



NORTH TEXAS FAMILIES IN TRANSITION PROFESSIONAL WORKGROUP

Raising the Bar for Forensic Practice in North Texas

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WHY CAN'T I MAKE A RECOMMENDATION REGARDING POSSESSION OR ACCESS?

As a therapist you may be asked by a client (or their attorney) to make recommendations regarding parenting plans, legal custody, and/or allocation of parental decision-making authority. You may even think because you have spent a great deal of time with a parent/child/family that you have all the facts needed to make those kind of recommendations. It might surprise you that this is an area where many therapists inadvertently overstep the boundaries of their data by not realizing the complexity of what they are being asked about.

Many therapists are not comprehensively trained in working with families raising children between two homes, or experienced in litigation-related issues. When serving as a therapist, instead of as a court-appointed evaluator, even professionals who are forensically specialized are in a helping role rather than an evaluative role. As professionals, we are required to understand these differences and stay abreast of current research and standards of practice. Making parenting-time (aka “custody”) recommendations as a therapist has long been noted as an ethical conflict, and we are seeing this discussed more and more frequently in peer-reviewed literature.

The American Counseling Association doesn't mince words in addressing this:

E.13.c. Client Evaluation Prohibited

Counselors do not evaluate current or former clients, clients' romantic partners, or clients' family members for forensic purposes. Counselors do not counsel individuals they are evaluating.

<http://www.counseling.org/knowledge-center/ethics>

Similarly viewing treatment and forensic evaluation as conflicting dual roles, the American Association of Marriage and Family Therapists addresses this issue, and points to the areas where treating professionals can be most helpful to courts:

7.7 Separation of Custody Evaluation from Therapy.

Marriage and family therapists avoid conflicts of interest in treating minors or adults involved in custody or visitation actions by not performing evaluations for custody, residence, or visitation of the minor. Marriage and family therapists who treat minors may provide the court or mental health professional performing the evaluation with information about the minor from the marriage and family therapist's perspective as a treating marriage and family therapist, so long as the marriage and family therapist obtains appropriate consents to release information.

http://www.aamft.org/imis15/content/legal_ethics/code_of_ethics.aspx

Finally, Texas explicitly forbids treating professionals from offering expert opinions regarding conservatorship, possession, or access (our State's technical legal terms for “physical custody” and “legal care and control”) of children. Before addressing that directly, it's worth taking a moment to discuss the term of art “expert opinions.” There is a longstanding difference between an expert opinion – one which can be reliably defended using current research literature – and



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the opinion of an expert. Experts are people too, and may have various values and beliefs that contribute to their preferences. Obviously therapists are taught to watch out for our own personal views impacting on client autonomy, but sometimes the urge to help outpaces the actual knowledge base available, particularly when it comes to the specialized area of forensics. Consistent with the goal of avoiding simply giving personal opinion, the focus of the court is on what *professional* impressions are reliable (scientifically sound) enough to assist the trier of fact.

Texas approaches this in a way that closely mirrors the AAMFT:

Texas Family Code, Section 104.008. CERTAIN TESTIMONY PROHIBITED.

(a) A person may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child at issue in a suit unless the person has conducted a child custody evaluation relating to the child under Subchapter D, Chapter 107.

(b) In a contested suit, a mental health professional may provide other relevant information and opinions, other than those prohibited by Subsection (a), relating to any party that the mental health professional has personally evaluated.

<http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.104.htm#104.008>

This isn't a prohibition on all testimony, but a limitation on what may be admitted (and a good guideline for the therapist on what they should be addressing). These provisions apply to both children's therapists and those working with parents involved in litigation. Indeed, the classic bad example is a parent's therapist who testifies without ever meeting the child's other parent, based solely on their own client's self-report, as to the mental health condition/diagnosis of the child's other parent and/or reasons the other parent's time with the child should be changed (expanded, lessened, supervised, or ended). Even if accurate, such opinions are *unsupported*¹ and ethically, as well as legally, inappropriate.

For clinicians who are working with children there is clear guidance in professional literature regarding the need to examine multiple hypotheses for any issues presented. Greenberg, et. al (2003) offered the not-uncommon example of a child crying during transitions between the parents. They noted even when such behavior exists

“it is important that the therapist consider a variety of possible explanations for the child's statements and behavior. The therapist needs to consider the child's explanation, each parent's observations and views, surrounding circumstances, and the child's developmental stage. The timing of an allegation may also be important, particularly if there is an upcoming hearing or other event in which the reported event might be relevant in determining a legal outcome or a parenting decision. Possible hypotheses include, but are not limited to:

- 1) developmental issues which cause transitions or visits to be difficult for the child;
- 2) the circumstances of the visit exchange are stressful;

¹ See also ACA Code of Ethics E.13.a regarding objective findings that can be substantiated and appropriate techniques when offering evaluations for legal proceedings.



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- 3) the child experienced an unpleasant event with one of the parents, which the child perceived correctly and remembered accurately;
- 4) the child has a distressing memory or perception associated with one of the parents, which he or she only partially heard, saw, or understood;
- 5) the child is recalling some memory associated with one of the parents and has also heard extensive adult discussion about the alleged event;
- 6) the child has experienced an event or events which have been mischaracterized or misinterpreted due to age or developmental factors;
- 7) another person (the custodial parent, older sibling, or misled professional) has suggested or communicated to the child that the other parent is unsafe or exhibits emotional distress when the child has contact with that parent;
- 8) the child is currently having difficulty in his/her relationship with one parent, and the other parent is communicating that avoidance is an appropriate response to this problem (rather than resolving the issue with the parent involved);
- 9) the child is insecure about his or her relationship with a parent or feels responsible for caring for that parent emotionally;
- 10) the child has been externally influenced (by a parent, older sibling, or other significant adult) to report a false unpleasant event; and/or
- 11) the child is angry at a parent for some other event and the allegation is an attempt to retaliate or get the parent's attention. The latter possibility is most likely to be relevant in the case of an older child who may have been taught (often by observing their parents' behavior) that avoidance and/or retaliation are appropriate ways to deal with emotional issues.

The therapist who does not consider all of these possibilities, but rather limits his/her consideration to a subset of these interpretations (e.g., assuming that the child's account is literally accurate or, conversely, that it is entirely the product of the custody conflict) runs the risk of introducing a systematic bias into the child's treatment. Such a therapist is likely to limit his or her explorations in a manner consistent with this limited interpretation of events, and to seek or value only that information that is consistent with the therapist's pre-existing orientation or viewpoint."²

A child who experiences difficulty adjusting to their parents' separation is, as noted above, not an uncommon event, and even that simple issue may have almost a dozen reasonable explanations. Unfortunately, family transitions are often difficult and packed with complicated issues that families turn to mental health professionals to assist with. If you've continued reading this far, it seems likely you're interested in how to address those cases as well. Our ethics codes and State statutes are roadmaps for the basics, and a shield against attorneys who may trip us up by overreaching. For those who are willing to invest the time, good information exists for advanced intervention as well.

² Greenberg, L. R., Gould, J. W., Gould-Saltman, D. J. & Stahl, P. M. (2003). Is the child's therapist part of the problem? What judges, attorneys, and mental health professionals need to know about court-related treatment for children. *Family Law Quarterly*, 37, 39-69.



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GUIDELINES FOR WORKING WITH CLIENTS INVOLVED WITH THE COURTS

For over 50 years the Association of Family and Conciliation Courts (AFCC) has brought together the leading researchers and practitioners dedicated to the resolution of family conflict. In addition to publishing the interdisciplinary journal *Family Court Review*, AFCC has helped combine general ethical rules and current research to craft detailed guidelines for therapists working with clients involved with the courts. They also have a number of other guidelines and resources available for free on line at: <http://www.afccnet.org/Resource-Center/Practice-Guidelines-and-Standards>

A few critical, and self-protective, points to review (in addition to what we've already covered):

- Therapists should anticipate that clients, attorneys, and the Courts may ask the therapist to testify beyond the limits of their knowledge and role, and should respectfully decline to provide information or opinions that exceed the treatment role or the CIT's knowledge base.
- Even well-meaning parents present information through the lens of their own experience. Often ego defenses push them to construct narratives where they are the "good" partner, and cause them to focus on their former partner's bad acts to support that conceptualization. Foibles that were tolerated in a loving relationship become flaws post-separation that are often vilified, and other interactions are recast in light of current negative emotions.
- When children are involved in treatment, therapists have an enhanced obligation to consider multiple hypotheses, seek information and involvement from both parents, and avoid the biasing effects of one-sided or limited information.
- One parent being more involved in treatment than the other creates risks. Consideration of both parent-child relationships, and the encouragement of perceptions or information from all caregivers are particularly important.
- Particularly when a child or adolescent is expressing a "position" regarding parents' legal conflicts or other adult issues, it may be easy to overlook external influences on the child's perceptions, or the impact of developmentally unhealthy coping skills on the child's statements. Particular caution should be used when addressing statements that may not be developmentally appropriate or may reflect overexposure of the child to adult conflict.

Following ethical guidelines is not just good for your clients, it is good for you as well. Attorneys (and their clients) are becoming more educated on these issues, and seek to hold counselors accountable to professional best practices. Bottom line, you risk a client filing a complaint with your licensing board if you make a recommendation regarding parenting plans, legal custody, and/or decision-making authority. So what do you say if an attorney or judge asks you to make such a recommendation? You can provide this handout and explain, professionally, why you are unable to do so! However, your information is still valuable and Judges are smart people. Your behavioral observations with your clients, the professional analysis and decision making that went in to diagnosis or crafting treatment plans, and the work you have done to help clients progress are all part of the expert information you can assist the court with.

In the end, your obligation is to supply relevant, reliable, ethical, and professional information and to let the Court do justice. Do your part and let the court do its part.