

---

# Best Interest Factors in Child Custody Evaluations

Mark L. Goldstein

Child custody evaluators are expected to address the best interests of the child or children in their evaluation. Prior to the 1900s, children were usually awarded to the father, because judges assumed that fathers were in a better position to financially support their children. English law generally followed Roman practice and applied a broad preference for paternal custody (Stevenson, Braver, Ellman, & Vortuba, 2013). In addition, children were often viewed as property at that time. During the industrial revolution, there was an increased awareness of the mother's role in the care of children, leading to the tender years doctrine (Ackerman, 2001). Since that time, judges usually relied on the tender years doctrine, which led to children typically being placed with the mother. LoCascio (2011) related that courts made decisions based on the quality of the relationship or as a function of time spent as the caregiver. Evaluators made decisions based on information gathered through interviews with parents and family members. In both cases, the "best interest" of the child or children was frequently ignored or not considered.

The tender years doctrine, espoused by Bowlby (1951) suggested that children have their primary attachment with one parent, typically the mother. However, a plethora of research has suggested that infants and children are capable of multiple, equal attachments (Ainsworth, 1967;

Kelly and Lamb, 2000). By contrast, the best interest doctrine is seen as gender neutral, although mother's rights and father's rights groups have both opined that their gender has been harmed by "best interests" statutes. Stahl (2011) has noted the "politicization" of child custody. Nonetheless, all states and most industrial countries have adopted the best interests approach to determining custodial and visitation arrangements.

In the early 1970s, the Uniform Marriage and Divorce Act (UMDA) was developed and adopted by most states. The UMDA focused on the best interest of the child and suggested that a number of factors should be considered in deciding best interest. However, there has been much variability from state to state.

The best interests of the child may have very specific factors as in Illinois and Michigan or vague as in Florida. The American Law Institute (2002) has expressed concern that best interest's statute in most states is problematic due to the vagueness, and this then leads to potential conflict for many families. For example, in Florida, custody is no longer even mentioned. The statute in Florida focuses on how parents are to develop a plan to share residential responsibilities, as well as how parents are to develop a parenting plan in which they are to delineate how they intend to share decision-making responsibilities. This may result in some families with split decision making, with one parent making educational decisions and the other parent making medical and extracurricular decisions or some other combination of decision making. In other families, all

---

M. L. Goldstein (✉)  
2324 Scott Rd, Northbrook, IL 60062, USA  
e-mail: mlglmr@aol.com

decisions may be made by one parent, with the other parent consulted on decisions.

In Illinois, 750 ILCS, 602 established the best interest factors which are to be considered by evaluators and judges. These include the wishes of each of the child's parents as to custody, the wishes of the child as to his or her custodian, the interaction and interrelationship of the child with his or her parents, siblings, and any other person who may significantly affect the child's best interest, and the child's adjustment to the home, school, and community. Other relevant factors include the mental and physical health of all individuals involved, physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person (i.e., domestic violence), the occurrence of ongoing abuse whether directed against the child or directed against another person, and the willingness of each parent to facilitate and encourage a close relationship between the other parent and the child. The Illinois statute also compels the evaluator and judge to consider "other factors," although not statutory. These include the stability of the environment, which parent has been the primary caretaker, and parental conduct which has an effect on the child.

In Michigan, the statute cites a number of factors, including the love, affection, and other emotional ties existing between the child and parents, the capacity and disposition of the parents to give the child love, affection, and guidance, and to continue the education and raising of the child in his or her religion or creed if any, the capacity of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of the state, and other material needs, and the length of time that the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. The statute also cites the permanence, as a family unit, of the existing or proposed custodial home or homes, the moral fitness of each parent, the home, school, and community record of the child, and the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. Furthermore, the statute considers the willingness and

ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, domestic violence, whether the violence was directed against or witnessed by the child, and any other factor considered by the court to be relevant in a child custody dispute.

In contrast to Illinois and Michigan, Florida's statute (61.13, 2009) does not mention custody and visitation, but instead focuses on how parents are to develop a parenting plan and share responsibilities. This may result in one parent making most decisions, splitting decision making so that one parent makes medical decisions and one parent makes educational decisions or making shared decisions. In addition, parents may share residential custody, or one parent may have primary residential custody. In Colorado, the statute focuses on parenting time with the child and parenting responsibilities.

Klein (2005) has argued that the best interests of the child are met by being raised by parents who love each other and love the child. Anything less than this ideal is not in the child's best interests. Furthermore, he has opined that decisions regarding best interests must include the ability and willingness of stepparents to assist in meeting parental obligations.

Emery, Otto, and O'Donohue (2005) have written that the best interests of the child are vague. In addition, they have opined that the best interests of the child paradigm puts judges in the position of trying to perform an impossible task, and increases parental conflict, as well as parenting and co-parenting. Further, they argue that the approximation rule, where parenting time is awarded approximate to what role each parent performed historically during the course of the marriage, is the most clear and determinative standard.

Hippensteele (2011) looked at best interest in gay, lesbian, bisexual, and transgender (GLBT) parents and their children. They argued that best interest standards fail to recognize the contemporary cultural reality of families and parent-child relationships involving GLBT parents and their children.

Bowids (2004) examined which of the factors from the best interest standard were most important, as well as which aspects of a psychological evaluation were most relevant to this issue. She found that there were no statistically significant results.

Some states have also addressed more unique situations with best interest factors. For example, in Illinois, best interest has addressed the removal of a child from the jurisdiction (750 ILCS 5/609). A number of additional factors have been identified in several Illinois Supreme Court cases, most notably Eckhart and Collinbourne. In the Eckhart case, the court cited that the judge and evaluator were to consider whether the move had a likelihood of enhancing the general quality of life for both the child and the custodial parent, whether the custodial parent had a good motive in moving, whether the noncustodial parent had a good motive in resisting the move, whether a reasonable and realistic visitation schedule could be reached if removal were allowed, and all other relevant evidence and factors based on the circumstance of each case. Collinbourne then expanded on the Eckhart decision, in that indirect benefits needed to be considered as well. For example, if a mother was the custodial parent and remarried, and, as a result of the remarriage, she no longer needed to work, she would be more available to the children, thereby creating an indirect benefit to the child.

Warshak (2013) analyzed best interest factors in international relocation cases. He noted that the foreign country's laws, customs, educational system, political status, and judicial practices can create a climate that are either favorable or hostile to the child's best interests, as well as access for the noncustodial parent. Warshak also opined that how the moving parent will co-parent and support the child's relationship with the noncustodial parent is even more important in international moves in comparison to domestic moves.

Evaluators may be confronted with several different tasks in conducting child custody evaluations. In some instances, the evaluator is asked to make recommendations related to primary residential custody, while in other instances, the evaluator is asked to assess whether the parents

are capable of sharing joint decision making or whether sole legal custody is preferred. In other cases, the evaluator is asked to evaluate whether overnight visitation for a young child is reasonable and the extent of overnight visitation, while in other cases, the evaluator is given the task of assessing as to whether supervised visitation is required. Evaluators may also be addressing whether siblings of different ages can be separated or whether a parent's request to move out of state or to a different country is in the best interest of the child.

The task of evaluating the needs of the child as well as the needs of the parent are factored into the assessment of best interests, but the task is often complex and multifactorial. First, it requires that the evaluator assess the developmental needs of the child or children. In some instances, there may be quite different needs for individual children, for example, when the children are of very different ages or when one child has special needs. Second, the evaluator also is required to assess the role or roles which parent played in the child's life historically as well as more recently. For example, one parent may have been a stay-at-home parent for the first 10 years and handled the majority of educational, medical, and extracurricular needs, but has then become employed full-time during the past 2 years. The other parent, who had been minimally involved in the past, is now unemployed and has been the primary parent for the past 2 years, and he/she has handled the majority of the various parenting tasks. Third, the evaluator is asked to assess the psychological health of each parent as well as the psychological match with the child or children. This requires that the evaluator assess each parent for psychiatric disorders and compliance with treatment if any, substance abuse, domestic violence, child abuse, as well as the emotional fit of each parent with the child or children. For example, a parent may have no significant psychological issues, but may lack the ability to nurture, which would be an important quality with younger children in particular.

Fourth, the evaluator is often assessing each parent's ability to facilitate a relationship between the children and the other parent. If a parent is

alienating the child from the other parent, this would be a significant finding and play a large role in looking at best interest. Fifth, the evaluator is asked to assess the child's attachment with each parent, and whether the parents are capable of attending to and meeting the child's developmental needs. In the past, there was a belief that mothers were more nurturing than fathers, and, as a result, more important (Goldstein, Freud, & Solnit, 1984). More current research (Kelly & Lamb, 2000; Ludolph, 2009) has suggested that children develop an attachment with both parents.

There are several other factors which need to be considered by the custody evaluator. Foremost are the strengths and weaknesses of each parent, as well as each parent's ability to understand the needs of each child and the capacity of the parent to meet the needs of the child. Strengths would include the ability to nurture, the ability to provide guidance, the ability to provide stability, the ability to focus on the child's needs, and the ability to understand the child's emotional, intellectual and social needs and development. Weaknesses would include psychiatric disorders (such as depression, schizophrenia, and bi-polar disorder), substance abuse, domestic violence, child abuse, narcissism and personality disorders. Physical illnesses or physical problems may also impact a parent's capacity to function effectively and needs to be considered as well.

In addition, the evaluator needs to consider the relative psychological stability of each parent, often assessed through psychological testing and collateral sources of information. Furthermore, parenting style, including the ability to establish an appropriate hierarchy, communicate effectively and enhance self-esteem need to be evaluated. For example, research has consistently demonstrated that an authoritative style of parenting may be the best for developing emotionally healthy children. Finally, the custody evaluator needs to assess each parent's ability to foster a relationship between the children and the other parent. An assessment of alienation is often a component of this factor.

In summary, the custody evaluator is guided by state statutes in assessing the best interest factors. Regardless of the statute, the task for the evaluator is complex and challenging. Evaluators are asked to assess not only the wishes of each parent and the children, but to assess the capacity of each parent to function in the parenting capacity, the willingness and capacity of each parent to foster a relationship between the children and the other parent, the psychological stability of each parent, the parenting style of each parent, and the child's attachment to each parent.

## References

- Ackerman, M. J. (2001). *Clinician's guide to child custody evaluations*, (2nd ed.). New York: Wiley.
- Ainsworth, M. D. (1967). *Infancy in Uganda: Infant care and the growth of love*. Baltimore: John Hopkins University Press.
- Bowids, H. C. (2004). The implication of psychological evaluations in judicial custody determination when applying the best interest standard. *Dissertation Abstracts International: Section B: The Sciences and Engineering*, 64(10-B), 5208.
- Bowlby, J. (1951). *Maternal care and mental health*. Geneva: World Health Organization.
- Emery, R., Otto, R., & O'Donohue, W. (2005). A critical assessment of child custody evaluations: Limited science and a flawed system. *Psychological Science in the Public Interest*, 6(1), 1–29.
- Goldstein, J., Freud, A., & Solnit, A. (1984). *Beyond the best interests of the child*. New York: Free Press.
- Hippensteele, K. A. (2011). "Best interest" analysis and the power of legal language. In K.A. Davis (Ed.) *Agency and advocacy. Contemporary language education* (pp. 39–59). Charlotte: Information Age Publishing.
- Kelly, J., & Lamb, M. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family Court Review*, 38(3), 297–311.
- Klein, A. (2005). The rights of parents and stepparents: toward a redefinition of parental rights and obligations. In L. Gunsberg & P. Hymowitz (Eds.) *A handbook of divorce and custody: Forensic, developmental and clinical perspectives* (pp. 143–150) New York: The Analytic Press.
- LoCascio, C. L. (2011). A comparison study of the decision-making processes of family court judges and child custody evaluators in Southern California. *Dissertation Abstracts International: Section B: The Sciences and Engineering*, 72(6-B), 3748.

- Ludolph, P. (2009). Answered and unanswered questions in attachment theory with implications for children of divorce. *Journal of Child Custody*, 6(1–2), 8–24.
- Stahl, P. (2011). *Conducting child custody evaluations: from basic to complex issues*. Thousand Oaks: Sage Publications.
- Stevenson, M., Braver, S. L., Ellman, I. M. & Vortuba, A. M. (2013). Fathers, divorce and child custody. In N.J. Cabrera & T.S. Tamis-LeMonda (Eds.) *Handbook of father involvement: Multidisciplinary perspectives* (2nd ed., pp. 379–396). New York: Routledge.
- Warshak, R. A. (2013). In a land far, far away: Assessing children's best interests in international relocation cases. *Journal of Child Custody: Research, Issues and Practices*, 10(3–4), 295–324.

Handbook of Child Custody

Goldstein, M.L. (Ed.)

2016, XXII, 353 p. 17 illus., Hardcover

ISBN: 978-3-319-13941-8