

**Psychologists' Practices In Child Custody Evaluations:  
Guidelines, Psychological Testing And The Ultimate  
Opinion Rule**

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### Declaration

I declare that this thesis, **Psychologists' Practices in Child Custody Evaluations: Guidelines, Psychological Testing and the Ultimate Opinion Rule**, hereby handed in for the degree Ph.D (Child Psychology) at the University of the Free State is my own independent work and that I have not previously submitted the same work for a qualification at/in another university/faculty. I further concede copyright to the University of the Free State.

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Signed.....

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**Psychological Assessment Methodology in Child  
Custody Evaluations: Practice Guidelines**

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# Psychological Assessment Methodology in Child Custody

## Evaluations: Practice Guidelines

This study examined 24 child custody reports on the basis of seven evaluation guidelines compiled from international and South African literature. The purpose of the research was to determine the extent to which psychologists performing custody evaluations followed these or similar guidelines as methodological points of departure in their assessment process. Although the results in general indicated an adherence to some of the guidelines, the following concerns were noted: a) Several of the psychologists did not utilise multiple methods of data gathering. b) Some of the psychologists performed custody evaluations without considering the important variables of parenting capacity, the needs of the child and the resulting fit. c) A number of psychologists made custody recommendations without assessing both parents and the children. d) Assessment of the child's wish was almost completely absent. These shortcomings indicate a need for better training of child custody evaluators, as well as the need for a comprehensive protocol of practice guidelines for South African psychologists working in this field. Limitations of the study are indicated and guidelines are provided for psychologists performing child custody evaluations.

*Keywords:* child custody evaluations, care and contact evaluations in divorce, forensic assessment methodology, child custody practice guidelines

*In hierdie studie is 24 versorging-en-kontak verslae ontleed in terme van sewe evalueringsriglyne wat uit internasionale en Suid-Afrikaanse literatuur saamgestel is. Die doel van hierdie navorsing was om te bepaal tot watter mate sielkundiges wat sodanige evalueringe doen, hierdie of soortgelyke riglyne as metodologiese vertrekpunte in hul assesseringsprosedure gebruik. Alhoewel die resultate aangetoon het dat die sielkundiges oor die algemeen wel sekere riglyne gebruik het, het verskeie leemtes voorgekom: a) Verskeie sielkundiges het nie van veelvuldige data-insamelingsmetodes gebruik gemaak nie. b) Sommige sielkundiges het nie die belangrike veranderlikes van ouerlike bekwaamheid, die behoeftes van die kind en resulterende pasgraad ondersoek nie. c) 'n Aantal sielkundiges het aanbevelings gemaak sonder om albei ouers en die kinders te assesseer. d) Ondersoeke na die kind se wens is feitlik afwesig. Hierdie tekortkominge dui op 'n behoefte aan beter opleiding vir forensiese evalueerders wat met versorging-en-kontakgedinge werk, asook 'n behoefte aan 'n omvattende protokol van praktykryglyne vir Suid-Afrikaanse sielkundiges wat in hierdie veld werksaam is. Beperinge van die studie word uitgewys en 'n aantal riglyne word verskaf vir sielkundiges wat versorging-en-kontakevalueringe doen.*

*Sleutelwoorde: bewaring-en-toesigevaluering, versorging-en-kontak-evaluering, forensiese assesseringsmetodologie, praktykryglyne vir versorging-en-kontakevalueringe*

Numerous authors have questioned the potential value or actual contribution of psychological testimony in child custody<sup>1</sup> evaluations (Allan & Louw, 2001; Kaliski, 2006; Melton, Petrila, Poythress, & Slobogin, 2007). This concern has been raised due to the contention that psychologists formulate their opinions based on unscientific assessment techniques and methodologies, and personal bias that contribute to flawed conclusions (Emery, Otto, & O'Donohue, 2005; Scherrer, Louw, & Möller, 2002). Despite these concerns, psychological opinion in custody matters is commonly sought in high conflict divorces and often contribute significantly to the decision making process (Africa, Dawes, Swartz, & Brandt, 2003). Psychologists performing custody evaluations are in fact facing a double edged sword: on the one hand their services are required by the judiciary, but on the other hand they are criticised for these services by the judiciary. In addition, psychologists are often reported to the professional board by an unhappy parent who was not favoured in the custody evaluation. Studies by Bow, Gottlieb, Siegel, and Noble (2010) and Quinnell (2001) and Gourley and Stolberg (2000) found that between one and two thirds of custody evaluators in the USA had been accused of ethical violations and had been reported to the professional board. As a result, most psychologists avoid psycho-legal work or, as Bow and Quinnell (2001)

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<sup>1</sup> This study was completed during a change in legislation in which the Children's Act of 2005 was implemented. This resulted in a change of terminology in the common law concepts of 'custody' and 'access' as to better reflect the rights of children. Section 1.2 of the Children's Act 2005 stipulates that in addition to the meaning assigned to the terms 'custody' and 'access' in any law, they must also be construed to also mean 'care' and 'contact' as defined by the Children's Act of 2005. In this study it has been decided to retain the terminology of 'custody' and 'access' and not merely replace them with the concepts of 'care' and 'contact'. This has been done as to provide better continuity with regards past research and the international literature. As indicated by the APA (2010) despite the changes in terminology, the substantial majority of legal authorities and scientific treatises still refer to the term 'custody' when addressing the resolution of decision making, care and contact disputes. As a consequence, both the old and new terminology is used and for the sake of clarity, 'custody' also means 'care' and 'access' also means 'contact' and vice versa.

reported, at least 10% of those psychologists who had done custody evaluations no longer perform psycho-legal services. Scherrer et al. (2002) reviewed ethical complaints levelled against psychologists in South Africa and found that problems regarding reports were the second most frequent charge, while approximately a quarter of the complaints emanated from child custody cases.

The debate concerning the appropriateness of psychologists' involvement in custody evaluations goes back more than three decades. Goldstein, Freud, and Solnit (1973) were the first authors who raised alarm bells in their book, *Beyond the Best Interests of the Child*. Textbooks published in the 1980s addressed some of these issues and echoed some of these concerns (Grisso, 1986; Melton, Petrila, Poythress, & Slobogin, 1987). However, the controversy surrounding the psycho-legal practices of psychologists and their increasing involvement in child custody evaluations led to the spawning of various practice guidelines (American Psychological Association (APA), 1994, 2010) and model standards of practice (Association of Family and Conciliation Courts (AFCC), 2007) for American forensic psychologists performing child custody evaluations. Furthermore, there are numerous American publications that provide comprehensive guidelines for Custody evaluations (e.g., Ackerman, 2006; Bartol & Bartol, 2004; Clark, 1995; Gould, 2006; Stahl, 1994, 1999, 2010). Although these practice or instructional guidelines are not mandatory, they were developed to be aspirational, since they outline important areas to consider in child custody practice. Guidelines have provided much needed direction for psychologists, while certain American states such as Florida and Pennsylvania have legally codified the APA guidelines (Bow & Quinnell, 2001).



In the South African context psychologists have been less fortunate: no specific protocol or guidelines are available, while South African authors appear to rely heavily on American based literature in this regard. For example, Brandt, Swartz, and Dawes (2005) recommend Philip Stahl's book, *Conducting Child Custody Evaluations: A Comprehensive Guide* (1994) as an authoritative text on the practicalities of conducting evaluations. Four issues for consideration are identified: the bond between child and parent, parenting capacity, parental dysfunction and devising a parenting plan, while the fit between the needs of the child and the parents' capacity to provide those needs is highlighted. They also suggest using the Jameson-model (Jameson, Ehrenberg, & Hunter, 1997) in custody assessment as well as for professional training. The Jameson-model uses the best interests of the child criterion and refers to three focus areas of assessment: developmental (the needs of the child), structural (the relationships between the caregivers and between the child and the caregivers) and functional (the capacities of the caregivers). Brandt et al. (2005) highlight that custody evaluations "should follow and be based on the current best-practice guidelines and reputable publications in the field" (p. 149). They indicate that there is no overriding approach to custody evaluations and suggest that mental health professionals should adapt their assessment to the referral reason. Louw, Vorster, and Burke (2003) provide a brief, very basic outline (without an in-depth discussion) for a comprehensive custody evaluation. They also discuss the role of the psychologist in the comprehensive child custody evaluation, which they largely base on the work of Gardner (1989, 1999). Other South African publications which have dealt with the issue of child custody evaluations are either outdated and/or out of print (Bosman-

Swanepoel, Fick, & Strydom, 1988; Hoffman & Pincus, 1989; Kaliski, 2006). Apart from instructional guidelines (e.g., Brandt et al., 2005), there are also ethical guidelines (Louw & Allan, 1997) and judicial guidelines (McCall v. McCall, 1994) available in South Africa for psychologists conducting custody evaluations. Many of these 'guidelines' however, lack empirically based support.

Added to the complexity of the South African situation, is that the South African family law has changed dramatically over the last decade with regards to the rights of children and the rights and responsibilities of parents. According to Schäfer (2007), the Children's Act 38 of 2005 has repealed seven previous acts of law and now regulates both the private and public law aspects of child law. The Children's Act reconfigures the building blocks of custody, access and guardianship which regulated parental relationships with children, while the common law concepts of 'custody' and 'access' have been replaced with 'care' and 'contact' respectively. The best interest principle still remains the golden thread which psychologists use in custody evaluations, however, it now dominates access judgments as it is enshrined in section 28 of the Bill of Rights and replicated in section 9 of the Children's Act. The legal foundation for psychologists performing custody evaluations has evolved for the better and psychologists can now refer to an accepted and legally codified best interests checklist in section 7 of the Children's Act 38 of 2005. However, the legal criteria has also been criticised as being indeterminate, unduly subjective and so opaque that it makes the scrutiny of the decision making process very difficult. In addition, the legal best interest of the child is not necessarily the psychological best interest: the psychologist's focus is on the emotional well-being of the child, while the judiciary

typically considers other factors such as moral issues, financial security and educational opportunity (Miller, 2002).

Most of the guidelines presented in the literature focus to a greater or lesser extent on four or five broad categories (APA, 1994, 2010; Brandt et al., 2005; Clark, 1995; Kaliski, 2006; Louw et al., 2003). These encompass the following: First, orientating guidelines indicate the purpose and focus of the evaluation and the criterion on which an evaluation is based. Second, general guidelines indicate the specific competencies of the psychologist, such as specified knowledge and impartiality. Third, procedural guidelines state the role and conduct of the psychologist, such as establishing the referral reason and obtaining consent from the parties. A fourth guideline addresses the actual evaluation process, while a fifth guideline involves the report.

It is unclear, however, how South African psychologists use these 'guidelines', what evaluation methodologies they use when conducting an evaluation, what information is considered important, how this information is gathered and how this information is presented to the courts. It is also unknown whether psychologists' methodologies are being used and presented in accordance with the ethical, instructional and judicial guidelines presented in the literature. Numerous South African authors have noted a paucity of research into psychologists' custody evaluation practices in the South African context (Africa et al., 2003; Brandt, Dawes, Africa, & Swartz, 2004). The limited research into South African psycho-legal custody practices has inter alia focused on issues and criteria that inform psychologists' decision making (Brandt et al., 2004; Cumes & Lambiase, 1987) or criteria for the evaluation of parents in custody evaluations (Bezuidenhout, 2000), or on a broader

level, the psychologists' and lawyers' perceptions of psychologists' forensic work (Allan & Louw, 2001). In addition, there is no formal accreditation, no or very limited training or peer review for psycholegal assessment work for psychologists in South Africa while the majority of psychologists working in this field are primarily 'self-taught', either through reading, self-study, or attending conferences.

The lack of guidance and standardisation for conducting a custody evaluation is a disservice to psychologists, the legal fraternity and the families who have to be served. It is therefore imperative that psychologists receive guidance in this regard.

Authors such as Ackerman (2010) and Tippins and Wittmann (2005) state that the assessment methodology for custody evaluations should be borne out of empirically based psychological research. This contention is endorsed by South African authors Brandt et al. (2004) and Louw and Allan (1998) who believe that it is imperative that information generated by research be translated into uniform, standardised guidelines that can be used for professional training and practice in South Africa.

## **Method**

### **Purpose and Aim of Research**

Against this background, the purpose of this research is to analyse the content of a sample of child custody reports and compare practices used in evaluations to the ethical and instructional guidelines provided in the North American and South African literature. The aim of this study is therefore to illuminate current practice, compare the assessment methodologies utilised by psychologists in South Africa with the

practices of psychologists as evidenced by national and international research, point to problem areas and provide suggestions for improvement.

### **Data Sources**

This study consists of a content analysis of 24 psychologists' custody reports that were performed for the Office of the Family Advocate<sup>2</sup> in the Cape Town and Port Elizabeth Judiciary between 2005 and 2007. Content analysis is the examination of qualitative information in terms of predefined categories. The contents of these sources are examined systematically to record the relative incidence of themes (Henning, 2004). A content analysis of reports was chosen as this removes the distortion resulting from methodologies such as self-report surveys of psychologists or surveys of the opinions of the legal fraternity. Owing to the procedural difficulties of obtaining reports, this study represents a small convenience sample. The psychologists' reports and corresponding court orders were obtained from the court archives with the assistance of the family advocates, who provided relevant case numbers for the search. The psychologist's registration category and gender was recorded and the data was analysed on a group basis only. Although these reports and court orders form part of the court files, which are a matter of public record, the identifying information was not recorded. The sample of reports differed in content and purpose and included interim orders, custody orders made at the time of divorce, applications for reversals of custody and access after the divorce order.

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<sup>2</sup> This is a specialised state service that is staffed by state appointed advocates and social workers which institutes enquiries into the welfare and interests of children in divorce matters in order to make recommendations to the court (McCurdie, 1994).

### **Data Sources Demographics**

The length of reports ranged between 2 pages and 48 pages, with an average length of 27 pages. The gender of psychologists performing evaluations favoured more male psychologists (62%) than female (38%). The registration categories were equally distributed between clinical (45%) and counselling (42%) psychologists, followed by educational (13%) psychologists.

### **Procedure**

The data collection instrument was developed on the basis of a protocol developed by Horvath, Logan, and Walker (2002), and the child custody recommendations of the APA (1994) and Clark (1995), in conjunction with instructional guidelines mentioned in South African texts such as Brandt et al. (2005) and Kaliski (2006). For the purpose of this research, the focus was mainly on the actual evaluation process of the psychologists and not necessarily on the other broad categories, although some overlapping did occur. Two categories were identified: the issues/variables assessed by the psychologists (reflected in Guidelines 1 and 2) and the techniques used to assess these issues/variables (reflected in Guidelines 3-7):

Category: Issues/Variables

1. The focus of the evaluation is on parenting capacity, the psychological and developmental needs of the child, and the resulting fit.
2. The assessment of the parents and children include a comprehensive biopsychosocial history.

Category: Assessment techniques

3. The psychologist uses multiple methods of gathering data.
4. The evaluator conducts interviews with both parents, using the same procedures for both parties. Interviews with the child/children are also conducted.
5. The evaluator obtains collateral information from third party sources such as any adult directly responsible for care of the children, and any party living in the custodial or visited home. If relevant, day-care providers, medical, mental health and school personnel are interviewed.
6. Formal psychological testing for adults and children is conducted where applicable.
7. Parents and children are observed interacting with each other, both in formal and informal settings.

In line with similar content analysis research, the frequency to which the seven guidelines were followed in the reports was recorded. Additional components that fell outside the scope of the data collection instrument but mentioned by the psychologists were also recorded. Only information obtained by reading the report was included in the data, with the assumption that processes not documented, were not included.

### **Results and Discussion**

The results of this study are presented according to the seven identified guidelines. The extent to which the relevant issues/variables were assessed is reflected in Guidelines 1 and 2:

### **Guideline 1: Parenting Capacity, Needs of the Child and Resulting Fit**

The first guideline stipulates that the focus of the evaluation is on parenting capacity, the psychological and developmental needs of the child and the resulting fit. According to the APA Guidelines (2010), these issues are central to the court's ultimate decision-making obligations. It is stated (p. 864) that "the most useful and influential evaluations focus upon skills, deficits, values and tendencies relevant to parenting attributes and a child's psychological needs, Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context". Issues that are typically investigated include the continuity and quality of parent-child attachments, special needs of the child, the parent's ability for sensitive care, relationship with siblings, styles of parenting and discipline, styles of conflict resolution and pertinent cultural, ethnic, religious and gender issues (Herman, 1999). Table 1 reflects the extent to which the sample of psychologists focused on this issue.

Table 1

*Evaluation of Parenting Capacity, Needs of the Child and Resulting Fit*

Evaluation	N <sup>3</sup> (%)
Assess parenting skills	18(75)
Assess psychological and developmental needs of child	17(71)
Assess ability of parent to meet child's needs	21(88)

<sup>3</sup> N does not always equal 24, as responses were only included in the sample when the data collected was an aspect which could have been assessed. For example, psychological tests appropriate for adolescents were only included in the number of responses when an adolescent was assessed.



From the results in Table 1 it is evident that the majority of the psychologists attempted to examine and made reference to assessing parenting skills (75%), to assessing the psychological and developmental needs of the child (71%) and to assessing the ability of the parent to meet the needs of the child (88%). However, the child's view/preference was only canvassed in 12% of the cases. The scope of this study did not allow for the determination of how thoroughly these aspects were assessed and which variables were incorporated, but were included in the data if the psychologist made reference to them in the report.

Horvath et al. (2002) appear to have followed the same method of analysis and found parenting skills assessed in 87% of cases, psychological and developmental needs of child assessed in 80% of cases and the ability of parent to meet the needs of child assessed 72% of cases. Research by Brandt et al. (2004) indicated that the psychologists in their study adopted a child centred approach. The child's basic developmental needs ranked as the most important criterion and were reflected in 95% of the reports.

### **Guideline 2: Biopsychosocial History**

The second guideline stipulates that a comprehensive biopsychosocial history be taken, which includes the relationship history of the parents (with each other and with their children), the emotional functioning and physical and mental health of the various parties (including substance abuse/dependence and treatment), current and anticipated living arrangements, educational and employment status and working arrangement, while a thorough child history should also be taken (Bartol & Bartol,

2004; Clark, 1995; Louw et al., 2003; Melton et al., 2007). The issues/variables indicated by the research sample are included in Table 2.

Table 2

*Biopsychosocial History*

Focus areas	N (%)
Relationship history	21(88)
Substance abuse	12(50)
Living conditions	16(67)
Physical health status	2(8)
Mental health status	18(75)
Employment Status	22(92)
Child history	14(58)

Table 2 reflects that the psychologists' reports varied greatly in the amount and depth of the information provided regarding these topics. The parents' employment status figured in the majority of the reports (92%). However, the parents' personal relationship dominated most of the content (88%) and was often reflected in the greatest detail, while a child history was only provided in 58% of the cases. Living conditions (67%) and substance abuse (50%) were also mentioned with regularity. Health status only appeared in a minority of the reports (8%) and appeared only to be discussed when an allegation had been made against the other parent. Enquiry into the parties' mental health was indicated in 75% of the reports. With regards to research elsewhere, Horvath et al. (2002) found a biopsychosocial history in 43% of reports, while Bow and Quinnell (2001) reported that historical information was given in most reports with almost all focusing on family circumstances and history.

The following guidelines (3-7) reflect the assessment strategies and techniques used by the psychologists to assess these issues and variables.

### **Guideline 3: Multiple Methods of Data Gathering**

The third guideline is that psychologists should use multiple methods of gathering information. The rationale for using multiple methods of data gathering is poignantly stated by the APA (2010, p. 866): “Multiple methods of data gathering enhance the reliability and validity of psychologists’ eventual conclusions, opinions, and recommendations. Unique as well as overlapping aspects of various measures contribute to a fuller picture of each examinee’s abilities, challenges and preferences”.

The extent to which the psychologists in this sample used multiple sources of data collection is reflected in Table 3.

Table 3

*Multiple Methods of Data Gathering*

Number of methods	N (%)
Used two methods	2(8)
Used three methods	5(21)
Used four methods	7(29)
Used five methods	10(42)

It is evident from Table 3 that more than one source of information gathering was used in all of the cases. Five methods of data gathering were used in the majority of cases, while in only 8% of the cases two methods were used. In their content analysis of 102 custody reports, Horvath et al., (2002) found that the majority of psychologists (84%) used two methods, 58% used three methods and 33% four methods.

Judging from the results, it seems that the South African sample of psychologists was inclined to use more than one source of information, which is in line with international and national recommendations.

As reflected in Table 4, the methods of data gathering utilised by the psychologists in this study, fall in the following five broad categories: clinical interviews, observations, psychological tests, collateral information and legal documentation.

Table 4  
*Method of Data Collection*

Method	N (%)
Clinical interviews	24(100)
Collateral information	21(88)
Observations	19(79)
Psychological testing	18(75)
Legal documentation	15(65)

Clinical interviews were indicated in all of the reports, followed by the obtaining of collateral information (88%). Observations were indicated in 79% of cases, while psychological testing was performed in 75% of cases. Additionally, legal documentation was obtained in 65% of the cases. Interestingly, when legal documentation was listed in the report, it was only discussed in the content of the reports in 20% of the cases.

The methods employed by psychologists in South Africa appear consistent with the results of other research (Bow & Quinnell, 2002) that showed usage of clinical interviews in 100%, obtaining collateral information in 77%, observations in 82% and

document review in 78% of cases. The only significant difference was psychological testing which was used 15% more often as a method in the American based study. In a study by Gourley and Stolberg (2000), almost all of the psychologists indicated that they primarily use interviewing (parents, children, and collateral sources) for all the variables assessed, although a majority used psychological testing to supplement interviews especially regarding parent and child mental health.

These procedures of data collection are also endorsed by the legal fraternity. In a national survey of 159 American family law judges and 153 family attorneys, Ackerman, Ackerman, Steffen, and Kelley-Poulos (2004) found that over 85% of the attorneys and judges expected psychologists to interview the parents, interview the children, conduct parent child observations and review mental health records. Approximately 66% of the judges and attorneys thought that parents and children should be psychologically tested and collateral information should be obtained. Recommendations for the use of a variety of methods of data gathering is also reflected in the APA (1994, 2010 p. 866) guidelines in which it is suggested that psychologists should “strive to employ optimally diverse and accurate methods for addressing the questions raised in a specific child custody evaluation”.

#### **Guideline 4: Procedures Applied for all Parties**

The fourth guideline stipulates that in order to give a custody determination, the psychologist has to examine both parents as well as the child or children. If this desired examination cannot be arranged, the psychologist must document the limitations of the evaluation. An exception is if the psychologist is not instructed to

conduct a child custody evaluation per se, but rather an evaluation of a particular parent or child or another professional's assessment methodology. In these cases, the psychologist cannot compare the parents or offer opinions or recommendations about the apportionment of decision making, care-taking, or access (APA, 2010). Furthermore, a common pitfall is that parties are often not given equal opportunities or equal time, and/or the collateral sources of only one parent is canvassed or used. This could be construed as bias (Kaliski, 2006). Herman (1999, p. 145) states the following in this regard: "One-sided evaluations – particularly those that go to the ultimate question of custody without including all of the parties – do a disservice to all: the court, the profession, and especially the family". Table 5 represents the procedures of the research sample in this regard.

Table 5

*Procedures Applied*

Assessment procedure	N (%)
Assessed mother	21(88)
Assessed father	20(83)
Assessed children	17(81)
Same procedures used for both parents	20(83)

As reflected in Table 5, the mother was assessed in 88% of cases, the father in 83% of cases and the children were assessed in 81% of the cases. The same procedures were applied to both parents in only 83% of the cases. Horvath et al (2002) found much the same figures for mothers (89%) and fathers (93%) but children were assessed considerably less (69%). Although the majority of the psychologists used the

same procedures for both parents, and assessed both the parents and the children, there are still some psychologists who do not adhere to this ‘best practice’ rule.

### **Guideline 5: Collateral Information**

The fifth guideline stipulates that in addition to the parent and child interviews and individual assessments, it is recommended that the evaluator interview other relevant parties. These include accessing information from a variety of sources such as extended family, teachers, child and health care providers, family friends and other collateral sources. The rationale is that sources outside the nuclear family can illuminate potential sources of support (or the lack thereof) and may provide relatively objective glimpses of children’s responses to arrangements developed during separation and under temporary custody orders ( Bow, 2010; Melton et al., 2007). The APA guidelines (2010, p. 866) conclude that “Psychologists may seek corroboration of information gathered from third parties and are encouraged to document the bases of their eventual conclusions”. Table 6 reflects the research sample’s utilisation of collateral sources. Only collateral sources that were mentioned in the reports were indicated in this table.

Table 6  
*Characterisation of Collateral Sources*

Source	N (%)
Day care providers	13(56)
School teachers	8(50)
Medical personal	10(43)
Relatives	11(46)
New partners	8(42)
Therapists	6(32)

Day care providers featured in more than half the reports (56%) and teachers in exactly half of the reports (50%). Collateral information from medical professionals featured in 43% of the reports and family relatives in 46%. New partners featured quite extensively (42%), while therapists were included in a third of the reports.

Bow and Quinnell (2001) found therapists were the most common collateral contacts (77%), followed by medical personnel (65%), school personnel (62%) and relatives (51%). Horvath et al. (2002) found less use of collateral contacts, indicating that therapists were used as collateral contacts in 30% of reports, followed by relatives (44%), teachers (24%), day care providers (9%) and medical personnel (8%).

From the results it seems that collateral sources were relatively under-utilised by the psychologists in this research sample. It may be that psychologists are not aware of the potential benefit of using collateral information or they may regard it as less useful. The collateral sources used could also be an indication of the referral reason and would likely vary considerably depending on the scope of the evaluation.



### **Guideline 6: Psychological Testing**

The use of psychological testing in child custody cases is a contentious issue, with some experts endorsing its use, others cautioning its use and still others condemning its use (Geffner, Conradi, Gies, & Armada, 2009; Medoff, 2010; Melton et al., 2007). The main issue concerns the fact that traditional psychological tests were not designed to answer the legal question per se, with the result that substantial inferences have to be made. In addition, in the case of custody evaluations, adequate test instruments and well-normed questionnaires are rare. Table 7 reflects the psychological testing of adults in the research sample.

Table 7

*Psychological Testing of Adults*

Testing / Type of tests	N (%)
Psychological testing	16(67)
Personality inventories	13(54)
Specialised forensic instruments	5(21)
Projective tests	2(8)

As indicated in Table 7, psychological testing of the parents was performed in 67% of the cases. Personality inventories were used in just over half of the evaluations. Specialised forensic tests were used in approximately one fifth and projective tests were used in less than one tenth of the evaluations.

Research elsewhere indicated testing of adults between 71% and 91% of cases (Bow & Quinnell, 2002; Horvath et al., 2002). Bow and Quinnell (2001) found

personality inventories used in 87% of reports, parenting inventories in 44% of reports and projective tests in 40% of reports.

The results indicate a relatively lower rate of test usage in the South African sample. Many psychologists opt not to use psychological tests because of a dearth of well-normed instruments designed to assess relevant issues such as parenting skills and the parent-child relationship, while little research is available that link performance on personality and psychopathology measures to the issues of parenting skills or competence (Gourley & Stolberg, 2000). However, the test usage of the psychologists who did make use of testing in the research sample is questionable: only 21% of the psychologists indicated any form of limitations in their reports with regards to their assessment process and the psychological tests used, while none indicated the psychometric properties of the tests. In addition, none of the tests used have been standardised for use in South Africa and none of the psychologists made any reference to research to substantiate the inferences made from the test results.

In addition to the testing of parents in child custody evaluations, many psychologists also formally tested children. However, the same concerns mentioned for the testing of adults also apply to the testing of children. Table 8 reflects the utilisation of psychological testing of children as indicated by the sample of psychologists.

Table 8  
*Psychological Testing of Children*

Testing / Type of tests	N (%)
Psychological testing	13(72)
Projective drawings	10(55)
Projective tests (picture cards)	5(28)
Personality inventories	2(15)
Specialised forensic instruments	2(11)
Play therapy techniques	2(9)

As reflected in Table 8, the reports showed that psychological testing of children was evident in 72% of the cases. Projective drawings of the family and person were most commonly used and featured in more than half of the assessments. Projective tests using picture cards were used in 28% of the reports and personality inventories were used in 15% of the evaluations. Specialised custody tests were used in one tenth of the evaluations, while specific play therapy techniques were used in less than one tenth of the reports.

In studies of American psychologists' assessment procedures, Bow and Quinnell (2002) found that children were tested in only 38% of cases; projective tests (drawings and cards) and specialised custody tests were used equally in 21% of reports, while personality tests were used in 19% and IQ tests in 11% of reports. Although the sample sizes are not comparable, it does seem that the South African sample of psychologists relied more heavily on the testing of children than their American counterparts. This is quite baffling, since the quality of tests available for South African children is questionable. From the results it could be concluded that tests and techniques (mostly projective in nature) with poor validity and reliability

were used in this sample. In addition, as in the case of the testing of adults, the limitations of the tests were not indicated and relevant research was not referenced.

### **Guideline 7: Parent-Child Observations**

The seventh guideline stipulates that parents and children should be observed interacting with one another. Louw et al. (2003, p. 122) state emphatically that “[no] evaluation of the parents should be done without seeing them in interaction with the children involved”. Although some may contend that such interactions are artificial and forced, others argue that it can still provide information about how the parent and child interact (Herman, 1999). The purpose of these observation sessions is to help the clinician gain naturalistic information regarding the relationship between the parent and child (Clark, 1995). The sessions may be structured, open-ended or both, although Louw et al., (2003) propose a more formal evaluation system in this regard to specifically assess issues such as attachment and bonding, the appropriateness of a parent’s behaviour and the quality of the parent-child interactional patterns. Observations may occur in a variety of settings, such as in the clinician’s office and/or behind a two-way mirror. Home settings may provide additional information regarding the child’s natural environment. An important factor to remember is that the relevant parties have to have equal opportunities. The extent to which parent child observations formed part of the assessment process is reflected in Table 9. The venue where the observations took place was also recorded.

Table 9

*Parent Child Observations*

Observation / Venue	N (%)
Parent child observations	19(79)
Home Visits	15(63)
mother's home	24(100)
father's home	21(88)
Park	2(8)
Psychologist's room	2(8)
Unspecified venue	5(21)

As shown in Table 9, parent child observations were indicated in 79% of the evaluations. Most of these observations took place as 'home visits' (63%). It is important to note that this often doubled as an opportunity to get an indication of the living conditions and to observe the parent interacting with the child. In some evaluations the home visit was performed without any parent-child observations. The mother's home was visited in all of the cases, while the father's home was visited in only 88% of the cases. Although this discrepancy could be due to logistical problems, it could also be construed as bias, since both parties have to receive equal treatment. The park and the psychologist's rooms were used in 8% of the cases as venues for observation sessions. In a further 21% of the reports the psychologist indicated that they did perform observation sessions but the venue was unspecified and the session was not described in the report. Furthermore, all the parent child observation sessions appeared to have followed an unstructured format as not one psychologist indicated any formal structured approach to these sessions or gave an indication that any specific tasks were followed.

Regarding international research, Horvath et al. (2002) found parent child observations in approximately 60% of reports, while Bow and Quinnell (2002) found that 76% of psychologists did parent child observations. In almost half of these reports the session was not described in the report and 22% specified that these observations took place during a home visit.

Additional information noted in the reports but which fell outside the scope of the data collection instrument used in this study, were also recorded. Judging from this information, the following limitations were noted: The referral reason, which informs the process, was left out in one third of the reports. Informed consent and limits of confidentiality were frequently ignored, with less than one tenth of the psychologists mentioning these in their reports. More than two thirds of the psychologists listed the documents reviewed, however only about one fifth specifically referred to these documents in their reports. The dates and lengths of the consultations with the parents and children were also inadequately covered and were only indicated in just more than a third of the evaluations. Recommendations to the court were made in every report, however only one fifth of these reports contained any limitations to their findings. Alarming from a child's rights perspective, the child's preference was canvassed and reflected in only 12% of the reports.

### **Conclusion and Recommendations**

It is necessary to interpret the findings of this study with caution, particularly due to the small sample size and limited geographic distribution. The reports were also obtained from one specific organisation, which has a function within the courts. This

could represent a selective sample group as the authors would be aware of the role of the Family Advocate's Office and would most probably submit reports representing their best practices. Thus, what is reported might not actually reflect general child custody practice/procedures in South Africa. However, there are some key conclusions that can be drawn from the findings.

There are essentially three components of custody evaluations: The collection of data; the interpretation of the data; and the integration of data into a forensic report with the relevant conclusions and recommendations for the family involved. The focus of this study was on the methodology employed when gathering data and how this was represented in the final report. An inherent weakness of the current study is that the other two components were not explored. It is therefore vital that further research be conducted into how this data is interpreted and integrated to inform psychologists' final conclusions.

The present findings are consistent with those of prior content analysis and survey research focusing on the practices of psychologists in child custody work in North America. In general, the evaluations suggested that the psychologists did follow some guidelines. However, the specific protocol used was not referenced; therefore it is unclear which set of guidelines was used. A number of psychologists did not identify the specific procedures used in the evaluation, and did not provide dates of consultations or length of consultations. The referral reason, informed consent and limits of confidentiality were not addressed in the majority of the reports. Furthermore, many problematic areas and concerns were identified:

The majority, but not all of the psychologists used multiple methods of data gathering, while some did not address the vital psychological and legal question of parenting capacity, the needs of the child and the resulting fit. Many psychologists made custody recommendations to the courts without interviewing all the parties concerned (i.e., both the parents as well as the children) and/or not applying the same methodology to both parents. A concern is also raised over the use of questionable psychological tests, largely due to the dearth of appropriate and applicable tests available for the South African population, while the gathering of data from collateral sources to verify or refute information and/or the hypotheses generated was under-utilised. Much of the content of the reports was dedicated to providing the parents' historical information at the expense of an in-depth analysis of the variables that should be the focus of the evaluation. It should be noted that most of the jurists involved in the case are aware of the relevant background and such information provided in a report is therefore superfluous and unhelpful. The children's developmental history was often not provided and the children's preferences/wishes were not indicated in the vast majority of cases. This is problematic as custody evaluations should be child orientated. The results of the study also indicate a lack of transparency regarding the limitations inherent in the custody evaluation processes, such as the psychological tests used or recommendations made.

The concerns raised about the methodology of conducting custody evaluations are serious issues and need to be addressed for the sake of protecting families and the psychologists performing custody evaluations. The goal of guidelines for custody evaluations is to promote proficiency, to provide a climate in which the psychologist



has the confidence to provide the parties with a 'safe and predictable' environment, avoid ethical complaints and to ultimately assist in reducing the family conflict in the most efficient manner possible. These guidelines also provide the psychologists with the foundation and understanding to offer custody reports that are well balanced, unbiased, helpful and scientifically meaningful. A valid model of custody evaluation will help psychologists to support their evaluation results with empirical findings and valid evaluation techniques, while standardised measures may also help to provide important information to the judiciary who have to evaluate the testimony of psychologists (Gourley & Stolberg, 2000).

Inconsistencies in psychologists' reports may be an indication that they apply guidelines in an ad hoc manner, therefore psychologists fail to deliver reports which are consistently of a high enough standard. This not only highlights the need for the better training and education of psychologists, but also for a more standardised approach to conducting custody evaluations that is approved by organisational bodies. Incidentally, since its inception in the USA in 1994 of the APA guidelines for conducting custody evaluations, an improvement in custody evaluations has been noted in the custody evaluations of American psychologists. An increased understanding of procedural issues, an application of critical decision-making skills, advanced knowledge of ethical, legal and risk management issues have been noted. In general, the custody evaluations have become more sophisticated and comprehensive (Bow & Quinnell, 2001). It is therefore high time for the establishment of a comprehensive set of guidelines for use in custody evaluations in South Africa. These should include, 1) orientating guidelines, in which the purpose of the evaluation is

addressed and the legal criterion is stipulated, 2) general guidelines, which stipulate the competence and the required knowledge base of the psychologist who engages in these matters, 3) procedural guidelines, which indicate the procedures that need to be undertaken and the variables that have to be assessed, 5) evaluation guidelines, which recommend the methods that should be employed to assess the various variables, 6) report writing guidelines, which provide guidance for the rendering of effective reports, and, 7) guidelines for testifying in court.

For the interim however, and in light of the results of the study and the literature overview, the following recommendations are provided for psychologists performing custody evaluations:

1. Each report should explicitly state the referral reason, as this informs the assessment process. Issues regarding consent and confidentiality should be documented.
2. Psychologists should indicate the instructional, procedural and ethical guidelines that they utilise in the evaluation.
3. If a custody recommendation is required, all the parties (both the parents and the children) should be assessed. Parents should be assessed with the same methods.
4. Multiple methods of data gathering should be employed. The methods of data gathering should be documented in the report with dates and length of the applicable consultations and observations. Failure to apply multiple methods should be well justified and the limitations of the evaluation indicated.
5. Clinical interviews with all the parties concerned, observation of parent-child interaction and collateral information from third parties are methods of data

- gathering that should take preference and should be included in all custody evaluations.
6. If psychological tests are used, the rationale and purpose should be stated, the psychometric properties should be indicated, research should be referenced to indicate the inferences made to answer the legal question, and the limitations of the tests should be indicated.
  7. The content of the psychologist's report should in all cases contain data and a reasoned analysis which indicates the assessment of parenting capacity, the psychological and emotional needs of the child and the resulting fit. The psychologist should take care to act in the child's best interest, and not that of the parents.
  8. The content of the psychologist's report should always indicate the assessment of the children's relevant developmental histories and wishes, as is age appropriate.
  9. The parents' relationship and personal histories should be summarised, concise and not occupy the majority of the content of the reports. A good rule of thumb is to only indicate information that is relevant to the psychological/legal question.
  10. Limitations to the custody evaluation process should be indicated in the psychologist's report.
  11. Recommendations that are psychologically relevant should be provided, only after due consideration of all the relevant data and the incorporation of empirical research to corroborate the data

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# **Psychological Testing In Child Custody Evaluations**

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## Psychological Testing In Child Custody Evaluations

The use of psychological tests in custody evaluations is controversial. While some authors endorse their use, others express a guarded use, and still others strongly advocate against their use. The most common reason for this controversy involves the contention that standard psychological tests are not designed and standardised to directly assess the legal issue of the best interest of the child or parenting capacity, while the general reliability and validity of most tests are also at issue. This study examined 24 child custody reports of psychologists that were utilised by the Office of the Family Advocate in Cape Town and Port Elizabeth. A content analysis of each psychologist's report was performed to determine their testing practices. Children were assessed with psychological tests in 72% and parents in 67% of cases. Structured personality tests were used mostly with the parents and projective tests mostly with the children. Some concerns emerged regarding the practices of these psychologists: in the majority of cases, the tests used were not standardised for the South African population, or outdated and/or inappropriate to address the legal issue. The majority did not indicate any form of limitation regarding the psychological tests used, nor were any validation research indicated for the use of foreign tests in the South African context. These practices pose a danger to the judicial process and indicate a need for the better training and education of psychologists performing custody evaluations. Guidelines are provided for the use of psychological tests in custody evaluations, while the limitations of the study, as well as directions for future research, are indicated.

*Keywords:* custody evaluation, care and contact evaluations, psychological tests in custody evaluations, guidelines for the use of psychological tests in custody evaluations

*Die gebruik van sielkundige toetse in die evaluering van die bewaring-en-toesig (versorging en kontak) van kinders in egskeidingsgedinge is kontroversieël. Sommige outers onderskryf die gebruik daarvan, sommige stel 'n omsigtige gebruik daarvan voor, terwyl nog ander sterk teenkanting uitspreek. Die algemeenste rede vir hierdie kontroversie hou verband met feit dat standaard sielkundige toetse nie opgestel en gestandaardiseer is om die regskwessie van die beste belang van die kind of ouerlike bekwaamheid direk te meet nie, terwyl die geldigheid en betroubaarheid van die meeste toetse ook onder verdenking staan. Hierdie studie het 24 versorging-en-kontakverslae ontleed wat deur sielkundiges vir die Kantoor van die Gesinsadvokaat in Kaapstad en Port Elizabeth opgestel is. 'n Inhoudsanalise van elke sielkundige se verslag is uitgevoer ten einde hul prosedures en metodes te ontleed. Kinders is in 72% en ouers in 67% van die gevalle getoets. Gestruktureerde persoonlikheidsstoetse is meestal ten opsigte van die ouers en projektiewe toetse ten opsigte van die kinders gebruik. Die volgende knelpunte is geïdentifiseer: die toetse is in die meeste gevalle nie gestandaardiseer vir die Suid-Afrikaanse populasie nie, of is baie verouderd en/of ontoepaslik om die regskwessie aan te spreek. Die meeste sielkundiges het nie die beperkinge van die toetse aangedui nie en geen empiriese data vir die gebruik van buitelandse toetse in die Suid-Afrikaanse konteks is aangedui nie. Sodanige gebruike kan die juridiese proses ondermyn en dui 'n behoefte aan vir die beter opleiding vir sielkundiges wat sodanige forensiese evaluerings uitvoer. Riglyne word aangebied vir*

*die gebruik van sielkundige toetse in versorging-en-kontakgedinge, terwyl die beperkings van die studie aangedui, asook aanbevelings vir toekomstige navorsing gemaak word.*

*Sleutelwoorde: Bewaring-en-toesigevaluering, versorging-en-kontakevaluering, sielkundige toetsgebruik in versorging-en-kontakevaluering, riglyne vir die gebruik van sielkundige toetse in versorging-en-kontakevaluering*

Child custody<sup>1</sup> assessment is one of the most difficult and complex type of forensic evaluation. The reason for this is threefold (Otto, Edens, & Barcus, 2000): First, as opposed to other forensic evaluations in which one person is typically assessed, child custody evaluations involve a number of persons (e.g., mother, father, child or children and significant others). Second, psycho-legal issues such as the best interest of the child and parenting capacity have to be taken in consideration, and in order to do this, the examinees must be assessed regarding a variety of behaviours, capacities and needs. Third, since these evaluations usually involve cases of contested custody, the emotions of the contesting parties typically run high, further compounding the already difficult evaluation process. In addition, many psychologists have little to no training in psycho-legal work and they therefore tend to rely heavily on treatment-based approaches, including interview and observation techniques and standard

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<sup>1</sup> This study was completed during a change in legislation in which the Children's Act of 2005 was implemented. This resulted in a change of terminology in the common law concepts of 'custody' and 'access' as to better reflect the rights of children. Section 1.2 of the Children's Act 2005 stipulates that in addition to the meaning assigned to the terms 'custody' and 'access' in any law, they must also be construed to also mean 'care' and 'contact' as defined by the Children's Act of 2005. In this study it has been decided to retain the terminology of 'custody' and 'access' and not merely replace them with the concepts of 'care' and 'contact'. This has been done as to provide better continuity with regards past research and the international literature. As indicated by the APA (2010) despite the changes in terminology, the substantial majority of legal authorities and scientific treatises still refer to the term 'custody' when addressing the resolution of decision making, care and contact disputes. As a consequence, both the old and new terminology is used and for the sake of clarity, 'custody' also means 'care' and 'access' also means 'contact' and vice versa.

psychological tests (Alan, 1995). In fact, many authors (e.g., Melton, Petrila, Poythress, & Slobogin, 2007; Tippins & Wittmann, 2005) have questioned the usefulness of psychologists' involvement in custody evaluations, while the courts often perceive their contributions to be of limited value (Allan & Louw, 2001; Bonthuys, 2001). These contentions pertain to a lack of scientific validity, clinical data that is irrelevant to the legal question and problems associated with clinicians reaching beyond their clinical expertise (Melton et al., 2007).

One of the controversial issues in child custody evaluations concern psychological testing. These concerns involve: using psychological tests in isolation; over interpreting tests or making unsubstantiated assumptions; utilising standard psychological tests that are irrelevant to the legal issue; administering tests with questionable reliability and validity indices; using tests which are not normed for the population in question; and that some psychologists lack even basic knowledge about the instruments they use for legal purposes (Allan & Louw, 2001; Bonthuys, 2001; Brodzinsky, 1993; Heilbrun, 1992; Medoff, 2010; Melton et al., 2007; Quinnell & Bow, 2001).

The debate regarding the use of psychological tests in forensic assessment started in the 1980s with Ziskin's view that utilising these tests are "of doubtful validity and applicability in relation to forensic issues" (Ziskin, 1981, p. 225). This debate currently still seems at issue, with some endorsing the unbridled use of psychological testing, others expressing guarded use of psychological tests, and still others who strongly advocate against their use (Melton, et al., 2007).

### **Endorsement of Psychological Tests**

Clinicians who endorse this position, purport that psychological tests provide useful information that may assist in determining psychological strengths and weaknesses of parents, the parents' and children's personality characteristics, and the presence of mental illness (Bosman-Swanepoel, Fick, & Strydom, 1998; Hoffman & Pincus, 1989; Geffner et al., 2009). Others contend that psychological testing can reveal the emotional make up of the child and parents; they may provide important information regarding parent capacity; the parent's potential for response bias (such as distortion or deception); the dynamics of the individuals involved and may assist in the resolution of the crisis (Johnston & Roseby, 1997; Stahl 1999, 2011). According to Brodzinsky (1993), testing permits observation of each party under controlled conditions and helps to assess how the parties view one another in various domains of functioning. Still others claim that psychological testing provides objective support for the evaluator's hypotheses, and helps balance bias and potential errors in clinical interviews (Otto & Butcher, 1995). Some authors uncritically endorse the routine use of a wide variety of tests (ranging from IQ tests, personality and psychopathology inventories to child behaviour checklists, specialised tests developed for custody purposes and projective techniques) to conduct parental fitness evaluations and to investigate the child's feelings, thoughts and fantasies ( Bosman-Swanepoel et al., 1998; Ellis, 2001; Geffner, 2009).

### **Cautionary Use of Psychological Tests**

Proponents of the viewpoint that psychological tests should be used with caution, state that psychological tests that assess clinical constructs (also called first generation tests) such as intelligence, personality, achievement and psychopathology are linked only indirectly to the key legal issues of custody and visitation (Melton et al., 2007). This means that inferences beyond the capacity of the test are often made, resulting in the inappropriate and/or misuse of the test. However, Heilbrun (1992, p. 269) argues that when “properly used psychological tests should not be expected to provide direct information about legal issues, and this criticism should only apply to evaluators who misuse them in such a fashion”. Brodzinsky (1993) also argues that the problem is not that psychological tests are used in custody evaluations, but rather how they are used. He states that in too many instances psychologists administer tests without a clear sense of how the information gathered will address the substantive issues in the legal dispute.

A particular problem in South Africa is that the traditional psychological tests are of poor quality and fail to meet the international standards for clinical practise; they are therefore even less appropriate for psycho-legal assessments (Allan, 1995; Louw & Allan, 1996). Allan (1995) points out that traditional South African psychological tests are, for the most part, not standardised or normed for the various population groups in the country and are therefore invalid for most sections of the population, while the majority of the tests are outdated and compare poorly with those used in other countries – yet they are still widely used, often without reservation. Cohen and Malcolm (2005) also warn against using tests without adequate training, using

obsolete versions, out of date tests or modified tests that have not been researched adequately. Using these types of tests in forensic evaluations undermine the credibility of the evidence presented to the courts. Allan (1995), as well as Cohen and Malcolm (2005) advise that both normed and non-normed tests should be used with caution in South African courts, and where they are used, the clinician must explicitly declare the limits of the inferences drawn.

Another caveat is extended to the use of so-called specialised forensic tests that purport to provide a more focused determination on the issues of custody and visitation. These tests include second generation tests such as the Bricklin scales. A variety of these instruments (Bricklin, 1995) were developed to assess issues in the parent-child relationships, ranging from the child's perception of each parent's competence and the degree of closeness the child feels with each parent, to the parent's understanding of the child's developmental needs and the parent's awareness skills in reaction to typical child care situations. Other instruments purport to assess the parent's risk for physical child abuse (Milner, 1986); parents' attitudes towards parenting (Gerard, 1994); and parents' stress in the childrearing role (Abidin, 1990). In addition, specialised scales that include a battery of tests (the so-called third generation tests) were also developed. An example is the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (ASPECT) (Ackerman & Schoendorf, 1992). Authors such as Bow, Gould, Flens, and Greenhut (2006), Heinze and Grisso (1996), Otto et al. (2000) and Melton et al., (2007) criticise these measures on the grounds of their poor psychometric properties (validity and reliability), an absence of normative data and poor scoring guidelines. In addition, they assess ill-defined constructs, while



no studies examining the psychometric properties of these measures have been published in peer-reviewed articles. These issues compromise the scientific standing of these measures, not only for forensic psychology as a science, but also as a criterion that should apply for the courts (Emery, Otto, & O'Donohue, 2005). Although Melton et al. (2007) purport that some of these measures may facilitate the gathering of useful data, they advise against the use of these measures, or at best the formal indices of these measures, until adequate empirical research has been conducted. Heinze and Grisso (1996) also warn that test data should be supplemented with interview and observational data.

### **Advocacy against the Use of Psychological Tests**

Some authors advocate against the routine use of tests or the use of certain tests such as specialised custody measures or projective techniques in child custody evaluations. For example, Herman (1999) contends that while psychological tests may be helpful to validate a clinician's hypothesis, test results may also serve to heighten the conflict between the litigants. He states that the introduction of such tests in custody evaluations "can lead to increased battling over the meaning of raw data but may have little use in the assessment of parenting" (p. 141). This viewpoint is echoed by Brodzinsky (1993) who argues that tests may often be misused against parents in litigation, and by Roseby (1995), indicating that testing can result in a "pathology hunt" (p. 98). In addition, Stahl (1999, 2011) reports concerns about the intrusive effects of tests and that some psychologists over generalise the results of the tests. Melton et al. (2007) argue that psychometric testing is frequently unnecessary and

recommend that traditional psychological tests only be used when specific problems or issues that these tests were designed to measure, appear in the case. These authors strongly advocate the comprehensive observation and interviewing of the parents and children, the gathering of collateral information from third party sources, and a limited use of traditional tests. This viewpoint endorses Herman's (1999, p. 141) contention that the "heart of the evaluation lies in the interview" and that "no test should ever take the place of a comprehensive interview".

Regarding specialised custody measures, such as the Bricklin Scales, Emery et al. (2005) purport that in the absence of scientific support the use of these instruments should be used for no purpose other than research. Concerning projective techniques, considerable debate exists regarding the use of techniques such as the Rorschach Inkblot Test, Thematic Apperception Test, the Children's Apperception Test, Human Figure Drawings, Family Drawings and Kinetic Family Drawings. Questions have been raised about even the basic psychometric properties of these tests. In their overview of the literature on the scientific status of projective techniques, Lilienfeld, Wood, and Garb (2000, p. 53) state: "Given the limited validity of many of the indexes derived from these techniques, it is virtually inevitable that the inferences routinely drawn from them by practitioners are often unjustified, erroneous, or both". This view is also echoed by Medoff (2010, p. 88) who contends: "Use of these measures is forensically unacceptable, violates standards of practice for forensic psychological testing, and jeopardizes the integrity of the evaluative methodologies in which they are used". Emery et al. (2005) advise that, because of the potential dangers, projective tests should not be used in child custody evaluations (or any other

evaluation contexts for that matter). These authors are also concerned about the potential for evaluators to create the impression that projective measures have scientific authority, precisely because these techniques are “mysterious” to lay observers and therefore potentially misleading or difficult to challenge, while in reality the empirical and legal questions remain unanswered.

### **Psychologists’ Use of Psychological Tests in Custody Evaluations**

Despite the controversy regarding the use of psychological tests in custody evaluations, psychologists still seem to use these tests. In his review on child custody practices, Bow (2006) found that the majority of American psychologists routinely use psychological testing of adults, and to a lesser extent, of children. However, these child custody evaluators place only moderate weight on testing compared with other procedures such as comprehensive interviews and observations. According to Bow (2006) and Bow and Quinnell (2001) a definite shift in the practices of American psychologists in child custody evaluations have occurred since the publication of the APA guidelines for child custody evaluations in 1994. Child custody evaluations seem to have become more sophisticated and comprehensive during the past 15 years, and psychologists’ current practices seem to adhere closely to APA guidelines. Louw and Allan (1998) surveyed South African psychologists regarding the assessment techniques they employed in psycho-legal evaluations, and found that almost all employed some form of psychological test or technique in the majority of assessments. Unfortunately, Bonthuys (2001) and Genis (2008) could not find the same degree of caution employed by American practitioners regarding the use of tests

and methods of forming expert opinion in the South African cases that they surveyed. However, there is a paucity of research on the practices of child custody evaluators in South Africa (Brandt, Dawes, Africa, & Swartz, 2004), with a result that we do not have a clear view of how tests are utilised in custody evaluations.

Why do psychologists tend to continue using tests in forensic contexts despite the controversy surrounding the use of tests? A number of factors seem to promote the overuse and misuse of psychological tests in forensic evaluations; some reflect the assumptions and motives of the legal profession, while others reflect the assumptions and motives of mental health professionals. For example, Bonthuys (2001) argues that both judges and lawyers fail to understand that psychological knowledge is not attained in the same way as legal knowledge. Hagan and Hagan (2008) explain that in the legal sense, a 'test' ascertains the truth or the quality or fitness of a thing. As such, a test assists the court in making a decision regarding the ultimate issue. When access and custody is the issue, the legal test is usually the best interest standard. Psychological tests in the legal context are therefore regarded as psychological instruments that are used to generate hypotheses about the legal test. However, in the psychological sense, the term 'psychometric or psychological test' could include a formal test (which evaluates correctness of responses), inventories, questionnaires, and projective techniques (which assess personality functioning, psychopathology, attitudes and perceptions). Each instrument represents a different level of psychometric sophistication. None determine any legal issue per se, but rather assist the psychologist in gathering information relevant to the testee's psychological functioning (Melton et al., 2007).

Brodzinsky (1993) notes that many judges and lawyers have an unrealistic view of what psychological testing can accomplish. Because psychological tests tend to lend an air of objectivity, science and insight into evaluation, many legal professionals assume that psychological tests measure aspects of a person that cannot be uncovered by other procedures. They therefore favour test-based or test-anchored evaluations and opinions, which may push psychologists to go beyond their limits (Otto et al., 2000). One example of pushing psychologists beyond their expertise is the assumption that due to their “objective” techniques, they will be able to predict which parent, or circumstances will ultimately be to the child’s benefit. The truth is in fact that mental health professionals cannot precisely predict long-term prospects. Psychologists, who attempt to answer this issue, are therefore applying “guess work” and not scientific rigour (Kaliski, 2006). According to Brodzinsky (1993), lawyers often pressure psychologists into incorporating psychological tests as part of their legal strategy rather than to uncover the truth. The result then is unnecessary testing. Furthermore, psychologists who refuse to use inappropriate tests are often criticised by jurists for taking this stance (Allan, 1995).

Psychologists, on the other hand, often do not understand the legal issues involved in custody and visitation disputes, and often do not adequately understand the way in which psychological knowledge could (or should) be used in such cases (Melton et al., 2007). Melton and colleagues argue that because of a lack of adequate training/and or knowledge, psychologists often do not differentiate the role of the forensic evaluator from that of the clinician and they therefore adopt clinical practice to the forensic situation. This pattern results in the indiscriminate and thoughtless use

of testing which then results in opinions on legal matters based on irrelevant data. Overuse of testing by psychologists could also occur because testing is associated with their professional identity. It should therefore come as no surprise that they would use standard psychological tests when conducting child custody evaluations, particularly if they are unfamiliar with the specific decision-making criteria used by the judiciary (Otto et al., 2000). Concern is also raised by Heinze and Grisso (1996), that some psychologists cloak inappropriate data from psychological instruments in a scientific manner, weigh this data more heavily than they should be weighted or misuse the data. Brodzinsky (1993) also notes that overuse of psychological testing could be driven by financial incentives, since the administration, scoring and interpretation of tests of all the parties add substantially to the professional's fee.

### **Guidelines for Custody Evaluations**

In absence of adequate training, how may psychologists involved in custody evaluations enhance the scientific standing of their procedures? There is a substantial body of evidenced based knowledge in the USA which serves as the basis for ethical and instructional guidelines. Probably the best known of these is the American Psychological Association's guidelines for child custody evaluations (APA, 1994, 2010). These guidelines include orienting guidelines which describe the purpose of the evaluation; general guidelines which deal with the preparation of the custody evaluation; and procedural guidelines which discuss the procedures involved in the evaluation. These procedural guidelines specifically direct psychologists to use

multiple methods of data gathering and to “interpret the assessment data in a manner consistent with the context of the evaluation” (p. 866).

In South Africa there is no unified set of guidelines available for psychologists conducting custody evaluations. Louw and Allan (1997) have proposed ethical guidelines for psychologists who render psycho-legal services. These pertain to the forensic evaluator’s responsibility, competence, relationships, confidentiality issues, methods and procedures, and public and professional communication. The ethics code (Professional Board of Psychology 2006b) includes only one page on the psycho-legal activities of psychologists. The psychologist’s competence, the basis for psycho-legal competence, limits to opinions, truthfulness and candour, conflicting roles, maintenance of expert witness role, prior relationships, and the witness role are addressed. Kaliski (2006) offers some general guidelines for custody evaluators and also suggests a format for the assessment procedure. Elkonin, Foxcroft, Roodt, and Astbury (2001) indicate good conduct practises in psycho-legal assessment and testimony, and ethical practice standards for child custody assessments, while Naylor, Vorster, Cronje, and Donaldson (2003) discuss the role of psychometric tests in forensic assessment and Louw, Vorster, and Burke (2003) discuss the role of the psychologist in comprehensive custody evaluations.

However, none of the above guidelines address the issue of psychological testing in forensic evaluations in depth, although Kaliski (2006) alludes to the controversy surrounding the use of assessment tools, and in particular, psychometric instruments. Furthermore, Louw et al. (2003) provide a list of generally used tests in custody evaluations (including personality and intelligence tests and projective techniques) but

caution against the use of these instruments because of their inability to directly answer the legal question. South African psychologists are bound by generic conduct guidelines regarding test use by their ethical code (Professional Board of Psychology, 2006b). According to the ethics code, psychologists should not use outdated, obsolete measures that are not useful for the current purpose; they should be cognisant of the reliability, validity and norms of a particular test, and should indicate the limitations of a test. In addition, the Professional Board of Psychology (2006a) issued a list of classified tests, most of which have not been standardised or validated for the South African population. The Board states that even though a test may be classified as a psychological test, the onus rests on the test user to ensure that (a) the test is valid for the purposes for which it is being used; (b) appropriate norms are consulted; and (c) where tests that have been developed in other countries are concerned, appropriate research studies need to be undertaken to investigate whether the test is culturally biased and special care should be taken when interpreting the results of such tests.

Authors have indicated the paucity of research into South African psychologists' custody evaluation practices and the lack of clear guidelines for clinicians performing these evaluations (Africa, Dawes, Swartz, & Brandt, 2003; Brandt et al., 2004; Louw & Allan, 1997). A major issue concerns the use of psychological tests in these assessments. Research into psychologists' practices in this regard is therefore crucial, since ensuring high quality custody evaluations is imperative because documents resulting from these are pivotal and may dramatically influence the lives of children involved in acrimonious divorce litigations.



## **Method**

### **Purpose and Aim of Research**

Against the above exposition, the purpose of this research is to analyse a sample of child custody reports regarding the use of tests in custody evaluations. Due to the paucity in the South African based research, the goal of such research is to illuminate current practice, compare the assessment practices utilised by psychologists in South Africa with the practices of psychologists as evidenced by international research, point to problem areas and provide suggestions for improvement.

### **Data Sources**

This study consists of a content analysis of psychologists' custody reports. Content analysis is the examination of qualitative information in terms of predefined categories. The contents of these sources are examined systematically to record the relative incidence of themes (Henning, 2004). A content analysis of reports was chosen as this removes the distortion resulting from self-report surveys by psychologists.

The research sample consists of the reports of 24 psychologists from evaluations performed for the Office of the Family Advocate<sup>2</sup> in the Cape Town and Port Elizabeth Judiciary between 2005 and 2007. This represents a relatively small convenience sample owing to the procedural difficulties of obtaining reports. The

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<sup>2</sup> This is a specialised state service that is staffed by state appointed advocates and social workers which institutes enquiries into the welfare and interests of children in divorce matters in order to make recommendations to the court (McCurdie, 1994).

psychologists' reports were obtained from the court archives with the assistance of the family advocates, who provided relevant case numbers for the search. Although these reports form part of the court files, and are a matter of public record, the identifying information was not recorded. The sample of reports differed in content and purpose and included interim orders, custody orders made at the time of divorce, applications for reversals of custody and access after the divorce order. The gender of the psychologists performing evaluations favoured more male psychologists (62%) than female (38%). The registration categories of the psychologists were equally distributed between clinical (45%) and counselling (42%), followed by educational (13%).

### **Procedure**

Each psychologist's report was analysed to determine if psychological testing was administered to the parents and children. The type of psychological test and frequency with which the test was used across the evaluation was recorded. Only information obtained by reading the report was included in the data, with the assumption that processes not documented were not included.

### **Results and Discussion**

An examination of the reports with regards to the psychological tests used in the custody evaluations follows.

Table 1  
*Psychological Testing in Custody Evaluations*

Description	N <sup>3</sup> (%)
Psychological testing of adults	16(67)
Psychological testing of children	13(72)
Indicated limitations of psychological tests	2(9)

As indicated in Table 1, psychological testing of adults occurred in 67% of the cases, while testing of children occurred in 72% of cases. This is in contrast with the current practices of American psychologists. In a national survey of 198 psychologists, Bow and Quinnell (2001) found that psychological testing of adults occurred in 91% of cases, while testing of children occurred in 61% of cases. The testing of children has seen a decline since Ackerman and Ackerman's 1997 study, where it was reported that 92% of children were tested. Reasons for the decline in the testing of children seem to be related to the decline of routine IQ testing of children, and a decline in the utilisation of projective techniques as tests per se (Quinnell & Bow, 2001). However, although American psychologists continue to use psychological tests in custody evaluations, they rank clinical interviews with both parents and children much higher than testing procedures, and they tend to use tests selectively (Bow & Quinnell, 2001; Quinnell & Bow, 2001).

A disconcerting finding is that although most of the psychologists in the present study used testing, only 9% indicated the limitations of these procedures in their reports.

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<sup>3</sup> N does not always equal 24, as responses were only included in the sample when the data collected was an aspect which could have been assessed. For example, psychological tests appropriate for adolescents were only included in the number of responses when an adolescent was assessed.

### Tests Administered to Adults

The psychological tests used in the adult evaluations are provided in Table 2. The tests are categorised as structured tests (such as intelligence tests and personality inventories), specialised forensic instruments, and projective techniques. The second last column indicates if the test has been classified by the Professional Board of Psychology (2006a) as a ‘psychological test’. The last column indicates whether this test has been standardised for use in the South African context.

As indicated in Table 2, structured tests were used in half of the evaluations. Specialised forensic tests were used in approximately one fifth and projective tests were used in less than one tenth of the evaluations.

Table 2  
*Types of Psychological Tests Administered to Adults*

Test type	Test category	N (%)	Listed by the Professional Board	Standardised for SA use
Structured Tests	Millon Clinical Multiaxial Inventory-III	11(46)	No	No
	Minnesota Multiphasic Personality Inventory-II	6(25)	Yes	No
	OMNI Personality Inventory	1(4)	Yes	No
	Neo Five Factor Inventory	3(13)	Yes	No
	Myers-Briggs Type Indicator	2(8)	Yes	No
Specialised Forensic Instruments	Parent Awareness Skills Survey (PASS)	5(21)	No	No
	Parent Stress Index (PSI)	4(17)	No	No
Projective Tests	Parenting Alliance Measure (PAM)	2(8)	No	No
	Rorschach Inkblot Test	2(8)	Yes	No
	Rotter Incomplete Sentences	2(8)	No	No

**Structured tests administered to adults.** As indicated in Table 2, personality inventories and inventories to diagnose psychopathology were used in the custody evaluations. The most frequently used inventory was the Millon Clinical Multiaxial Inventory-III (MCMI-III), which was indicated in 46% of the reports. The MCMI-III (Millon, 1997) is intended to provide information on psychopathology, with a specific

reference to disorders outlined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (APA, 1994). The MCMI-III is standardised on a clinical sample of adults in North America. It is not intended for use as a general personality instrument with the normal population, or for purposes other than for diagnostic screening or clinical assessment. Dyer (1997), however, states that if child custody litigation progresses to the point where a judge orders an evaluation, then this constitutes a significant degree of interpersonal difficulty to label the evaluation as a clinical case. The purported use of this test in custody evaluations is for assessment of personality traits and clinical symptoms in parents, which may impact on the psychological environment of the child (Erickson, Lilienfeld, & Vitaco, 2007a). European research indicated that Spanish forensic psychologists used the MCMI in 60% of cases (Arch, Jarne, Peró, & Guàrdia, 2011), while American research (Bow, 2006) showed an increase in its use in child custody evaluations (from 34% in Ackerman and Ackerman's 1997 study to 52% in Quinnell and Bow's study in 2001). A recent study by Ackerman and Brey Pritzl (2011) indicated an increase to 71%. However, the MCMI is not without controversy. Authors such as Ackerman (2006) recommend against using the MCMI-III in custody evaluations, while Erickson et al. (2007a) are ambivalent with regards to recommending it for use in custody evaluations due to concerns relating to its criterion-related and construct validity, and to concerns that it exaggerates psychopathology. In addition, it seems to be gender biased and tends to over-pathologise female custody litigants in particular (Hynan, 2004; McCann et al., 2001). Such concerns are raised particularly because the MCMI was standardised on a clinical sample and not a normal sample, although Dyer (1997)

noted that the standardisation sample included a number of high conflict couples, which, according to him, makes it applicable for custody cases. Emery et al. (2005) also advocate a cautious approach and believe that in some cases there can be a role for clinical instruments such as the MCMI-III, provided caution is used in its interpretation.

In addition, in a survey of psychologists' opinion on psychological measurements meeting the Daubert standard<sup>4</sup>, the MCMI received high endorsement (Bow, Gould, Flens, & Greenhut, 2006). However, in another study by Bow, Flens, Gould, and Greenhut (2005) grave concerns about the administration, scoring and interpretation of the test were revealed. Almost half of the psychologists demonstrated a lack of basic knowledge of this instrument, although they use it widely in custody evaluations. In addition, hand scoring of this instrument is extremely difficult, while the computer-generated reports have specific limitations. This inventory has not been standardised for use in the South African context, and it is not on the current list of classified tests issued by the Board. No South African research could be found in which the MCMI-III was used for custody or forensic purposes.

The second most used test was the MMPI-II which was administered in 25% of the evaluations. This is contrary to American studies that show the MMPI-II is the psychological test of choice and is evident in 92% (Ackerman & Ackerman, 1997), 97% (Ackerman & Brey Pritzl, 2011) and 94% (Quinnell & Bow, 2001) of custody evaluations, while Spanish psychologists use it in 60% of cases (Arch et al., 2011).

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<sup>4</sup> The Daubert standard is typically used in American courts to assist trial judges in determining the admissibility of expert testimony. Four guidelines are used. The underlying theory (a) has been tested or falsifiable, (b) has been subjected to peer review and publication, (c) has a known or potential error rate and maintenance of standards controlling the technique's operation and (d) has been subjected to peer review and publication.

The MMPI-II is used to identify personality structure and psychopathology and consists of 3 validity scales and 10 clinical scales. The purported use in child custody evaluations is to assess personality and pathology in parents (Erickson et al., 2007a) and there are numerous studies (e.g., Posthuma & Harper, 1998; Siegel & Langford, 1998), which have examined the MMPI in custodial disputes, while others have established child custody norms (Bathurst, Gottfried, & Gottfried, 1997).

In addition, in a survey of psychologists' opinions and testing practices, the MMPI-II received the highest endorsement for meeting the Daubert standard (Bow et al., 2006). However, some authors (Erard, 2007) have raised concerns regarding the MMPI-II's psychometric qualities, but Erickson et al. (2007a) and Erickson, Lilienfeld, and Vitacco (2007b) believe there are no serious justifications for the prohibition of the MMPI-II in forensic cases. There appears to be support (Ackerman, 2006; Emery et al., 2005; Moran & Weinstock, 2011) for the use of the MMPI-II in custody evaluations provided care is taken when using it in these contexts. For example, defensive profiles on the MMPI-II are common in child custody evaluations, which complicate its interpretation. Although this inventory has been classified by the Board, it has not been standardised for the South African population. No South African research could be found in which the MMPI was utilised for custody purposes, although it has been used in research on criminal responsibility (Du Toit, 2006). An Afrikaans-translated version of the MMPI indicated that the American norms and cut off points were not appropriate for Afrikaans speakers (Shillington, 1989).

The other structured tests such as the Neo Five Factor Inventory (which measures five personality traits); the OMNI Personality Inventory (which measures both normal

and abnormal personality traits) and the Myers-Briggs Type Indicator (which is based on Jung's theory and consists of four bipolar scales, such as Introversi-Extroversi) were used less frequently. A perusal of the custody evaluation literature indicated limited reference to these personality inventories. For example, the Neo Five Factor Inventory was included in Bow et al.'s (2006) research but they found no indication on its Daubert standard or usability in custody evaluations. Although these inventories are listed by the Board as psychological tests, they have not been standardised for the South African context. No South African research could be found in which the Neo Five Factor Inventory, OMNI or the MBTI was used for custody or forensic purposes, although cross-cultural research has been done regarding the MBTI (Bachtis, 2000; De Beer, 1997 and the Revised NEO Personality Inventory (NEO PI-R) (Brunner-Struik (2001).

**Specialised forensic assessment instruments administered to adults.** As indicated in Table 2, the Parent Awareness Skills Survey (PASS) featured in 21% of the reports. Bricklin (1995) describes the PASS as a clinical tool designed to illuminate the strengths and weaknesses in the awareness skills of a parent in reaction to typical child care situations. This survey has gained popularity in the USA [from 8% in 1997 (Ackerman & Ackerman, 1997) to 21% in 2001 (Quinnell & Bow, 2001), to 28% in 2011 (Ackerman & Brey Pritzl, 2011)]; however, not without controversy. Erickson et al. (2007a) suggest that the PASS falls short of acceptable scientific standards and have ethically called into question the test because the authors have suggested that psychologists can create their own scoring methods. In conjunction with the absence of clear scoring guidelines, the PASS has also been criticised for the



absence of norms, reliability and validity data, while no study examining these properties have been published in peer reviewed journals (Emery et al., 2005; Otto & Edens, 2003). The PASS has not been classified by the Board as a psychological test and has not been standardised for use in the South African context.

The Parent Stress Index (PSI) was used in 17% of cases. As with the PASS, an increase in its usage by American custody evaluators have been noted, from 9% in 1997 (Ackerman & Ackerman, 1997) to 41% in 2001 (Bow & Quinnell, 2001) to 66% in 2011 (Ackerman & Brey Pritzl, 2011). The PSI is a parent report checklist that assesses the degree of stress parents experience in their childcare role (Abidin, 1990). The aim of the PSI is to identify dysfunctional parenting relationships, which places the child at risk for emotional disturbance. Heinze and Grisso (1996) report that numerous studies attest to the concurrent, predictive and discriminant validity of this instrument. However, they identified some problems regarding the research: Researchers applied variable methodologies which compromise the evaluation of the measure. Furthermore, a bias exists in studying mothers rather than fathers or both parents. This is a problem, because fathers respond differently than mothers to the PSI. These gender differences make it inappropriate to compare both parents' scores to each other or to suggest custody be awarded to the parent with the lower PSI. Furthermore, if more than one child is involved, the PSI should be administered regarding each child separately. This instrument has not been classified by the Board as a test and has not been standardised for the South African context.

The Parenting Alliance Measure (PAM) was used in 8% of the evaluations. A perusal of the research literature did not show any reference to the use of this

instrument in custody evaluations. The PAM measures the strength of the child-rearing alliance between parents via a self report checklist, which involves the one parent rating the other's involvement and attitude towards parenting. It provides information regarding the parents' perspective of how cooperative, communicative, and mutually respectful they are with regard to caring for their child. The authors, Abidin and Konold (1999), claim that that it can be used in joint custody evaluations, and that the PAM is highly reliable, with an internal consistency of .97 and the test-retest reliability of .80. However, no peer review research could be found to substantiate these claims.

A perusal of the South African literature did not indicate any research conducted with the PASS, PSI or PAM in custody or forensic contexts. In their study, Bow et al. (2006) found that none of the custody specific tests and techniques was viewed as meeting, or even approaching the Daubert standard of scientific rigour. Heinze and Grisso (1996) point out that the flawed assumptions on which most of these measures rest may contribute to their low reliability and validity for use in custody determinations. They contend that no instrument "can ever meet the basic scientific standards for making judgements about "preferred parents", or making comparisons between parents that would justify suggesting that one parent's abilities are more desirable than the other's" (p. 310).

**Projective tests administered to adults.** From Table 2 it is evident that the Rorschach and Rotter Incomplete Sentences were the only projective techniques reflected in the sample and were used equally infrequently, in only 8% of reports. In his review of empirical research on child custody practice, Bow (2006) indicated that

the Rorschach continues to be the most popular projective technique to use with adults and its use has remained consistent over the years (51%, Ackerman & Brey Pritzl, 2011; 44%, Quinnell & Bow, 2001; 48%, Ackerman & Ackerman, 1997; 42%, Keilin & Bloom, 1986). The purported use in custody evaluations is the assessment of personality traits and psychopathology of both parents and children. Critics initially argued that it lacked standardised administration procedures and adequate norms and that the reliability and validity was weak or non-existent (Lilienfeld et al., 2000). The advent of the Exner Comprehensive Scoring System (Exner, 1993), seemed to revive its use. This system provides detailed rules for administration and scoring and a set of norms for both children and adults. However, this system is also currently engulfed in controversy due to the following reasons (Erickson et al., 2007a; Grove, Barden, Garb, & Lilienfeld, 2002; Lilienfeld et al., 2000; Wood, Nezworski, Lilienfeld, & Garb, 2003): (a) the norms are inadequate. They seem to be in error for both children and adults and have the effect of “overpathologising” normal individuals, therefore the use of these norms in clinical and forensic settings may harm clients, which is a transgression of the ethical code; (b) the cultural generalisability is highly problematic and is not recommended for routine cross-cultural applications; (c) the scoring reliability is problematic for a substantial number of variables; (d) the test-retest reliability is still at issue; (e) the influence of response frequency (R) has not been resolved; (f) the various variables do not intercorrelate; and (g) validity for the majority of the indexes is still a problem. Lilienfeld et al. (2000) identified only four indexes that can be regarded as empirically supported: the thought disorder index; the prognostic scale for the prediction of treatment; the oral dependency scale; and

deviant verbalisations and poor form in the assessment of schizophrenia. In Bow et al.'s (2006) study, the Rorschach failed to meet the Daubert standard, although when used with the Exner (1993) comprehensive scoring system, psychologists seem to believe that it does meet these criteria, although debate continues over its forensic application. Erard (2007) passionately argues against the criticism raised against the Rorschach and believes that it can be used for custody evaluations, but he fails to provide empirical research to support his opinion. Although the Rorschach has been listed by the Board, it has not been validated for South African use. No South African research could be found in which the Rorschach was used for custody purposes.

The Rotter Incomplete Sentences was developed as a screening method to identify maladjusted school and college students (Rotter, Lah, & Rafferty, 1992). It is assumed that this test reflects underlying motivations, attitudes, conflicts and fears of the respondent. Holaday, Smith, and Sherry (2000) indicate that sentence completion tests are the most commonly used personality assessment instruments in clinical practice. This usage is not consistent with custody evaluation procedures reviewed by Bow (2006); however, an increase in its use was noted in Ackerman's studies, from 22% in 1997 (Ackerman & Ackerman, 1997) to 41% in 2011 (Ackerman & Brey Pritzl, 2011). Sentence completion tests can be interpreted in two different ways: subjective-intuitive analysis or objective analysis by means of scores assigned to each completed sentence. Holaday et al., (2000) found that most psychologists do not formally score the test, but prefer to use their clinical experience for interpretation. This poses obvious reliability and validity concerns especially in the forensic setting.

Incomplete sentence tests generally also do not meet the Daubert standard of scientific rigour. The Rotter Incomplete Sentences is not a Board approved test and it is not standardised for use in South Africa. No South African research could be found in which the Rotter Incomplete Sentences Test was used for custody or forensic purposes.

### Testing of Children

A variety of tests were used across a broad spectrum when assessing children during custody evaluations. The psychological tests used in the evaluations of children are provided in Table 3.

Table 3  
*Types of Psychological Tests Administered to Children*

Test type	Test category	N (%)	Listed by the Professional Board	Standardised for SA
Projective Tests	The House-Tree-Person Test	2(11)	No	No
	Kinetic Family Drawing	10(55)	No	No
	Draw a Person (Goodenough-Harris)	8(44)	Yes	No
	Rotter Incomplete Sentences Test	5(31)	No	No
	Bene Anthony Family Relations Test	7(39)	No	No
	Children's Apperception Test	3(17)	Yes	No
	Roberts Apperception Test	2(11)	No	No
	Rorschach	2(11)	Yes	No
	Anatomical Drawings	5(28)	No	No
	Sand Tray (Play Therapy Technique)	2(11)	No	No
Structured Tests	High School Personality Questionnaire	2(15)	Yes	Yes
	Beck Depression Inventory	2(15)	Yes	No
	Personal Home Social & Formal Relations Questionnaire	2(15)	No	Yes
Specialised Forensic Instruments	Perception-of-Relationships Test	2(11)	No	No
	Bricklin Perceptual Scale	2(11)	No	No

The second last column indicates whether the test has been classified by the Professional Board of Psychology (2006a), and is listed as a 'psychological test' for use in South Africa, while the last column indicates whether the test has been standardised for the South African population.

**Projective tests administered to children.** As indicated in Table 3, Projective drawing techniques were used the most often, as these were used in more than half of the assessments. The Kinetic Family Drawing (KFD) and Draw a Person (DAP) were used most extensively while the House-Tree-Person (HTP) was used considerably less. According to Bow (2006), projective drawings such as the DAP and KFD have become the most widely used tests with children in custody evaluations. In their survey, Quinnell and Bow (2001) found that the KFD was used in 45% of cases, the DAP in 33%, and the House-Tree-Person in 29%. In a Spanish sample, the KFD was the most frequently used test for children and was used in 75% of the cases (Arch et al., 2011). The purported use of the KFD is to investigate the testee's subjective perceptions of the family (Burns & Kaufman, 1970); the DAP reflects children's inter- and intra-personal relationships as well as their attitude towards stressors in their lives (Koppitz, 1968); while the HTP reflects the testees' home life and interfamilial relationships, their view of their environment and their interpersonal relationships (Kaufman & Wohl, 1992). Numerous authors (Hunsley, Lee, & Wood, 2003) have highlighted the psychometric shortcomings of drawing techniques. The most consistent criticisms are lodged against the ad hoc administration, scoring and interpretation procedures followed by most psychologists, the poor interrater and test-retest reliabilities, and negligible validity indexes (Gregory, 2000; Lally, 2001). Interestingly, the Goodenough-Harris Draw-A-Person Test is the only projective drawing test classified as a psychological test in South Africa, but not one psychologist used the formal scoring in their evaluation. The use of projective drawings techniques in custody evaluations has also been harshly criticised

(Lilienfeld et al., 2000). Needless to say, the projective drawing tests do not meet the Daubert standard of scientific rigour (Bow et al., 2006).

Regarding the projective picture cards, the Children Apperception Test (CAT), Roberts Apperception Test for Children (RATC), and the Rorschach were used in a minority of the reports. Quinnell and Bow (2001) found that the TAT or CAT was used in 35% of cases, the RATC in 25% and the Rorschach in 23% of cases. Ackerman and Brey Pritzl (2011) found very similar figures: the TAT/CAT was used in 38%, the RATC in 26% and the Rorschach in 39% of cases. The purported use of these tests is to facilitate understanding of a child's relationship to his/her most important figures and drives (CAT, Bellak & Bellak, 1980); to assess the child's perceptions of general interpersonal relationships in order to determine his/or her personality functioning (RATC, McArthur & Roberts, 1989); and to assess the inner aspects of personality (Rorschach, Gregory, 2000).

There was no indication in any of the current study's reports that the responses on the projective tests had been scored according to the proposed scoring guidelines. De Bruin (2001) contends that this intuitive and impressionistic approach in the administration, scoring and interpretation of such tests, seriously compromise the reliability and validity of the instruments. The Rorschach Inkblot Test and the CAT are classified as psychological tests in South Africa, but face fierce criticism for use in custody evaluations (Erickson et al., 2007a). As in the case of the projective drawings, these projective techniques do not meet the Daubert standard (Bow et al., 2006; Erickson et al., 2007b).

The Rotter Incomplete Sentences Test featured in 31% of the custody assessments of children. Quinnell and Bow (2001) found sentence completion used in 30%, and Ackerman and Pritzl (2011) in 51% of cases. Critique of this instrument has already been discussed elsewhere in this article.

The Bene Anthony Family Relations Test (BAFRT) was frequently used and featured in 39% of the reports. This is atypical of American studies, which did not show any use of the BAFRT (Bow, 2006). This is possible because the BAFRT was developed in the UK and is therefore not standardised for American use. However, no research could be found regarding its use in forensic evaluations in Britain, Australia or New Zealand. The Bene-Anthony Family Relations Test is a semi projective technique designed to assess the child's perception of family relations (Bene, 1985). The technique determines issues such as the psychological importance of each family member as well as the child's defensiveness. The BAFRT provides a paradigm of the child's feelings in regard to himself and to members of his family. Parkin (2001) asserts that the BAFRT can provide an important insight into the child's perspective of family relations; however the test is not sufficiently robust, as its reliability and validity have not been convincingly demonstrated. The Board does not classify the BAFRT as a psychological test, and it is not standardised for use in South Africa.

Anatomical drawings featured in 28% of the reports, which suggests that allegations of sexual abuse may have occurred. Anatomical Drawings (Groth, 1990) was developed as an interview aid to approach the subject of sexual abuse in interviewing a young victim. It therefore has no norms or a standardised scoring



procedure. The evaluation of sexual abuse in custody disputes is complex and requires specialised skills which include knowledge of a variety of family dynamics that underlie such allegations and knowledge of three forensic areas: (a) the practices and procedures of child custody, (b) sexual abuse evaluation techniques, and (c) assessment of alleged sexual offenders. The integration of these areas provides an exceptionally challenging task for the evaluator (Bow, Quinnell, Zaroff, & Assemany, 2002; McGleuglin, Meyer, & Baker, 1999). Due to the limitations of the current study, the specific evaluation procedures of the psychologists who encountered these allegations was not explored, therefore it is not known how the anatomical drawings were utilised. One only hopes that they were used in conjunction with other assessment techniques and procedures, since the use of anatomical drawings as a sole technique to investigate sexual abuse will be unethical and invalid. Nichols (2009) contends that the probability that anatomical aids may produce false and unreliable information is high and as a result it is likely to introduce error, bias, and confusion into the deliberations. However, many authors recommend anatomical drawings as part of an assessment protocol (American Professional Society for the Abuse of Children (APSAC), 1999; Bentovim, Bentovim, Vizard, & Wiseman, 1995; Bow et al., 2002). In her cross-cultural research on the assessment of child sexual abuse, Louw (2000) also found this technique useful as part of an assessment protocol. However, she advises that evaluators who use such techniques should be well equipped to do so. The incorrect application, administration and interpretation procedures, or administering the technique at the wrong time of the assessment procedure, could seriously compromise the assessment.

The sand tray, a projective play therapy technique was indicated in 11% of the evaluations. It was not evident in the American studies reviewed by Bow (2006) and is not recognised as a test by the Board. The sand tray technique provides children with an opportunity to use symbols (toys) to tell their story by recreating it in a sand tray and in their imaginations (Geldard & Geldard, 2008). Children explore events and situations from their past and present. Exploring possibilities for the future or expressing their fantasies in the sand tray are also encouraged (Ryce-Menuhin, 1992). However, the approach to acquiring and verifying information differs considerably in therapeutic and forensic practice. Sand tray is a recognised therapy technique appropriate for intervention purposes, but using it as a method of data gathering in forensic investigations is contraindicated (Gussak & Cohen-Liebman, 2001). As a golden rule, psychologists are advised not to occupy dual roles due to these roles being fundamentally different (Cohen & Malcolm, 2005; Greenberg & Shuman, 2007). Forensic psychologists should therefore be aware of the obvious reliability and validity limitations of using play therapy techniques in custody evaluations.

**Structured tests administered to children.** From Table 3 it is evident that personality was investigated in 28% of the reports with adolescents. The High School Personality Questionnaire (HSPQ) was the only objective personality inventory indicated and featured in 15% of these reports, while the remaining 13% of these reports did not indicate which personality test was used. The HSPQ was developed by Raymond and Mary Catell in the USA (Catell & Catell, 1975). The HSPQ has been standardised for use in South Africa (Visser, Garbers-Strauss, & Prinsloo, 1992). The norms are, however, becoming outdated and are limited in scope, as they do not cater

for all the different cultural and language groups in South Africa. The HSPQ is purported to identify emotional and behavioural problems, understand problems better, predict future school achievement, and to promote self-knowledge and monitor personal growth. It was not developed for forensic evaluations and there are concerns regarding problems of distortion and deliberate faking (Sherman, Krug, & Birenbaum, 1979). The Millon Adolescent Clinical Inventory (MACI) and the Minnesota Multiphasic Personality Inventory-Adolescent Version (MMPI-A) are the personality inventories of choice in custody assessments in the USA (Quinnell & Bow, 2001). However, the HSPQ is not an equivalent personality inventory to the MACI and MMPI-A as these are based on pathological personality traits.

Another structured test that was used in the custody evaluations was the Personal Home Social and Formal Relations Questionnaire (PHSF). This self-report questionnaire and was used in 15% of reports. The PHSF measures the personal, home, social and formal relations of high school students and adults in order to determine their level of adjustment (Fouché & Grobbelaar, 1983). There are 11 components of adjustment measured and there is also a desirability scale indicating the honesty with which questions were answered. The PHSF is standardised for use in South Africa and the measure was normed on high school students in 1969 and 1971 and on first year students at teacher training colleges according to language (English and Afrikaans) and gender. The norms are outdated and the relevance for use in custody evaluation is questionable as no research in this regard could be found.

The Beck Depression Inventory (BDI) (Beck, Steer, & Brown, 1996) is a multiple choice self-report inventory measuring the severity of depression in adults and

adolescents aged 13 year and older, and was used in 15% of the evaluations. One shortcoming of self-report measures is that symptoms can be easily exaggerated or minimised by the person completing the test. It is also not clear whether the BDI measures a state or a trait (Jooste, 2001). These issues present obvious limitations for use in custody evaluations especially when the parties involved have motivations to distort their emotional disposition. Although the BDI meets the Daubert standard, it is either infrequently used in custody evaluations in the USA (Bow et al., 2006) or not at all (Bow, 2006). The BDI has not been classified by the Board and has not been standardised for the South African population.

**Specialised forensic instruments administered to children.** The Perception-of-Relationships Test (PORT) and the Bricklin Perceptual Scales (BPS) were used, but rarely. As indicated in Table 3, these custody specific tests were found in 11% of the reports. This is lower than findings from other studies. Quinnell and Bow (2001) found the BPS in 28% of custody reports and the PORT in 23% of custody reports. Ackerman and Ackerman (1997) found a higher percentage usage of the BPS (35%) and a lower percentage usage of the PORT (16%).

The PORT (Bricklin, 1995) purportedly reflects the degree of psychological closeness with each parent. Bricklin believes it is particularly useful in custody decisions because it sheds light on the degree to which the child seeks interaction with a parent, as well as on the functional parenting style. The PORT has been widely criticised due to its apparent incomplete and confusing manual, unclear scoring guidelines, missing norms and minimal reliability and validity data (Emery et al., 2005; Erickson et al., 2007a; Otto & Edens, 2003).

Bricklin (1995) describes the BPS as a projective measure of the child's perception of the parents' competence, supportiveness, follow-up consistency, and possession of admirable traits. Bricklin claims that the nonverbal nature of the task allows for the assessment of the child's unconscious preferences, which are less likely to be subject to distortion due to social desirability or parental persuasion. Erickson et al. (2007a) and Emery et al. (2005) dismiss the claims that the BPS can assess the child's unconscious preferences or that the child's responses are not subjected to outside influence. These authors also mention an absence of norms and a lack of sufficient data regarding its validity.

These custody specific tests are not classified as psychological tests by the Board and there is ongoing debate regarding their scientific validity and usefulness in custody evaluations (Emery et al., 2005; Heinze & Grisso, 1996). In addition they do not meet the Daubert standard of scientific rigour (Ackerman & Brey Pritzl, 2011).

### **Conclusion and Recommendation**

It is necessary to interpret the findings of this study with caution, particularly due to the small sample size and limited geographic distribution. The results can therefore not be generalised and should at best be regarded as exploratory research with preliminary findings. The reports were also obtained from one specific organisation, which has a function within the courts. This could represent a sample that are aware of the role of the Family Advocate's Office and would most probably submit reports representing their best practices. Thus, what is reported might not actually reflect

general child custody practice/procedures. However, there are some key conclusions, which can be drawn from the findings.

From the literature exposition, it is clear that there are basic requirements which should be understood by psychologists performing custody evaluations. These include the use of multiple sources of data collection. If standard psychological tests are used, these should be used with caution, as they were not designed to answer the legal question per se, while the reliability and validity of many of these tests are also at issue. Psychologists should have an understanding of the scientific properties of the psychological test and should have a sound knowledge regarding the strengths and weaknesses of the applicability of the test in a legal context. This is imperative for two reasons. Firstly, science and law require that the onus rest on the psychologist who used the test to prove why the psychological test is psychometrically and forensically adequate. Secondly, no psychological test is scientifically strong enough that it can be used without hesitation or limitation in custody evaluations. It is therefore required that psychologists indicate the level of inference made (i.e., based on opinion or empirical fact) to answer the legal question and also to state the limitations of the test.

This study shows that psychologists in this sample follow the international trend of using psychological testing as part of the custody evaluation procedure. A second international trend that is reflected in the current sample is the wide use of structured tests with adults with less usage of projective techniques, while in the case of children more projective techniques and less structured tests are used. A third trend suggests that internationally children are being tested less frequently than adults; however, in

the South African sample the situation is reversed. A fourth trend that emerged internationally and in the South African sample, is that intelligence testing is no longer de rigueur in child custody assessments. A fifth trend suggests that, despite of serious reliability and validity issues, the use of custody specific tests is on the increase.

However, some concerns regarding the use of psychological tests in the current sample are evident, most of which is a violation of the ethical code and the guidelines set for the use of foreign tests: First, the vast majority of the tests are not standardised for the South African population; others are outdated, while still others are not valid custody assessment measures. This compromises the scientific rigour generally required by the courts. Second, the vast majority of clinicians did not indicate the limitations of the tests applied, nor did they indicate any South African-related validation research. This could give the wrong impression that the measures used are validated for the custody evaluation in South Africa. Rulings based on incorrect assumptions and findings could put children and families at risk. Third, deviations from the standardised administration, scoring and interpretation procedures were evident for some of the tests. This seriously compromises the validity of the instrument. In addition, a number of psychologists did not indicate which psychological tests were used. The test results were not discussed or the results were left out entirely in some reports. This reflects the psychologist's less than perfect testing practice, which may include routine testing and over testing, and could constitute unethical behaviour.

Another limitation of this study is that it did not evaluate how the psychological tests were interpreted, what the degree of the inferences about the legal issue was, or how they contributed to the final recommendations. It is possible that psychologists are over reliant on the data obtained by psychological tests and use this data inappropriately in their custody determinations. It is imperative that the manner in which the data of psychological tests is utilised by psychologists be explored in future research. An additional concern is that at least some of the clinicians in the sample performed a sexual abuse assessment within the custody evaluation. As this constitutes a highly complex evaluation procedure and requires specialised skills and knowledge, questions can be raised about the psychologists' expertise in this regard. However, this issue was not explored in the current study, but should certainly be investigated in research.

The findings from this study, albeit exploratory and preliminary, highlight the need for better training and education of psychologists performing custody evaluations, especially regarding their knowledge of testing procedures and the utilising of tests in the forensic arena. However, the following guidelines for test usage are suggested which could lead to better standards of practice in this regard (Heilbrun, 1992, 1995; Lilienfield et al., 2000; Otto et al., 2000; Stahl, 1999, 2011):

- \* A comprehensive test manual should be available; it should fully describe the test development, standardisation, administration, scoring and psychometric properties of the instrument.
- \* Adequate levels of reliability and validity must be demonstrated. Because reliability limits validity, special caution should be exercised when using instruments



with reliability estimates lower than .80. The use of less reliable tests would require an explicit justification by the psychologist.

\* Reliability and validity studies should be published in peer reviewed journals because this allows for the most objective examination of the test and its properties. This implies that the instruments should be investigated by others and not its author(s).

\* The test should be relevant to the legal issue, or to a psychological construct underlying the legal issue. This implies that the test should be valid for the purpose it is being used for. Inferences made (such as a link between personality and parenting capacity) should be made clear, and the relevance should be established by validation research in refereed journals. The limitations of these inferences should be clearly indicated. Overgeneralisations or making definitive statements about a particular test that is beyond the data of the test (such as profiles for which there is no validity), should be avoided.

\* The standard administration procedures should be followed. Departure from these procedures (e.g., giving a test to be completed at home) will seriously compromise the outcome/and or objectivity of the results.

\* In selecting a test, the psychologist must ensure that the testee fits the standardisation sample as closely as possible. Any deviations should be indicated.

\* Instruments that utilise computer-generated scores and reports generally compromise the complexity and conceptual thinking of custody evaluations. When these are used, the limitations should be indicated.

\* Instruments given to one parent must also be given to the other parent. In addition, the response style of the testees should be explicitly assessed and tests should be interpreted within this context. Heightened forms of bias, distortion and deception could render the results meaningless.

\* Regarding the use of projective techniques, psychologists must be aware of the controversial nature of these instruments; they therefore have an ethical obligation to describe the limitations of these techniques. For example, projective techniques are susceptible to faking, as well as to subtle situational influences, which compromise the validity. The psychometric properties (validity and reliability) of many projective techniques are mostly dubious or non-existent, while norms for projective techniques are often non-existent, poor, or misleading. These techniques may also be biased against certain population groups.

\* It is unethical to use psychological tests alone as a foundation for custody recommendation. Test results should be integrated with information gathered through interviews, collateral information and observations. At best, tests should be used to investigate hypotheses.

\* The psychologist should have the necessary training, knowledge and qualification to use a specific test. Even a valid and appropriate test can produce invalid results if it is administered, scored or interpreted by a professional who lacks the requisite knowledge. In addition, using a test without adequate knowledge or expertise, may suggest that the psychologist is practising outside his/her competency, which is a violation of the ethical code.

In conclusion, psychological testimony can be invaluable in family court matters where complicated and delicate issues are frequently present. Such evidence is strengthened when psychologists arrive at accurate conclusions regarding the parents and children involved in litigation. Misleading testimony based on invalid or inappropriate psychological tests presents a direct threat to the integrity of the forensic psychologist and should be vigorously challenged by both attorneys and psychologists.

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**Psychologists' Recommendations In Child  
Custody Reports:  
The Ultimate Opinion Rule**

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## **Psychologists' Recommendations In Child Custody Evaluations:**

### **The Ultimate Opinion Rule**

There is considerable debate concerning psychologists' legitimacy and ability to adequately address the legal question in custody evaluations. Authors in favour of the ultimate opinion rule suggest that psychologists are acting beyond the scope of their scientific, professional and ethical expertise by providing ultimate issue recommendations. Authors against the ultimate opinion rule suggest that psychologists are acting within the scope of their abilities; that custody recommendations by psychologists in family law are a relevant necessity and the ultimate opinion rule places the court in a worse position to understand expert testimony. Some authors take a cautionary route, suggesting that only well-trained and experienced forensic evaluators should offer ultimate opinions, after taking into consideration all relevant data and scientific material. This study evaluated 24 psychologists' recommendations in child custody reports performed for the Office of the Family Advocate. The psychologists' recommendations were analysed to determine the frequency of ultimate issue recommendations and the extent to which these recommendations corresponded with the resulting court order. These psychologists followed the international trend and provided custody recommendations in the vast majority of the forensic reports, while there was 94% accordance between the psychologists' ultimate issue recommendations and the final court order in stand-alone reports. However, concerns are expressed about the quality of the reports and the judiciary's acceptance of such reports. A need for better training of psychologists performing custody evaluations and greater judicial vigilance is expressed. Indications for future research are given.

*Keywords: child custody evaluations, ultimate issue recommendations, ultimate opinion rule, recommendations in custody evaluations*

Die geldigheid en vermoë van sielkundiges om die regspraak rakende versorging-en-kontakgedinge na behore te kan beantwoord, word al 'n geruime tyd gedebatteer. Outeurs wat ten gunste van die eindopinie-reël is, is van mening dat sielkundiges wat eindopinie-aanbevelings maak, buite die bestek van hulle wetenskaplike, professionele en etiese kundigheid optree. Outeurs wat die teen die eindopinie-reël is, is van mening dat sodanige sielkundiges wel binne die bestek van hulle vermoëns optree, dat sielkundiges se aanbevelings binne die gesinsreg relevant en nodig is, en dat die eindopinie-reël die hof in 'n swakker posisie stel om deskundige getuienis te verstaan. Sommige outeurs neem 'n meer versigtige standpunt in en is van mening dat slegs goed-opgeleide en ervare forensiese evalueerders sodanige aanbevelings kan maak, en slegs nadat alle relevante data en wetenskaplike inligting deeglik oorweeg is. Vier-en-twintig sielkundiges se aanbevelings rakende die plasing van kinders wat aan die Kantoor van die Gesinsadvokaat gelewer is, is ontleed rakende die frekwensie waarmee sielkundiges eindopinie-aanbevelings gemaak het, asook die mate waartoe die aanbevelings met die hofuitspraak ooreengestem het. Dit blyk dat hierdie sielkundiges, in ooreenstemming met die internasionale neiging, aanbevelings ten opsigte van versorging en kontak in 'n beduidende meerderheid van gevalle gemaak het. In die geval van alleenstaande verslae, was daar 'n 94% ooreenkoms tussen die sielkundiges

se aanbeveling en die finale hofuitspraak. Kommer word egter uitgespreek oor die kwaliteit van hierdie verslae en die regslui se aanvaarding van sodanige verslae. Beter opleiding vir sielkundiges wat forensiese evalueringe doen, asook beter juridiese waaksaamheid word voorgestel. Aanbevelings vir toekomstige navorsing word verskaf.

*Sleutelwoorde:      Versorging-en-kontak-evalueringe,      eindkwessie-aanbevelings, eindopinie-reël, aanbevelings in versorging-en-kontak-evalueringe*

Psychologists' involvement in the legal system in the form of reports, affidavits and oral evidence dates back to the beginning of the 20<sup>th</sup> century, while their involvement in legal proceedings has increased and evolved over time (Melton, Petrila, Poythress, & Slobogin, 2007).

The law of evidence consists of those legal rules (such as the ultimate opinion rule) which indirectly or directly specify what facts may be presented to the court, how the court considers those facts, the threshold that needs to be exceeded before facts become established and what weight is given to such facts (Murphy, 2011; Van der Merwe, 2009). The South African law of evidence, as in most English speaking countries (USA, Canada, England and Australia) is based on the Anglo-American system of law (Allan, 2005).

### **Types of Psychological Evidence**

Psychologists typically provide testimony/evidence to the court as factual witnesses, as treatment or professional witnesses, as expert witnesses, and as clinical detectives/investigative psychologists (a special kind of expert witness) (Allan, 1995). Psychologists who work in the field of child custody are often called as expert witnesses by the court. An expert witness assists the court by interpreting inferences from the facts of the case and by providing intelligible information that would otherwise be difficult to

appreciate by those not skilled in the field. Experts are therefore called when the court lacks sufficient knowledge about specific issues. Types of expert testimony required from expert witnesses may be (Dennis, 2007; Van der Berg & Van der Merwe, 2009; Zefferett, Paizes, & Skeen, 2003): a) non-expert evidence of fact, which requires no special expertise, such as a description of behaviours; b) expert factual evidence, which refers to specialised knowledge and the use of specialised instruments, such as knowledge of human behaviour and psychological tests, and c) expert evidence of opinion, where the expert considers all the facts, decides what inferences can be drawn from them and makes a judgement or recommendation in the form of an opinion.

### **Rules of Expert Testimony**

As a rule, witnesses are not allowed to express an opinion in court. However, the court will allow the opinion evidence of an expert witness if all of the following five rules of expert testimony have been satisfied (Allan, 2005; Allan & Meintjies-Van der Walt, 2006; Murphy, 2011; Sales & Shuman, 2007):

- **The specialist rule.** This rule states that only those experts that the courts find are specialists in the field will be allowed to express opinions. Traditionally, the courts examine educational credentials in order to establish the specialist rule; however a title or qualification in psychology does not make that professional an expert witness. The court therefore examines whether the professional has specialised knowledge, training, skill or experience sufficient to enable them to express opinions not generally available to members of the public. South African courts are not explicit about what the specific criteria are before witnesses are regarded as

experts; it does seem however, that they are required to have both theoretical and practical knowledge. (In fact, psychologists are sometimes surprised by the ease with which South African courts are prepared to accept that they are specialists in a specific field!)

- **The scientific trustworthiness of evidence.** This stipulates that the courts will only accept testimony based on theories and techniques that have gained scientific credibility. Unlike in the USA, the South African courts have never explicitly considered when knowledge moves from being speculative to being a recognised field of expertise that is admissible as an expert opinion. In the USA, the court typically applies the so-called Daubert test. The Daubert test follows from a court case (*Daubert v. Merrell Dow Pharmaceuticals*, 1993) in which the court formulated a specific approach to expert testimony. This stipulates that a) it must be possible to test the theory presented by an expert witness; the theory must therefore be falsifiable; b) the theory or technique must have been subjected to peer review and publication; c) the potential error rate of the theory or technique must be known and there should be standards for controlling the operation of the technique; and d) the theory or technique enjoys general acceptance within the most relevant scientific community. It would appear however, that the South African courts apply the general acceptance standard test, which is common to Daubert, when they consider the admissibility of scientific testimony.
- **The helpfulness rule.** According to this rule, testimony of an expert is only admissible if it is deemed to be of assistance to the court, and has the capacity to

add to the court's knowledge. However, if the specific information is or becomes common knowledge, the evidence of the expert will be excluded.

- **The basis rule.** According to this rule, the opinion of an expert witness must have a factual basis; therefore experts must be able to provide facts, data and reasons on which their opinions are based. Courts will generally allow experts to reinforce their opinions by referring to relevant scientific journals, textbooks and psychological tests, provided such information comprises part of the general body of knowledge falling within the field of expertise. The basis rule serves to prevent the introduction of hearsay evidence and to provide the proper context for the fact finder to understand expert opinion.
- **The ultimate opinion rule.** In every case there are factual and legal issues that must be proved by one of the parties. These issues are referred to as the ultimate or material facts and it is the court's function to decide the central legal question (e.g., whether the person is legally sane, competent, dangerous, fit to be a parent). The traditional formulation of the ultimate opinion rule provides that it is not permissible for witnesses to express their opinion upon any of the issues, whether fact or opinion, which the court or a jury has to determine.

### **Controversy of the Ultimate Opinion Rule**

Of all the rules of expert testimony, the ultimate opinion rule is the most controversial. The legislatures in English speaking countries who have a history in Anglo-American law, adopted the ultimate opinion rule and originally applied it rigidly (Allan & Louw, 1997). A major shift occurred as the result of the writings of an eminent American legal

scholar, Wigmore (1940, 1979), who questioned the need for the rule. In England, a change in thinking resulted in the rejection of the rule in the ground breaking English case of *Hollington v. Hewthorn & Co* (1943). The ultimate opinion rule was abolished in civil proceedings; however it still technically operates in criminal cases. Therefore, there is an increasing tendency by the English courts to allow ultimate issue testimony (Allan, 1995). In the United States, the ultimate opinion rule was abolished by the introduction of section 704 of the Federal Rules of Evidence (1975). However, this changed because of a public outcry after the Hinckley verdict (Melton et al., 2007). (Hinckley attempted to shoot President Reagan and at the conclusion of his trial the jury delivered a not guilty verdict by reason of insanity because of the expert testimony.) In Australia, it would essentially appear that the courts do not apply the traditional formulation of the ultimate opinion rule and the Australian lawyers avoid transgressing the rule by formulating questions and answers in non-legal sounding terminology (Allan, 1995). In Canada during the early 1980s, a Federal and Provincial Task Force recommended that witnesses be allowed to give their opinions on ultimate issues when the court determines that it will be helpful (Nesca, 2007). As a result, the ultimate opinion rule was abolished.

The South African courts strictly applied the ultimate opinion rule in the early part of the last century, however they have moved away from this position, although some inconsistencies are apparent (Allan & Louw, 2001). The current legal position in South Africa is that psychologists may express opinions regarding ultimate issues provided the courts find the testimony relevant (Allan & Louw, 1997). Dennis (2007) explains that as a result of the weakness for the justification of the rule and its inconvenience in practice, the opinion rule has virtually disappeared in modern law.

### **The Ultimate Opinion Rule in Custody Evaluations**

However, the debate regarding the ultimate opinion rule has not yet been resolved. This debate mainly concerns the legitimacy of psychologists making ultimate issue recommendations in custody evaluations and whether it exceeds their scientific basis. This debate has been an on-going issue spanning many decades (Grisso, 1986, 2003; Melton, Petrila, Poythress, & Slobogin, 1997; 2007), with some endorsing the ultimate opinion rule, others rejecting it and still others advocating a cautious application thereof.

A cautionary approach to the ultimate opinion rule is extended by various authorities promoting guidelines for custody evaluations. The benchmark guideline for psychologists has been American Psychological Association's (APA, 1994, 2010) guidelines for child custody evaluations. These guidelines stipulate that the psychology profession has not reached a consensus about whether a psychologist should make ultimate issue recommendations. However, if such recommendations are made, it should be derived from sound psychological data obtained through established professional and scientific standards and should be based on the best interests of the child. It is advised that psychologists be familiar with the various opposing arguments on ultimate issue recommendations and that they should be able to logically explain their position on why the ultimate issue was addressed. This position is also held by the Association of Family and Conciliation Courts (AFCC, 2007), whose guidelines stipulate that psychologists "should only provide opinions and testimony that are a) sufficiently based upon facts or data, b) the product of reliable principles and methods and, c) based on principles and methods that have been applied reliably to the facts of the case" (p. 89). A strong emphasis is placed on articulating limitations of the evaluation with respect to data

interpretation. Some authors who supply guidelines for custody evaluations (e.g. Clark, 1995; Gardner, 1998) are more adamant and opine that custody evaluators have the necessary expertise to act in the best interest of the child and should not refrain from making both specific and general recommendations to the court; to do so experts will negate their obligations to the court. Rogers and Ewing (2003) argue that any bans of ultimate and penultimate testimony may obscurify rather than clarify critical issues. Moreover, forensic psychologists are often encouraged to engage in ‘semantic brinkmanship’, paralleling but not using forbidden phraseology. This situation, according to these authors, renders the ultimate opinion ban meaningless.

Proponents of the ultimate opinion rule, argue that legal issues such as child custody, are moral determinations, not clinical judgements, and since psychologists do not possess any specialised knowledge of the applicable legal issues of legality and morality, they are unqualified to provide ultimate issue opinions (Melton et al., 1997, 2007; Slobogin, 1989). In addition, Tillbrook, Mumley, and Grisso (2003) argue that under English common law, judges have been assigned exclusive societal authority to decide legal and moral issues, while society qualifies mental health professionals to provide expert testimony on the basis of their clinical and scientific expertise. Therefore, the practice of psychologists testifying to the ultimate legal issue constitutes an improper displacement of the court’s responsibility onto people not qualified or authorised to do so. “Thus testifying to the ultimate legal issue is inappropriate and illogical and to do so threatens the integrity of mental health professions and the legal process” (p. 77). Tippins and Wittman (2005) are in agreement with these forensic scholars, and conclude that in the case of custody evaluations, clinicians should routinely avoid addressing the ultimate



issue before the court regarding specific custody arrangements, access plans, or schedules. These authors state that “[d]rawing conclusions about the ultimate issue before the finder of fact blurs critically important boundaries between the person invested with the power to make socio-moral and social-control decisions (the judge) and the expert witness (the psychologist) who is hired to assist the court” (p. 203 ). Some South African authors also contend that by abstaining to offer ultimate issue testimony, psychologists will be upholding important professional standards of practice and maintain the boundaries of their role in the courtroom. For example, Allan and Louw (1997) argue that the psychology profession should actively discourage psychologists from providing ultimate issue opinions to the courts. The answer according to these authors is for the psychologist to provide reports and testimony that is in fact so comprehensive and enlightening that there is no need to ask them for such opinions: the judge should, at the conclusion thereof, be able to form an accurate opinion about the ultimate legal question that needs to be answered. A core problem with providing ultimate issue recommendations according to these authors is that it becomes the focus point during cross examination. If the ultimate issue opinion is proven wrong, it often results in a total rejection of the psychologist’s report and testimony. As a result, much information, which is relevant and valuable, gets disregarded. Conversely, if no such opinion was expressed, only those parts of the report or testimony which have been shown to be wrong will be rejected.

However, Tippins and Wittman (2005) have noted that there are important gradations of reasoning involved in expert testimony, from low level interpretations to ultimate opinions. They describe four levels of data and inferences that evaluators gather and work

with during custody evaluations: Level I constitutes the psychologist's sensory observations, without the addition of higher level abstractions about these observations. These would include observations about the child/parents' behaviour, or the scores on psychological tests. Level II constitutes the psychologist's inferences from these observations and his/her conclusions about the psychology of the parent or child, without reference to custody or best-interest constructs. Comments could include issues such as attachment and parenting styles, substance abuse and mood disorders. Level III signifies a higher level of abstraction about the implications of Level II conclusions. These inferences are more global and intuitively based, and although they do not directly state what should happen to the children, the inferences begin to make a greater potential impact on the judiciary's final decision. Comments may include custody-specific constructs such as global parenting capacity, emotional/psychological fit between parent and child, primary attachment/psychological parent, parent-child alliances, etc. Level IV is the final transition where the psychologist uses Level III inferences to prescriptively conclude how care and contact plans should be structured by the court. At Level IV, value judgements therefore become much more overt, prescriptive, and potentially life-changing for the litigants.

Although Tippins and Wittmann are quite critical of the definitional, assessment, reliability and validity problems associated with interview protocols and psychological tests used in custody matters, they concede that Level I and Level II observations and inferences are appropriate to share with the court. This opinion is also shared by South African author Kaliski (2006) who notes that custody experts are usually requested to predict which parent or circumstances will ultimately benefit the minor child. However,

mental health professionals generally are unable to predict future events, even in areas where there is much research. According to Kaliski it is therefore somewhat preposterous to expect psychologists to be able to venture even a guess about the long-term prospects a child may have with a particular parent. He agrees, however, that custody evaluators could assist the court a) by providing observational data that is otherwise not available; b) in focusing on more relevant considerations that otherwise may be given too little weight; c) by expressing relevant feelings and attitudes that the parties have difficulty expressing; and d) by providing an understanding of the family dynamics.

According to Tippins and Wittmann, inferences based on custody-constructs, such as best interests, and parent-child fit, that clinicians typically begin to draw at Level III, have inherent problems, and should therefore be used with caution. For example, Heilbrun (2001) contends that legal concepts such as ‘child custody’ and the ‘best interests of the child’ are not measurable and there is no meaningful way to decide how much is legally enough or better. Psychologists therefore cannot properly draw conclusions because the inferences they make exceed the data available to them. Tippins and Wittmann suggest that the only ethical statements that can be made by clinicians at this level include information to the court regarding notable psychological risks and/or advantages associated with various custody/access plans. These statements should be made in conjunction with cautionary statements to the court and specific references to the limitations of the evaluation methods. Krauss and Sales (2000) and Melton et al. (2007) share a similar view, and as a guiding principle, suggest that statements about potential risks/advantages need to be grounded in case-specific facts and reliable empirical

literature, otherwise they can be considered unethical and possess no value to the court or to the families being evaluated.

Tippins and Wittmann suggest a moratorium on the practice of psychologists of providing ultimate issue recommendations at Level IV. They argue that this is unethical, given the lack of empirical evidence to support psychologists making such recommendations. Kalliski (2006) contends that experts should not make findings on the ultimate legal issues as they do not have the expertise to judge the evidence. In addition, the basis on which these recommendations are made in most cases fail to meet the high standard of reliability and validity expected for expert evidence as required by Daubert, and are often accepted unchallenged by the judiciary (Tippins & Wittmann, 2005).

Psychologists Gould and Martindale (2005) are mostly in agreement with Tippins and Wittmann and make a distinction between the *ultimate legal issue* and *ultimate factual issue*. The first refers to the decision made by the judge (e.g., awarding custody and access) and the second to factual issues that have been the focus of the investigation. They also stress the difference between the *legal best interest of the child* and the *psychological best interest of the child*. These authors opine that custody evaluators are permitted to offer testimony about ultimate factual issues and the best psychological interests of the child, provided they have adequate informational foundations to support their opinions. They remind psychologists that they have an ethical responsibility to limit their recommendations to those for which there is empirical support and to indicate the limitations of their evaluation procedures and subsequent recommendation. This is also the opinion of Bonthuys (2001) and Miller (2002) who indicate that when mental health professionals express opinions, their recommendations can only relate to the best

*psychological* interests of children, and not to the best *legal* interests of the child, since these two concepts are not the same.

Although most commentators are in agreement with Tippins and Wittmann's (2005) analysis and criticism of psychologists' practices, many take a more conditional approach, while they are not only critical of psychologists' practices, but also hold the judiciary accountable to a certain degree. For example, Kelly and Johnston (2005) (a psychologist and a jurist respectively) argue that although they are in agreement with Tippins and Wittmann's analysis, they do not entirely endorse their call for a moratorium on psychologists in providing recommendations to the court in child custody proceedings. According to them, such a moratorium does not solve the many problems associated with expert testimony and may have unintended consequences which could place families at even greater risk. They argue that as judges are sometimes even less qualified in training and experience than mental health professionals in the vague mandate of 'the best interest of the child', they should not be left to make the final decision without the input from custody evaluators. In addition, as opposed to custody evaluators who have considered each child and the family situation in depth, judges and legal advocates often rely on prescriptive guidelines (such as primary residence of one parent, and alternative weekend visits with the other) and personal biases and presumptions which may lead to a simplistic, one-size-fits all substitute for the complex issue of serving the best interest of each individual child. Kelly and Johnston contend that in cases where trained and experienced evaluators have collected data systematically, used valid and reliable instruments, and linked their Level I and II observations to Level III conclusions, and citing empirical research to support these conclusions, it will be ethical to make

recommendations regarding custody and access and to provide the trier of fact with some options for parenting plans. Psychologists' contribution at Level IV could involve offering a series of alternative hypotheses, predictions about the future functioning of the child under different custody scenarios, which should be backed by research findings. However, to address the serious issues of the less-than-perfect practices of many mental health professionals, they recommend better training for forensic custody evaluators, more research on long-term outcomes of child custody decisions and the greater use of parenting plan options.

Canadian law professor Bala (2005) and Australian judge Dessau (2005) endorse the limitations of psychologists' practices, but agree with Kelly and Johnston that there are great variation in the experience and expertise of judges who make best interest decisions and that the exclusion of mental health professionals in this regard will be detrimental to children and their families. In addition, Dessau questions the suitability of the adversary system in cases related to children. In the same vein, Rotman (2005) calls for a reform of the family court system, stating that the inordinate influence of custody evaluations and recommendations result from systemic problems within the legal system. Therefore, according to her, barring Level IV testimony on the ultimate issue will not solve the problem, since custody decision making will still be based on inadequate and untested evidence. She argues for better training for all the role players involved, including lawyers and judges.

In agreement with Kelly and Johnston, psychologist Phillip Stahl (2005) argues that well-trained and competent custody evaluators are in a position to make recommendations to the court. These pertain not only to the ultimate issue, but also to

recommendations in areas such as parenting plans, conflict resolution, special needs children, domestic violence interventions and therapy. He also believes that certain cases are more likely to lend themselves to a recommendation, some to multiple recommendations and others to no recommendation at all. However, Stahl does voice his concern about poor quality child custody evaluations and the lack of standards in the field, and calls for vigilance in this regard. He contends that judicial officers need to be better informed about the kinds of information they will be receiving and about what constitutes good and bad evaluation data. In his view, it is be the poorly trained judge who benefits the most from informed recommendations.

Law professors Kisthardt and Fines (2005) affirm that psychologists cannot usurp the socio-legal judgement of the best interests of the child, but acknowledge that judges' unease in determining this standard, has led to the excessive reliance on the opinions of psychologists. Furthermore, attorneys, in their duty to present their client's case, cannot effectively evaluate when an expert has moved from Level II to Level III inferences, since they have every incentive, and perhaps a duty, to move the expert in a direction of an ultimate opinion. Due to heavy case loads, the courts have little incentive to police the boundaries of expert testimony; therefore, should psychologists increasingly refrain from providing ultimate recommendations, attorneys and judges may conclude that they have little value in the adversarial contest. Kisthardt and Fines therefore suggest three structural changes: a) using custody evaluators in less adversarial settings, such as preparing parenting plans; b) revising the procedures by which custody evaluations are elicited in litigation (e.g., using experts in panel discussions); and c) adopting the approximation standard for child custody determinations, rather than the vague best

interest standard (e.g., by evaluating a parent's demonstrated ability to meet the child's needs, rather than focussing on a predictive ability).

As alluded to in the above exposition, psychologists are not entirely to blame for overstepping their expertise; the legal fraternity also seems to play a role. Mental health professionals are often simply responding to the demand of the legal consumers who actively seek such invalid opinions (Gould & Martindale, 2005; Tippins & Wittmann, 2005). Research indicates that a specific recommendation that addresses the ultimate issue is one of the most valued components sought by the legal system (Bow & Quinnell, 2004); that the majority of judges and attorneys believe that psychologists should provide an opinion on the ultimate issue (Allan & Louw, 1997); and that they rank the need for this testimony relatively highly (Redding, Floyd, & Hawk, 2001). Furthermore, research also shows that the majority of psychologists provide ultimate issue testimony (Allan, 1995; Bow & Quinnell, 2004).

Possible explanations for psychologists providing ultimate issue recommendations are the judiciary's desire for conclusory testimony, economic pressure on the psychologist to sustain referrals, the psychologist's willingness to offer ultimate opinions, and a fear of being perceived as incompetent (Melton et al., 2007), while the dynamics of the courtroom may also tempt the psychologist to address issues often beyond his or her expertise (Stevens, 2011). It is for these reasons that Gould and Martindale (2005) suggest that judges and attorneys should become more vigilant in order for mental health professionals to become more responsible practitioners. However, Grisso (2005) concludes that looking to the law to solve the problem of Level IV testimony is not likely to work because a) many judges favour the availability of expert opinions about the



ultimate legal question, and b) ultimate opinions are accepted in most other areas of law in which psychological testimony is involved. In order for ultimate opinions in custody issues to be resolved, Grisso suggests a strategic collaboration with the other areas of forensic psychology, psychiatry, and social work.

South African psychologists are in a particularly unfavourable position (Allan, 2005; Allan & Louw, 1997): Psycho-legal training appears to be largely inadequate; there is a lack of comprehensive guidelines for custody evaluations; psychologists are not well informed regarding the law of evidence and the rules of expert testimony; and contrary to their counterparts in other countries, very little research has been executed in these areas. This study endeavours to contribute to much needed research into psychologists' custody evaluation practices, especially regarding the ultimate opinion rule.

## **Method**

### **Purpose and Aim of Research**

Against this background, the purpose of this research is to analyse psychologists' recommendations in a sample of child custody reports and compare these recommendations with the final court orders. The goal of such research is to illuminate current practice, compare the practices of psychologists in South Africa with the practices of psychologists as evidenced by international research, point to problem areas and provide suggestions for improvement.

## **Data sources**

This study consists of a content analysis of twenty-four psychologists' custody reports and court orders that were performed for the Office of the Family Advocate<sup>1</sup> in the Cape Town and Port Elizabeth Judiciary between 2005 and 2007. Content analysis is the examination of qualitative information in terms of predefined categories. The contents of these sources are examined systematically to record the relative incidence of themes (Henning, 2004). A content analysis of reports was chosen as this removes the distortion resulting from self-report surveys by psychologists.

Owing to the procedural difficulties of obtaining reports, this represents a relatively small convenience sample. The psychologists' reports were obtained from the court archives with the assistance of the family advocates, who provided relevant case numbers for the search. The psychologist's registration category and gender was recorded and the data was further analysed. Although these reports and court orders form part of the court files, which are a matter of public record, the identifying information was not recorded. The sample of reports differed in content and purpose and included interim orders, custody orders made at the time of divorce and applications for reversals of custody/access after the divorce order. The recorded gender of the psychologists was 62% male and 38% female. The registration categories were equally distributed between clinical (45%), counselling (42%) and educational (13%) psychologists.

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<sup>1</sup> This is a specialised state service that is staffed by state appointed advocates and social workers which institutes enquiries into the welfare and interests of children in divorce matters in order to make recommendations to the court (McCurdie, 1994).

## Procedure

Each psychologist's report was analysed to determine the type of recommendations made. The type of recommendation and frequency with which it was indicated across the evaluation, was recorded. The court order was then compared to the ultimate issue recommendations. Only information obtained by reading the report and court order was included in the data, with the assumption that processes not documented were not included.

## Results and Discussion

The types of recommendations made by psychologists are provided in Table 1 and Table 2. All the psychologists made some form of recommendation in the sample of reports. This high percentage is congruent with the international literature. LaFortune and Carpenter (1998) found that 86% of mental health professionals (89% were psychologists) they surveyed submitted recommendations in their custody reports and Bow and Quinnell (2001) found that 96% of psychologists made some form of recommendation. The recommendations that would constitute ultimate issue recommendations made by psychologists are provided in Table 1.

Table 1

*Ultimate Issue Recommendations made by Psychologists*

Specific Recommendation	N (%)
Ultimate issue recommendation	22(92)
Custody /Care	18(75)
Guardianship	17(71)
Access /Contact	21(88)

Ultimate issue recommendations were made in 92% of the reports. The international survey literature of psychologists performing custody evaluations shows there has been an increase in ultimate issue recommendations from 66% in the Ackerman and Ackerman (1997) study to 94% in the Bow and Quinnell (2001) study; however in a recent study Ackerman and Brey Pritzl (2011) noted that this figure has dropped to 59%. In a critical review of psychologists' reports, Bow and Quinnell (2002) found that custody recommendations were made in 92% of the reports and 84% of psychologists offered recommendations about parenting time. In their critical review of custody evaluators, Horvath, Logan, and Walker (2002) found that 92% of evaluators (not exclusively psychologists) made recommendations about custody and visitation.

The high percentage of psychologists making ultimate issue recommendations in the current sample could be an indication of a lack of knowledge of the ultimate opinion rule, pressure from the judiciary, economic incentives and lack of training.

Table 2

*Other Types of Recommendations made by Psychologists*

Specific Recommendation	N (%)
Therapy for parents	6(25)
Therapy for children	7(29)
Mediation	6(25)
Parental guidance	5(21)
Drug testing	4(17)
Children's wishes and competency to choose	3(12)
Further investigations	2(8)
Limitations of evaluations	5(21)

Other types of recommendations made by psychologists are provided in Table 2. These recommendations were only evident in less than a third of the reports. Therapy for children (29%) was recommended more than therapy for parents (25%). Bow and Quinnell (2001) found that individual therapy was recommended more for the parent (41%) than for the child (36%).

Parental guidance was only evident in one fifth of the reports and a quarter of the psychologists suggested mediation for future disputes. Ackerman and Ackerman (1997) found that mediation was recommended in 49% of cases and Bow and Quinnell (2001) found a significantly lower rate of 24% for mediation and 11.5% for parenting classes. Recommended drug testing for parents featured in 17% of reports.

Only 21% of the psychologists indicated any form of limitations in their reports, in regards to their assessment process, psychological tests used or recommendations made. This is concerning, as this is one of the major problematic issues addressed by authors on the ultimate opinion debate (Allan & Louw, 1997; Melton et al., 2007; Tippins & Wittmann, 2005).

In addition to examining the components of the recommendations, the extent to which these recommendations were supported by the court order was also explored and is provided in Table 3. Only recommendations regarding the ultimate issue were considered namely: custody/care, guardianship and access/contact were examined.

Table 3  
*Ultimate Issue Recommendations and Court Order*

Ultimate Issue Recommendations	Court Acceptance of Ultimate Issue Recommendation N (%)
All 24 cases	17(71)
Stand alone reports / 19 cases	18(94)

In 71% of the reports, the court order (as ordered by the judge or settled through the family advocate's office) was in accordance with the psychologist's recommendations. The remaining 29% consisted of seven cases, six of which contained other evaluators' reports with opposing recommendations. This in essence means that in cases involving only one psychologist's report there was 94% accordance between the psychologist's report and final court order. Only one psychologist's report was not accepted. The psychologist in this case recommended a joint custody (50/50 residency) for a three-year-old minor, which was supported by both the parents. The judge in this matter however ruled against the opinion of the psychologist and the parents' wishes as he felt the child was too young for shared residency and he ordered that primary residency be awarded to the mother.

In North American research, (Bow & Quinnell, 2001) found the exact recommendations were instituted in the court order 27% of the time, and in 64% of reports there was a similarity between the recommendations and court order. In only 9% of reports, were the psychologists' recommendations completely contrary to the court order. Ash and Guyer (1984) also found a concordance between custody/visitation recommendations and the final court decision.

Paradoxically, due to the concerns raised in articles 1 and 2 of this study, it appears that the courts are ill equipped to identify possible deficits in psychologists' custody reports, which could have implications for their acceptance of the recommendations.

Some authors (Tillbrook et al., 2003; Heilbrun, 2001) believe that psychologists can never attain the scientific certainty to provide ultimate issue recommendations and are destined to fail, no matter how good their methods of inquiry are. However this view should not be used as an excuse for psychologists providing sub standard custody reports or for the judiciary's blind acceptance of expert opinion. The high accordance between the psychologists' ultimate issue recommendations and the court order substantiates Allan's (1995) assertion that jurists' support of the ultimate issue rule in child custody matters is weak.

### **Conclusion**

It is necessary to interpret the findings of this study with caution, particularly due to the small sample size and limited geographic distribution. Furthermore, all the reports were obtained from one specific organisation, which has a function within the courts. This represents a selective sample group as the evaluators would be aware of the role of the family advocate's office and would most probably submit reports representing their "best practices". Thus, what is reported might not actually reflect general child custody practice/procedures and the results can therefore not be generalised. Due to the process of custody evaluations and the documentation of the cases by the courts, it

was not possible to do a retrospective analysis of the court files in order to elicit information as to how or why the judges made their decisions. The case files did not contain a written court record or written judgement, which could have been used to gain a better understanding of the problems the courts may have had with the reports, or on what information they based their final decision. Investigating this question further, is therefore beyond the scope of this study but should form part of the subject matter of a future study. Due to these limitations the results should be regarded as exploratory research with preliminary findings.

The ultimate opinion rule in the custody evaluations in this (very limited) sample appears largely unsupported by psychologists and the judiciary (although there may be concerns that psychologists are not even aware of this contentious issue). The judiciary also appears to have overwhelmingly accepted ultimate issue recommendations in cases where there was a stand-alone psycho-legal report. However, the court's acceptance of the psychologists' ultimate issue opinions is not a guarantee that the psychologists performed a thorough evaluation, or that their opinions were based upon good psycho-legal fundamentals and practice, or that the jurists were necessarily satisfied with their testimony. For example, Allan (1995) and Allan and Louw (2001) found that jurists rated the potential value of psychologists' testimony as moderate, but the actual value of their testimony as significantly poorer than expected. Furthermore, an analysis of the reports of the psychologists in the current study (articles 1 and 2) indicated serious fundamental flaws with the methodology, assessment procedures and measures, which would provide methodological reasons for concern regarding the final conclusions formulated in the



ultimate issue recommendations. This also calls into question the judiciary's ability to evaluate expert opinion in custody matters and to recognise sub-standard reports. Several authors (e.g., Allan, 2005; Dessau, 2005; Kelly & Johnston, 2005; Rotman, 2005) have called for better training of both psychologists and the judiciary.

The rules of expert testimony in the law of evidence are meant to assist in the process of improving testimony. However, the ultimate opinion rule in custody evaluations appears to be an ineffective gatekeeper of admissible evidence and an artificial means of ensuring that psychologists' testimony is of a high enough standard. Unless the rule is adequately policed and upheld, it renders itself ineffective in its aim and purpose. In theory, even if there are good arguments for the ultimate opinion rule and that it will ultimately improve psychological testimony, it can add little value in practice if judges and psychologists do not follow the rule. Grisso (2005) and Melton et al. (2007) acknowledge that despite numerous strong appeals from legal and clinical academicians, there has been little movement in the law toward imposing formal restrictions. Allan and Louw (1997) have expressed similar sentiments.

Although there appears to be little regard for the ultimate opinion rule in custody evaluations, it does not automatically follow that the proponents of the ultimate rule should be ignored. As indicated by Gould and Martindale (2005), such debate stimulates professional enquiry, along with closer examination of limitations in child custody practice. Even authors who disagree with a ban or moratorium on ultimate issue testimony agree with Tippins and Wittmann's (2005) call for clinical humility and judicial vigilance. In this respect there is universal agreement for evaluators to

make an affirmative statement in the report suggesting that the court and the parents need to understand the limitations of an evaluator's recommendations (Stahl, 2005) and that ultimate issue opinions are not scientific determinants but should rather be considered advisory only (Melton et al., 2007). This includes clearer statements by psychologists in their reports of the limitations of existing evaluation methods and the limitations of a psychologist's abilities to make recommendations and predictions about the future.

Unfortunately, this area needs a lot of attention in the South African context. It is alarming that only 21% of the psychologists indicated any form of limitation in their reports. This could be because psychologists do not want to open a "can of worms" and state their limitations, which they feel could reflect negatively on their authority or may open themselves up to cross examination. A more alarming explanation could also be that evaluators are not aware of the limitations of their methods of assessment, the psychological tests used, or of the recommendations made. This would highlight the need for better and ongoing training for forensic psychologists. Indicating limitations in custody evaluations is imperative, as it reflects the true nature of the social sciences and it accurately reflects the difficulties involved in making in custody determinations. Making limitations implicit in the reports prior to testimony empowers the psychologist's position, as it is evident that pitfalls have been considered. This paradoxically will make it harder for the lawyers to expose this position as a concession under cross-examination.

Furthermore, the problem is not that psychologists offer ultimate issue recommendations, but rather when the psychologist offers these recommendations

without the support or appropriate consideration of the data gathered. Inexperienced and untrained psychologists entering into the forensic field, or the psychologist who acts as a hired gun, poses a threat to the integrity of the forensic psychology profession because they do not work with the due diligence required. In custody evaluations, providing ultimate issue rule recommendations is an essential and necessary part of the process both from a legal, psychological and practical point of view. The best solution in high conflict custody disputes is one that carries the necessary power and authority of the judiciary, combined with the relevant psychological considerations provided by knowledgeable experts.

It is important to realise that psychologists making custody decisions have a near impossible task in attempting to determine children's future best interests in cases where parents cannot agree. Emery, Otto, and O'Donohue (2005) put it simply, "neither the wisest judge nor the most insightful psychologist has good answers to impossible questions" (p. 11). The ongoing difficulties and complexities in child custody evaluations and psychologists' lack of training in forensic principles generally produce reports of a poor standard, highlighting the need for better training of psychologists performing evaluations. Similarly, more research is needed to establish the long-term efficiency of psychologists making ultimate issue recommendations on the well being of the children.

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