

Parenting Considerations

The previous chapter addressed parenting considerations specifically related to each stage of development. The discussion below, however, focuses more generally on how to assess the parent-child relationship, the impact of potential parenting impairments, and co-parenting skills. In doing so, we avoid the use of the terms such as "fit" or "unfit," or even reference to potential "custodian." This type of language serves to polarize the custody proceeding as a contest resulting in a clear winner and loser, when in fact both parents may play important roles in their child's future development. As the discussion of co-parenting below demonstrates, in most cases, children are best served through the development of meaningful relationships with both parents. As also noted in the previous chapter, where issues of domestic violence are involved in a custody case, you might need to consider additional safeguards and the use of experts in domestic violence to best serve the needs of the child.

Assessing the Parent-Child Relationship

The Parent's Grief Process

Following a separation, divorcing parents experience a grief cycle of emotions ranging from love, anger, sadness, fear, and guilt. Many have described the divorce as akin to a death in the family. They may feel a loss of their identity or the roles that they assumed as an intimate partner, provider, and nurturer. It can be very unsettling for a parent to now be referred to as "the former spouse," or for many, "the absent parent." The adversarial court process compounds their sense of loss because it appears that there can only be one "winner."

When people are in crisis or have experienced a traumatic event, they are usually counseled not to make any decisions about major aspects of their life. The divorce process, however, requires parents to make a host of critical life decisions. As their attorneys rattle off a list of legal considerations, the client-parent may be

in a state of psychological numbness or a state of rage, depending on the corresponding stage of the grief process. Neither of these emotional states is conducive to decision making, particularly when the decisions affect their children.

How parents handle emotions inevitably impacts on their parenting abilities during this family transition. Many parents are forced to shift to "survival mode." Distracted and overwhelmed, a parent may not be able to meet the multiple tasks related to the developmental needs of their children during this time. It is critical to understand the parent's grief process, determine the parent's stage of grief, and consider the stress of this family transition when assessing "parental fitness." Once parents have a sufficient support system, including referrals for professional help, and have some time to deal with their grief, a more accurate assessment of parenting skills can be made. Mental health professionals can often make these preliminary determinations as to how a parent is coping. One parent's coping skills may be poor immediately following their separation. However, that same parent may return to the court for assistance with a modification in a custody arrangement with much improved coping and parenting skills.

At the same time, you may need to take preventative measures to ensure that the parent's grief process does not put the child at risk. A parent "stuck" in the anger stage, for example, may negatively impact the child's self-concept and perhaps even the child's sense of safety and security. Parents who resort to alcohol or drugs in order to "numb" their emotions during this time also may be endangering their children. Similarly, a parent whose sense of profound loss leads to clinical depression may need professional help in order to parent effectively. For more information regarding substance abuse and mental health issues, see **Potential Parenting Impairments** below.

Courts must also be sensitive to the recovery process of an abused parent. Prolonged anger can help heal the wounds of domestic violence. Efforts to curb or minimize this anger can interfere with healing and encourage continual abusive behavior.

Attachment

Judges often ask how they can assess the level of "attachment" within a parent-child relationship. Attachment theory, as it is called, grew out of the recognition that infants have an innate ability to form enduring emotional bonds or "attachments" to caregivers who consistently respond to their needs. While mothers are often the infant's first primary attachment figure, infants and young children who are given sufficient time to interact with both parents usually form equally strong attachments to both.

Although a somewhat fancy term, assessment of "attachment" involves the same parenting considerations described in **Chapter 3**. That is, how consistently does

the parent respond to the child's various developmental needs? As children grow, their attachments to certain adults may alternatively strengthen or dissipate, depending on the nature of their contacts and their developmental needs. The process usually takes time; a parent or other caregiver, for example, with whom the child has not previously formed an attachment, cannot expect to have an instantaneous relationship. Sometimes it may be traumatic for a child to separate from a parent who is primarily responsible for the child's emotional and physical needs. At other times, however, the child may actively seek other attachment figures because of certain developmental needs.

The child's attachment to siblings also must play a role in the court's determination of what is in a child's best interests. Research indicates that courts very rarely grant custody of one child to one parent while granting custody of another child to the other parent.¹ This reluctance to separate siblings is due to legitimate concerns that the children will suffer the additional loss of attachment to their siblings. Children benefit from stability and continuity at all stages of development.

Changes in the Parent-Child Relationship

Separation and divorce can have a dramatic effect on the nature of the parent-child relationship. As noted in **Chapter 3**, the stresses of the divorce process can make parents less accessible to their children, both mentally and physically, and may result in less quality time together. Conversely, some parents experience a relief from the conflict that plagued their married life and are finally able to focus on improving their relationship with their child or perhaps forming a relationship for the first time.

As discussed in **Chapter 3**, there is a risk, particularly in certain age groups, for an unhealthy parent-child dynamic to develop following a separation and divorce. For example, a younger "parental child" may worry excessively about the parent and attempt to take care of him or her. An older adolescent may also assume many of the responsibilities of the former spouse, including being a close confidante to the parent. Unless the parent prevents these unhealthy dynamics from occurring, the child's development may be harmed.

Another unhealthy parent-child interaction that may occur after a divorce is when one parent attempts to control a rather suggestible child's feelings toward the other parent. Again, the adversarial process tends to promote this kind of manipulation of the parent-child relationship.⁴

Stepparents and Significant Others

Many parents become involved with a new partner following separation and divorce, creating another factor in the decision-making process. Specifically, what impact does this significant other or stepparent have on the child's development?

Does the new relationship tend to promote or hinder the child's self concept and sense of security following the separation and divorce?

While children often express happiness for their parents, they can experience a complex range of emotions that are based on divorce-related losses, such as the fear of losing the sense of closeness to a parent. Instead of acknowledging these feelings, many parents set up unrealistic expectations for the relationship between the child and stepparent or significant other in an effort to create a new sense of family. Again, the child's reaction depends in large part on the child's stage of development and what impact the divorce has had on the child. The following are important questions to consider:

- How long has it been since the divorce?
- How many prior relationships has the parent had and how involved was the child in each relationship?
- What opportunities has the child had to develop a relationship with the new partner?
- Have the parent and new partner been able to accept the child's feelings of loss that have been rekindled by the new relationship?
- Does the child's other parent support the child having a relationship with the significant other or stepparent?
- Does the parent still spend sufficient one-on-one time with the child without the significant other or stepparent?

Parenting Considerations

Chapter 3 presented age-specific parenting considerations in order to make clear the relationship between parenting responsibilities and the child's developmental needs. These considerations represent a neutral and child-focused way to assess parenting ability. The child is an individual with particular needs and the parents must demonstrate to the court how best they can meet those needs.

Historically, of course, custody determinations have not been particularly neutral or child focused. The judicial process does not take place in a vacuum. Rather, certain presumptions, biases, and prejudices have come into play and often control the outcome of the proceeding. Even our fairly evolved concept of the "best interests of the child" is susceptible to these societal influences. It may be that the lack of "bright line" rules in this area of law makes judges uncomfortable and therefore more likely to reach for prevailing societal assumptions of what makes a good parent. In any case, you need to be especially aware of your own values,

attitudes, and beliefs and how those views may consciously or unconsciously impact the custody determination. See **Chapter 1, Addressing Bias.**

At some point in time, each of the following has been considered a controlling factor in custody determinations. We know now, however, that none of these factors should be determinative and, in some cases, not even a consideration. Instead, the "best interests of the child" doctrine, as informed by the developmental model presented in **Chapter 3**, should remain the focus of the proceeding.

Gender

Despite a long history in family law of maternal preference, courts have moved towards a gender-neutral stance in custody determinations. This shift does not mean, however, that gender should never be a consideration in custody proceedings. At certain points in a child's development, the child has a need to identify and spend more time with a parent of a particular gender. For example, preschoolers and early elementary school-aged child are increasingly aware of gender differences and learn to identify with the same-sex parent. They also begin to internalize parental values related to gender. The child's positive sense of self may be compromised if a parent with whom he or she spends significant time tends to "bad-mouth" the same-sex parent or make derogatory remarks about that parent's gender.

This process of gender identification continues into adulthood. For example, it is not uncommon for adolescents experiencing more intimate relationships with the opposite sex to want to discuss these relationships with the same sex-parent.

Religion, Culture, and Ethnicity

Race, culture, and ethnicity should never control the outcome of a custody proceeding. For further discussion of race and ethnicity issues, see **Chapter 1, Managing the Child Custody Case.** Unfortunately, there are cases in which a parent was denied custody or visitation on the basis of his or her "nontraditional" or minority religious or cultural beliefs or practices. Unless these beliefs or practices somehow put the child at risk, however, these factors should have no bearing on the assessment of parenting ability.

There is no social science research to support the contention that the child will be harmed or unduly confused by exposure to different religions, ethnic, or cultural practices. Indeed, such exposure to their parents' diverse backgrounds may have a positive effect on their development and may be critical to their sense of identity.⁹ With this exposure in childhood, adolescents can make a more informed choice about their preferences in these areas.

Sexual Orientation

Although unquestionably a controversial topic in the field of family law today, the sexual orientation of parents is another factor that should not play a role in assessing parenting ability. Based on available research, gay and lesbian parents are no less likely than heterosexual parents to foster supportive and stable environments for their children. No data exists to support a bias against homosexual parents. The questions in **Chapter 3** that relate to parental fitness apply equally to both homosexual and heterosexual parents.

You should not ignore, however, the impact that a parent's sexual orientation may have on a child. The discretion with which a parent engages in sexual activity when a child lives in the home can still be considered in most states, particularly when the child is cognizant of the nature of the parent's relationships. As with heterosexual parents, you will need to consider how the parent's sexual behavior impacts on the individual child in determining whether a parent has made inappropriate choices about their own sexual activity. If there is no apparent negative impact, it should not be considered a factor in the custody determination."

Socioeconomic Status

Socioeconomic factors should not be a factor when evaluating parenting ability. It is not uncommon, of course, for the separation or divorce to result in a disparate standard of living between two parents. One parent's ability to reside in a more affluent neighborhood or provide a child with more physical luxuries, however, is not relevant to custody decisions. Furthermore, a better way to address economic disparity can be through child or possibly spousal support and property distribution.

Potential Parenting Impairments

While many problems may potentially diminish a parent's capacity to parent effectively, this section will highlight the most prevalent concerns, including mental illness, domestic violence, substance abuse, and chronic illness. Again, the focus should be on how a particular impairment affects the child's development or puts the child at risk. It is not a foregone conclusion that parents confronting one or more of these issues are therefore incapable of meeting the developmental needs of their children.

Mental Illness

Research has expanded our understanding of the biochemical causes of affective disorders such as clinical depression and manic depression." This increased understanding of mental illness has led to a rise in the number of reported cases and the number of individuals on medication to treat such illnesses. The psychological impact of separation and divorce can also paralyze some parents,

who may or may not have an underlying affective disorder, but still need intervention to help them cope.

It is not uncommon in more bitter custody disputes for a parent to hurl the allegation that the other parent is "mentally ill" and therefore "unfit." Before taking this contention seriously, of course, an independent licensed evaluator must make a diagnosis. If a parent has been diagnosed with an affective disorder, you may still need further professional advice on the nature of the illness, the treatment necessary, and to what extent, if any, it may affect parenting ability.

There is still a stigma associated with mental illness in our society. Many parents may be reluctant to reveal information regarding mental health issues or may even try to conceal this information. There are also difficult legal and ethical issues posed when the court or a parent tries to obtain treatment records of the other parent.

Mental illness alone should never be determinative of parental ability. Much depends on how the parent is utilizing and benefiting from medical treatment and other forms of intervention, including psychotherapy. Parents who avail themselves of this assistance should be viewed in a positive and responsible light when assessing parenting ability. The focus should remain on the ability of the parents to work together to foster healthy parent-child relationships and not a judgmental assessment of a parent's mental illness.

Domestic Violence

Research demonstrates that a child is at risk for physical and psychological abuse when there is domestic violence in the home.¹⁶ Often a separation or divorce will escalate the abuser's behavior. It is therefore critical that the emotional and physical safety of the child and the abused parent be the primary focus in decision making. Basic decisions first need to be made about appropriate shelter and services for the abused parent and child, and holding the abuser accountable.

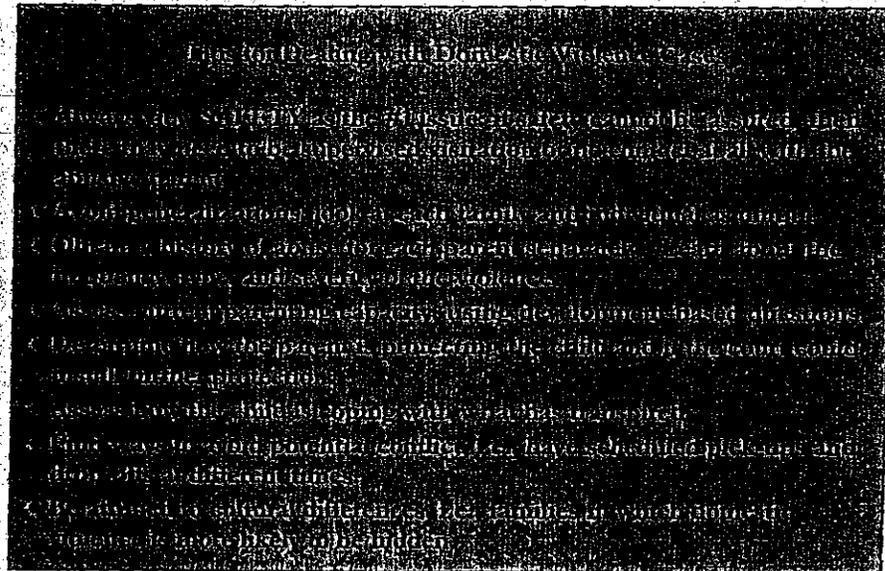
Tips for Dealing with Cases Involving Mental Illness

- Consider a complete medical/mental history, both past and present.
- Take into account the parent's compliance with the treatment recommendations.
- Determine if the parent is consistently attending any recommended therapy sessions.
- Ask the child's therapist to work with you and discuss and report health issues in light of the child's adjustment.
- Determine how the parent diagnosed with mental illness is managing the child with and/or without the illness.
- Understand how the other parent is assisting the child with and/or without the parent's mental illness.
- Avoid overreacting to DSM-IV diagnoses.

After initial safety concerns are addressed, you need to assess the particular family's pattern of domestic violence and how it impacts each family member. The parent who has been abused may experience post-traumatic stress syndrome and may exhibit symptoms of hysteria, depression, fear, and anxiety. As a result, the victim may have diminished parenting capacities and will need a support system to handle some of the parenting responsibilities following the separation.

The child also may experience post-traumatic stress syndrome and will need appropriate professional intervention. In **Chapter 3**, we noted that children often model their parents' behavior. A child may imitate the violent behavior he/she has seen, or empathize and identify with the abused parent. The child may then become anxious, fearful, aggressive, and/or depressed.

Finally, you need to focus on the parent who was abusive and to what extent he or she should be involved in parenting. You will need to rely on expert opinion to determine whether or not the parent can be rehabilitated. For additional discussion of domestic violence, see **Chapter 6**.



Substance Abuse

A parent who resorts to drugs or alcohol on a daily basis and in amounts that impair functioning can pose a significant risk to a child. If the substance abuse problem existed before the separation, it may have been that one parent compensated for the substance-abusing parent or was driven to self-medicating by domestic violence. Following the separation, the child may spend more time alone with the parent who has a substance abuse problem.

You should request a qualified specialist certified in alcohol and drug abuse to evaluate the parent to determine the extent of the illness and the potential impact on the child. At a minimum, you will need the following information in order to determine whether parenting is compromised by a substance abuse problem:

- The nature and quality of the parent's supervision of the child. For example, is there a risk that the parent drinks while supervising the child? Does the parent ever black out when with the child?
 - Reports from significant others about drinking or drug use and whether they tend to confirm or disagree with the parent's self-reporting.
 - The extent of the parent's support system in seeking and completing treatment, and participating in post-treatment, e.g., support groups.
 - The specific history of substance use/abuse in the parent's family.
 - The parent's testimony or admission as to ever having a substance abuse problem.
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- How long the parent has been abusing substances.
 - Whether or not the parent is currently receiving treatment and what progress is being made, as determined by treatment specialists working with the parent.
 - Whether or not the parent has been known to drink or abuse drugs and drive. If the parent has had one or more drunk driving convictions, when was each conviction and what was the corresponding sentence? If there is continued concern about the parent's sobriety, you may consider ordering the parent to undergo random alcohol and drug screening, such as urine screens and/or breathalyzer tests, and regular attendance at AA meetings.
 - Does the child express reservations about driving or being alone with the parent?
 - Have children been given alcohol while visiting?

For more information on this topic, see **Chapter 6**.

Chronic Illness

The news of a parent's possibly life-threatening or chronic medical illness affects all members of the family. Both parents and children experience a complex range of emotions and must be allowed to grieve. Children may have strong reactions and feelings that they may not be able to articulate fully. Both parents and children may benefit from referrals to mental health professionals in order to deal with these complicated issues.

In the case of HIV/AIDS, this need may be even greater due to the continuing stigma and prejudice that exist today. It is important to note, however, that a parent's HIV infection should not be a reason in itself to deny custody or visitation. As with any chronic illness, the judge must first determine through factual evidence how a particular parent's HIV infection affects a child.¹²

Typically in the case of a chronic illness, a parent's energy level fluctuates at different times of the day or week and more parenting support may be needed at those times. Some chronic illnesses may not initially or perhaps ever impact the parent's ability to be an effective caregiver, especially given current medical advancements. Parents affected by HIV, for example, are living longer and without complications despite their initial diagnosis of terminal illness.

The course of a particular chronic illness, however, is unpredictable and it is critical that the court help the family focus on the parent's current capabilities rather than the "what ifs?" In this respect, the parent's illness should not be a factor in itself for denying someone an opportunity to parent. You can assess a parent's ability to assist a child at different developmental stages with understanding and coming to terms with illness, death, and dying.

The Co-Parenting Relationship

Co-Parenting vs. Conflict

Research confirms that there is a healthy way to divorce and to minimize the potentially negative impact on children. Whether or not parents can "co-parent" effectively (e.g., there is no domestic violence, they live close to each other, they can cooperate) is a critical determinant of the long-term adjustment of a child following a separation or divorce. Specifically, parents must learn to conceptualize their relationship following the separation as more of a cooperative business relationship or partnership with a focus on raising their children. Parents need to communicate on a regular basis in a child-focused and constructive way. To "co-parent" is to participate in a fluid and ongoing analysis of the ever-changing needs of a child. This arrangement is independent of any legally constructed definition of a particular custody arrangement.

Judges usually observe a continuum of conflict among parents during custody proceedings. On one end are parents who have divorced amicably, learned to set their differences aside, and can effectively co-parent. On the other end are parents who may be physically or verbally abusive to each other, especially during transition times. Somewhere in the middle are parents who make the child a detective, "bad mouth" the other parent in front of the child, and threaten to keep the child. The greater the conflict, the greater the need to assess the safety of the child and to exercise judicial control by minimizing the contact between the parents. Shared or joint custody arrangements, for example, are not a viable option if the parents' interactions remain highly conflicted or they are unable to learn basic co-parenting skills. The risk to the child is too great.

You can tailor appropriate referrals based on the level of conflict between the parents. The range of services the parents might benefit from includes parent education classes (see below), anger management and conflict resolution sessions, mediation, and ongoing counseling. (Some of these services, however, may be inappropriate in cases involving domestic violence.) A key factor in promoting constructive solutions for parents is to have parents be accountable through the use of court reports indicating the degree of compliance with the referral.

Assessing Co-Parenting Skills

The following questions are designed to assess how effectively parents communicate and work together to raise their children. You can gather information based on these questions from court testimony and independent neutral evaluators. These questions refer to all age groups. Refer to **Chapter 3** for more specific age-related parenting considerations.

- How often do parents set aside time to discuss the issues affecting the child?
- How do the parents treat each other when upset or angry?
- Do parents communicate directly instead of making the child a messenger and/or detective?
- Are parents able to communicate in front of the child without fighting?
- Do parents avoid "bad mouthing" each other in front of the child?
- In what ways does each parent support the child's relationship with the other parent, including regular visitation and child support payments?

- How flexible is each parent about modifying the parenting schedule once in a while to account for special events in the child's life, such as birthday parties?
- If parents both attend school functions or other special events, where does each parent sit and how do they handle attending events at the same time?
- What common criteria do parents have concerning safety?
- Have both parents investigated and discussed child care arrangements?
- Do the parents communicate with each other to provide consistent discipline or rules and consequences in each home?
- Do the parents ensure safety by communicating about important medical needs and appointments?

Parenting Seminars: Learning to Co-Parent Effectively

Attendance at parenting seminars for separating and divorcing parents has proven to be an extremely effective way for some parents to learn how to "co-parent." Typically, the seminars follow a model similar to the one presented in **Chapter 3** by first giving an overview of normal developmental expectations and the potential impact of separation and divorce on children's development. Ideally, an interdisciplinary team would present the material. The presence of a judge at these seminars can be pivotal. He or she can demystify the court process and shatter the myth that a custody proceeding means war. Attorneys who present at seminars also help highlight the need for a flexible co-parenting plan that adapts to the changing needs of the child. The Appendix contains some examples of research-based parenting seminars.

Parents ambivalent or even resentful of being mandated to attend these seminars often become very receptive once they realize how profoundly their behavior can impact their children either positively or negatively. The mental health professionals, judges and attorneys who present at the parenting seminars also reinforce the idea that loving parents are the real experts of their children's needs. In a safe and supportive environment, the parents can learn to communicate in a more child-focused and constructive manner. Many of these parents then draft their own "parenting plans" based on their knowledge of their children's developmental and special needs.

Special Topic: Relocation

In this transient society, it is not uncommon for judges to have to consider the impact of a parent's wish to relocate following a separation or divorce. Despite

the distance, some parents who must relocate for various reasons are able to continue co-parenting quite effectively and to communicate frequently about a child's needs. There are some parents, however, who may be seeking to "escape" from co-parenting responsibilities and to minimize the child's contact with the parent, or to protect themselves or a child from an abusive parent. This topic is also addressed in **Chapter 6**.

The critical determinant, of course, when considering the issue of relocation is what impact it will have on the child and his or her development. Applying the model presented in **Chapter 3**, you should consider the following factors:

- How critical is the relocation, e.g., is it in "good faith"?
- Can relationships be maintained with the parent who is left behind?
- Are there safety issues?
- What has the nature of the child's relationship been with each parent prior to the divorce and post-divorce?
- What is the temperament of the child? For additional discussion of temperament, see **Chapter 3**.
- What is the developmental stage of the child and how will relocation impact or affect the child's development psychologically, intellectually, interpersonally, and in terms of safety and security? See **Chapter 3**.
- How willing is each parent to accommodate these developmental needs?
- What is the nature of the co-parenting relationship in setting aside a consistent time to talk only about each child's needs and what each parent's responsibility is to meet those needs?