

# SPECIAL ISSUE: PARENT-CHILD CONTACT PROBLEMS: CONCEPTS, CONTROVERSIES, & CONUNDRUMS

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## CASE EVALUATION AND RESPONSE

### SHERLOCK HOLMES AND THE CASE OF RESIST/REFUSE DYNAMICS: CONFIRMATORY BIAS AND ABDUCTIVE INFERENCE IN CHILD CUSTODY EVALUATIONS

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Had Sir Arthur Conan Doyle's fictional detective, the great Sherlock Holmes, actually engaged in deductive reasoning, he would have solved many fewer crimes. In fact, Holmes' logical progression from astute observation to hypotheses is a model of a type of *inductive* reasoning. This paper argues that mental health professionals tasked to evaluate why a child is resisting/refusing contact with one parent must approach each family the way that Holmes approached each case, without a presumed suspect, moving systematically from detail to hypothesis, well-versed in the full range of dynamics that may be at play, and erring in favor of parsimony rather than pathology. By contrast, the custody evaluator who approaches these matters through a deductive process, seeking data that support an *a priori* theory, is vulnerable to confirmatory bias and doing harm to the child whose interests are paramount. The literature concerned with resist/refuse dynamics is reviewed, yielding 13 non-mutually exclusive variables that evaluators must consider so as to more fully identify why a particular child is resisting or refusing contact with one parent. On this basis, the hybrid model is expanded to include the full spectrum of contributing dynamics. Specific recommendations are made for judicial officers in the interest of writing orders for custody evaluations that minimize the risk of confirmatory bias.

#### Key Points for the Family Court Community:

- Deductive reasoning seeks to confirm or refute an *a priori* hypothesis
- Deductive reasoning is highly vulnerable to confirmational bias
- Confirmational bias can corrupt and invalidate forensic evaluation to the detriment of all involved
- Resist/refuse dynamics must be understood through an inductive process that is open to all possible hypotheses
- A survey of the literature identifies at least thirteen mutually compatible hypotheses, all of which must be evaluated
- Courts must take care to word orders for forensic family evaluations in a manner that minimizes confirmatory bias and invites inductive investigation

**Keywords:** *Alienation; Child Custody; Confirmatory Bias; Co-parenting; Divorce; Enmeshment; Estrangement; Polarization; Resist/Refuse; Triangulation.*

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“I suppose it is tempting,  
if the only tool you have is a hammer,  
to treat everything as if it were a nail.”  
Maslow (1966) (p. 15).

By definition, child custody evaluators are asked to engage in a sort of retrospective detective work. Given a family's dysfunction and distress in the present, one must infer past causes so as to either intervene as a Court Involved Therapist (Fidnick, Koch, Greenberg, & Sullivan, 2011) or

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advise the court in the capacity of Guardian *ad litem* (“GAL”), court-appointed child custody evaluator, or party retained testamentary expert (Gould, Dale, Fisher, & Gould, 2016). Logic dictates that this task can be approached in one of two ways. The *deductive* process presumes a hypothesis about causation and proceeds to gather data that will either confirm or refute it. The *inductive* process begins by gathering data and, on the basis of those agglomerated observations, only then infers competing hypotheses that might thereafter be tested.

This paper describes the deductive process as incompatible with the court-appointed child custody evaluator’s ethics, leaving him or her vulnerable to confirmatory bias and thereby doing harm to children. By contrast, the inductive process is congruent with the child custody evaluator’s ethical guidelines and more likely to generate an opinion that is impartial and genuinely child centered. The literature concerned with resist/refuse dynamics is reviewed, yielding 13 non-mutually exclusive variables relevant to assessing resist/refuse dynamics. The child custody evaluator is advised that each of the 13 variables must be weighed so as to induce the unique formula or recipe that describes the dynamics associated with a particular child’s polarized position in the conflicted family.<sup>1</sup>

## I. DEDUCTION, INDUCTION, AND ABDUCTION

Most people associate *deduction* with Sherlock Holmes, Sir Arthur Conan Doyle’s brilliant and daring fictional detective. In a typical mystery, Holmes visits the scene of a crime. He observes details others failed to note, and applying these data to his encyclopedic grasp of the possible dynamics in play, he generates a who-done-it hypothesis. For all of the character’s fame and skill, this process of “reasoning backwards” (Conan Doyle, 1888) is not, in fact, deductive. Deduction is a top-down process of inference that seeks to confirm or refute a preliminary hypothesis. Deduction is the second step of the scientific method, the means with which hypotheses induced from observation are refuted or confirmed. Holmes pointedly took on each investigation without presumption. He rigorously (and sometimes tediously) studied the facts and only then offered a hypothesis. Building his case from the bottom-up, his method is the prototype of *inductive* reasoning.

To illustrate: were Holmes the master of deduction that he is commonly thought to be, he would have approached each murder scene with a hypothesis already in mind, for example, in the perseverative belief that his arch enemy, Moriarty, had struck again. He would then have gathered evidence relevant to that hypothesis. In so doing, he likely would have been blind to the minutiae that a more open-minded, inductive process relies upon (e.g., a dog’s failure to bark [Conan Doyle, 1892]). He would thereby have been a far less successful detective (Carson, 2009).

Inductive logic describes the process that physicians use in the course of generating preliminary diagnoses. The physician collects symptoms the same way that Holmes collects clues. When a pattern is recognized, hypotheses are generated in the form of potential diagnoses. Further testing (i.e., deduction) is then conducted to rule in or rule out these competing hypotheses. The initial inductive process in medicine is distinct, however, from the inductive process that Holmes engaged in to the extent that the physician’s set of possible hypotheses is finite and familiar. Nosologies such as the International Classification of Diseases (World Health Organization, 1993) effectively create a menu of options.

Inductive reasoning in a context in which the field of possible hypotheses is finite and familiar is known as *abduction* (not to be confused with kidnapping [Rapezzi, Ferrari, & Branzi, 2005]).<sup>2</sup> Where Sherlock Holmes’ reasoning is best identified as inductive in that the pool of possible perpetrators was effectively limitless and unknowable, murder mysteries in which the pool of possible perpetrators is well established are abductive. Agatha Christie, for example, asks readers to engage in an exercise in abduction in her renowned play, “And Then There Were None” (Christie, 1939).<sup>3</sup>

## II. CONFIRMATORY BIAS

The primary difference between deduction on one hand and induction and abduction, on the other, is the risk that approaching a problem with an *a priori* hypothesis increases the risk of confirmatory (or confirmation) bias (Koehler, 1991; Wason, 1960).<sup>4</sup> Confirmatory bias is the human predisposition to see and hear that which one expects to see and hear (Erard, 2016; Martindale, 2005). Conan-Doyle's infamous detective said it this way: "It is a capital mistake to theorize before you have all the evidence. It biases the judgment" (Conan Doyle, 1888).

Cognitive scientists define the phenomenon as a vulnerability to, ... recognize whatever supports [one's] biases and fail to see counter-evidence. Contexts color a person's readiness to perceive something in accordance with expectations. These expectations, which are influenced by past experience, cultural upbringing, knowledge, and context, cause people to selectively attend to certain aspects of a stimulus while failing to process others. This can produce significant errors of judgment (Safarik & Ramsland, 2012, p. 14).

Confirmatory biases are evident in unintentional "bias blind spots" (Fidler & Ward, 2017; Kukucka, Kassin, Zapf, & Dror, 2017; Pronin, Lin, & Ross, 2002) and intentional "confirmatory distortion" (Martindale, 2005). In family law, both phenomena pose a risk of, "[m]isclassification and inaccurate identification..." of the dynamic(s) in force, with, "... serious repercussions for children and families..." (Fidler, Bala, & Saini, 2013, p. 80).

Confirmatory bias is ubiquitous throughout human activity, from the mundane to every type of professional endeavor. The subject has received intense and well-deserved attention in the field of forensic investigation and analysis. Kassin, Dror, and Kukucka (2013), for example, report that: "... pre-judgment expectations can indeed influence interrogators, jurors, judges, eyewitnesses, and experts in a range of forensic domains" (p. 45; citations excised). Grabman and Dodson (2019), find that police officers' interpretations of victims' statements vary as a function of the officers' expectations.

Studying eyewitness identification of criminal suspects, O'Brien (2009, p. 328) observes that, "... once people form a hypothesis, they tend to confirm rather than refute it: they search for information to support it, interpret ambiguous information as consistent with it, and minimize inconsistent evidence..." In particular, observers who articulated a hypothesis at the start of an investigation, "... tended to agree more with propositions that supported their hypothesis and less with those that did not support it. Articulating a hypothesis early also affected the course of action they advocated."

Confirmatory bias has often been recognized in clinical and forensic mental health settings. Rosenhan's (1973) classic study of mental health professionals' ("MHPs") perceptions of healthy individuals placed in psychiatric hospitals ("pseudo patients") captures the idea powerfully.<sup>5</sup> Once admitted, MHPs routinely perceived these individuals' otherwise unremarkable behavior as congruent with their faux diagnoses of major mental illness.

Mendel et al. (2011) demonstrated that psychiatrists' and medical students' confirmatory biases generate inaccurate diagnoses and therefore inappropriate treatments. Richards, Geiger, and Tussey (2015) warns against the effects of confirmatory bias in forensic neuropsychological examinations.

Maldonado (2017) has demonstrated the effects of bias in general across custody litigation. This fascinating analysis demonstrates the often unrecognized and pervasive role of racial, ethnic, and language-based bias in CCES: "... unconscious biases may influence a judge's or custody evaluator's perception of a parent's behavior as defensive, passive, or impulsive, based on racial or cultural stereotypes" (p. 214).

Wittman (2017) recognizes the phenomenon in custody evaluations as, "... the tendency to seek data that supports one's hypotheses about a family while neglecting to seek disconfirming information." Drozd & Olesen (2004, p. 69)) similarly warn evaluators against, "... premature closure of analysis and the narrow consideration of alternatives due to emotional polarization or dichotomous thinking."

With specific regard to resist/refuse dynamics, Miller (2013, p. 28) cautions that, "clinicians who initially suspect estrangement are likely to show confirmation bias in favor of estrangement; those

who initially suspect alienation are likely to show confirmation bias in favor of alienation.” This can also occur when research studies are conducted retrospectively (e.g., Baker, 2010) or when a forensic MHP presumes that a specific child’s refusal to see Parent B is due to Parent A’s alienating behaviors and then reasons top-down -deductively- by reference to checklists to confirm his or her hypothesis (e.g., Baker, Burkhard, & Albertson-Kelly, 2012). This error has elsewhere been discussed as the view through the wrong end of the funnel (Garber, 1996).

Mindful of this problem, Pickar (2007) advises that the custody evaluator, “... must remain open-minded throughout the process and even aggressively search for data which is disparate from predominant analyses of the case.” In the same vein, Klein (2005, p. 783)) advises that, “It is thus critical to remain constantly vigilant for any information that may contradict your existing [hypothesis], and to give any such information careful consideration, rather than dismissing it as irrelevant. It is also a good idea to try to think of specific reasons why your current theory might be wrong and to ask questions that could potentially disprove your hypothesis. Always be aware of alternative hypotheses and ask yourself whether they may be better than your current ideas”<sup>6</sup>.

The problems associated with confirmatory bias are nowhere more evident and pernicious within the field of family law than when a child appears to be polarized within the conflicted family system; that is, strongly allied with Parent A and rejecting of Parent B. The torn loyalties, grief, rage, humiliation, and anxiety commonly generated by these matters, compounded by zealous advocates and exacerbated by the adversarial court system can compromise rational thinking for all involved.<sup>7</sup> The response is often a regression to more primitive, emotion-driven, and biased positions, including the vulnerability to confirmatory bias. As Maslow (1966) anticipated, when all that the forensic MHP has is a hammer, everything will begin to look like a nail.

### **III. THE BEST INTERESTS OF THE CHILD (“BIC”) STANDARD REQUIRES AN INDUCTIVE APPROACH**

The law governing child custody litigation moved from one that supported the rights of the father in the nineteenth century (Wyer, Gaylord, & Grove, 1987), to a presumption in favor of the mother in the twentieth century (DiFonzo, 2014), to our contemporary emphasis on serving the needs of the child (Warshak, 2015a; APA custody guidelines II.13). Because the former approaches were based on default legal rules and presumptions, child custody evaluations were seldom necessary. When they did occur, they were by definition deductive efforts to refute the prevailing legal approach of the time.

Since the 1970s, most legislatures and courts have rejected presumptions of either sort in favor of an individualized, child-centered approach to the allocation of parenting rights and responsibilities (cf., Stamps, 2002). This sea change has created a far greater need for child custody evaluations (“CCEs”) and an inductive, Sherlock Holmes-like approach to the process that is thereby less vulnerable (but by no means invulnerable) to bias.

### **IV. PROFESSIONAL ETHICS AND BEST PRACTICE GUIDELINES FOR CHILD CUSTODY EVALUATION**

In this age of decision-making based on an assessment of the child’s best interests, the custody evaluator is called upon to invoke the scientific method (American Psychological Association, 2017: item 2.04), to minimize bias (Association of Family and Conciliation Courts Task Force on Court-Involved Therapy, 2011: item 2.4; American Psychological Association, 2017: principles C and D; American Psychological Association, 2010: items II.5 and II.13), and to rely upon multiple methods (Coupet, 2013; American Psychological Association, 2010: items II.10; Association of Family and Conciliation Courts, 2006: items 5.4 and 11.1), so as to explore reasonable competing hypotheses (Association of Family and Conciliation Courts, 2006: item 5.4). To approach a

custody-related matter as an exercise in deduction in the first instance - that is, with the goal of supporting or refuting an *a priori* hypothesis - is to breach these ethics and fall short of best practice expectations.

It is critically important that the forensic MHP evaluator's work process and product are transparent. The expectation is that an inquiring court should be able to reconstruct the professional's reasoning from observation to inference to hypotheses and, when appropriate (Tippins & Wittmann, 2005), on to recommendations. This is mandated by relevant ethics (American Association of Matrimonial Lawyers, 2011: item 11.1; Association of Family and Conciliation Courts, 2006: item 12.2), recognized as best practice (Karson & Nadkarni, 2013; Martindale, 2004), and complies with the rule every fifth grade math teacher repeats endlessly: "show your work" (Dvoskin & Guy, 2008; Karson & Nadkarni, 2013).

## **V. MUST THE REFERRAL QUESTION OR ENABLING ORDER POSIT A HYPOTHESIS?**

No. Given the power and pervasiveness of confirmatory bias and given professionals' relative ignorance of their own biases (Kukucka et al., 2017), it is important that evaluators take every reasonable step to approach their task inductively. This may require altering office policies and educating referral sources, including the courts accordingly.

The value of carefully crafted orders for child custody evaluations is well documented (e.g., Markan & Weinstock, 2005), but little attention has been paid to how these orders should be worded. In particular, the balance between open-ended vagueness (e.g., "what are the best interests of this child?") and far too narrow questions that risk implanting bias ("Is this mother alienating?") may seem impossible to find. Striking this balance, Shear (personal communication, 28 December, 2018) advises that, "I want to discourage framing the referral questions too concretely, or around competing allegations. I try to shift the focus from blame and a contest between the parents to the plan. While the report/testimony needs to respectfully consider the concerns raised by the parents, the evaluator needs to identify what matters to the child's well-being."

Gould (1999) advocates for evaluators to meet with judges, counsel and parties to assure that the questions to be addressed by the proposed evaluation are carefully defined and that evaluators not overstep their bounds.<sup>8</sup> More recently, Gould and Martindale (2009, p. 2), emphasize that, "When judges fail to translate the issues in dispute into specific psycho-legal questions that may be answered by child custody evaluators, they handicap their appointed experts" Critical as this advice is, the task of drafting a court order for a child custody evaluation is a balancing act, weighing the need for specificity on the one hand against the risk of creating bias on the other.

Specific to the court's wish to understand and remedy the reasons for a child's polarized position within the litigating family system, the following wording is recommended: "Parties will enlist a qualified mental health professional to conduct an evaluation intended to summarize the history and quality of the child's relationship with each parent, seeking in particular: (1) to identify the circumstances and precipitant(s) of any change in the quality of those relationships; and (2) to recommend the specific constellation of interventions best suited to facilitating the child's opportunity to enjoy a healthy relationship with both/all caregivers."<sup>9</sup>

## **VI. THE PLAUSIBLE CAUSES OF A CHILD'S POLARIZATION ARE FINITE, FAMILIAR, AND MUTUALLY COMPATIBLE**

In a field where disagreement is the *raison d'être*, it is a relief to discover agreement. One such agreement is relevant here: Evidence that a child is strongly allied with Parent A and resisting or rejecting contact with Parent B is *not* sufficient cause in and of itself to conclude that Parent A is the cause of the problem (Garber, 1996; Garber, 2007a; Lorandos, Bernet, & Sauber, 2013; Fidler

et al., 2013; Kelly & Johnston, 2001).<sup>10</sup> Kelly and Johnston (2001, p. 250) refer to this as, "...the overly simplistic focus on the brainwashing parent as the primary etiologic agent" Ludolph and Bow (2012, p. 173) describe this more simply: "... it is futile and counterproductive to approach these families looking for a pure 'bad guy'" Milchman, Geffner and Meier (this volume of *Family Court Review*) prefer the phrase, "single factor advocates.

Unfortunately, that is as far as the agreement goes. For some, the "bad guy" (alienation) hypothesis is cast as an either-or presumption without attention to the complex, Escher-like dynamics of the family system and its larger interpersonal context. Baker and Andre (2008) and Gottlieb (2012), for example, take the position that a child's resistance to/rejection of Parent B must be the result of Parent A's alienating behaviors if Parent A is known to have engaged in presumably alienating behaviors, if the child is demonstrating presumably alienated behaviors, and if Parent B is not known to be abusive.<sup>11</sup> The problem, of course, is that this argument is dyadic, not systemic. It is blind to the ecology in which these discrete behaviors are observed. More specifically, it is deductive and therefore highly vulnerable to confirmatory bias. By beginning with a refutable presumption of alienation, the evaluator invested in this heuristic is likely to be unaware of those many systemic factors (like the dog that did not bark) that can contribute to or wholly generate the observed result.

More commonly, professionals endorse a three-factor or "hybrid" approach to understanding resist/refuse dynamics (Fidler & Bala, 2010; Friedlander & Walters, 2010; Garber, 2011; cf., Meier, 2010). This approach asks the evaluator to assess whether and to what degree a particular child's polarized position might be due to some combination of alienation, estrangement, and enmeshment. The available empirical literature supports the value of this more complex model (Friedlander & Walters, 2010), without determining its sufficiency. That is, there is strong reason to believe that alienation, enmeshment, and estrangement together account for a meaningful part of the variance associated with refuse/resist dynamics, but there is no way to determine how much of that variance is accounted for.

With this in mind, more recent writers have begun to advocate for a more nuanced and complex approach that looks beyond the hybrid factors consonant with Fidler and Ward's (2017), p. 13) caution that,

... cases of parent-child contact problems are complex and multidetermined. Courts and family law professionals need to move beyond polarized and simplistic analyses that not only fail to capture the richness and subtlety of these cases but also mirror the inflexible, all or nothing' thinking of alienated children and their parents.

In this vein, the present paper posits that alienation is but one among at least 13 unique and non-mutually exclusive factors relevant to understanding resist/refuse dynamics, all of which must be evaluated in a Sherlock Holmes-like inductive manner so as to more adequately hypothesize and propose individually-tailored remedies for why a particular child has become polarized within his or her conflicted family system.

The 13 mutually compatible hypotheses set forth in Table 1 and discussed below were identified in the following manner: Kelly and Johnston's (2001) publication was identified as seminal in the field. All citations to that article were referenced via APA PsychNet® (p. 233) and the *Family Court Review* (Wiley) online archives (p. 131). The vast majority of publications thus identified were tangential to the goal of identifying factors attributed to resist/refuse dynamics in families engaged in recidivist litigation and were set aside. Nine publications were identified as explicitly positing causal factors. Seven of these are peer-reviewed. These collected factors were then collapsed within face-evident content domains, generating 13 categories. Each category has been labeled with a question intended to motivate evaluator inquiry.

Although this qualitative process is not statistically driven, none of the publications reviewed conducted factor analyses, and are therefore ineligible for statistical meta-analysis. Instead, the



<p>7. Is the child R/R all separations from Parent A?</p>	<p>resistance arising from the child's concern about an emotionally fragile custodial parent</p>	<p>Does the child resist separation from the sending parent in general?</p>	<p>Emmeshment</p>	<p>The favored parent's intractability and emmeshment</p>
<p>8. Does the child R/R all separations?</p>	<p>normal separation anxieties in the very young child</p>	<p>Does the child evidence separation anxiety?</p>	<p>Emmeshment</p>	<p>Worried or depressed children Stubborn children</p>
<p>9. Is the child avoiding the parents' mutual conflict at transition?</p>	<p>normal separation anxieties in the very young child</p>	<p>Does the child evidence separation anxiety?</p>	<p>Emmeshment</p>	<p>Child's appraisal of adult conflict</p>
<p>10. Is the child avoiding stimuli incidental to Parent B?</p>	<p>normal separation anxieties in the very young child</p>	<p>factors incidental to the time, place, and context of contact</p>	<p>Emmeshment</p>	<p>Impact of stepfamily, siblings</p>
<p>11. Is the child avoiding "culture shock"?</p>	<p>normal separation anxieties in the very young child</p>	<p>Is the receiving parent notably more or less strict or demanding than the sending parent?</p>	<p>Emmeshment</p>	<p>Impact of stepfamily, siblings</p>
<p>12. Is Parent B a sensitive and responsive caregiver?</p>	<p>resistance in response to a parent's parenting style</p>	<p>Is the receiving parent sensitive and responsive to the child's needs?</p>	<p>Estrangement</p>	<p>The rejected parent's intractability and rigidity;</p>
<p>13. Is Parent A needlessly undermining the child's relationship with Parent B?</p>	<p>Alienation</p>	<p>Is the child currently safe from physical, emotional, and psychological harm?</p>	<p>Alienation</p>	<p>Determining the presence of abuse</p>
	<p>Alienation</p>	<p>Identify and circumscribe the child's experience of abuse within the family system</p>	<p>Alienation</p>	<p>Alienation; Parental intractability; Encapsulated delusion</p>
	<p>Alienation</p>	<p>Identify and circumscribe each parent's influence on the child's relationship with the other parent</p>	<p>Alienation</p>	<p>Alienation</p>
	<p>Alienation</p>	<p>Identify and circumscribe each parent's influence on the child's relationship with the other parent</p>	<p>Alienation</p>	<p>Alienation</p>
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inductive *meta-conceptualization* process used here, building from observations to generate hypotheses is intentionally parallel to the sleuthing process that should drive every CCE.

The 13 factors are as follows:

1. **How do characteristics of the child contribute to the resist/refuse dynamic?** In the high pitched, blame-ridden environment that is family law, it's easy to focus on the adults and forget that children contribute to the drama as well (Garber, 2014).

Although the child's temperament is identified as relevant to resist/refuse dynamics time and again, the subject often receives only passing attention and little definition. Certainly a child's predisposition to anxiety and associated deficits of resilience, security, and capacity to manage change are identified as relevant (Friedlander & Walters, 2010; Pickar & Kaufman, 2015, 2019). Kelly & Johnston (2001, p. 261) acknowledge, for example, that, "[a]nxious, fearful, and passive children lack the resiliency to withstand the intense pressures of the custody battle and the aligned parents' alienating behaviors. It might be psychologically easier for them to choose a side to avoid crippling anxiety."

Walters and Friedlander (2016) caution that, "A child's rigid rejecting stance may reflect, in part, having resources that are too limited or inadequate for navigating shared time with warring parents, particularly when conflicts arise unpredictably during transitions between homes."

2. **Do objective data suggest that the child has ever had a healthy relationship with Parent B?** The first part of this consideration is historical. One would expect many children who have never had a positive relationship with a parent to resist or refuse contact with that parent. Most dramatically, a child's anxiety about contact with a parent who is entirely unknown (e.g., having been incarcerated, on active military duty, or voluntarily missing) is realistic and expectable. This conclusion does not, however, preclude consideration of other factors that might compound the child's anxiety.

The second part of this consideration is contemporaneous. Observing that a child had or has a healthy relationship with both parents and yet is engaged in resist/refuse behaviors should prompt the evaluator to focus on incidental and transitional difficulties that may be associated with contact resistance or refusal.

Unfortunately, determining whether a child has a healthy relationship with either parent, past or present, remains highly subjective (Hynan, 2016). While the research literature on attachment security has promise in this regard, it is not yet ready for forensic application (Garber, 2009).

3. **Is the child saying what s/he believes the listener wants to hear?** Children's suggestibility has been thoroughly documented and the corresponding need to conduct non-leading interviews is thoroughly established (Garber, 2007b; Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007). Further, many children who are forced to migrate between warring homes develop extraordinary skills reading and responding to adult cues, adapting chameleon-like to their parents and to inquiring adults, alike (Garber, 2014).
4. **Is the child expressing developmentally appropriate affinity?** Affinity describes a child's age and stage appropriate preference for one parent or the other. "For example, it could be that a daughter is closer to her father around ages 5 or 6 and then again in early adolescence, but that she is closer to her mother at the ages in between" (Drozd & Olesen, 2004). Affinities can develop on the basis of gender, shared interests, and shared cultural or racial attributes, among other factors. Although affinities are commonly seen as preferences, they are not associated with the black and white thinking that can be characteristic of polarized children (Friedlander & Walters, 2010).
5. **Is the child's position acute and reactive?** The evaluator must understand the child's behavior in the larger context of the child's life. Without context, it's difficult or impossible to distinguish a child's vehement rejection of Parent B in response to a recent punishment from the same behavior associated with a history of insensitive care. Context is just

as necessary if one is to distinguish a child's fawning adoration of Parent A immediately after receipt of a gift (a.k.a., bribe; e.g., the coincidental purchase of a longed-for puppy) from the same behavior associated with a particularly strong affinity, idealization or enmeshment. With this in mind, the evaluator is reminded that one interview is never sufficient (Hynan, 1998) and advised that a process-oriented observation protocol (Garber, 2016) can further help to make these distinctions.

6. **Is the child's resistance/refusal event- or time-dependent?** Allegations of alienation, supercharged emotions and zealous advocates can blind all involved - evaluators as easily as anyone - to simple, pragmatic concerns. When court-ordered time with Parent B conflicts with desirable events scheduled in the child's world (e.g., team practice or a play-date) or in Parent A's home (e.g., family dinner, holiday celebration, time with half- or step-siblings), a child's transition resistance may have little or nothing to do with either parent.

Polak & Saini (2015, p. 237) identify neighborhood, community, and peer access among the variables relevant to this factor:

... children might rather stay at one parent's home not because they have an alignment toward that parent, but because their friends or significant other lives in the neighborhood. This is especially important for children who attempt to remove themselves from any ongoing parental conflict by spending more time with friends.

7. **Is the child resisting separation from Parent A across contexts?** A number of publications caution that what may be mistaken as resistance transitioning *to* Parent B may, to some degree, be a resistance separating *from* Parent A. This behavior raises hypotheses about developmentally appropriate separation anxiety (Garber, 2019) and role corruption, particularly parentification (Garber, 2011).
8. **Does the child resist all separations?** Separation anxiety can occur quite typically in the course of development (Silove, He, Ferrand, & Scott, 2018) and can be exacerbated in the context of family turmoil. In some instances, separation anxiety can rise to the level of diagnosable pathology (American Psychiatric Association, 2013; DSM-5 309.21). Evaluators must take care not to mistake a child's separation anxiety and parents' associated misattributions for resistance/refusal specific to relationships at issue.
 

Other mental health concerns evident in some children can be associated with separation anxiety without any necessary reflection on the quality of the child's relationship with either parent. These include depression (Warshak, 2002) and agoraphobia.
9. **Is the child avoiding the parents' mutual conflict at transition?** For many children, transition from Parent A to Parent B means yet again enduring the anxiety that is piqued when the two adults are together. It may not matter whether transition is supervised, video recorded, and occurs at the local police station. It may not even matter whether the adults are silent and remain in their respective vehicles. For the child, the tension can be palpable and highly aversive. For this child, resistance and refusal may be acute and transitory, but vulnerable nonetheless to mischaracterization.
10. **Is the child avoiding stimuli incidental to Parent B?** Careful evaluation of apparent resist/refuse dynamics may find that at least some of the child's distress is not about Parent B, *per se*, but instead is caused by persons, events, and/or sensory experiences associated with Parent B. This is most likely the case after an emotionally significant change in the family system, for example, when the adults first separate, when either parent moves out of the home, takes on a new partner, or relocates. Anecdotes about children who resist/refuse contact with Parent B, but who are, in fact, scared by that parent's neighbor's dog or the smells in the new apartment building are familiar (Garber, 2007a). Alert to this factor, evaluators conduct home visits (Hynan, 2003), even in the absence of allegations specific to either environment.

11. **Is the child avoiding “culture shock”?** When homes and parenting practices and family compositions are disparate, transition can induce a kind of culture shock akin to the experience of the world traveler who wakes up 1 day in Moscow and the next day in Tijuana (Garber, 2016). In fact, this writer has used this analogy successfully with children in clinical settings to help them better understand and cope with transition and “re-entry” difficulties (Smart, Neale, & Wade, 2001).
12. **Is Parent B a sensitive and responsive caregiver?** A child’s resistance/refusal of contact with a parent who is known to be relatively insensitive and unresponsive to their needs (“... from mild insensitivities to outright emotional abuse...” [Friedlander & Walters, 2010, p. 106]) is known as realistic rejection or estrangement. This includes the child’s incidental or vicarious experience of mutual partner violence (Saunders, 2015; Saunders, Faller, & Tolman, 2016). Evaluators are strongly advised to proceed with relevant guidelines in mind (Association of Family and Conciliation Courts, 2016) and consistent with relevant decision trees (e.g., Drozd & Olesen, 2004).
13. **Is Parent A needlessly undermining the child’s relationship with Parent B?** Parental alienation occurs when Parent A exposes his or her child intentionally or otherwise to unwarranted damning words, actions, and expressed emotions about Parent B. The emotional impact of this experience can be profound (Garber, 2004), and both the immediate behavioral and developmental sequelae immense (Warshak, 2015a, b).

As corollaries to this factor, evaluators are cautioned that (1) Parent A’s alienating words, actions, and expressed emotions may be intentional or incidental but still be alienating, and (2) Parent A’s extended family, friends, neighbors, and surrogate caregivers (e.g., babysitters, nannies) are sometimes complicit in the alienation and other times act alone without Parent A’s knowledge or endorsement.

## VII. A CASE ILLUSTRATION

In 2012, Sarah’s parents separated. She was 10 years old. She’d been diagnosed with Autistic Spectrum Disorder (“ASD”) several years earlier. She excelled in school and benefited from various therapies and academic supports. Sarah’s father moved into a beautiful new home in the same town. The parents negotiated a shared schedule of care until Sarah began to refuse to sleep over at her father’s home. To be clear: Sarah was glad to see her father and to spend days with him. She simply did not want to sleep there.

The parents argued. Each hired attorneys. The attorneys hired experts. Evaluations were completed. Hearings were held. Tens of thousands of dollars were spent. Mother and her allies argued that father was abusive. Father and his allies argued that mother was alienating.

Child protective services (“CPS”) investigated allegations against father at least three times. All were unfounded. Sarah’s contact with her father was supervised while these processes unfolded. Mother became more and more protective. Father became more and more desperate. Co-parent communications broke down. Sarah’s grades tumbled. She began to have rage episodes with peers. Each adult blamed their daughter’s deterioration on the other. By Sarah’s fourteenth birthday, the adult schism was thoroughly entrenched and the young teenager now refused to see her father.

Mother’s experts read between the lines of the CPS investigations, certain that something had been overlooked. Father’s experts saw contact resistance, saw no evidence that father was abusive, ticked off checklist items they associated with alienating parents and alienated kids and stormed the court with compelling reports justifying immediately placing the child in her father’s care.

Recounting this real drama even in this very brief and anonymized form stirs emotions that are all-too-familiar to most family law professionals. The emotions that the real life players in this Shakespearean tragedy endured were many magnitudes greater. Confirmation bias ran rampant, blinding all involved.

Stepping back from the emotion and away from the bias, hindsight and a thorough record review finds the following:

1. How do characteristics of the child contribute to the resist/refuse dynamic? In the first instance, Sarah's resistance was due to anxiety and a sensory need associated with her ASD. The bed at father's new house was unfamiliar. The texture and the smell of the sheets were aversive. Had the parents compared notes (e.g., adopted the same fabric softener, bedtime ambient noise machine), or sought therapeutic supports rather than legal intervention, the problem may have been solved.
2. Do objective data suggest that Sarah has ever had a healthy relationship with her father? Yes.
3. Is Sarah saying what she believes the listener wants to hear? Likely. Sarah's ambiguous and ambivalent statements during each of a succession of high-pressure CPS interviews may qualify.
4. Is Sarah expressing a developmentally appropriate affinity? Sarah achieved menarche during the period in question. It is this writer's experience that many peri-pubescent daughters are understandably shy and fearful about overnights with father when this occurs. In this case, however, this does not seem to have been a significant factor.
5. Is Sarah's position acute and reactive? It was not acute, but it was reactive to her experience of sensory discomfort in her bedroom in her father's home. Unfortunately, she was not able to voice this concern clearly or consistently enough to pierce her parents' biases.
6. Is Sarah's resistance/refusal event- or time-dependent? Yes, in that her resistance/refusal is specific to overnights.
7. Is Sarah resisting separation from her mother across contexts? Yes, in fact. Sarah had always been anxious and resistant to change and unfamiliarity. Once acclimated, however, she transitioned easily. For example, she only resisted going to school during the first few days after summer vacation.
8. Does Sarah resist all separations? To some degree, as noted earlier.
9. Is Sarah avoiding the parents' mutual conflict at transition? Yes, later in the evolution of this drama. This was not, however, an initial cause as the parents were amicable and cooperative early on.
10. Is Sarah avoiding stimuli incidental to father? Yes. This is the point that the parents are unable to see. Sarah's resistance/refusal was not initially about her father at all.
11. Is Sarah avoiding "culture shock"? No.
12. Is father a sensitive and responsive caregiver? Yes, except perhaps to the extent that he failed to see his daughter's genuine needs through the emotional haze of adult conflict.
13. Is mother needlessly undermining Sarah's relationship with her father? No, except to the extent that she failed to see her daughter's genuine needs through the emotional haze of the adult conflict.

Neither Conan Doyle nor Christie would leave the reader without an ending, although this one is far from satisfying: In the end, the court endorsed father's experts' recommendations. Sarah and her father were transported to an intensive reunification program. The abrupt change and loss and interruption of her precious routine completely overwhelmed her. She regressed dramatically. The program failed.<sup>12</sup> Sarah was returned to her mother's full time care.

### VIII. SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Sherlock Holmes would have made an excellent custody evaluator and stands as a model to us all. He is an astute observer, well-versed in all of the potential dynamics at play, and a marvel of inductive inference. Custody evaluators should follow the fictional detective's example, particularly when asked to evaluate litigating families in which a child is polarized within the adult conflict. To

approach these families with a pre-existing agenda, engaging from the outset in a deductive investigation, is to breach relevant ethics and to risk doing harm.

A review of the literature that has grown out of Kelly and Johnston's (2001) seminal paper on resist/refuse dynamics identifies 13 mutually compatible variables that every evaluator must consider in order to fully advise the court how best to understand the needs of the polarized child. A process of abductive inference generating child-specific hypotheses will minimize the evaluator's vulnerability to confirmatory bias and assist in generating a valid and practical picture of the child's unique needs. This process begins with the wording of the court order appointing the evaluator and proceeds to collect child-centered, contextually informed, individual, dyadic, systemic, and environmental data.

This model provides the forensic MHP with a conceptual framework that, "... lays out an array of variables to consider, and [in so doing] can help guard against premature closure of analysis and the narrow consideration of alternatives due to emotional polarization or dichotomous thinking. A conceptual framework can also prevent the evaluator's opinion from being distorted by bias, inattention, ignorance, or chance. In addition, when an evaluator follows the framework, there is a reduced possibility of confirmatory bias..." (Drozd & Olesen, 2004, p. 69).

The reader is reminded of Polak and Saini's (2015, p. 239) call for evaluators to, "... conduct a thorough and comprehensive psychosocial assessment of the multiple factors that could be contributing to the parent-child relationship problems on a case-by-case basis" This article strongly advises that: (1) there are a finite number of non-mutually exclusive plausible hypotheses that can explain why a child appears to be aligned with Parent A and resists/rejects Parent B; (2) all of these factors must be explored; (3) to approach such an evaluation with an *a priori* hypothesis is to become vulnerable to confirmatory bias and risk harming the child, thus the evaluator must engage in "... comprehensive sequential hypothesis testing to avoid bias..." (Ludolph & Bow, 2012, p. 166).

Inductive reasoning can only succeed so much. Having gathered the data and generated hypotheses with a minimum of bias, one then turns to deductive (top-down) methods to confirm or refute the hypotheses thus generated. The study of resist/refuse dynamics has moved from binary either-or hypotheses to tripartite, mutually compatible ("hybrid") hypotheses, and now on to a more complex and nuanced model. What remains is the empirical process of validating the model. A large enough sample might allow a statistical exploration of the distribution of variance among the multiple factors which combine to leave a child polarized in the midst of parental conflict.

More urgent than statistics, however, are remedies. Courts must draft orders for evaluations without presupposing dynamics. Evaluators must better recognize their biases and blind spots and take active, documented measures to minimize them. Clinicians involved in "reunification" interventions must continue to explore and validate new methods (e.g., Garber, 2015), emphasizing the Sherlock Holmes-like inductive method described herein. The polarizing influences of zealous advocacy and an adversarial court system must be avoided via innovative alternate dispute interventions so that the needs of children like Sarah can be seen and served first and above all.

## ENDNOTES

1. Because litigating family conflicts is a powerfully emotional experience for all involved with profound and lifelong consequences, for none more so than the children, it is very important that the language used to discuss such matters be as unambiguous and unemotional as possible. This paper speaks to the process of gathering data, generating, and testing hypotheses impingent upon child custody evaluators. Of particular focus are those children who behave in a manner that suggest a strong emotional alliance with Parent A and resistance to or rejection of Parent B. The adults involved in these matters are described generically whenever possible so as to minimize inferences specific to gender, generation, genetics, and the legal status of the adult relationship. Indeed, the "parents" referenced here could be any adult caregivers. The word "custody" and the phrase "child custody evaluation" or "CCE" are used here because they are familiar conventions without intending connotations of ownership. "Custody" should be read as the more cumbersome phrase, "the allocation of parenting rights and responsibilities." In a like manner, "child custody evaluation" is more accurately described as a court directed "child-

centered family evaluation” or “parenting plan evaluation” (Drozd, Saini, & Olesen, 2016). Children who are pulled emotionally into the middle of their parents’ conflicts are described as “triangulated” (Kelly & Johnston, 2001). Those who become aligned with one side of the conflict against the other are described as “polarized.” At issue here and throughout this volume are the dynamics of polarization including, but not limited to, the phenomenon most commonly known as parental alienation.

2. “... diagnosis begins with ‘signs’ and finishes in a probability of disease. The abductive reasoning process is the generation of a hypothesis to explain one or more observations (signs) in order to decide between alternative explanations searching the best one” (Soldati, Smargiassi, Mariani, & Inchingolo, 2017, p. 15).

3. Eight strangers are invited to an island home, where they are greeted by a butler and a housekeeper. One by one, each of the 10 dies, apparently murdered. The killer must be among them. The reader is left to *abduct* which one, though Christie finally reveals the mystery.

4. Tippins (2017) colorfully refers to custody evaluations as a “... veritable petri dish of opacity within which bias can flourish.”

5. Martindale (2005).

6. The critical value of inductive investigation and interview is highlighted and often cited as it arises in *State v. Michaels* (642 A.2d 1372, N.J. [1994]): “...the factors that can undermine the neutrality of an interview and create undue suggestiveness ... [including] the pursuit by the interviewer of a preconceived notion of what has happened to the child...”

7. “...the court process itself may exacerbate the conflict, placing the children in the middle and affecting their lives on a daily basis in highly destructive ways” (Martinson, 2010, p. 181). Also: “The nature of the adversarial process encourages hostile, polarized, black-and-white thinking with little challenge, presents perceived truths as facts and fuels and channels rage in a scripted manner” (Kelly & Johnston, 2001, p. 258).

8. *See for example* IN RE: MARRIAGE OF Melinda T. and Timothy M. SEAGONDOLLAR in which the court-ordered custody evaluator is criticized for having overstepped his (ill-defined) role. Specifically, “Defining the purpose and scope of Dr. Adam’s evaluation was more than an academic exercise. When Dr. Adam was appointed, Melinda’s move-away request was not in issue: She had not requested a modification of custody by responsive pleading or her own OSC (Order to Show cause). Her counsel had represented that Melinda did not intend to relocate until after the hearing on Timothy’s March OSC (then set for July). The trial court had stated this was not a move-away case. Yet, Dr. Adam evaluated the issue of Melinda moving to Virginia with the children and concluded she should be given primary custody.” (IN RE: MARRIAGE OF Melinda T. and Timothy M. SEAGONDOLLAR. Court of Appeal, Fourth District, Division 3, California. No. G035270. Decided: May 25, 2006).

9. Crediting Gould, J. (personal communication 01.11.2019) with guidance as to this wording.

10. “...even if there is proof of ‘rejection’ (lack of access by a parent), that fact alone does not lead to the conclusion of alienation” (*J.F. v. D.F.* as quoted in the *New York Law Journal*, 12.27.2018 at p. 9).

11. For example: “Dr. Baker testified that she could state her opinion this way: Was there a prior positive relationship with the targeted parent? Is there an absence of abusive conduct by the targeted parent to the child? Are many of the alienating strategies observed in the conduct of the alleged alienating parent? Does the child exhibit most of the alienating behaviours? In her opinion, if the answers to these questions are all ‘yes’, then alienation is present.” (*Fielding v. Fielding*, 2013 ONSC 1458 at 15).

12. This must not be mistaken as a condemnation of such programs. At least two have published very promising outcomes (Sullivan, Ward, & Deutsch, 2010; Warshak, 2010, 2018).

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