

The Role of the Child Custody Evaluator and the Best Interest Attorney

Child custody is one of the most difficult decisions a judge is forced to make. Information provided at a trial, is limited, often skewed and difficult to decipher. In addition Judges often do not hear from the source of all of the issues, the child. It is no longer the default assumption that child custody proceedings will produce the classic paradigm of sole custodian versus visiting parent. Many states recognize some form of “joint” or “shared” custody that affirms the decision-making and caretaking status of more than one adult. The issues presented by the litigants are varied and complex, some coming from traditional family households, but many coming from a variation. This leaves a judge attempting to determine a child’s best interest with limited information. The Courts, recognizing the importance of child development issues, mental health issues, and a child’s psychological needs, have utilized child custody evaluations to aid the court in fleshing out the facts, and in determining these important issues. A child custody evaluation is an objective assessment of the child’s needs and each parent’s ability to meet those needs. The evaluation is conducted by a mental health professional who is trained in this field. In accomplishing this, each parent’s strengths and weaknesses are considered as well as factors that may make effective parenting or co-parenting a challenge.

A comprehensive and informative child custody evaluation will include parent interviews, interviews with the child, observations of parent-child interaction, some psychological testing, and interviews with individuals outside the family that may help provide important information. As the best interest attorney (BIA), your role is to work with the evaluator, often times gathering information such as school records, medical records, and, if privileged is waived, mental health records. Depending on the evaluator, the BIA may go on visits with the evaluator, participate in phone conferences with collateral witnesses, and conduct interviews with collateral witnesses. The goal is to work with the evaluator so that you are familiar with the process, have confidence that all the factors are being investigated and agree with the recommendations.

As the BIA, you may be faced with the decision of whether you want to file a Motion requesting a Child Custody Evaluation for the benefit of your client. Each case must be evaluated on its facts, but issues to consider are:

Are there allegations of physical or mental abuse

If so, are these directed at the child

Are there issues of mental health concerns of the parents

Could these issues affect the care of the child

Does the child have any special needs

How are these needs being addressed in each household

Are there fundamental parenting differences and how are these impacting the child

Has there been a history of ongoing litigation

Do the parties have resources to retain a well-qualified evaluator

It is important to ensure that the evaluator selected is competent in this field. You should request information regarding their education/licensure and their experience. You should investigate their reputation within the mental health community and within the family law bar. You should speak with the evaluator and make sure that they intend to comply with the American Psychological Association Guidelines for Custody Evaluations or the Association of Family and Conciliation Courts (AFCC) Guidelines.

The next determination that you need to make as the BIA is whether to waive the privilege of confidential communications between your client and his/her therapist, school guidance counselor, or other mental health professional. Remember, you CANNOT waive the privilege only for the evaluator. If the privilege is waived, all parties then have access to the provider.

If you have a difference of opinion with the evaluator as to the relative fitness of the parents, or the schedule for parenting, you and the evaluator must address these issues to determine if additional investigation is necessary, or if there is a flaw in the methodology of either. You should strive to understand the basis for the evaluator's recommendations and why there is a difference. If consensus cannot be obtained, then, as the BIA, you must advocate for what you believe is in the child's best interest.

The BIA also must address the question on "what to tell the children" about the process. Generally it is good to tell the children very little about what to say--urge them to be open and honest. Do not promise them that their talk with the evaluator will be kept confidential, as it likely will not. The evaluator may talk with you about the interviews before they occur, and give you direction about how to prepare the child. Most evaluators make a great effort not to distress the child and not to place the child in the position of having to state a preference or tell anything about either parent which might be negative. Rather, the child will be interviewed about general issues such as school, friends, activities and interests, and about family constellation. Do not indicate that the evaluator is the child's friend, or that the evaluator might take the child away from either parent. Remain matter-of-fact, neutral, and brief in what you do say. Something like, "This woman/man is going to help us make the best arrangement for how you will spend time with both of your parents."

In conclusion, the BIA should remain involved in the evaluation process by working with the evaluator by providing information, participating as much as possible and reassuring your client. In this manner, the BIA can feel confident that their client's best interest will be promoted.