

Juvenile Law Resource Center Issue Brief

Admissibility of Parenting Capacity Evaluations

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I. ISSUE

In the child welfare context, protective agencies, the courts, and attorneys often turn to psychologists to evaluate parenting capacity. This issue brief aids attorneys representing parents in child welfare proceedings by: (1) describing the components and methodology of a typical parenting capacity evaluation; (2) describing the uses and limitations of a parenting capacity evaluation; (3) reviewing the evidentiary standards in Oregon for admission of scientific evidence, particularly psychological testing; and (4) offering a roadmap for challenging the admissibility of parenting capacity evaluations as evidence in child welfare proceedings.

II. RESEARCH

a. Components and Methodology of Parenting Capacity Evaluations

In numerous scholarly articles, Professor Karen Budd describes the recommended model for parenting capacity evaluation.¹ Such an evaluation has three principal steps: (1) clarifying the assessment objectives through specific referral questions; (2) assessment activities, including clinical interviews with the parent, psychological testing, direct observation of parent and children, collateral interviews, and record review; and (3) integrating findings and writing a report.² The evaluator should also adhere to three core principles: (1) a narrow focus on the parent's capabilities and deficits as a parent and on the parent-child relationship; (2) a functional approach, emphasizing behaviors and skills in everyday performance; and (3) an application of a minimal parenting standard.³ Professor Budd suggests that the evaluation may extend over two to three

sessions with the parent, while other practitioners favor a minimum of four sessions along with tests completed independently by the parent.⁴

b. Uses and Limitations of Parenting Capacity Evaluations

According to Professor Budd, a parenting capacity evaluation conducted as described above can be expected to achieve certain outcomes.⁵ A parenting capacity evaluation can:⁶

- Describe characteristics and patterns of a parent's functioning in adult and childrearing roles, explain possible reasons for abnormal or problematic behavior, and the potential for change
- Identify person-based and environmental conditions likely to positively or negatively influence the behavior
- Describe children's functioning, needs, and risks in relation to the parent's skills and deficits
- Provide directions for intervention

These evaluations, even when conducted strictly according to recommendations, cannot:⁷

- Compare an individual's parenting fitness to universal parenting standards
- Draw conclusions about parenting adequacy based only on indirect measures
- Predict parenting capacity from mental health diagnoses
- Rule out the effects of situational influences (e.g., time limitations, demand characteristics, current stressors, cultural issues) on the assessment process
- Predict future behavior with certainty
- Answer questions not articulated by the referral source

III. LEGAL ARGUMENTS

a. The Evaluation of Parenting Capacity is Scientific Evidence

As a threshold inquiry, a trial court must determine whether the proffered evidence constitutes scientific evidence. In *State v. Brown*, 297 Or 404 (1984), the Oregon Supreme Court held that scientific evidence is that which draws its convincing force from some principle of science, mathematics and the like.⁸ In *State v. O'Key*, 321 Or

285 (1995), the Court significantly expanded the definition of scientific evidence to include proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as scientific assertions.⁹ Professor Kirkpatrick notes that the Court apparently intended to categorize as scientific evidence anything which jurors would perceive as scientific because it is likely to influence (and perhaps mislead) jurors when conveyed with the imprimatur of science.¹⁰

Psychological evaluations and testimony are often considered to be scientific evidence. Oregon courts have held in several cases that comparisons of a particular individual to a generic profile or psychological syndrome is a form of scientific evidence that must satisfy the *Brown* foundational requirements for admission. For example, in *State v. Milbradt*, 305 Or 621 (1988), the court held that caseworker testimony about typical child sex abuse victims' reaction to sexual abuse was scientific evidence. Similarly, in *State v. St. Hilaire*, 97 Or App 108 (1989), the court decided that detective testimony about sex abuse syndrome was scientific evidence. The same logic drove the court's decision in *State v. Lawson*, 127 Or App 392 (1994), where psychologist testimony about child abusers characteristics and testing to show the defendant did not meet that profile were considered scientific evidence.

Meanwhile, testimony by a psychologist may not qualify as scientific if it is not based on psychological testing. In *State v. Stafford*, 157 Or App 445, 458 (1998), a psychologist testified about sex abuser grooming methods. There, the court ruled that the testimony was not scientific evidence because it merely provided evidence that the jury could use to infer the defendant's sexual intent, and was derived from the psychologist's personal observations, not psychological testing.

Parenting capacity evaluations apparently qualify as scientific evidence for several reasons. First, testimony by a licensed psychologist with an advanced degree has potential to influence a juror as a scientific assertion merely because of the title and education of the witness. Second, a technical discussion of psychological instruments, tests, and assessments will likely carry similar persuasive power with a juror. Third, like the testimony deemed scientific in *Milbrant* and *St. Hilaire*, parenting capacity evaluations compare a particular individual (the evaluated parent) with a generic profile (the minimally adequate parent). Also, unlike the psychologist testimony in *Stafford*, a

parenting capacity evaluation typically combines aspects of psychological testing and personal observation. Thus, under Oregon case law, testimony concerning a parenting capacity evaluation likely constitutes scientific evidence as defined by *Brown* and *O'Key*.

b. Many Factors Affect a Trial Court's Decision on the Admissibility of Scientific Evidence

The recent Supreme Court decision in *State v. Southard*, 347 Or ____ (2009) summarizes the Court's jurisprudence on the admissibility of scientific evidence: It must be relevant, OEC 401; it must possess sufficient indicia of scientific validity and be helpful to the jury, OEC 702; and its prejudicial effect must not outweigh its probative value, OEC 403.¹¹ Note that the proponent of the scientific evidence has the burden to make a sufficient showing of admissibility.¹²

In *State v. Brown*, 297 Or 404 (1984), the Court identified seven primary factors that could affect a trial court's decision on admissibility of scientific evidence: (1) the technique's general acceptance in the field; (2) the expert's qualifications and stature; (3) the use which has been made of the technique; (4) the potential rate of error; (5) the existence of specialized literature; (6) the novelty of the invention; and (7) the extent to which the technique relies on the subjective interpretation of the expert.¹³ The *Brown* court also listed 11 additional factors, which overlap somewhat with the seven primary factors.¹⁴

In *O'Key*, the Oregon Supreme Court adopted four additional criteria for consideration by trial courts in determining the admissibility of scientific evidence. These criteria, originally proposed by the landmark United States Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993) are: (1) whether the theory or technique in question can be (and has been) tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error and the existence of operational standards controlling the technique's operation; and (4) the degree of acceptance in the relevant scientific community.¹⁵ The *O'Key* court also approved several other criteria for assessing the admissibility of scientific evidence posited by *United States v. Downing*, 753 F.2d 1124, including the non-judicial uses and experience with the process or technique, and the extent to which other courts

have permitted expert testimony based on the process or technique.¹⁶ Not all of these factors will apply in a given case, and not even a majority need be satisfied for evidence to be admissible.¹⁷ Consequently, analysis for admissibility of scientific evidence tends to be case-specific.¹⁸

c. Why Evidence from Parenting Capacity Evaluations May Not Be Scientifically Valid

Courts often begin their analysis with the second step: whether the scientific evidence possesses sufficient indicia of scientific validity to be admissible under OEC 702.¹⁹ This article primarily focuses on that step, since the other analyses under OEC 401 and OEC 403 tend to be highly case-specific. Attorneys for parents may consider challenging the scientific validity of parenting capacity evaluations at three different levels: (1) the validity of individual psychological tests or instruments; (2) the validity of the evaluation as conducted in this instance; and (3) the validity of the overall methodology of parent capacity evaluations.

i. Individual Psychological Tests

Psychologists employ a number of tests to evaluate parenting capacity, many of which do not satisfy the foundational requirements of *Brown, Daubert*, and *O'Key*. A research study surveyed forensic psychologists who conduct child custody evaluations in the family court context to determine which tests psychologists believed satisfied *Daubert* admissibility standards.²⁰ The study indicated that psychologists had low confidence in the admissibility of many of the tests conventionally used in parenting capacity evaluation.²¹ The highest percentage of respondents (90%) said that the MMPI-2 satisfied the *Daubert* standard, although only 54% recommended the test.

Several other tests received mixed reports.²² The study reported that 63% of respondents believed that the MCMI-III (Millon) was admissible but only 28% recommended it, while 56% of psychologists said that the Personality Assessment Inventory (PAI) satisfied *Daubert* and only 33% recommended it.²³ Additionally, only one parenting inventory (Parenting Stress Index), and two parent rating scales (CBCL and CPRS) even received over 50% endorsement as satisfying *Daubert*, and less than 30% of psychologists even recommended their use.²⁴ Thus, attorneys representing parents may consider challenging the admissibility of results from individual psychological tests,

especially those which the study reports are disfavored even by psychologists themselves.

Even otherwise valid tests may not be admissible when used in the child welfare context. Professor Budd notes that, although psychologists typically administer tests or inventories to evaluate parenting capacity, *with few exceptions, [these tests] were not designed to assess parenting capacity and have not been empirically tested regarding their validity in the child protection context.*²⁵ Consequently, evaluators should *apply a conservative approach in interpreting findings+by corroborating their conclusions with other evidence.*²⁶ Further, the same survey of forensic psychologists discussed above also revealed that the major purposes of psychological testing were ruling out psychopathology and assessing personality functioning, not *as a primary data source, or as a means of assessing parenting capacity. . . .*²⁷ In challenging the admissibility of conclusions about parenting capacity, whether in a general evaluation or a parenting capacity evaluation, attorneys should highlight the lack of empirical support for applying these particular psychological instruments to child welfare proceedings.

ii. Problematic Evaluation Practices

Scholars also warn that standard practice of psychologists who evaluate parenting capacity often falls below the standards recommended by professional bodies such as the American Psychological Association (APA).²⁸ The APA published guidelines which require psychologists conducting parenting capacity assessments in child welfare cases to:

- Determine scope of the evaluation based on the nature of the referral questions
- Inform participants about the limits of confidentiality
- Use multiple methods of data gathering (e.g., records, questionnaires, interviews, observations, collateral sources)
- Make efforts to observe child together with parent, preferably in natural settings
- Neither over interpret nor inappropriately interpret assessment data
- Provide an opinion only after conducting an evaluation adequate to support conclusions.²⁹

If the particular parenting capacity evaluation or evaluator does not adhere to these APA guidelines, the parent's attorney should challenge the admissibility of any resulting evidence. Divergence from the APA guidelines would implicate several *Brown* factors, including: the technique's general acceptance in the field; the use which has been made of the technique; the extent to which the technique relies on the subjective interpretation of the expert; the existence and maintenance of standards governing the technique's use; the extent to which the technique has been accepted by scientists in the field involved; and the care with which the technique was employed in this case.³⁰ Similarly, failure to adhere to APA standards implicates two *O'Key* factors: the known or potential rate of error and the existence of operational standards controlling the technique's operation; and the degree of acceptance in the relevant scientific community.³¹

Even if parent evaluations comply with APA recommendations, they do not necessarily conform to the expectations of the broader scientific and scholarly community.³² Some common problematic practices that have been identified by prior research include: vague referral questions; single office sessions with parents; no direct information on the child or parent-child interactions; reliance on traditional psychological instruments not directly related to parenting; limited access to or use of written records; minimal collateral information from caseworkers or therapists; failure to warn parents of the purpose and limits of confidentiality of evaluations; and overstated conclusions and recommendations.³³ Attorneys challenging a parenting capacity evaluation should look for evidence of these suspect practices and highlight such deficiencies in light of the *Brown/Daubert/O'Key* factors.

iii. Overall Methodology

Parents' attorneys may also argue that the overall methodology of parenting evaluations is scientifically invalid for several reasons. First, the psychologist must apply an unspecified, untested standard to evaluate parenting capacity. According to scholars, one of the core features of the recommended evaluation model involves applying a *minimal* parenting standard.³⁴ Yet, several researchers note that child development, psychology, and law lack consistent standards for describing minimal competence in parenting.³⁵ The guidelines that do exist are also flawed. Checklists for social workers lack empirical evidence of reliability and validity, while statutory definitions lack

behavioral specificity.³⁶ Moreover, the acceptability of parenting practice differs among cultural, ethnic, and economic groups.³⁷ Thus, the lack of an explicit definition of minimally adequate parenting strongly implicates the seventh *Brown* factor (the extent to which the scientific technique relies on the subjective interpretation of the expert) and the first *Daubert / O'Key* factor (whether the theory or technique in question can be and has been tested), among others.³⁸

Second, the enterprise of measuring parenting capacity is inherently clinical, and thus potentially lacks the empirical foundation required for admissibility. The parenting capacity evaluation model endorsed by the scholarly literature includes components recommended by scholars and professional organizations.³⁹ And, the model was piloted extensively in juvenile courts.⁴⁰ Yet, according to Professor Budd, this model of parenting capacity evaluation is not a proven methodology.⁴¹ Rather, it is still a clinical assessment, albeit one informed by empirical knowledge.⁴²

This distinction is subtle, but important. A single psychological instrument, such as the WAIS-III cognitive functioning assessment, can be considered an empirical test if it uses clearly defined rules for administration, scoring, and interpretation, and has extensive norms to which an individual's performance is compared.⁴³ Such a test will also likely meet specific *Daubert* criteria because it is testable, valid and reliable (in the statistical sense), has a standard method of administration and scoring, has known error rates, has been subjected to peer review and publication, and is generally accepted among experts in the field.⁴⁴ In contrast, a parenting capacity evaluation must remain purposely flexible to adapt to various clinical situations.⁴⁵ Thus, the competent evaluator always includes several core components, but makes clinical judgments about whether to include individual psychological assessments, collateral interviews, and records reviews, and about the methods of parent-child observation. Consequently, it would be very difficult ever to establish a known or potential error rate for the overall methodology of evaluating parenting capacity, the third admissibility factor adopted by *O'Key*.

IV. ATTORNEY STRATEGIES

Attorneys should use their knowledge of the strengths and limitations of parenting capacity evaluations at several different stages in representing parent clients.

a. Private Psychological Evaluations of Your Own Client

When seeking expert evaluation of your own parent client, take steps at the onset to ensure that the results will likely be admissible. Always provide specific referral questions to your evaluator, as required by APA guidelines. Do not ask your evaluator to compare your client's parenting fitness to a universal standard (such as the minimally adequate parent). Do not encourage your evaluator to make certain predictions about the future, such as stating, for example, that your client will become an excellent mother with the help of parenting classes. Instead, ask the evaluator to explain the possible reasons for your client's behavior and stress the potential for change in that behavior. Or, ask the evaluator to provide directions for intervention that conform to your client's goals, such as your client and her child would benefit from hands-on parenting coaching in the home. When in doubt, provide your evaluator with a summary of the uses and limitations of the parenting capacity evaluation described earlier in this brief to guide their reporting.

b. Dependency Adjudication

Attorneys may challenge the admissibility of evaluations of parenting capacity during the dependency adjudication. The Oregon Evidence Code applies to the adjudicatory hearing in a dependency proceeding.⁴⁶ Thus, the three-step analysis for admissibility of scientific evidence described by Oregon case law and above . relevancy (OEC 401), scientific validity (OEC 702), unfair prejudice (OEC 403) . also applies in this context. The inquiry is a question of preliminary fact for the trial court under OEC 104(1) (ORS 40.030(1)). Consequently, an attorney challenging a parenting capacity evaluation should request an OEC 104 hearing to determine whether the expert's opinion is based on scientifically valid knowledge.⁴⁷

c. Termination of Parental Rights Hearing

Attorneys representing parents in termination proceedings should challenge the admissibility of testimony by a parenting capacity evaluator about the ultimate termination decision. While OEC 704 generally permits an expert to testify about the

ultimate issue to be decided by the trier of fact, the rule only permits such testimony when it would be otherwise *admissible*.⁴⁸ As discussed above, many conclusions based on parenting capacity evaluations are scientifically invalid, and thus inadmissible.

In particular, parents' attorneys should challenge the admissibility of parenting capacity evaluator testimony concerning one crucial element of the *Stillman* termination standard: whether the child will be reunified within a reasonable time. The test articulated in *State ex re SOSCF v. Stillman* to determine whether parental rights should be terminated requires the court to find that:

- (1) the parent has engaged in some conduct or is characterized by some condition; and (2) the conduct or condition is "seriously detrimental" to the child. Second - - and only if the parent has met the foregoing criteria -- the court also must find that the "integration of the child into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change." That second part of the test for termination requires the court to evaluate the relative probability that, given particular parental conduct or conditions, the child will become integrated into the parental home "within a reasonable time."⁴⁹

This second component of *Stillman* explicitly requires the court to make predictions about the likelihood that a parent will be able to reunify with the child within a certain time.⁵⁰ But, scholars agree that parenting capacity evaluations *cannot* predict a parent's future behavior with certainty.⁵¹ Thus, you should ask the court to exclude an evaluator's unscientific conclusion that the parent's deficiencies will definitely prevent her from reuniting with her child in a reasonable time. This same type of argument can be used any time an evaluator offers conclusions about parenting capacity beyond the scope permitted by scholarly consensus. In sum, you must assume the role of an educator to help the court understand the acknowledged limitations of parenting capacity evaluations, and urge the court not to defer automatically to those conclusions.

V. CONCLUSION

As described above, parenting capacity evaluations may lack sufficient indicia of scientific validity to be admissible in juvenile dependency or termination of parental rights proceedings. Individual psychological tests may also be suspect, and their use in the child welfare context has not been empirically tested. Further, parenting evaluators frequently fail to adhere to APA recommendations and other scientific standards.

Finally, the overall methodology of parenting capacity evaluations relies on subjective interpretations by experts (applying the poorly defined minimal parenting standard) and involves so much clinical variation that error rates cannot be established. Attorneys representing parents in child welfare proceedings should critically examine and, when appropriate, challenge the admissibility of expert testimony concerning the parenting capacity of clients.

¹ See Karen S. Budd, *Assessing Parenting Capacity in a Child Welfare Context*, 27 Child. & Youth Services J. 429, 432 (2005).

² *Id.* at 433-36.

³ *Id.* at 432-33.

⁴ *Id.* at 434; Karen Shelton, Ph.D., Address on Conducting and Using Parental Capacity Evaluations (January 30, 2009) (on file with the author).

⁵ Budd, *supra*, at 436.

⁶ Budd, *supra*, at 436.

⁷ *Id.*

⁸ *Id.* at 407.

⁹ *Id.* at 293.

¹⁰ Laird C. Kirkpatrick, Oregon Evidence §702.04[1][e] (5th ed. 2007).

¹¹ *Id.* at ____ (slip op at 4); see also *State v. O'Key*, 321 Or 285 (1995) 297-99.

¹² Laird C. Kirkpatrick, Oregon Evidence § 702.04[1][h] (5th ed. 2007).

¹³ *Id.* at 417.

¹⁴ These additional factors are:

- 1) the potential error rate in using the technique; the existence and maintenance of standards governing its use;
- 2) Presence of safeguards in the characteristics of the technique;
- 3) Analogy to other scientific techniques whose results are admissible;
- 4) The extent to which the technique has been accepted by scientists in the field involved;
- 5) The nature and breadth of the inference adduced;
- 6) The clarity and simplicity with which the technique can be described and its results explained;
- 7) The extent to which the basic data are verifiable by the court and jury;
- 8) The availability of other experts to test and evaluate the technique;
- 9) The probative significance of the evidence in the circumstances of the case; and
- 10) The care with which the technique was employed in this case. 297 Or at 418-419 n. 5.

¹⁵ *O'Key*, 321 Or at 303-06.

¹⁶ *Id.* at 307 n. 28.

¹⁷ *Southard* at ____ (slip op at 4).

¹⁸ *Id.*

¹⁹ *Southard* at ____ (slip op at 4).

²⁰ James N. Bow et al., *Testing in Child Custody Evaluations-Selection, Usage, and Daubert Admissibility: A Survey of Psychologists* J. Forensic Psychol. Practice, July 2006.

²¹ See *id.* at 25.

²² *Id.*

²³ The authors also note that scholars have significant concerns about using the MCMI-III in forensic settings, despite the moderate level of approval by psychologists. *Id.* at 30-31.

²⁴ *Id.*

²⁵ Budd, *supra* at 434 (emphasis added).

²⁶ *Id.*

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- ²⁷ Bow et al., *supra* at 28-29.
- ²⁸ Budd, *supra* at 431.
- ²⁹ Committee on Professional Practice and Standards, APA Board of Professional Affairs, Guidelines for Psychological Evaluations in Child Protection Matters, 54 *Amer. Psychologist* 586-93 (1999) (available at http://www.apapractice.org/apo/insider/professional/apaapproved/guidelines3.GenericArticle.Single.article.Link.GenericArticle.Single.file.tmp/APA_Guidelines_for_Psychological_Evaluations_in%20Child_Protection_Matters.pdf).
- ³⁰ *Brown* 297 Or at 417, n. 5.
- ³¹ *O'Key*, 321 Or at 304.
- ³² For a complete description of recommended practices, please see Table 1 in Budd, *Assessing Parenting Capacity in the Child Welfare Context*.
- ³³ *Id.*
- ³⁴ *Budd* at 433 (emphasis in original).
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ See *Brown*, 297 Or at 417; *O'Key*, 321 Or at 306.
- ³⁹ Budd, *supra* at 432.
- ⁴⁰ Budd, *supra* at 432.
- ⁴¹ Telephone Interview with Karen Budd, Department of Psychology, DePaul University, (Sept. 30, 2009).
- ⁴² *Id.*
- ⁴³ David Medoff, *The Scientific Basis of Psychological Testing: Considerations Following Daubert, Kumho, and Joiner*, 41 *Fam. Ct. Rev.* 199, 208 (2003).
- ⁴⁴ *Id.* at 207.
- ⁴⁵ Telephone Interview with Karen Budd, Department of Psychology, DuPaul University, (Sept. 30, 2009).
- ⁴⁶ See OEC 101 (ORS 40.015).
- ⁴⁷ See *Baughman v. Pina*, 200 Or App 15, 20 n. 1 (2005).
- ⁴⁸ OEC 704 (ORS40.420) provides that, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."
- ⁴⁹ 333 Or 135, 145-46 (2001).
- ⁵⁰ 333 Or 135, 145-46 (2001).
- ⁵¹ Budd, *supra*, at 436.