

The Use and Mis-use of Social Science Research in Child Custody Decisionmaking

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I. Introduction

A. Social science research has taken on increased importance in child custody policy and litigation in the past generation. Why?

1. Indeterminacy of best interest standard – need to guide discretion.
2. Growing body of child development knowledge that can inform planning of future custody when about family dissolves.
3. General legitimacy of social science knowledge creates incentives for advocates.

B. Two contexts for social science input

1. Policy formation- Social science research can contribute to better decision rules.
2. Social science research – Input in resolving child custody disputes. Parties introduce scientific evidence in support of custody claim.

C. Research has played (and is likely to play) more beneficial role in policy formation than in litigation.

II. Social Science Research in Policy Formation

A. The concept of the psychological parent\ primary caretaker– a brief history

B. The approximation standard and the ALI custody standard

1. Research on the importance of primary caretaking and the stability of past parental roles.
2. Research on the role of fathers in child development.
3. Deciding custody on the basis of past parental roles.
 - a. The academic argument
 - b. ALI Principles of the Law of Family Dissolution– Principle 2.08

C. Same sex parents and the defacto parent standard

1. Research on lesbian same-sex parents and children's welfare
2. The impact of research on recognition of de facto parents.

D. Evaluating the utility of research in policy formation

1. Good and bad social science– How to evaluate and weigh?
A body of developmental research conducted outside the policy arena v. isolated policy driven studies.
2. Promoting a deliberative process
3. Avoiding moral panics and political agendas

III. Social Science Research in Custody Litigation

- A. Adversarial litigation under the best interest standard.
- B. Litigation as a gender war enabled by pseudo-science
 - 1. Sexual abuse allegations
 - a. Child Sexual Abuse Accommodation Syndrome
 - b. Memory research and repressed memory claims
 - 2. Retaliation by fathers' advocates
 - a. Parental Alienation syndrome
 - b. Hostile Aggressive Parenting
- C. The perils of using scientific research in custody litigation
 - 1. Why has pseudo-science become so important in custody litigation?
 - 2. The distortion of science in the adversarial process.
 - 3. Ways to improve the use of social science research.
 - 4. Can social science research ever be useful in custody adjudication?
How to avoid throwing out the baby with the bath water.

IV. The Limits of Social Science Research

- A. The problem of scientific indeterminacy– Conflicting studies, ambiguous findings, gaps in knowledge, etc.
- B. Value, principles and policy choices in custody policy and decisionmaking– Not all issues are empirical.
- C. Imperfect knowledge v. no knowledge