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If we knew what happened, we would know better what to do: A commentary on Kleinman and Kaplan’s “Relaxation of rules for science detrimental to children”

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ABSTRACT

Allegations of child abuse and domestic violence present family courts with numerous dilemmas. Difficult decisions must be made about what did or may have happened with a minimal amount of information beyond the reports of the victims. The state’s *parens patriae* obligations to protect can clash with prevailing family court reforms designed to encourage joint parental decision-making and continuing frequent contact between the child and both parents. Advocates in family court frequently press for believing one side or the other and often proffer “science” serving their positions. Kleinman and Kaplan would have us believe the victims because, they claim, the victims are almost always telling the truth. But neither the law nor science can accept such a simple solution. We need to do our very best to find out what happened in order to better know what to do.

KEYWORDS

Bias; child abuse; child custody evaluations; child interviews; cognitive errors; domestic violence; intimate partner violence

My first law professor carefully scanned the class for volunteers to answer his question regarding a hypothetical scenario of a client coming in for a consultation with an attorney. Three days of property law and the Socratic Method had taught the ambitious thirty-plus law students in the class to hesitate before answering, wary there might be hidden complexities beyond the superficial appearance of the question. Thirty awkward seconds of silence filled the room. Thirty more followed. Finally, after ninety agonizing seconds of total quiet, I raised my hand and asked the question that twenty years of clinical and forensic psychology with children and families had taught me to ask, “Professor, are we to assume the client is telling the truth?”

Child abuse and domestic violence in family court

Child abuse and domestic violence are extremely difficult to investigate because we do not immediately “know” what happened or whether what is being alleged is true. Frequently, only the perpetrator and victim are present and the verbal allegations of the child and adult victims are the primary

evidence. Even when corroborating evidence is available, domestic violence may be ignored or minimized (Hardesty, Haselschwerdt, & Johnson, 2012; Johnston, Lee, Oleson, & Walters, 2005). All too often, the characteristics of the victim and how she presents her story can dictate whether or not she is believed (Hardesty, Hans, Haselschwerdt, Khaw, & Crossman, 2015). The search for truth in family law cases involving child abuse and domestic violence is often an almost impossible task because of differences in circumstances, perceptions, and perspectives. But when we find it, it should be impossible to ignore.

Accurate identification of child abuse and domestic violence is crucial if we want to end victimization, protect children, and provide children and families with appropriate justice, services, and treatment in lives free from abuse and violence (Mallory, La Rooy, Lamb, & Katz, 2011). In addition to their needs for immediate protection, children exposed to violence and high conflict are at increased risk for a broad range of emotional and behavioral difficulties (Baker & Campbell, 2012; Bancroft & Silverman, 2002). These children also bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families on their own (Johnston, Roseby, & Kuehne, 2009).

The state's *parens patriae* obligations for protecting those most vulnerable and unable to protect themselves has its roots in the child protection movement and has become a task assumed by family courts (Babb, 2008; Dale, 2014). In "Relaxation of the rules for science detrimental to children", Toby Kleinman and Philip Kaplan (2016) are critical of the responses of family courts to child abuse and domestic violence. This comment examines the relationship between the professional communities of family court and domestic violence and focuses on the uncertainty inherent in many, if not most, cases involving allegations of abuse or violence. When it comes to child abuse and domestic violence, we do not always know what happened and who needs to be protected from what or whom.

Missions of family courts

Current family courts attempt to take less blaming positions and to keep both parents involved in the lives of their children. Paradigm shifts related to gender equality, joint custody, and shared parenting were attempts to solve the "winners and losers" problem for judges and to keep both parents involved with their children (Elrod & Dale, 2008). In addition, public policies promoting the rights of unwed fathers encourage involvement of non-residential parents. They also emphasize the financial responsibilities of parents (Mason, 2012) and serve to protect the public purse from the high costs associated with fragile and single-parent families (Parkinson, 2011).

Family court reforms in the latter half of the twentieth century sought to transform the court's role from that of fault finder to conflict manager

(Schepard, 2000). Judges now attempt to create “settlement cultures” that reduce parental conflict and emphasize children’s relationships with both parents (Schepard, 2000). The state’s *parens patriae* obligations are embodied in the best interests of the child standard, which has gradually moved family courts from an adversarial, adjudicative model to a more rehabilitative, service-oriented model focused less on fault and more on settlement and parenting plans (Schepard, 2004). “Today’s family court judge is more than an adjudicator. In addition, he or she may oversee a multidisciplinary group of service providers all engaged with the children and families whose cases are before the court” (Schepard & Salem, 2006; Knowlton, 2015).

The best interests of the child standard and the advent of different alternative dispute resolution approaches brought increasing numbers of mental health professionals into the family court process. In addition to providing therapy, mental health professionals now serve in numerous roles including but not limited to that of court-appointed custody evaluator, mediator, parent educator, and parenting coordinator. The increasing use of mental health professionals and court services officers in family courts to encourage cooperative parenting has led some parents to believe these professionals were increasingly in charge of what was once the family’s private life (Pruett & Jackson, 1999).

There are serious disagreements about the general trajectory of family court system policies and practices and the needs of children and adults exposed to domestic violence or intimate partner violence (Johnston & Ver Steegh, 2013). The overarching institutional values, priorities, or “biases” of the family court system are not well suited to serve many families where IPV is an issue (Johnston & Ver Steegh, 2013). Policies favoring frequent, continuing access and joint custody match the needs of the general population of divorcing and separating parents, but these same policies can threaten the safety of victims of abusive relationships and their children. All too often ex-partners repetitively litigate and incorporate disputes about access to the children into their coercive and controlling behaviors toward their victims (Bemiller, 2008; Kernic, Monary-Ernsdorff, Koepsell, & Holt, 2005). Friendly parent statutes emphasizing parental cooperation often create difficult dilemmas for survivors of abuse.

Attempting to promote parental cooperation in every case may not be in the child’s best interests. When joint custody is imposed over the objection of the parties, the rate of litigation is roughly the same as when a parent has sole custody. Many believe that neither joint legal nor joint physical custody should be imposed in cases of high conflict or in cases involving domestic violence. ... Shared residency awards that have the effect of reducing child support can create financial burdens for the child and the residential parent (citations omitted). (Elrod & Dale, 2008, p. 399)

Kleinman and Kaplan (2016) assert that the relaxation of the rules in family court, particularly those applicable to the admissibility of scientific evidence, causes problems. These problems include reliance upon unqualified experts,

admission of opinions without cross-examination, and presentation of expert “speculation” rather than opinions based on science and accepted practice. According to the authors, family court would better protect children and families if they acted more like other civil and criminal courts regarding evidentiary rules. They should also rely upon expert testimony that could contribute to determinations of guilt or innocence like what occurs in criminal court. In addition, they believe family courts should emphasize cross examination of experts prior to admission of their testimony.

What is “science” in child custody?

In order to evaluate the “scientific” claims made by Kleinman and Kaplan (2016), it is first necessary to define “science” as applied to child custody.

There are three major ways to think about science. The first and most common way is to view science as “scientific knowledge,” as if science were a collection of facts that are so well established that they are generally considered truth. The second definition of science focuses less on facts and more on process. “Scientific methodology” comprises procedures used to generate questions and select methods of empirically and systematically studying the identified phenomena. And finally, science also includes “scientific theories” or systems of logic for developing inferences and interpretations, and analyzing the accumulated information in a manner most likely to produce valid answers to the questions (Dale & Gould, 2014, p. 3).

Regarding scientific knowledge, perfect studies that definitively answer questions in individual cases simply do not exist (Schepard, 2004). Social science research can provide valuable contextual information in custody disputes by helping to identify the questions to be investigated (Ramsey & Kelly, 2006). Use of methods and procedures grounded in a scientific mindset can often lessen bias. But judicial decisions apply the applicable law after consideration of the facts in individual cases. No single research study, or even aggregate of research studies, can tell us what the court’s decision should be (Ramsey & Kelly, 2006).

The focus on possible prejudices in family court is a known old problem now being examined under new labels such as “cognitive errors” (Drozd, Oleson, & Saini, 2013) or “bias” (Saunders, Faller, & Tolman, 2011). Cognitive errors can be divided into three groups: procedural errors, systematic errors in thinking, and errors in the assertions of relationships based on research.

- Procedural errors are “methodological shortcuts” that omit or distort certain steps or procedures that can impact the overall results.
- Systematic errors are “thinking shortcuts” in which people think too fast and thus react too fast or too unconsciously, or they become blind to some of the hypotheses by over-focusing on one or two other proposed explanations.

- Assertion errors are “application shortcuts” where research is misused or overused and there is an overgeneralization of research findings to cases without considering the potential limits of transferability based on sample, design, methods, and/or results (Drozd, Oleson, & Saini, 2013).

Controversies over false allegations and bias

Statistics about the frequency and different sub-types of abuse and domestic violence remain controversial. The possibility of false allegations in custody disputes is a particularly problematic aspect of these controversies. Kleinman and Kaplan (2016) extensively cited a survey research project that claims child custody evaluators are biased towards abuse and domestic violence survivors (Saunders et al., 2011). According to the research, these biases exist because of evaluator beliefs related to the prevalence of false allegations and patriarchal views related to notions of a just world and the social dominance of men over women (Saunders et al., 2011). For example, the findings include:

- Evaluators (judges and private attorneys) are more likely to believe mothers make false allegations than do legal aid attorneys and domestic violence workers.
- Domestic violence workers and legal aid attorneys gave the highest estimates of the percentages of fathers who made false allegations of abuse while judges and custody evaluators made the lowest estimates.
- On average, custody evaluators estimated that 26% of allegations made by mothers and 31% of allegations made by fathers were false.
- Evaluators were more likely to view fathers as alienating their children than mothers alienating their children.
- Male evaluators are more likely than female evaluators to believe that DV allegations are false.
- Patriarchal beliefs about gender norms, justice, and equality in evaluators were related to increased beliefs in false allegations.
- Beliefs about false allegations, alienation, friendly parent statutes and domestic violence significantly affect recommendations about custody and the need for supervised visitation.
- In response to a case vignette, those who favored perpetrators of domestic violence believed that DV victims alienated children from the other parent, DV allegations were typically false, DV victims hurt children when they resist co-parenting, DV is not important in custody determinations, and coercive-controlling violence was not a factor to explore (Saunders et al., 2011).

The differences in opinion on this issue are striking, but they are not limited to evaluators. For example, a review of the report finds other data equally indicative of bias among other professionals. For example:

- Almost 30% of domestic violence workers believed fathers made false allegations 90–100% of the time. Another 24% of domestic violence workers

believe fathers make false allegations more than 70% of the time. (See Table 4 from the Saunders et al., 2011 report.)

All of the findings of this large study cannot be reported here. The report is available online at: <https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf>.

However, after citing the extraordinary high figures for the prevalence of false allegations from the Saunders et al. (2011) study, Kleinman and Kaplan (2016) cite the *Child Maltreatment 2012* survey research for the proposition that only 1.07% of completed child protection reports regarding abuse are intentionally false. This statement then becomes the foundation for the claim made by Kleinman and Kaplan (2016) that there is no basis for evaluators to disregard closures of abuse and maltreatment made by children and protective parents.

Unfortunately, Kleinman and Kaplan (2016) take a single statistic and act as if it were “scientific” knowledge strong enough to make a sweeping policy change. Previous researchers have noted that some who cite low rates of false allegations count only deliberate attempts to deceive and exclude cases in which honest errors were made (Ceci & Bruck, 1995). It is true that some professionals take the position that most accounts are most likely true (J. Herman, 1981; O’Donahue, Benuto, & Cirlugea, 2013) and this is true for many kinds of child abuse. Yet, it is also historically true that some research has shown that significant numbers of child protection professionals believed that children never lie about child sexual abuse (Everson & Boat, 1989).

The issue of the frequency of intentionally false allegations in child custody cases remains unsettled. There is a widespread perception that mothers frequently made intentionally false allegations of child abuse in divorce and separation cases in order to gain a tactical advantage (Trocme & Bala, 2005), but the data for this assertion are slim. Indeed, the rate of intentionally false allegations is fairly low. Studies examining child sexual abuse report lower base rates than those including reports of physical abuse. For example, one review of research noted studies noting 4.7% of intentionally false child sexual allegations (Faller & Devoe, 1995), a rate of 12% in a divorcing sample (Trocme & Bala, 2005), and as much as 23% in a sample that included child sexual abuse and physical abuse (Bala & Schulman, 2000). There also remain debates over whether abuse victims are misidentified or overidentified, as well as over whether false-positive or false-negative reports create the greater harm (S. Herman, 2009; Kuehnle, 1996).

In my opinion, Kleinman and Kaplan (2016) are making broad claims based upon an inadequate analysis of complex research findings. They do not provide, however, the context for this research data or data inconsistent with their conclusions. For example, Kleinman and Kaplan are utilizing Table 3-2 from *Child Maltreatment 2012* for the following:

- Only 10 jurisdictions provided data on “intentionally false” dispositions. In those 10 jurisdictions:

- Only 16.2% of the reports were either substantiated or indicated;
- 83.8% of the dispositions were found to be “unsubstantiated,” “closed with no finding,” “unknown,” “no alleged maltreatment,” or “unknown;”
- In none of these 10 jurisdictions was the burden of proof for substantiating the allegation the higher clear and convincing evidence standard. The burden of proof in six of these jurisdictions was “a reasonable preponderance of the evidence” (Delaware, Florida, Puerto Rico, Tennessee, Virginia & Washington). The burden of proof in two states was “credible evidence” (Illinois and Minnesota); in the other two, it was “reasonable evidence” (Utah and Vermont);

When all 52 jurisdictions were included:

- Only 18.6% of the disposition reports were either “substantiated” or “indicated.”
- 58.0% of the disposition reports were “unsubstantiated.”
- 69.3% were either “unsubstantiated,” closed with no finding,” “no alleged maltreatment,” or “unknown.”

Table 3-2 of *Child Maltreatment 2012* does not provide sufficient support for any policy always accepting as truth what children or others say about abuse or violence. These allegations must be taken seriously and must be investigated, but accepting them as face value does not fit well with the kinds of flexible, fact-sensitive interest balancing that now characterizes family law (Meyer, 2008).

Interviewing children: A focus on rights and reliability versus risk

Most family courts have become wary of interviewing or taking direct testimony from children for fear of placing them in the middle of the conflict or encouraging parents to do the same (Dale, 2014; Warshak, 2003). It is becoming, however, more clear that children want to be heard on matters affecting them (Cashmore & Parkinson, 2008; Parkinson, Cashmore, & Single, 2005). The resistance to hearing directly from children is softening.

Some child advocates have called for independent lawyers to make children’s voices heard in custody and child protection proceedings for decades, noting that such “traditional client-based representation empowers a child as a ‘rights-holder’ to have their wishes presented and considered by the court.” (Elrod, 2007, p. 869). Others support “best interests” lawyer representation of children. The American Bar Association has adopted two sets of Standards of Representation – ABA Model Act Governing Lawyers Representing Children in Abuse, Neglect, and Dependency Proceedings (2011) and ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003). In addition, an increasing number of jurisdictions are allowing and even requiring judicial interviewing of children in post-separation decision-making because these meetings can be valuable for children, judges, and the dispute resolution process (Bala, Birnbaum, Cyr, & McColley, 2013).

Advocates for the child's voice to be heard in the process must overcome two obstacles, both of which caution against direct use of children's testimony. First, out of the gender wars of the 1980s came the controversies over "parental alienation syndrome" and/or "parental alienation." In custody disputes involving allegations of child abuse, parental alienation became the defense used by the targeted parent (Gardner, 1992). Almost 25 years later, the parental alienation controversy persists, albeit in forms that parallel court reforms in attempting to be less blaming toward parents. The dynamics once singularly and controversially described as "parental alienation syndrome" have evolved into more family systems-oriented ideas of "the alienated child" (Kelly & Johnston, 2001), differential diagnosis including the possibility of affinities and estrangements in parent-child relationships (Drozd & Oleson, 2004), distinctions between justified and unjustified facilitative or restrictive gatekeeping (Austin, Fieldstone, & Pruett, 2013), and behavioral descriptions of what has been labeled the "refuse/resist dynamic" (Friedlander & Walters, 2010).

Second, we learned that trusting what children say in interviews during investigations carried serious risks. Outlandish and eventually disproven charges of abuse in highly publicized daycare cases based almost entirely on children's allegations highlighted concerns about the suggestibility of children, the importance of careful interviewing of children when abuse was alleged, and the need for empirical research on children's testimony (Ceci & Bruck, 1995; Mallory et al., 2011). In response, a voluminous literature about children's testimony now exists (See Lamb, La Rooy, Mallery, & Katz, 2011). This literature includes, *inter alia*, protocols for forensic interviews of children where there are child sexual abuse allegations (See Kuehnle, 1996; Lamb, Hershkowitz, Orbach, & Esplin, 2008a), and developmental research on children's cognitive, memory, and linguistic capacities (Walker, 2013).

The prevailing scientific view is that investigative interviewers should be neutral towards allegations of abuse or violence and entertain multiple hypotheses that might explain any allegation (Kuehnle, 1996). When writing about investigations of, for example, child sexual abuse,

It is in the interests of all stakeholders (including prosecutors, defense attorneys, and child protective services workers) to thoroughly understand and evaluate the major rivaling alternatives in a sexual abuse case (p. 297). A balanced perspective that places an equal premium on both sensitivity (preventing false negatives) and specificity (preventing false positives) is likely a necessary condition for professional consensus on best practice (Faller & Everson, 2012).

We have learned a lot. The sensitivity and specificity issues are present in investigation of all abuse and violence allegations. While it is not true that children (J. Herman, 1981) or other victims never lie and it would be inappropriate to believe everything they say, children can provide reliable testimony.

We now know that children—even young children—can provide reliable and accurate testimony about experienced and witnessed events. We also know that children [like adults, added] are suggestible, and that we must be aware of ways in which suggestibility can be minimized. We further know that the level of accuracy and the amount of detail provided by young witnesses is largely dependent on the ways in which children are interviewed and that the role of the interviewer is thus paramount (Mallory et al., 2011).

Progress and guidelines

Dramatic change characterizes the past 50 years of family court systems' responses to domestic or intimate partner violence (Jaffe, Lemon, & Poisson, 2003). Yet, "critics continue to voice serious concerns about the adequacy of protection afforded to victims, the extent to which perpetrators are held accountable, the appropriateness of the dispute-resolution processes and other services available to families, and the effects of custody decisions and parenting plans that are ordered by family courts. In response, proponents—mostly professionals who work within the family court system—defend the trajectory of change" (Johnston & Ver Steegh, 2013). Progress is hard.

Multiple sets of guidelines from major professional organizations provide aspirational outlines for those providing services in various roles to children and families (e.g., evaluators, lawyers, mediators, parent coordinators, and therapists, etc.; see American Academic of Child and Adolescent Psychiatry (AACAP), 1997; American Academy of Matrimonial Lawyers (AAML), 2013; American Bar Association (ABA), 2003; American Bar Association (ABA), 2011; American Professional Society on the Abuse of Children (APSAC), 2002; American Psychological Association (APA), 2013; Association of Family and Conciliation Courts (AFCC), 2007). These guidelines have often led to more uniform forensically defensible practice (Gould & Martindale, 2007).

Currently, a task force of the Association of Family and Conciliation Courts (AFCC) is working on guidelines for custody evaluators where domestic and intimate partner violence has been alleged. This task force is comprised of advocates and evaluators who have worked for more than 3 years. They have solicited public comments on a first set of draft guidelines and will soon solicit a second round of public comments. These forthcoming guidelines are one of numerous efforts to improve collaboration and build trust between family courts and advocates. These efforts recognize that:

[f]or the children from violent homes whose parents are involved in the family court system to stand a chance, family court professionals and domestic violence advocates must search for answers together as colleagues rather than separately as combatants (Salem & Dunford-Jackson, 2008, p. 443).

Conclusion

Doing what is best for every individual child is complicated. Each best interests of the child decision considers the individual child's developmental and psychological needs within the changing characteristics, dynamics, and structure of the family (Kelly, 1997). Our society has chosen to consider children on a case-by-case basis. When the lives of children and parents involve child or violence, it is our duty to simultaneously protect them and to find out what may have happened to them. We should embrace the idea behind the title of one of the best treatises on interviewing children, "Tell me what happened."

If we knew what happened, we would know better what to do.

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