is, of course, not appropriate or possible for the psychiatric consultant to make a recommendation as to which parent should be awarded custody. The psychiatric consultant can, however, make the recommendation that the court seek an evaluation of the total family situation.

When a *Guardian ad Litem* Requests a Psychiatric Consultation

A practice that has developed in recent years is the appointment by the judge of a *guardian ad litem*, usually an attorney but sometimes a person of another profession (sometimes a psychiatrist), or a lay person, to represent the interests of the child. The *guardian ad litem* may initiate investigations (including psychiatric ones), introduce evidence, and cross-examine witnesses with reference to the custodial issue. There is great variation in how individual *guardians ad litem* function. Some carry out their own investigation and seek consultations, while others attend the

hearing and offer the judge their opinion as to the proper disposition of the case on the basis of the testimony heard. In an adversary proceeding that otherwise would involve only two attorneys, each vigorously representing a parent's interest, the *guardian ad litem* may serve a useful function in assisting the judge in focusing on the best interests of the child. When a *guardian ad litem* requests a psychiatric consultation, the situation has many parallels to the one where the psychiatric consultant is either agreed upon by both attorneys and both parents or is appointed by the court. In most instances, these evaluations are in fact court-ordered. Through the *guardian ad litem*, the psychiatric consultant may come to understand better the legal situation and learn of new alternatives for the child or children involved. The psychiatric consultant may find in the *guardian ad litem* an ally in court. A *guardian ad litem* differs somewhat from the lawyers of the parents or other parties petitioning for custody. The child is not a legal party; the parents are. Thus, the parents' attorneys may agree on a settlement and often obviate the function of the *guardian ad litem*. Nonetheless, the *guardian ad litem* who takes the job seriously may do a great deal to assure that the child's interests are not obscured and may have an influential role in the proceedings.

When a Child Care Agency Requests a Psychiatric Consultation

These types of psychiatric consultations are usually court-ordered at the outset or can readily be so structured; in this way the psychiatrist has access to all parties and information. Agency initiated cases most often involve abuse and neglect, foster care, termination of parental rights, and adoption.

When a Consultation Should be Declined

Throughout this report attention is paid to issues external to and within the psychiatric consultant that can detract from clinical objectivity. A situation that would make objectivity virtually impossible is when a child or parent has been the psychiatrist's patient: a psychiatrist who has been providing treatment should decline a custody evaluation involving that patient Similarly, it is best to refer rather than take into treatment a child one has seen for a custody evaluation. The role one has had with such a family introduces a great number of issues to complicate the treatment, the most serious of which would usually be an impediment to an adequate alliance with both of the child's parents. And, as discussed previously, a custody evaluation that would involve the child and only one parent should generally be converted into one that will involve both parents or it should be declined (unless there are special circum stances in specific cases).

IV. The Evaluation

Divorce custody contests between two capable parents generally require the most comprehensive evaluation and are the most common type of case for which psychiatric consultation is sought. The guidelines that follow are geared to this type of evaluation. Not all facets of the evaluation may be required in other types of contested custody.

The ability of a parent to provide for the material, educational, and health requirements of a child is generally within the capacity of the legal system to ascertain. However, questions of children's attachments, the nature of their relationships with their parents, and assessment of developmental disturbances or emotional problems often require a psychiatrist's assistance.

The psychiatric consultant may draw upon two categories of data in carrying out child custody evaluations. The first is observations made in interviewing the child and parents and in observing interactions between the child and family members. The second may include indirect sources such as social service records, school reports, psychological test results, and medical and psychiatric records. When available, the *guardian ad litem* can be helpful in collecting data from secondary sources.

Psychiatric consultants' preferences and local legal practice may vary considerably regarding these secondary sources. Many psychiatric consultants may limit their task to direct clinical work only, unless there are pertinent psychiatric records available to examine; other psychiatric consultants may prefer to obtain extensive records of various kinds for study. The psychiatric consultant should make clear to the attorneys what types of data will be used and what data will not be used in the custody evaluation, so that the attorneys can be relied upon to bring before the court information not used by the consultant.

Cases in which psychiatric consultants participate vary in a great many ways. In some, the attorneys have great conviction and energy; in others, one sees quite the opposite. For example, in situations where both parties are members of influential families, or situations where the attorneys have been exhausted and discouraged by intransigent parents who are clearly damaging their children, the attorneys may tend to leave the entire responsibility for the custody issue in the hands of the psychiatric consultant There are many issues pertinent to child custody which a psychiatric consultant may never learn from an evaluation but which lawyers routinely put before the court from their investigations. These may range from a parent's excessive alcohol use to a criminal record. As mentioned previously, it is important to meet with both lawyers. The psychiatric consultant invariably enhances his or her understanding of the case, can clarify roles, and can carefully discuss with the attorneys what can be expected of the psychiatric consultant in such a meeting.

Fees and Payment

This area deserves special mention because of two major issues: at the conclusion of one's work, one or both parties may be angry at the psychiatric consultant; and medical insurance companies generally consider such consultations to be legal and not medical activities. Approaches to assure that one is remunerated include having payment for the consultation included in the court order (the relative amount each party pays is generally allocated by the court), and requiring a deposit or a retainer, or payment in advance for work to be done.

Confidentiality

While there are many similarities of custody evaluations to other types of clinical work, the practice regarding confidentiality is not one of them. The psychiatric consultant must actively dispel the expectation that confidences will be kept. Some clinicians require the adults to sign a release even when the court has ordered the evaluation. The psychiatric consultant generally presents himself or herself to the child as a person who is helping the judge to think about with whom the child should live. The psychiatric consultant must explain to the child in language the child understands that confidentiality does not exist because one purpose of the evaluation is to help the court understand the child's needs and preferences.

The Major Questions

The psychiatric consultant can contribute to resolution of the custodial question by providing information to the court regarding at least four major areas: 1) the reciprocal attachment between a parent and a child, 2) the child's preference, 3) the child's needs and the adult's parenting capacities, and 4) the relevant family dynamics. A discussion of each of these areas follows.

The reciprocal attachment between parent and child. The strength and quality of the child's attachment to each parent or other caretaking adult is of great importance in cases involving post-divorce custody and in cases where adoption would disrupt a long-term foster child/foster parent relationship. The meaning of a child to a parent provides useful information about the nature of the parent's attachment to the child. For example, a parent may regard the child as a personal possession or as an extension

of the parent A parent may have un realistic, unconscious expectations that the childful fill the parent's fantasies or conflicted needs. Alternatively, a parent may realistically view the child as a separate and temporarily dependent being who needs support and guidance toward achieving autonomy. A parent's description of the child can pro vide an indication of the parent's awareness of the child's existence separate from that of the parent and may offer some indication of the parent's knowledge of and respect for the child's strengths, weaknesses, fears, and other attributes.

The importance of the child to the parent can be determined by assessing the extent of the parent's constructive involvement in the child's life, attentiveness to the child's needs, and consideration of the child in activities and in planning for the future. A technique which often provides useful in formation is for the psychiatric consultant to ask a parent to prepare a living plan for the child in the event he or she gains custody. A thoughtful and realistic plan may give some indication of the extent of the parent's caring for the child and capability as a parent.

Goldstein, Freud, and Solnit[1] describe the psychological parent-child relationship as arising out of day-to-day interaction, companionship, and shared experiences of the child and an emotionally involved adult A psychological parent-child relation ship can generally be assumed to exist between a child and the adults who have maintained a home for the child over an extended period of time.

Observation of the nature of the interaction between a child and a parent can provide an indication of parental empathy and ability to communicate with the child. Physical interaction with young children and verbal exchange with older children provide clues about the quality of the relationship between child and parent.

Family drawings by the child may provide indications of the person or persons whom the child considers to be his or her psychological parent(s). Family drawings are an excellent means of exploring the child's feelings; they may indicate the child's view of who is close to whom and can lead to ex tended discussions of a variety of family issues. Similarly, a kinetic family drawing, a drawing of the family doing something together, can add further to the psychiatrist's understanding of the child's world.

Another technique commonly used in routine psychiatric work with children is also useful in child custody evaluations. The child is asked to make three magic wishes. The wishes are to be for really big, important things, not for a steak dinner or a bicycle, or other good things like that. The child in a divorce custody dispute will almost always respond with wishes focused immediately upon the separation or divorce. Usually first, is the wish the family were still together. Such a response can lead into a useful discussion of how the child perceives and is affected by the current emotional climate generated by the parents, and can provide the child with an opportunity to share the pain.

The psychiatrist may ask questions or present situations that will indirectly elicit responses from the child that will reflect his or her feelings toward each parent. For example, asking the child which person or persons he or she would rather be with if lost in the woods or ill may indicate the person or persons whom the child trusts to provide care and protection. Questions as to whom the child would want to ask on a picnic if there were room in the car for only one person or which person the child would save first from a burning may also pro duce significant responses. Rarely, however, will a single bit of play or a single verbal interaction speak for itself; clinical judgment and understanding of context remain essential. Often the child will refuse to answer or will answer based on an immediate need or impulse, or will find an ingenious alternative that avoids the choosing of one parent but allows the child to take or save both of them. In most circumstances, a child raised in a reasonably well-functioning home will be firmly attached to both parents.

The child's preference. The child's preference to live with one parent rather than the other is a consideration particularly in divorce custody cases. There is much attention paid and perhaps undue emphasis given to the child's preference in the legal literature.[17-26] This literature pertains most particularly to a preference stated by a child before a judge in open court (a practice most psychiatrists abhor) or in chambers, but applies as well to testimony of the psychiatric consultant regarding interviews with the child.

The term "the child's preference" implies, not only to the lay person but also to some clinicians, that each child must be asked his or her preference as to a custodian. Since the purpose of soliciting the child's preference is to estimate the attachment to the parent or parents, it would seem that the indirect methods described above for determining the child's attachments are more likely to elicit a response that reflects the tone of the continuing relationship with a parent than a direct question regarding with whom the child wishes to live. Such a direct question may be experienced by the child as threatening and con fusing, and often children refuse to answer. In response to either indirect or direct questioning, a child may answer in favor of the parent who just gave him or her a present, against the parent with whom he or she is momentarily angry, or in favor of the parent he or she fears the most. Sometimes a child will express a preference for the parent not "chosen" by a sibling, or for the parent with whom a degree of role reversal has occurred, with the child choosing the parent who appears to be the most in need.

Until the end of the preschool years, children have a very limited understanding of the meaning of divorce, adoption, illness, or death. The grade school child interprets such phenomena in highly personalized, egocentric ways. Youngsters in early adolescence, however, can be astute observers of people and events, but they may lack the experience needed to make judgments affecting their lives. Recognizing the cognitive immaturity of children, many courts do not take a child's overt preference into account prior to the age of eight, may consider it between ages eight and 14, and for the most part follow a preference expressed by children above the age of 14.

As mentioned above, pursuing by relatively in direct means the nature of the child's attachment to one or the other parent may provide material sufficient to answer the question of the child's preference and what the child's preference might mean in terms of the nature of the child's perception of and relationship with that parent. There are in stances, however, when the question may be appropriately posed directly. The custodial issue is rarely in the background in these types of evaluations. For some children, asking them the good points and the not-so-good points about living with one or the other parent may elicit significant data. Most older children are, however, aware of the significance of the custody issue, having discussed it with their parents and perhaps also with their parents' attorneys. When it seems appropriate to the psychiatric consultant to question the child directly, the child's anxiety, guilt, and other feelings related to the parental separation and to the child's awesome power to choose a parent should be worked with as sensitively as possible. It is unfortunate and ironic that, when a child is given so much power as to choose a parent, the child feels that he or she may not have any parents at all! Many children request that they not be asked to express a preference because it forces them to take sides with one or the other parent, and they fear the hurt they will inflict or the wrath they will incur. Some children are unambivalent in their preference in a way that reflects a realistic appraisal of one parent's greater capacity to meet their needs. Still other children are apparently certain of their choice but have been strongly influenced against one parent by the other. Or, driven by intense anxiety and ambivalence stimulated by their loyalty conflict, they vehemently choose one parent and reject the other for the emotional relief afforded. Another question able reason for a child's choice of one parent over the other has to do with children's feelings of responsibility for their parents. If a sibling has made a firm choice to go with one parent, the child may choose to remain with other parent In the interview situation, this child is likely to indicate that the children should be properly apportioned to their parents, and that it is a child's duty to prevent a parent's being abandoned. In a similar vein, the child may feel a need to protect a physically or mentally impaired parent It is not sufficient to simply elicit a preference: an effort should be made to explore what lies behind the stated preference. All of these possibilities highlight the importance of carefully evaluating a child's

expressions of preference in the context of family dynamics and of the child's re actions to the changes in his or her life.

The child's needs and the adult's parenting capacities. The psychiatrist is well aware of familial influences that facilitate or impede the process of development toward autonomous adulthood. Pa rental affection, protection, and guidance are necessary to promote the child's development of social and learning skills, self-control, socially oriented values, positive self-esteem, and a coherent sense of self. An understanding of a child's developmental needs is necessary to determine which of the potential custodians may be more helpful to the child in accomplishing these goals.

The ability to relate adequately to people depends upon having been valued and cared for early in life. Young children need parents who can accept and respond to their bodily functions as well as communicate with them to facilitate the acquisition of language, the fundamental social and intellectual skill. Children also need parents who can set limits and model coping techniques: the ability to tolerate frustration and postpone gratification permit the development of the self-control needed for social co operation and task performance. A range of learning skills is required to gain information about oneself, other people, and the world. Parental help in channeling curiosity and supporting education is important. A value system which accommodates self- interest to social realities must be modeled and taught by caring parents. Children benefit from learning recreational, creative, and pleasure-affording skills. Parental awareness and acceptance of the child as a unique person is essential to the development of positive self-esteem and a sense of autonomy. The presence of physical, educational, or emotional disorders in a child poses special challenges for a parent in working towards the above-stated child-raising goals. The clinician may be able to shed some light on the ability of each parent to assist the child to achieve these goals.

The psychiatric consultant sees the parents and child for individual interviews, the child and each parent together, and may see other persons of importance such as grandparents, stepparents, and child care persons. As mentioned, the psychiatric consultant may also obtain information, when applicable or desired, from day care centers, schools, social service agencies, and medical and psychiatric sources. In addition to general observations in the interview situation, the psychiatric consultant may obtain further data about the parent-child relation ship by assigning a task. For example, the psychiatric consultant may provide blocks and request that the parent and child build something together. Important observations may include the pair's ability to cooperate, the child's degree of initiative in the presence of each parent, the parent's ability to allow the child some autonomy, and the parent's ability to help or make suggestions without belittling the child.

Often the clinician will find that each parent has different strengths in the relationship with the child and may meet different needs in the child. One parent may be consistent and set appropriate limits for the child, while the other is more erratic but also more nurturing. In some cases the clinician's role may be to describe to the court the strengths and weaknesses of each parent, leaving the court to make what is ultimately a value judgment in deciding which parent should have custody. Particularly when the case is not clear-cut, courts, in determining custody, are often inclined to seize upon a parent's personal characteristics, life style, and any other qualities that may serve to differentiate the contesting persons. The psychiatric consultant may serve a useful role in directing the court's attention to those parental qualifies that have a known positive or negative effect upon the child while minimizing the importance given to other issues. For example, in a situation where a capable custodial parent who is homosexual or who has been psychotic in the past is challenged for custody, the psychiatrist can address the specific implications of the parent's life style or psychiatric condition on the child.

Family dynamics. A parent seeking custody may have important motivations in addition to affection and concern for the child. The parent's behavior often is complicated by emotional reactions to the disruption of the spousal relationship. Custody may be sought as a way to maintain a sense of identity when one's sense of self and continuity is threatened by the separation or divorce. A parent may seek custody and may seek to disrupt visitation out of anger at the former spouse.

A parent's anger at the former spouse may come to involve a child as stand-in for the other parent With the diminution of generation boundaries between parent and child that characterizes the new one-parent family, there may develop in the mind of the parent a blurring of the boundary between the former spouse and the child, often, but not necessarily, with a child of the same sex as the other parent This can result in a partial recreation of the former spousal relationship by the custodial parent and child. Often this relationship contains many elements reminiscent of the struggle with the former spouse. Parents who are caught in this type of problem typically repeatedly drift from talking about their daughter or son to talking angrily about the former spouse. Children of middle school age and older are often well aware of the problem and its origin. One eleven year old boy stated that his mother stayed angry with him because he was the closest thing to his father.

In foster parent adoption cases, the biologic parents' resistance to adoption may be as much related to avoiding the finality of loss, feelings of failure, or guilt as to genuine wishes to have the child back. Attempts of stepparents to adopt have at least two common motivations that are unrelated to the child's needs. The first is the desire of the custodial parent to banish the noncustodial parent from the child's life as the final punishment of the ex-spouse. The second has to do with the new couple—the custodial parent and the stepparent—unconsciously maintaining the amiability of their relationship with each other by tacitly agreeing that the dissatisfactions in their marriage and their lives is caused by the noncustodial parent whose rights to the child must be eliminated. These types of dynamics are probably present to some degree in most cases and must be weighed along with all the other issues.

An important consideration in divorce is the custodial parent's ability to promote and protect the child's relationship with the non-custodial parent who maintains an interest in the child. Studies indicate that children benefit when they have regular access to both parents after divorce. Awarding custody or primary physical residence to a parent who supports the child's relationship with the other parent may help to mitigate post-divorce problems and loyalty conflicts for the child. Sometimes this is codified in law: one state favors for primary physical residence the parent who "is more likely to allow the child frequent and continuing contact with the non-residential parent."[6]

A phenomenon that has come to prominence in the late 1980s is the allegation by one parent, typically the mother, that the father is physically or sexually abusing the child. The children involved are generally of preschool age and the allegations are brought by the parent. Several reports in the literature[27-31] indicate a high proportion of unsubstantiated cases. In many instances, the allegations are not brought maliciously but are based upon a variety of complex overreactions on the part of the mother to the father's affectionate involvement in the physical and emotional care of the child. The mother's anxiety may then fuel the child's anxiety and foster regressive behavior that the mother then interprets as proof of sexual abuse. Due to the response of public agencies and the inherent difficulty in establishing that an event such as sexual abuse did not occur, such allegations can effectively interrupt the child's contact with the father.

Knowledge of the family history of a parent may provide insights about his or her ability to pro vide a healthy, growth-oriented environment for the child after divorce. A parent's traumatic childhood may leave him or her with conflicted motivation for being a parent. For example, a father sought custody of his son largely because of an unrecognized rescue fantasy based upon the death of his younger brother during his childhood. He feared that he would be abandoning his son and would in turn be abandoned by him if he did not seek custody.

A child's wish for parental reunion may lead to manipulation of the parents by the child. The child may give each parent the impression that the other is deficient as a parent, immoral, or otherwise unsuited to care

for the child, in order to keep them involved with each other. The psychiatric consultant can attempt to identify these intrigues and clarify issues for the court as well as to help the parents to understand better their child and each other.

Sometimes grandparents exert a powerful influence on a parent's desire for custody. For example, a major motivation of a biologic mother in a parental rights termination case may be to avoid humiliation in the eyes of her own mother. A parent might seek custody for the same reason in a divorce proceeding. A divorce custody suit by a father may be based upon his own mother's wish to raise the child.

The Evaluation as a Process

Parents can sometimes begin to think more flexibly about their children's situations and needs as they engage in the consultation process over a period of time. For example, the psychiatric consultant who finds that a child is well adjusted and well cared for by the mother might share that information with the father in explaining to the father that the consultant will not support his bid for custody. The father's wish for a closer relationship with his child might then take another and more practical direction. In a situation where two capable and potentially co operative parents live near each other, the psychiatric consultant might introduce the idea of shared parenting in a joint custody arrangement With this sort of approach, a more constructive resolution is possible than if the psychiatric consultant sees his or her task as simply to help the judge decide who wins and who loses.

The psychiatric consultant should arrange for ample time for a custody consultation. It cannot be predicted how many interviews will be required, although most evaluations require between eight and 18 interviews. More importantly, attempting to meet the deadline of an imminent court hearing appears to detract from the parents' developing their ability to take collaborative responsibility for their child or children, and has the unintended effect of seeming to place the basic responsibility for decisions regarding children in the hands of the consultant and the court.

In the course of many types of consultations, it is possible for the psychiatric consultant to be directly helpful to the children and adults involved. The psychiatrist can usually share with the caretaking adults ways of understanding and helping children with the various changes and losses occurring in their lives. In a divorce custody consultation, the evaluation process may include help to parents and children in dealing with the divorce and perhaps even assisting the parents in learning to deal with each other.

The Interpretive Interview

In the process of the evaluation, the psychiatric consultant's findings can be discussed with the child and parents in order to obtain their responses, to stimulate their and the psychiatric consultant's thinking, and, sometimes, to facilitate further negotiation. With older children there may be a substantial benefit to sharing findings with the child. Sometimes the child and the psychiatric consultant can collaborate in the process of developing the psychiatric consultant's recommendations to the court. Most parents are understandably angry and disappointed if they disagree with the psychiatric consultant's findings. However, the psychiatric consultant can often greatly enhance the parents' understanding of the child in the process of sharing findings with family members or other caring adults.

V. The Written Report

This section describes material which should be included in any report to the court and suggests a possible format for preparation of such a report. Whether the court requires a written statement or not, this format may assist the psychiatric consultant in organizing data and thoughts regarding the case.

Circumstances of the Evaluation

The introductory section of the report should state the circumstances of referral (by the court, *guardian ad litem*, welfare department, or one of the parties) and the specific questions being addressed by the psychiatric consultant regarding custody, visitation, adoption, or termination of parental rights.

Clinical work. The extent of clinical work should be documented: dates when interviews took place, length of those interviews, what person or persons were seen at a particular time, and any missed or cancelled appointments. Documentation of the discussion with the various parties regarding the pur pose of the evaluation and the absence of confidentiality should be recorded as well.

Secondary sources of information. All other sources of information or other interviews relative to the evaluation should be carefully documented. Reports and other written sources of information are often considered to be hearsay, and it is necessary that the psychiatric consultant make as clear as possible which impressions and information were obtained directly from the persons involved in the case and which were obtained from other sources.

Body of the Report

Material selected to appear in the report should be key to the psychiatric consultant's formulating a recommendation and clearly supportive of that recommendation. In cases where the psychiatric consultant does not make a firm recommendation, the advantages and disadvantages of the various custodial alternatives might be discussed.

An account of the history of custodial arrangements may be necessary in situations where it is pertinent to a discussion of psychological parent hood. Topics of possible relevance, besides the history of caretaking arrangements, are parenting skills and commitment of the contenders for custody, the child's wishes, and relevant intrapersonal and interpersonal issues regarding the child and/or con testing adults. Descriptions of adult-child attachment and interaction, or parental traits and behaviors that are thought to have positive or negative effects upon the children should be part of the report.

Clinical findings should be stated in objective and descriptive terms. Often the consultant can convey greater clarity by sharing observations or quoting persons interviewed rather than expressing a conclusion without supplying the steps that led to it Rather than noting that a person appeared de pressed, one might say that he moved slowly, his face was generally devoid of expression, and tears formed in his eyes when his children were discussed. Direct quotations from subjects involved in the evaluation tend to be clearer and to stand up better under cross-examination than do subjective judgments. For example, a father's statement, "I must get my child away from my former wife's evil ways, and I've looked into a boys' home since I can't care for him myself," speaks for itself more clearly than any conclusion drawn from such statements. Similarly, if a mother is attempting to interrupt visitation by the father on the basis of his alcoholism, quoting her statement that the children look forward to his visits and that she had never observed him to be inebriated on those visits can be very helpful to the court's understanding of the situation.

The report in most cases will be read by a number of different people: it may be challenging or even impossible to write an effective report that does not embarrass or humiliate someone. It is important to remember that the written report is a document from which one will testify and upon which some cross-examination will be based. One must be able to explain and clarify any statements made in the report.

The report should be free of jargon and theoretical discussion but should include psychiatric diagnoses where pertinent. The importance of a psychiatric diagnosis regarding parent or child can vary greatly from case to case. When a child is disturbed, a parent's understanding of the disturbance and attitude about therapeutic intervention may be of relevance to the custodial question. If a parent carries a psychiatric

diagnosis, it is the psychiatric consultant's task to address the implications for parenting ability. Often, a psychiatric diagnosis by no means disqualifies a person from adequately carrying out parental functions, and this needs to be made clear to the court. In addition, if the condition is readily remediable and the person is willing to engage in therapy, this should be included in the report. In the case of a parent with manic-depressive illness, for example, it would be important to state that this has been well controlled with medication and therefore does not importantly interfere with the parent's ability to care for the child. On the other hand, where a parent's psychiatric condition significantly impairs that person's responses to or ability to care for the child, then that should be stated by the psychiatric consultant.

The psychiatric consultant may be tempted to quote professional literature in order to bolster the findings of the report, but in so doing may open the door to possibly irrelevant and confusing cross- examination. The best preparation for cross-examination is a tightly constructed report or statement that does not contain unclear or extraneous material.

Formulation and Recommendation

The formulation and recommendation of a custody arrangement should be developed logically from material presented in the body of the report, and should be lucidly and succinctly stated. If the psychiatric consultant is unable to make a firm recommendation to the court, this should be clearly stated. The report might then discuss strengths and weaknesses of the various available custodial alter natives.

The psychiatric consultant who is unfamiliar with the court setting may be tempted to avoid taking a stand on issues, thereby failing to provide useful information to the court. This is often done, in part, to avoid upsetting parents or other adults involved in the case. It requires skill and practice to present tactfully the results of an evaluation that are unfavorable to one parent without weakening the impact of one's report and/or testimony.

The psychiatric consultant, in order to avoid a recommendation that would hurt one or both of the contesting adults, may be tempted to suggest a treatment plan that in other circumstances would be rejected as being impractical. The psychiatric consultant must be realistic about the availability and effectiveness of rehabilitative services and the court's ability to maintain a supervisory role with regard to psychiatric treatment or other interventions.

Upon completion of the evaluation, copies of the report, if a report is required, are sent to the appropriate parties. In an evaluation done for the court, the judge, the parties, and the attorneys involved in the case receive copies. If the psychiatric consultant has carried out a unilateral evaluation for one of the parental parties, the report will be entered as evidence by the parent's attorney if it supports that parent's cause; the report (and the psychiatric consultant) will not get into court if the report does not support that parent.

VII. Testifying in Court

In some instances, the court will ask only for a re port; generally, however, the psychiatric consultant is required to testify. By testifying in court, the psychiatric consultant directly contributes to the decision-making process. An additional benefit is the opportunity to educate attorneys and judges about the problems and needs of children in these predicaments. it is not sufficient to conduct an evaluation and write a good report one must also be able to communicate clearly and explain convincingly one's findings and recommendations. This re quires being able to document carefully the process of opinion formation, including a description of the sources of information relied upon.

For the psychiatric consultant, the evaluation and recommendations are generally of central importance; for the judge, the psychiatrist's findings are one of many factors to be weighed. The psychiatric consultant should be aware that his or her opinion may not be a central issue in the decision and should not feel insulted if the recommendations are not followed. The weight accorded to the testimony in a given instance, however, will generally be related to the psychiatrist's credibility and conduct in court.

Preparation for the Hearing

Anxiety about appearing in the courtroom is common but tends to diminish as one becomes familiar with courtroom procedure and personnel. Prior to the hearing, the psychiatric consultant should meet with the attorneys involved to go over anticipated lines of questioning. The psychiatric consultant can suggest the order of questions during testimony; e.g., it is usually preferable to present observations prior to conclusions. At this conference, the psychiatric consultant can discuss scheduling of testimony. Most courts are quite accommodating regarding scheduling and allow the psychiatrist to testify at a specific time.

The psychiatrist may react to cross-examination as a personal attack. It is helpful to remember that the psychiatric consultant is not on trial; the attorney who attempts to discredit the psychiatrist's testimony is merely acting in the tradition of the adversary system. Thorough preparation is, of course, the most effective way to allay one's anxieties about appearing as an expert witness. Section V described the written report that may be required by the court. If such a formal report is not required, the psychiatric consultant might still prepare notes on the model of such a report for the court hearing. These notes should exclude any sensitive material that is best left out of evidence, as an opposing attorney may request to see any notes the witness brings to court and may question the psychiatric consultant about them. The psychiatric consultant who has used secondary sources of information must be able to dearly distinguish opinions based upon direct clinical work from those based upon the other sources. If a significant amount of time has elapsed between the evaluation and the court date, additional clinical contact should be made so that the clinician's contribution is not subject to attack for being based on data that is out of date.

The psychiatric consultant should be sensitive to extraneous issues that may influence the findings of the evaluation. The problem raised by the psychiatrist's seeing only one of the contesting adults in evaluation was discussed in Section III. The psychiatrist may also be influenced by a tendency to identify with figures of authority such as parents or the judge or to become overly involved with the child and antagonistic to parents or third party custodians.

Who should have custody or primary physical residence is a fairly clear issue in some instances, as in a case where one parent's capacities are significantly impaired by mental illness, mental retardation, or some other obvious problem. In many instances, however, which parent should have custody is not clearly answered by an adequate clinical evaluation. The absence of dear criteria, in combination with pressure from judges for help in the decision, and pressure from within the psychiatric consultant to appear both clinically competent and helpful to the court, may tend to lead the psychiatrist to make a more definitive recommendation than is warranted. Also, the ambiguity of the clinical findings, in combination with some internal pressure to solve the problem, may lead the psychiatric consultant to rely upon unconscious personal biases. The psychiatric consultant must be aware of these forces so that he or she is not bound to act on them. The psychiatric consultant in equivocal cases can provide the court with a discussion of the advantages and disadvantages for the child of being with each parent

Proper demeanor in the courtroom will enhance one's impact The importance of appropriate dress, a respectful attitude, and good eye contact are obvious. Although the attorneys pose the questions, the psychiatric consultant's responses are directed to the judge. Cockiness, flippancy, and sarcasm should be avoided and one should strive to maintain equanimity in the face of provocation. Humor, how ever, may be judiciously employed as an effective means of disarming a hostile attorney or of making a point.

Careful attention should be paid to choice of language. It is important not to speak in a manner that might appear condescending, but equally important to avoid psychiatric jargon that may serve to confuse and perhaps antagonize the lay person. The use of neutral terms such as "he states" is preferable to those that could be interpreted as pejorative, such as "he claims." Psychiatric terms used should be adequately defined. It can be helpful to read the trial transcript in order to monitor one's performance in court and also to become aware of differences between what one wished to say and what one actually did say.

The Psychiatrist as Expert Witness

The expert witness status usually conferred upon the psychiatric consultant carries with it the privilege of being allowed to testify about one's opinion or recommendation. Other witnesses may only report their observations. The psychiatric consultant may have access to the judge to clarify questions posed by the court or to assist the judge in deciding the issue of whether or not the child should testify in court, be interviewed by the judge in chambers, or not be interviewed at all. During testimony, an ex pert may be required to give a "yes" or "no" answer to a question but is also entitled to give an explanation following that answer. If in doubt about how to answer a question, one may always turn to the judge for guidance.

Ideally, the psychiatrist goes to court as a willing expert witness. However, the psychiatrist is some times subpoenaed to gain information divulged in confidence during treatment of the child or of one of the divorcing parents, in an attempt by one of the parties to uncover information damaging to the other parent. The psychiatrist is then left in a difficult position for which there is no easy remedy. The psychiatrist's duty remains to the patient, but there is a legal obligation to respond to the subpoena. The psychiatrist may appeal to the child's *guardian ad litem* or to the attorney representing the party about whom information is being sought to quash the subpoena. The psychiatrist can point out that testifying would be damaging to current and future doctor-patient relationships. A maneuver which is often very effective is to inform the attorney bringing the subpoena that there is a risk that if forced to testify, the psychiatrist might disclose information that is damaging to his or her client as well. The psychiatrist's next step would be to appeal to the judge to try to avoid testifying at all, or to try to arrange to testify in as restricted a way as possible, leaving out material not relevant to the custodial issue.

Qualification

After being sworn in, the psychiatric consultant is asked for name, occupation, and credentials, thus providing the grounds for qualification of the psychiatric consultant as an expert. The novice may feel embarrassed by a paucity of credentials, whereas the more experienced witness may tend to rush through, perhaps omitting important items. Some courts or attorneys may opt to waive this recitation, particularly if the witness is known to them or if an attorney wished to avoid the judge's being too impressed by the witness's credentials. The risk of waiver is that the case may later be reviewed by another court that is not familiar with the witness. It may be helpful to bring a resume to court; this will assist the attorney in questioning and the stenographer in transcribing.

Direct Examination

Direct examination of the psychiatric consultant is conducted by the attorney representing the agency or party for whom one is appearing, or by the *guardian ad litem* for the child. If the psychiatrist has had the opportunity to discuss his or her findings with the attorney in advance of the hearing, direct examination usually poses few problems. It provides the opportunity for building one's case; therefore, it is important that the psychiatric consultant describe comprehensively the basis of any recommendation. Material will generally be drawn from the written report, although one may also amplify or introduce new material. Answers should be kept concise and relevant Careful attention should be paid to choice of words since anything said is subject to cross-examination. Direct testimony may be interrupted by objections from the other attorney. Such objections are usually related to rules of evidence, and the judge will rule immediately as to whether or not that line of questioning is admissible.

As mentioned previously, the psychiatric consultant may be quite reluctant to express findings that are damaging to a parent or other party, although this is commonly a part of custody consultation. Discretion must be exercised with respect to how much to reveal of a child's disclosures, particularly those that might jeopardize the future parent-child relationship. One option may be to share confidences of this type with the judge and attorneys in chambers. There is no guarantee, however, that the parents' attorneys will keep these confidences, as the attorneys' obligations are to the parents and not to the child.

Cross-Examination

Cross-examination can provide a stimulating exercise in thinking on one's feet, defending one's opinion, and maintaining one's composure. Skillful cross-examination may attempt to discredit the psychiatric consultant's testimony through pointing out weak nesses in the presentation, such as confusing hear say with direct observation, theory with fact; or clinical opinion with scientific proof. It is important to understand the distinction between a phenomenon's being possible and it being probable. "Probable" implies a greater than 50 percent likelihood of an event's or outcome's occurring, whereas almost anything is possible. The psychiatric consultant should be prepared to explain how a recommendation can be arrived at based on such limited clinical contact as a custody case often affords. Questions may be put forth in rambling fashion that is difficult to follow. One can and should request that such questions be rephrased or that they be separated into manage able portions.

Hypothetical questions may be introduced that infer that one does not have all the relevant information, which is, of course, sometimes the case. The psychiatric consultant should point out if and when the hypothetical facts differ from the situation as it is known to the psychiatric consultant An attorney may use hypothetical questions to present the psychiatric consultant with new information of relevance to the custodial issue, in which case the psychiatrist must be able to make appropriate alterations to the recommendation should the court find the information to be true.

Failing to undermine the psychiatric consult ant's testimony, an aggressive attorney may resort to attacking or belittling of the psychiatrist's profession or person. The attorney may call a woman psychiatrist "Miss" or ask irrelevant personal questions. It is helpful to turn to the judge for guidance in how to respond to such tactics. Generally, the judge will set limits and protect the witness from harassment. In the absence of the judge, such as in a deposition, the protective aspect of the judge's role may be fully appreciated. A common ploy is for the attorney to insinuate that one's opinion has been bought. A good response to queries about what one is being paid is to state that one is being paid for time, not testimony. Angry or sarcastic responses should assiduously be avoided, and one's equanimity maintained. The psychiatric consultant should never be reluctant to say "I don't know" when that is the case; he or she also does well to admit to limitations as to the clinical or research basis for any recommendations.

Redirect Examination

In redirect examination, both attorneys can seek clarification of what has been said. The psychiatric consultant has the opportunity to elaborate on ideas and opinions that could not be treated adequately in cross-examination. Similarly, if new material has emerged during cross-examination, then the opposing attorney is provided the opportunity to pursue it further with the psychiatric consultant The judge may wish at this time to pose questions to the testifying psychiatrist Following direct

examination, the witness is usually excused from the courtroom and permitted to leave.

Learning from Experience

Becoming an effective expert witness is an acquired skill, and the beginner should not feel intimidated or discouraged. The basic elements are thorough clinical evaluation, adequate preparation, and convincing presentation. The latter requires not only sound theoretical knowledge but also a combination of careful articulation, assertion, and humility. In order to improve courtroom skills, one might ask to sit in on the testimony of colleagues, ask a colleague to critique one's testimony, and review transcripts of hearings in which one has participated.

VII. Conclusion

We have sought 1) to encourage psychiatrists to participate as psychiatric consultants in the judicial custody determination process, 2) to introduce the novice to the field, 3) to suggest some guidelines for child custody consultation, and 4) to educate attorneys about realistic expectations from psychiatric consultation. To acquire skill in child custody consultation, it is necessary to have a basic under standing of child development, to have skills in communicating with young people, to be able to perceive human problems from an interpersonal perspective, and to be able to communicate effectively one's knowledge to those not trained in the behavioral sciences. Once one is familiar with the territory, child custody consultation can become another area where the psychiatrist can find challenge and reward in the exercise of clinical judgment and skill.

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