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AREA REVIEW

Child Testimony in Custody Cases: A Review

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ABSTRACT. The authors provide a brief historical review of judicial trends in child custody placement. In contrast to the start of the 19th century, by its end, courts took into consideration children's best interests, maternal rights, and prevailing sex role ideologies. Statutory changes began to reflect similar concerns by the end of that century. Modern practices, relying on the best interests of the child standard, also include consistent consideration of children's preferences in making custody determinations. An important factor in this context is the accuracy with which a child describes domestic relations, especially in contested cases with contradictory allegations by parents. Research dealing with children's report accuracy and techniques to enhance it are reviewed, and a description of various practical considerations when questioning children is provided. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <getinfo@haworthpressinc.com> Website: <<http://www.HaworthPress.com>> © 2002 by The Haworth Press, Inc. All rights reserved.]*

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O. J. Simpson was acquitted of the criminal charge of brutally murdering his ex-wife Nicole and her friend Ron Goldman. Then, despite the best efforts of Nicole's parents, Simpson was awarded custody of the couple's two young children, a result consistent with previous, similar custody decisions (Mason, 2000). This case was unusual, not only because of the murders, but also because it did not arise out of divorce proceedings, as do the majority of child custody disputes. Nevertheless, child custody issues can arise from adoptions, foster care placements, separations of unmarried partners, as well as from parental deaths and abandonment. Moreover, not all custodial disputes are between biological parents.

However, despite the fact that child custody disputes arise primarily out of divorce proceedings, not all divorces are associated with custody battles. In approximately 90 to 95% of cases, custody is not litigated, but is mutually agreed upon by parents (Gunnore & Braver, 2001; Maccoby & Mnookin, 1992). When agreements cannot be reached, courts are asked to step in and make the decisions instead, which they have done in increasing and overwhelming numbers in the past two decades (Mason, 2000). The ensuing battles can be fierce and unpleasant.

The court that weighs parents' competing claims and contentions is typically some form of Family Court. These courts are governed by state laws and cases, and consequently, jurisdictional variations are not uncommon (Crosby-Currie, 1996). Moreover, within each state, individual judges differ drastically in their personal experiences, perceptions, opinions, and beliefs, which likely influence and inform their decisions (Lombard, 1984; Scott, Reppucci, & Aber, 1988). Nevertheless, it is clear from our experience that many judges are keenly interested in educating themselves on issues of child development and testimony, updating their information by reading books and attending lectures on the subject.

Given that judges are evolving with the times, it is perhaps not surprising to note that there have been dramatic historical changes in custody decision-making. Over the past two centuries, for example, judges have shifted from automatically awarding custody to fathers based on property rights, to awarding custody to mothers as part of the "tender years" doctrine, to awarding custody based on children's "best interests." Judicial preferences also have vacillated between sole physical custody invested in one parent and joint physical custody shared equally by both parents. Finally, with changes in the cultural perception of children and childhood, courts increasingly have come to recognize and value children's voices and opinions in making custody determinations. Hence, today's judicial attitudes toward physical and legal child custody represent but the latest in this series of changing attitudes.

In the sections that follow, we review these historical changes in judicial decision-making, with particular emphasis on the evolving role of children in custody disputes. We also discuss current practices and address many of the developmental, psychological, and practical issues raised by children's involvement in custody and other forensic contexts. We then provide a few overarching guidelines for practitioners faced with the task of evaluating the information provided by children enmeshed in custody struggles.

However, given the confines of this review, a number of issues are not addressed. For instance, although we examine the reliability, accuracy, and impact of child testimony, we do not discuss what constitutes a full psychological assessment of a child for a custody case. That is, we discuss aspects of children's verbal testimony, but not other factors in observation or discussion with a child that practitioners might use to form an opinion (see Sattler, 1998). In addition, the focus of this paper is not children's disclosures of abuse in the context of custody cases, al-

though they are discussed. Rather, we focus on the evolution, importance, and impact of children's testimony in child custody cases.

Below, we begin by reviewing illustrative cases from the last two hundred years that document the shifts in judicial thinking regarding children's best interests, parental rights and the proper role of children in custody determinations. In doing so, we rely heavily on reviews and analyses by Grossberg (1985), Mason (1994), Mintz and Kellogg (1988), and Pinchoff (1998).

HISTORICAL TRENDS IN CUSTODY DETERMINATIONS

The colonial American legal system was characterized by a selective incorporation of English common law, especially as it related to the family. At the start of the 1800s, for instance, the response of most British and American judges to acrimonious custody battles was to award children to their fathers as part of his inalienable right to own property. Thus, in the 1804 British case *Rex v. DeManneville*, custody of an eight-month-old female "infant at the breast of her mother" was awarded to the father, despite his extreme cruelty (Mason, 1994). However, while the concept of paternal property rights to his family remained, primogeniture was no longer the rule because increased availability of land led to decreased dependence of sons on fathers for the bestowal of property. In addition, the realities of rural American life created an interdependence of men and women, increasing the entitlements of the latter group. Families became linked with the new Republic because they shaped future citizens, and mothers were seen as integral to this shaping process (Grossberg, 1985).

Hence, in 1809, a South Carolina court made the unprecedented decision to award Jennette Prather with a divorce and custody of her infant daughter (although her husband retained custody of their older children). The judicial tribunal based their decision on the husband's adulterous behavior and neglect of his domestic responsibility. This landmark case established the use of judicial discretion to "restrict paternal rights and align the law with new gender beliefs" (Grossberg, 1985, p. 238).

Later, as men began leaving farms to work in factories, families became less secluded, and the government gained a foothold in the regulation of domestic concerns. Domestic relations were increasingly regulated in response to the pressures associated with Industrialization, and the result was a general shift away from old notions of paternal

property rights. This shift was apparent on the part of judges who began awarding child custody in the majority of cases to mothers (if they were deemed morally fit), reflecting a dramatic change from the days when fathers were awarded child custody based on property rights alone (Mason, 1994).

Following these initial strides for mothers in case law, expansions of maternal rights were extended by state legislatures. As Pinchoff (1998) noted, there were growing signs of such successes as early as 1830. For example, in 1830, a New York law permitted women for the first time to file writs of *habeas corpus* seeking formal custody decisions in court. An 1840s Massachusetts law considered the rights of both parents to be equal, and required that custody decisions be made in accord with “the happiness and welfare of the child” (Grossberg, 1985, pp. 240-241). Also, a New Jersey statute in 1860 mandated the placement of children under the age of seven with the mother, as long as she was not deemed morally, financially, or mentally unfit (Grossberg, 1985). By the mid-nineteenth century, the romanticized image of a loving mother with her adoring children was ubiquitous. Children came to be viewed as in need of the care of women, who were considered superior at nurturance and moral training to men. With this change came another: The family was seen as a collection of individuals, all entitled to protection under the law, including children. However, this shift was relative, and paternal authority, though narrowed, certainly had not disappeared (Grossberg, 1985).

Take, for example, the 1854 case of *Hunt v. Hunt*. In trial court, Mary Hunt was awarded custody of her three-year-old daughter Louise because the judges felt that Louise needed maternal nurturance, being in her “tender years.” However, on appeal, the court upheld the father’s paramount right to his child.

Yet, despite such setbacks, social values continued to evolve, and children’s voices increasingly were recognized by the judiciary. For instance, two-year-old Susan was sent by her father, Allen Ellis, to live with her aunt and uncle, the Jesups (*Ellis v. Jesup*, 1875). Susan lived with them until the age of thirteen when her father sought custody. After two unsuccessful bids, Ellis tried to remove Susan against her will, but the Jesups petitioned to keep her, and to prevent her father from interfering. The trial judge interviewed Susan in chambers where she indicated her desire to continue living with the Jesups. Deciding in favor of the Jesups, the judge stated that thirteen-year-old Susan was of an age that was “sufficient to enable her to make an intelligent and prudent choice.”¹ The appeals court, upholding the decision, also affirmed the

propriety of a private examination of children's preferences in chambers.

In subsequent cases, judges considered the wishes of even younger children (e.g., *English v. English*, 1880; *People ex rel. Curley v. Porter*, 1886). However, children's wishes were not considered to be dispositive and did not outweigh those of a parent (see *Moore v. Christian*, 1879). At the same time, courts continued to rely on the tender years doctrine (as a reflection of children's best interests) and to reflect contemporary thinking about gender issues. Thus, in the 1880 New Jersey case *English v. English*, custody of a son and daughter, aged nine and eleven, was given to their mother Abby (in accordance with their expressed preference) because, being of tender ages, they still required her nurturance. But their father was advised to seek custody of his son when he was old enough to benefit from his father's guidance and training in business and trade. Thus, clearly the courts considered the children's wishes in deciding what was in their best interests, while sex role ideologies and expectations drove judicial interpretations of those best interests (see also *Umlauf v. Umlauf*, 1889).

The best interests standard was a powerful discretionary tool because it gave judges the ability to support a maternal preference even when a mother was the guilty party in a divorce. This was particularly salient in cases involving very young children because maternal nurturance was viewed as crucial to the child's development. However, it was not only very young children who came under the umbrella of the best interests standard, and not only mothers who benefited.

In the 1887 case of *Williams v. Williams*, which foreshadowed what is now thought of as the classic custody battle, Martha Williams sued her husband for divorce on grounds of violent and ungovernable temper and cruelty. Thomas Williams denied the charges and countersued for divorce on the same grounds, as well as desertion. Martha testified about repeated beatings from 1876 to 1884 (when she moved out), and their daughter Mary corroborated one of these alleged beatings. Although their two other daughters denied Martha's allegations of cruelty, Thomas had indirectly admitted his guilt in letters he had sent to Martha and her brother.

In addition, Martha had received disparaging letters written to her by her daughters. In one such letter, the child stated that she would rather kill herself than live with her mother. The court, however, judged that the content and style of the letters suggested that the father had influenced their composition. The judges stated that "little reliance is to be placed on their testimony, except as the utterance of his direct or indi-

rect prompting,” demonstrating an early appreciation for the suggestibility of children when subjected to intense parental pressures.

Nevertheless, although the court believed that Thomas’ daughters were turned against their mother by him, it also claimed that, because of their attachment to him and his superior resources, it was in their best interests to live with him. That the girls’ preference aligned with this outcome perhaps made it easier for the judges to disregard the father’s apparent coaching. Ultimately, the children’s (financial) best interests outweighed their father’s apparent dishonesty in the eyes of the judges (see also *State ex rel. Flint v. Flint*, 1895).

Finally, in Michigan at the turn of the century, the case of *Horning v. Horning* (1895) set an important precedent by allowing children over 14 to decide where they would live. In this case, the mother was granted a divorce from her husband on the grounds of extreme cruelty. She was awarded custody of the couple’s two younger children until they turned fourteen, while their two older daughters were permitted to choose where they would live. The appellate court agreed with the decision, validating the lower court’s reasoning and creating a significant advance for the cause of children’s rights.

Hence, this brief historical tour shows that, in contrast to the beginning of the nineteenth century, by its end, children had gained a voice in custody decisions, as judges began asking about their preferences in chambers, examining letters they wrote, and considering hearsay from others as to their wishes. In addition, concern for children’s best interests had led to a judicial presumption in favor of maternal care, although legislative changes that mimicked the court’s shift away from automatic paternal custody were slower in coming. In fact, at the start of the twentieth century, only nine states and the District of Columbia gave mothers the statutory right to equal guardianship (Grossberg, 1985). Yet, by the middle of that century, all states did so.

Also during the twentieth century, judicial preference for maternal care during children’s tender years was extended to include children’s teen years as well (Buehler & Gerard, 1995). This presumption lasted until the 1970s, when political and social pressures emphasized the need for gender neutrality in all spheres, including parenting and custody decision-making. Consistent with this goal, the “best interests of the child” standard was codified in 1970 in the Uniform Marriage and Divorce Act (UMDA; Buehler & Gerard, 1995), and was subsequently accepted, through either statute or case law, by all 50 states. As the current rule of law, it is in this context that children participate in custody determinations today.

CLINICAL JUDICIAL PRACTICES

The UMDA, in adopting the best interests of the child standard, suggested five criteria for its assessment. They were: (a) the wishes of the child's parent(s) as to his custody; (b) the wishes of the child as to his custody; (c) the interaction and interrelationship of the child with his parent(s), siblings, and any other person who may significantly affect the child's best interest; (d) the child's adjustment to his home, school, and community; and (e) the mental and physical health of all individuals involved (Buehler & Gerard, 1995). This limited set of factors clearly delineates a legal (though not constitutionally guaranteed) role for children in determining their own custody. In fact, some states (e.g., Georgia and West Virginia) have a legal preference for accepting a child's choice as dispositive for children 14 and older (Buehler & Gerard, 1995).

However, despite the potential role for children's voices in custody determinations, their participation varies in practice. Surveys over the past few decades have indicated that the amount and manner of child participation vary by jurisdiction and age of the child. For instance, Crosby-Currie (1996) surveyed judges in Virginia and Michigan and found that Michigan judges were more liberal in their consideration of children's wishes, particularly those of younger children, than Virginia judges, consistent with legislative differences between the two states at the time. Yet, in addition to jurisdictional differences, some of the variation in child participation also could be due, in part, to the indeterminate and time-consuming nature of the best interests standard, which relies to a great extent on judicial discretion (Buehler & Gerard, 1995).

Judicial discretion often drives the form of child participation in custody determinations. Children can be asked to testify in court as to their wishes, they can be asked to speak with a judge in chambers (i.e., in camera), with or without the presence of attorneys, or a child's preference can be filtered through a third party (e.g., a guardian ad litem or an evaluating mental health professional). Crosby-Currie's (1996) research indicates that children rarely engage in courtroom testimony regarding custody issues, although the extent to which they do so seems to vary according to jurisdiction and age: older children (e.g., 14 years and over) are more likely to be asked to testify than are younger children, who are rarely asked to do so. Instead, judges are more likely to consider evaluations by either a guardian ad litem or mental health professional regarding the child's preference (and other factors). When such reports are provided, they seem to have a major influence on judicial de-

cision-making, whether or not judges are aware of it (Kunin, Ebbesen, & Konecni, 1992; Sorensen et al., 1997).

In the absence of such a report, however, children's preferences are thought to be the next best predictor of custody decisions (Kunin et al., 1992). This is not surprising, given that judicial interviewing in chambers seems to be the most likely means of involvement, for even the oldest children, in custody determinations (Crosby-Currie, 1996; Lombard, 1984; Scott et al., 1988). Nevertheless, the likelihood of conducting a judicial interview and the weight accorded to preferences communicated during such an interview, are associated with children's age (for review, see Crosby-Currie, 1996).

In Crosby-Currie's (1996) survey, for example, 99% of judges and 92% of mental health professionals reported that a child's level of maturity determines the amount of weight they give to the child's wishes. For judges, this was roughly equivalent to age, as 86% of them also indicated that the weight depended on the child's age (only 30% of mental health professionals reported relying on age). This is consistent with additional research indicating that individuals who evaluate children's wishes in custody proceedings solicit that information and weigh it according to children's ages (e.g., Lombard, 1984; Scott et al., 1988). Hence, children under 8 years of age are infrequently asked their opinions regarding custody decisions, while the wishes of children under 11, when ascertained, are given moderate weight, at most. By 14, most children are likely to be asked their preferences, with those of 16- to 17-year-olds likely to be determinative in a substantial proportion of cases (Crosby-Currie, 1996).

Beyond the pragmatic reasons for such age-related practices (e.g., older children are more capable of acting on their wishes if they are ignored), there also seem to be psychological issues underlying these findings. Hence, age-related differences in children's competencies, as they relate to their custody decision-making abilities, are reviewed below.

CHILD COMPETENCE TO REMEMBER AND TESTIFY

Research on the development of memory is a central consideration in children's testimony in a range of forensic settings, including custody cases, because the accuracy of children's statements depends, to a large extent, upon their abilities to remember events. Indeed, an understanding of the developing memory system can be useful for diagnosing the

accuracy of children's allegations of inappropriate parental behavior, such as child abuse, domestic violence, and drug use, as well as testimony about more mundane issues, such as daily home routines, school performance, and relationships with family members. Although a variety of cognitive, social, and emotional factors affect the testimony of young witnesses, children cannot report what they cannot remember (Ornstein, Larus, & Clubb, 1991). Accordingly, an understanding of the developing memory system is important for clinical and legal professionals who consider the testimony of children in making decisions regarding custody and visitation arrangements.

The process of remembering and reporting events involves the execution of a complex set of operations. These operations can be characterized in terms of the flow of information in the memory system. Incoming information is selected for attention and encoded, or transformed into a representation that resides in memory storage. The resulting representation, which could be embellished and distorted over time, must be retrieved. Ornstein and his colleagues (Gordon, Schroeder, Ornstein, & Baker-Ward, 1995; Ornstein et al., 1991) have formulated a conceptual framework for characterizing the range of factors that can influence this memory system. Using this perspective, children's testimonial accuracy will be discussed in terms of six broad themes relating to the encoding, storage, and retrieval of information from memory.²

Not Everything Gets into Memory

When an event is experienced, not all aspects of that event are registered in memory (Broadbent, 1958). This occurs because the world is quite complex and the human cognitive system has a limited capacity to handle incoming information. Thus, experiencing an event does not necessarily lead to the complete encoding of that event. An implication of this for legal situations is that important aspects of experience may be absent from a child's testimony because the details were not entered into memory in the first place. Research points to several factors, including attention, prior knowledge, and stress, that affect what gets into memory.

Attention. Young children often fail to encode those aspects of an event that adults consider to be important (Mandler, 1990). This happens, in part, because children tend to pay attention to different parts of the same event than adults do. For example, while watching a basketball game, young children might pay more attention to the activities of the mascot and the popcorn vendor than to the players and the ball. Thus,

what children remember about a basketball game, or any other event, might be very different from what adults recall.

Prior Knowledge. Existing knowledge influences how children monitor the world, how they interpret events, and how and what incoming information they encode in memory (Chi & Ceci, 1987; Principe, Myers, Furtado, Merritt, & Ornstein, 1996). Knowledge may aid recall by increasing the comprehensibility of experiences (Bransford & Johnson, 1972), or by enabling the enriched encoding of information and the construction of more enduring memories (Chi, 1978).

What is encoded in memory is the result of constructive processes, not exact duplication of original events. When people attempt to understand and remember their experiences, they condense, modify, and embellish that information based on personal knowledge (Bartlett, 1932). The resulting memory representation, guided by existing knowledge, contains more and different information than was present in the "objective" event. For example, by age 6 or 7, children omit information that is illogical or does not fit with expectations, add information that helps to explain incongruous information, change details that are inconsistent with their knowledge, and reorder the sequence of events to make them more logical (Bischofshausen, 1985; Christie & Schumacher, 1975; Mandler, 1984). Although these constructive activities often facilitate memory, when knowledge is inconsistent with what was experienced, accuracy can be reduced (Ornstein, Merritt, Baker-Ward, Furtado, Gordon, & Principe, 1998).

Stress. Another factor that affects encoding is stress. Because the events surrounding contested custody cases can be very stressful for children, research on the effects of stress on memory is particularly relevant. Some investigators have suggested that stress during an event facilitates the encoding of information (Goodman, Quas, Batterman-Faunce, Riddlesberger, & Kuhn, 1997), while recent reviews indicate that high levels of stress actually hinder memory performance (Ornstein, 1995; Peters, 1997). Yet, levels of distress can vary markedly during an experience, with some components of the event being encountered in states of high anxiety and others in states of relative calm, causing some details to be remembered better than others. Thus, the key to understanding the effects of stress on memory might be a consideration of the behavioral consequences of the stress (Ornstein, Manning, & Pelphrey, 1999). To illustrate, Ornstein and his associates found that recall was enhanced among children who asked questions during a stressful medical procedure (Ornstein, Merritt, & Baker-Ward, 1995), whereas memory was hindered among children who closed their eyes or cried during plastic

surgery for facial lacerations (Burgwyn-Bailes, 1998). Hence, two children can have very different memories for the same stressful event, depending on their behavioral reactions to the stress.

What Gets into Memory May Vary in Strength

Representations of experience vary in terms of their strength and organization, which affects the retrievability, and hence memorability, of those representations. Strong and coherently organized memory traces tend to be more readily retrieved, even with minimal probing, whereas weak and fragmented traces tend to be more difficult to recover and require more prompting (Howe & Brainerd, 1989). Moreover, vulnerability to suggestive influences varies as a function of trace strength, with weak traces being especially susceptible to the effects of misleading suggestions (Pezdek & Roe, 1995; Principe, 1997).

Repeated Exposure. Variations in the frequency and duration of exposure to an event influence the strength of the resulting memory. In the case of a single occurrence of an event, the longer the exposure time to relevant features, the stronger the representation in memory. Likewise, all other factors being equal, repeated experience leads to stronger representations, and consequently, elevated recall (Endres, Poggenpohl, & Erben, 1999; Fivush & Hamond, 1989).

However, when children repeatedly experience the same event, they form scripts, or temporally and causally organized general representations of routine events (Nelson, 1986). For example, a child's script of a birthday party might include blowing out candles, eating cake, and opening presents. In general, scripts enhance recall for the general structure of an experience. However, they do so at the expense of memory for particular episodes of the event (Hudson, 1990; Powell & Thomson, 1996). Thus, recall of a particular experience may represent a child's memory of what "usually happens," rather than the details of a specific episode.

Developmental Improvements in Memory. A range of basic cognitive skills improve with age (e.g., the ability to adapt attention to situational requirements, the availability of strategies for storing information, and knowledge about the world; e.g., Kail, 1989), each of which might be linked to developmental improvements in memory. As a consequence, given comparable exposure to an event, older children and adults will construct stronger and more coherently organized memory representations than will younger children (Howe & Brainerd, 1989).

Hence, with respect to custody evaluations, relatively strong memories will be elicited by minimal cueing (although interviewers should be watchful for reliance on scripts), while weakly encoded information will require more specific and extensive prompting to be elicited. However, because weak memories are more vulnerable to suggestions, interviewers should be wary of asking questions that contain details not already been reported by the child.

The Status of Information in Memory Changes

Memory representations are not stored in memory the way that images and sounds are stored on video. Rather, representations are dynamic, changing over time in response to both internal and external events (Baker-Ward, Ornstein, & Principe, 1997). For example, intervening experiences, such as discussions and media exposure, can either strengthen or interfere with a memory, depending on whether or not the new information is consistent with that memory. Research has illustrated at least two ways in which information can change during storage.

Prior Knowledge. Just as knowledge affects the encoding of information, it also can influence the storage and retrieval of information already in memory (Bartlett, 1932). For example, as children's memory for the details of a physical examination fade, they have been found to incorporate typically-occurring, but nonexperienced medical procedures into their memory for the checkup, based on their general knowledge of doctor visits (Ornstein et al., 1998). These findings suggest that delayed accounts of events might contain more reconstruction and less reproduction than early accounts, possibly leading to erroneous memories for actual events when expectations run counter to what actually occurred.

In addition, new knowledge can lead to the reinterpretation and modification of previously encoded memories. For instance, Greenhoot (2000) showed that receiving novel information about a story character's typical behavior led some children to rework their story memories to be consistent with the new information. With regard to custody evaluations, these findings suggest that when questionable or unfounded allegations arise after a substantial delay, it is essential to determine the extent to which a child overheard or was involved in discussions that could have resulted in the reconstruction of previously encoded, harmless information.

Exposure to Suggestive Influences. Another factor that can affect the verity of children's accounts is exposure to suggestive or misleading ut-

terances. For example, research has revealed a number of interviewing practices and techniques that can produce serious degradations in children's reporting accuracy, such as repeated overt suggestions and selective reinforcement (Ceci & Bruck, 1993; Bruck, Ceci, & Hembrooke, 1997), exposing children to negative stereotypes about an individual (Leichtman & Ceci, 1995), creating an atmosphere of accusation (Lepore & SESCO, 1994), and aggrandizing the power differential between the child and the interviewer (Tobey & Goodman, 1992). In fact, when certain suggestive procedures are used together, children can be led to provide accounts of nonexperienced events with such a degree of elaborateness and emotionality that even highly trained professionals cannot tell whether the children's narratives are true or false (Ceci, Crotteau-Huffman, Smith, & Loftus, 1994).

However, children do not need to answer suggestive questions to make untrue allegations. For example, even a single, neutral interview consisting of yes/no questions can create distortions in children's subsequent accounts (Brainerd & Reyna, 1996). Further, merely asking children to think about whether nonexperienced events occurred can lead some children to produce false reports (Ceci et al., 1994). Information encountered before children participate in formal interviews also can compromise the accuracy of their reports. For instance, hearing parents describe nonexperienced incidents of bodily touch (Poole & Lindsay, 2001) or viewing a video of a similar but somewhat different event (Principe, Ornstein, Baker-Ward, & Gordon, 2000) can influence some children to provide spontaneous accounts of false events. Importantly, in these investigations, it was never suggested to study participants that the nonexperienced events occurred; the children simply were exposed to information that was inconsistent with the details of an already experienced event.

With regard to testimony, the memory literature provides ample evidence that children's retention of events can be influenced dramatically by a range of internal and external factors. As such, evaluators' assessments of the accuracy of remembering must consider the range of possible effects brought about by such factors.

Retrieval Is Not Perfect

Retrieving information from memory involves gaining access to a stored representation. Yet, for a variety of reasons, not all information in memory storage can be retrieved all of the time. In fact, some experienced information may no longer exist in storage (Bartlett, 1932). Re-

search on memory demonstrates several cognitive and social factors that can have an impact on children's abilities to gain access to previously acquired information.

Retrieval Cues. In response to open-ended or free narrative questions (e.g., "Tell me what happened"), young children tend to report very little information, possibly because they have difficulty producing their own retrieval cues (i.e., markers to locate memories). As a consequence, young children must rely on adults to guide their recall. Yet, if an adult supplies the wrong retrieval cues, this could limit the child's account and interfere with reporting accuracy. Moreover, as interviewers provide increasing levels of support, typically in the form of specific questions, (e.g., yes/no and multiple choice questions), children's accuracy declines. This results, in part, because children often try to provide interviewers with answers, whether or not they know anything about the topic being probed (e.g., Walker, Lunning, & Eilts, 1996).

Repeated Interviews. During the course of custody litigation, children often are asked to tell their custody-related stories repeatedly to different people, such as judges, lawyers, and child custody evaluators. One of the purposes of conducting repeated interviews is to give children multiple opportunities to disclose information that they forgot or were reluctant to mention during prior discussions. Indeed, longitudinal work has demonstrated that children often do provide new information when repeatedly interviewed. Unfortunately, it is also true that information reported for the first time during later interviews is substantially less likely to be accurate than information repeated across multiple interviews (Salmon & Pipe, 2000). Further, as discussed above, if suggestive questions are asked during any one of the multiple interviews, this information could be incorporated into the child's memory (Ceci & Bruck, 1995). Thus, because repeated interviews often are conducted in the hope that new information will be recalled, these data call into question the benefits of this practice with young children.

Source Monitoring Ability. Another factor that can influence children's reports is source monitoring skill, or the ability to distinguish the sources of information in memory (Johnson, Hashtroudi, & Lindsay, 1993). Source monitoring confusion, or misattributing a memory derived from one source (e.g., imagination) to another source (e.g., actual experience), can lead to errors in reporting (Ceci et al., 1994). For instance, Poole and Lindsay (2001) demonstrated that subtle manipulations, such as parents reading a book to their children, can lead some children to report that nonexperienced, read-about activities actually occurred. These findings might be relevant to accusations arising out of

custody proceedings because it is likely that children who make such allegations were engaged in or overheard conversations by at least one adult suspecting that abuse occurred. If so, the source monitoring literature suggests that false allegations could arise as a result, even in the absence of direct parental coaching or suggestive questioning.

Not Everything That Can Be Retrieved Is Reported

Even when children can accurately remember information, they might not report it. Various emotional and situational factors (some of which will be described below) could make children unwilling to disclose the details of certain experiences, especially to authority figures such as judges and custody evaluators. For example, feelings of disloyalty or guilt could render some children unwilling to discuss their parental preference (Rosen, 1977). Other motivations, such as shyness, shame, or embarrassment, might make some children hesitant to talk about events such as child abuse, domestic violence, and parental drug use (Saywitz, Goodman, Nicholas, & Moan, 1991). In addition, developmental and individual differences among children in language ability, temperament, emotional status, and intelligence can affect what children talk about in an interview (Saywitz, in press). Hence, what children report likely underestimates what is actually in memory, to the extent that less than optimal interviewing procedures are employed.

Interviewer Skills. There is growing consensus among memory researchers that one of the main determinants of young children's testimonial accuracy is the behavior of the interviewer (e.g., Ceci, Bruck, & Battin, 2000). Indeed, some have argued that inappropriate questioning is a greater source of false reports than are any limitations in young children's cognitive abilities (e.g., Lamb, Sternberg, & Esplin, 1994). The problems associated with less than optimal interviewing conditions are particularly acute for preschool-aged children, as the literature on memory development suggests that their memory performance is especially dependent on aspects of the recall context (Folds, Footo, Guttentag, & Ornstein, 1990). Indeed, research on questioning procedures has prompted a number of research groups and professional organizations to construct interviewing guidelines for those who question child witnesses—guidelines that are designed to increase the accuracy and completeness of memory reports by eliminating suggestive techniques and adopting strategies to enhance free recall (e.g., Poole & Lamb, 1998; Sattler, 1998). A few key guidelines for interviewers will be presented below.

Children's Skills. For children, a prerequisite to providing accurate testimony is understanding the purpose of an investigative interview.

Young children, however, are not automatically “on board,” even when their answers make sense. For example, preschool children often talk about unrelated events when interviewers ask specific questions about particular events (Poole & Lamb, 1998). Also, even when children begin to report the target events, they sometimes change topic without warning and unbeknownst to the interviewer (Poole & Lindsay, 1996). When questions are repeated within interviews, children might assume that their first response was wrong and change their answer (Poole & White, 1991). Similarly, when children are repeatedly interviewed, they might believe that the interviewer is privy to their earlier reports and thus provide incomplete accounts (Saywitz, 1995). Moreover, interviewers often distort children’s accounts and children rarely correct interviewers’ errors (Roberts & Lamb, 1999). Hence, with regard to custody evaluations, these deficits in young children’s skills must be considered when assessments of their testimony are made.

Not Everything That Is Reported Was Experienced

While some children might deliberately provide false information in legal settings, the line between children who do so because of exposure to suggestive influences and those who lie is sometimes unclear. Nonetheless, as reviewed by Ceci and Bruck (1995), there are a number of specific circumstances that tend to be associated with lying. For example, children will lie to avoid punishment, they will lie in the context of a game, particularly when coached by a familiar adult, and they will lie to gain material rewards. Also, children will lie to avoid personal embarrassment, and even children as young as three years of age will refrain from disclosing adult misconduct when asked to do so, especially when the adult is a loved one. These findings suggest that even very young children can deliberately provide false information, especially if they are persuaded to do so by a loved one. Yet, evidence of such persuasion does not necessarily mean that a child’s account was fabricated or is entirely inaccurate.

Implications for Children’s Testimony in Custody Cases

It is important to emphasize that in the absence of suggestive influences, even preschool-aged children can provide accurate and detailed accounts of personal experiences. However, various internal and external factors exist that can lead children to provide false reports that are indistinguishable from accurate reports. Indeed, such false reports often

meet established criteria for judging the credibility of children's testimony in forensic settings (see Ceci & Bruck, 1995), potentially because the children honestly believe their reports to be true. Thus, because memory is not always accurate, it is necessary to integrate material from child interviews with other information gained during custody evaluations to ensure that custody and visitation decisions are made in the best interests of the child. However, additional considerations regarding the impact and appropriateness of children's participation in custody determinations are detailed below.

Child Competence to Choose

Strong and varied opinions have been voiced regarding whether or not children's custodial preferences should merit serious consideration by the court. Some legal personnel hold the view that low priority should be placed on children's stated preferences (e.g., Gardner, 1999; Pearson, Munson & Thoennes, 1983; Radin, 1984), whereas other professionals propose that active participation by children in discussions about custody is essential and should be guaranteed by appropriate laws and court practices (e.g., Kaltenborn, 2001). However the extent and nature of children's involvement in custody evaluations should not elicit such definitive responses. As discussed earlier, children as young as 4 years of age can provide reliable and detailed information in a wide variety of forensic contexts, but their ability to do so is determined by a wide range of factors. Accordingly, it would be more appropriate to weigh children's custodial preferences on a case-by-case basis (Garrison, 1991).

Overall, three major arguments have been proposed to qualify concerns about the reliability of children's judgements when asserting a custodial preference. First, decisions about custody can evoke overwhelming feelings of disloyalty, guilt, betrayal, and a sense of responsibility in a child (Rosen, 1977). These powerful motivations can come into play at a very young age (recall that even three-year-olds will lie to protect a loved one; see Ceci & Bruck, 1995). Asking a child to state which parent is their preferred caregiver places the child in the untenable position of having to reject one parent. Consequently, the child's comments might be governed by what the child believes he or she should say, or by what would cause the least hurt or negative consequences, rather than by the actual preference. These problems can be addressed, to an extent, by assuring the child confidentiality (Crosby-Currie, 1996). However, confidentiality would in no way prevent social and motivational

factors from influencing children's responses. A child may choose a parent because that parent is viewed as the most needy or least responsible for the divorce, irrespective of the amount of overt pressure that has been placed on the child to do so (Sattler, 1998; Maloney & Byrne, 1993).

Second, many professionals argue that it is unrealistic to expect children to possess sufficient cognitive sophistication to know what is in their best interests. Decisions about custody are complex and need to be based on many factors, such as parenting capacity and availability, environmental factors, and the quality of the relationships between the child and prospective custodians (Sattler, 1998). However, this argument confounds having a preference with knowing what is in a child's best interest. Generally speaking, only the oldest children are given the opportunity to make their own custody decisions, which would require some cognitive sophistication. Younger children, however, might only be asked about their preferences, and as most parents know, children are capable at very young ages of stating a preference.

Nevertheless, questions remain regarding the ability of children of different ages to make competent decisions about custodial preference. Some have argued that even the youngest children can inform the best interests standard in custody decisions through their attachment behaviors (Radin, 1984). In one study, Garrison (1991) found that children as young as nine (the youngest age studied) demonstrated the potential to make such decisions. But research on decision-making in other contexts raises questions about the maturity of children's judgement across adolescence (Steinberg & Cauffman, 1996). A variety of age-related factors (e.g., greater proclivity for risk behaviors) seem to influence the decision-making competence of adolescents (Woolard, Fondacaro, & Slobogin, 2001), such that maturity of judgement might not occur until approximately 17 years of age (Steinberg & Cauffman, 1996). Hence, although sufficient evidence is lacking, it seems likely that the maturity and rationality of children's judgement increases through adolescence, validating judicial reliance on age as an indicator of competence. Moreover, when judges or other professionals weigh all of the evidence, and evaluate a child's maturity and reasoning on a case-by-case basis, judicial discretion provides a safety net, so that children's choices, if accepted, conform to their best interests.

Third, concerns are expressed that parents shape the perceptions of their children during divorce. While for most parents, divorce does not significantly disturb relationships with their children, in its extreme form, parental influence has been equated to "brainwashing" (Gardner,

1992; Byrne, 1989). As mentioned above, an intense, persistent desire to get the child to agree with a parent's negative views, paired with suggestive techniques, could lead children to adopt similarly biased views and beliefs (e.g., Bruck et al., 1997; Poole & Lindsay, 1996, 2001). This is an important concern because there is currently no reliable diagnostic test for determining if a child's report is false or contaminated. As Wilson and Powell (2001) explained, an allegation of abuse made by a child in the context of a "messy" divorce that includes the use of adult language by the child (e.g., "I've been molested") or lacks specific details could be the result of parental coaching. However, presence of these features does not guarantee that an account is false or has been fabricated. This information could have been obtained subsequent to a spontaneous disclosure (Wilson & Powell, 2001), and a lack of specific details in a child's account could be the result of normal developmental or memory limitations (see Roberts & Powell, in press).

In sum, each of the above-mentioned concerns could limit a child's ability to make a rational and honest judgement of custodial preference. For this reason, most custody guides recommend that unless custodial preference is readily articulated, children should not be pressured into making a choice (Garrison, 1991). Instead, they should be encouraged to provide input into the decision-making process (if they are deemed competent to participate) by responding to a basic set of questions that indirectly examine the nature and quality of the child's relationship with each parent, as well as the nature (and anticipated pros and cons) of each parent's current life situation (e.g., Ackerman, 1995; Chasin & Grunebaum 1981; Sattler, 1998). This allows the child's perspective to be heard without creating a loyalty bind, and allows evaluators to consider the validity and maturity of the child's reasoning. Justifiably, this approach puts the onus on interviewers to ensure that appropriate questioning strategies are used that maximize the children's potential to contribute, and to ensure that this occurs in a manner that compensates for their developmental weaknesses (Kuehnle, 1998).

Impact of Child Participation

While it is generally held that children's wishes are important to custody determinations, many legal professionals perceive children to be negatively affected by direct involvement in the custody decision-making process (see Crosby-Currie, 1996, for review). Accordingly, it is not surprising that many evaluators attempt to protect children by using child-friendly procedures, such as judges interviewing children in

chambers, at the risk of violating their parents' due process rights (Crosby-Currie, 1996). However, this view is based on personal opinion and anecdotal experience, rather than on empirical research. Little research has addressed the emotional impact of children's participation in custody determinations (confidential or otherwise), as this requires the complex task of separating the effect of legal proceedings from the emotional, financial, and physical stresses associated with the divorce (Wallerstein, 1991).

To isolate the effect of the legal/courtroom procedure, studies need to include (a) longitudinal designs that allow comparisons over time, (b) a variety of reliable and valid psychological measures, and (c) children from contesting and non-contesting parties (matched on a number of demographic variables), as well as normative test data so that the impact of divorce per se can be taken into account. Interestingly, the only study we were able to find that included these features revealed findings that are contrary to the opinion that active participation in custody litigation is detrimental to children's well being.

Wolman and Taylor (1991) generated data involving 135 children of various ages from 43 divorcing families. In 27 of these families, the parents were involved in legal child custody disputes in which the children were active participants, while the remaining families settled the issue of custody out of court. All of the children were interviewed and administered a battery of measures at entry into the study (3-4 months after marital separation) and approximately 18 months later. Results suggest that certain aspects of the custody-litigation experience might actually enhance the development of children's adaptive coping strategies. While at pretest, there had been few differences between the groups, 18 months later, the contested children were significantly more likely to perceive themselves to be in control of life events. Further, the contested children displayed less separation anxiety and significantly more positive family concepts than the uncontested group at post-test.

The authors suggested that being valued as a subject of contest, enhanced opportunity for open parent-child communication about family conflict, and the experience of parent-child interdependence may have fostered a healthy "articulation of interpersonal boundaries between parents and contested children" (Wolman & Taylor, 1991, p. 415). In addition, the experiences of contested children may have helped to validate and clarify family issues, rather than leaving children to imagine personal responsibility for parental conflict (Wolman & Taylor, 1991). Overall, the unexpected findings of this study highlight the importance of keeping an open mind about the impact of children's involvement in

custody proceedings, and the need for researchers to conduct and disseminate more research about the effects of such involvement so that legal practice can be informed by scientific research, rather than personal opinions and preferences.

By the same token, however, legal and mental health practitioners need to be cautious not to over-generalize the findings arising from group-based research. Within any group (even within families), there is variability in children's responses to the stress caused by custody litigation (see Wolman & Taylor, 1991). Hence, judgements about the impact of children's involvement in custody litigation, and the likely consequences that will follow, must be made about each child individually. Again, this places considerable importance on interviewers being well versed in the principles of investigative interviewing and in child development issues, so that the legal/interview process itself does not create an additional source of stress for children.

PRACTICAL RECOMMENDATIONS FOR QUESTIONING CHILDREN ABOUT CUSTODY MATTERS

Most forensic guides for child custody evaluation devote little discussion to the topic of questioning children (see Hynan, 1998 for review). When interviewing techniques are discussed, the primary focus is on the recommended content of questions or on the information needed from children. Questions center around daily home and school routines, rules and punishment, feelings about the divorce, and the child's relationships with parents and extended family (e.g., Sattler, 1998). These topics and interview questions are typically offered as fruitful areas to follow, rather than as structured or standard interview guides for all purposes, because each custody evaluation needs to be tailored to the particular characteristics of the case and to the needs and limitations of the child. As a consequence, in most forensic guides there is little discussion of the appropriate process or structure of an interview, and even when such information is offered, it is not always consistent with recommendations made by experts in child interviewing (e.g., Poole & Lamb, 1998; Walker, 1994; Wilson & Powell, 2001).

Despite the absence of research on interviewing children specifically for custody determinations, the process is no different from interviewing children in any forensic context (i.e., where accurate and detailed information is required about a person, situation, or event). Therefore,

these guidelines would be useful for lawyers, judges, social workers, and mental health professionals who conduct interviews about custody with children.³ While it is beyond the purview of this paper to provide a comprehensive outline of practical strategies, a brief summary of the four most important elements for effective interviews with children is offered.

First, rapport with the child (i.e., the establishment of trust and a supportive conversational environment) is one of the most important interviewer assets. The more at ease the child is, the more information the child is likely to share (particularly about sensitive issues), and the more likely it is that the child will reveal the depth of his needs, wishes, knowledge, and desires (Goodman, Rudy, Bottoms & Aman, 1990; Siegal, 1991). In establishing rapport with a child, the interviewer needs to establish an interaction that encourages the child to do as much talking as possible, but does not indicate to the child what information is required, or put him in a frame of mind that is eager to please (Ceci & Bruck, 1995). This is accomplished by avoiding any display of attitudes or beliefs about the child or the event in question, and by accepting any type of response the child provides, regardless of whether the response conforms to the beliefs or opinions of the interviewer. Good rapport also is facilitated by creating an interview environment that minimizes the child's anxiety, distractibility, and physical discomfort, and by conducting the interview at a relaxed pace where silence is tolerated and the child is free to respond or not respond without pressure (Wilson & Powell, 2001). This is more likely to be achieved when the interview is conducted in the absence of the parents, and in a situation where the child is not probed too deeply about issues that he does not want to discuss.

Second, research has demonstrated that evidence elicited from children is more likely to be reliable when children have a clear understanding of their role, the purpose of the questions, the "ground rules" of the interview (e.g., that it is permissible to say "I don't know," or "I don't understand"), and the likely consequences that will follow from any disclosures (see Wilson & Powell, 2001). Interviewers need to be as specific as possible, as vague descriptions (e.g., "My job is to help you," or "I listen to children's troubles") might lead children to relate irrelevant information or to provide inaccurate representations of their knowledge and opinions (Siegal, 1991). In the context of custody allegations, it also must be made clear at the outset that a decision about custody does not rest solely with the child. This would help to minimize feelings of be-

trayal or anger if the outcome differs from the child's stated wishes (Kaltenborn, 2001).

Third, any interview conducted for the purpose of gathering accurate and reliable information from a child must be regarded as an exercise in testing hypotheses, not a confirmation of what an interviewer already thinks or knows. Open-mindedness is one of the most important qualities of a good interviewer. When an interviewer is biased, or thinks she knows the truth about the nature of an event or an individual, relevant or vital information is overlooked, screened out, or ignored, and questioning is less likely to be complete and accurate. Open-minded interviewers attempt to gather all available evidence, not just that which fits with their perceptions or assumptions (Brodzinsky, 1993), they let the child do most of the talking (minimizing the use of leading, closed, and suggestive questions), and they try to determine to what extent the child's responses are constrained by limited language skills or a desire to please a parent or interviewer (Ceci & Bruck, 1995). This issue is particularly relevant to custody decisions because they are inherently subjective and value laden (i.e., personal bias predicts the type of custody arrangements favored by mental health professionals; Woody, 1977), and because some common practices (e.g., working with only one parent as opposed to being an independent evaluator) can minimize a professional's ability to remain objective (Foster, 1983).

Finally, the elicitation of accurate, detailed, and forensically relevant information from a child requires the use of effective, open-ended interviewing techniques. Essentially, the child should be encouraged to relate his account of an event or situation in his own words and at his own pace. When specific questions are asked, they should incorporate (where possible) the child's own terminology and must be composed of short, simple sentences that make clear the topic of information requested (Walker, 1994). Despite the advantages of open-ended questions, however, research suggests that their use does not come easily to most interviewers. To achieve this type of questioning, special training is usually needed with qualified professionals who can recognize areas of weakness, set up opportunities for deliberate practice, and provide constructive feedback where needed (Lamb et al., in press). Unfortunately, the level of investigative interviewer training that is currently offered to most professionals who conduct child custody evaluations (e.g., psychologists, lawyers, and judges) is inadequate for effecting these changes, which are necessary to consistently produce maximally productive and reliable interviews with children (Sternberg, Lamb, Davies, & Westcott, in press).

CONCLUSIONS

In this review, we discussed trends and practices with respect to children's participation in custody cases, as well as a variety of influences on their abilities to productively participate in those cases. We also discussed some of the repercussions of child testimony for children, as well as strategies for effectively interviewing children to assess their preferences. Although this represents the "state of the art," as it were, of child testimony in custody cases, there is clearly a great deal more work to be done. Understanding of children's capacities at various ages to form rational preferences and make reasonable decisions regarding custody is in its infancy. Moreover, there is almost no information available regarding the impact of making a custodial choice on children's psychological well being at different ages, both immediately and in the long-term. The field would benefit immensely from additional research in these areas.

However, despite these gaps in our current understanding, research on child custody cases is clearly very important. The divorce rate in the United States hovers around 50%, with projections that more than 30% of children born to married parents will experience divorce prior to their 16th birthday (Gunnore & Braver, 2001), to say nothing of children born to unmarried parents, and children caught in the myriad other types of custody struggles we see today. Current practices indicate the children who are the subject of custody conflicts are likely to have at least some voice in their own custodial future. However, given the history of custody decision-making in this country, there is no reason to believe that the evolving judicial thinking that characterized the past two centuries has ended, and that today's dominant judicial attitudes toward custody will forever be the case. Undoubtedly, as social scientists better understand the needs and capacities of children, courts will respond with changes in their thinking about custody.

NOTES

1. Around this time, judges began to regard the age of thirteen as a threshold for the child's ability to make a reasonable decision concerning custody (e.g., see *Henson v. Walts*, 1872).

2. The sixth theme—not everything that is reported was experienced—is not part of Ornstein and colleagues' original framework, but was added to the current discussion with regard to concerns of deliberate false allegations in custody cases, especially in situations involving parental coaching.

3. Useful guides include Poole and Lamb, 1998; Walker, 1994; Wilson and Powell, 2001. Also, refer to Powell and Bartholomew (in press) for guidelines on interviewing children and families from different cultural groups.

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