

## **Persuasive Evidence in Custody Cases**

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PERSUASIVE EVIDENCE IN CUSTODY CASES

**I. Introduction**

The purpose of this outline is to attempt to identify what kinds of evidence are the most persuasive in custody cases. In custody cases, like family law cases in general, the lawyer has to cull from all the information available those few facts that will make up the evidence actually presented at trial. Most of the time, in attempt to sift through all the available evidence, we usually rely on our own instincts and ideas of what evidence we think will ultimately be the most persuasive. While our instincts as trial lawyers may often be quite accurate, perhaps the best source of help in attempting to identify the most persuasive evidence in custody cases would be the people who most often make those decisions – judges. An additional source of helpful information as to what evidence is the most persuasive might also come from the people who most often assist either the judge or jury with custody decisions – mental health professionals.

For the purposes of this outline we examined these two sources, judges and mental health professionals, to find out what evidence or factors they think are the most important in deciding custody cases. Hopefully this outline will be helpful to the trial lawyer in trying to determine what evidence or factors are going to be the most persuasive in trial.

**II. What Judges Think**

In preparation for this article we polled 25 judges and associate judges from several north Texas counties on an anonymous basis. A copy of a blank questionnaire used in the survey is attached to the outline as appendix A. While neither the questionnaire nor the number of judges polled were done in such a way to be considered “scientific,” the results may be helpful in terms of identifying what kind of evidence we ought to focus on in a custody trial.

The judges were asked to rate twenty different factors on a scale of 1 to 5 with 5 being “most persuasive” and 1 being “not persuasive.” The judges were also asked an open ended question asking them what three factors they considered the most persuasive to them in custody cases.

**Results of Judge’s Survey on Persuasive Evidence in Child Custody Cases**

Ranking	Average Rating
1 Parenting Skill Or Capacity	4.71
2 Willingness To Work With Other Parent/Encourage Involvement By Other Parent	4.64
3 Parent Actively Disparages Other To Child	4.57
4 Alcohol/Substance Abuse By Parent	4.5
5 Mental Health Of Parent	4.32
6 Parent & Child Bond	4.29
7 Opinion Of Court Appointed Expert As To Custody	3.64
8 Parent Is Dating Another During Marriage/In The Presence Of Child	3.57

9	Older Child's Preference For One Parent	3.46
10	Parenting Style	3.14
11	Parent's Work Schedule	3.14
12	Ability Of Parent To Financially Support Child	2.93
13	Possession Calendars	2.79
14	Parent Is Living With Another After Marriage	2.64
15	Private Investigator Reports On The Other Parent	2.57
16	Parent Is Dating Another During Marriage/Outside The Presence Of Child	2.36
17	Opinion Of Retained Expert As To Custody	2.25
18	Family Videos	1.79
19	Photographs	1.79
20	Young Child's Preference For One Parent	1.79

The three most common responses to the open-ended question asking the judges to rate the three most persuasive factors were:

1. Parenting skill or capacity
2. Willingness to work with the other parent
3. Parent and child bond

### **III. What Mental Health Professionals Think**

The effort to determine what mental health professionals think was a little easier to determine and document as that work had been previously done by two attorney/psychologists. In their 1998 article in *Behavioral Sciences and the Law*, authors Kathryn A. LaFortune and Bruce N. Carpenter published the following ranking of various factors to be considered in custody determinations.

**Results Of Mental Health Professional Survey As To Factors Important In Custody Decisions**

Ranking		Average Rating
1	One Parent Actively Disparages Other To Child	4.62
2	Alcohol/Substance Abuse By Parents	4.60
3	Differences in Willingness To Work With Or Allow/Encourage Involvement By Other Parent	4.46
4	Special Needs Of The Child	4.43
5	Differences In Parent/Child Bonding	4.37
6	Psychopathology In Either Parent	4.27
7	Differences In Parenting Skill/Capacity	4.26
8	Quality Of Child Care Provided	4.14
9	Older Child's Preference For One Parent Over Another	4.00
10	Parent's Ability To Manage Household	3.79
11	Parent's Schedule That Allows More Time With Child	3.41
12	General Social Involvement Of Either Parent	3.33
13	Young Child's Preference For One Parent Over Another	3.21
14	Differences In Parenting Style	3.19
15	The Age Of The Child	3.19
16	The Ability Of The Parent To Financially Support A Family	3.09
17	Parent Is Openly Cohabiting With Someone	2.77
18	One Parent Has Remarried (Apparently Healthy Relationship)	2.73
19	Sex Of The Child	2.54
20	Parent Is Openly Homosexual	2.40
21	Preference Of A Mother Over A Father	2.06

#### IV. What to Do With This Information

##### 1. Tell Them What They Want To Hear

Although the judges and the mental health professionals rank the factors differently, the two groups rank the important factors in a somewhat similar fashion. The most important issues seem to be:

- A. does your client have good or better parenting skills when compared to the other parent;
- B. can your client work with the other parent regarding the children and can the other parent work with your client;
- C. how good of a relationship do the parents have with the children; and
- D. are there substance abuse issues or mental health issues concerning the parents that may effect the children.

When your client goes to talk to the court appointed psychologist for their "custody evaluation," the client should try to focus their comments and criticisms on the issues the mental health professionals seem to deem as the most important. Put another way, the client isn't going to be "persuasive" to the mental health professional if most of their focus is emotionally pointing out to the mental health professional what a jerk the other side is.

In fact, a strategy emphasizing labeling the other side as a jerk may be received by the mental health professional as not being able to support or work with the other side - a negative for your client instead of a positive.

Before your client goes to a deposition, the "custody evaluation," and certainly before you take your case to court, take time to look at your facts and find a way to direct your evidence and testimony to constructively compare the positive abilities and attributes of both parents and constructively criticize the other side's weaknesses.

Whether in the context of a deposition, custody evaluation or trial, try to have your client talk about their parenting philosophy, plans, schedules, programs and actions instead of personalities. Try to work with facts instead of labels. For instance, instead of saying the other side is evil, meanspirited and petty try saying the other parent is hard to work with because of their attitude or behavior. Instead of calling the other side a jerk (labeling) have your client describe the other side's jerk-like behavior.

In short, the best way to use this information is to share it with your client and direct your case and your evidence to give the court, jury, or mental health professional the information they most want to hear. Try to talk more about behavior than personalities and try to use facts instead of labels.

##### 2. Be Sure Your "Demonstrative" Evidence Really Demonstrates Something.

As lawyers, especially lawyers who are trying to be "creative" and "persuasive," we sometimes lose site of the forest for the trees. We come to court with photographs, calendars, charts, videos and power point presentations trying to be *persuasive*. We show up in court with all kinds of special effects but no story to tell. From the results of the two surveys above and from practical experience, persuasive custody cases are built around persuasive themes with compelling evidence – themes and evidence that tell the story of being a good, healthy and loving parent.

How many times have you been to a movie that had lots of great special effects but no story to tell? It isn't the pictures and the videos that win cases. It's the story that the videos or pictures tell that wins cases.

### 3. What Your Client Thinks Is Important May Not Be What the Judge/Jury Thinks Is Important.

How many times have you had clients that want to go to court for custody of the children because the other parent is having an affair? As can be seen from the above surveys, just the fact that someone is having an affair does not really rate very high on the relevance scale. The “affair” evidence, if it going to be persuasive, has to be tied somehow to the children – i.e. daddy missed five t-ball games because he was at his girlfriend’s house.

Many times in custody disputes there is a lot of anger at the other side. The clients are mad and they want to tell the court or jury why they are mad. Somehow, from the client’s perspective, justified anger will be persuasive. Try to help your client focus on what is going to be persuasive to the court and what is going to turn the court off. Both the judges and the mental health professionals feel strongly that bad mouthing the other parent is a big negative. Find a way to make the criticisms of the other parent factual not emotional.

### 4. Conveying Parenting Skill or Capacity

How do you convey parenting skill to a judge or jury? One way is to make the witnesses for your client tell the judge or jury *why* they think your client is a good parent. Presumably any witness willing to testify on behalf of your client in a custody case will testify that your client is a “good” parent. Prior to trial, be sure and ask these witnesses *why* they say your client is a good parent. The stories or examples they give you should help you develop trial testimony that shows real life examples of parental skill or capacity.

When a potential witness says dad loves his kids, ask the witness *why* they say that. Keep asking until you get a factual story to tell that *shows* love.

If you’re looking for other ideas to show parental skill or capacity consider reviewing the Children’s Bill of Rights and the Ten Tips for Divorcing Parents published by the American Academy of Matrimonial Lawyers and attached as appendixes B and C to this outline. Testimony developed around these “rights” and “tips” will often show the court a great deal about the relative capacities of the two competing parents.

Another idea is to dust off a copy of Holly vs. Adams, 544 SW 2d 367 (Tex. 1976) and develop testimony and evidence around the factors to consider in attempting to decide what is in the “best interests” of a child. A list of the factors listed in Holly vs. Adams is attached as Appendix D.



Appendix "A"

**PERSUASIVE EVIDENCE QUESTIONNAIRE**

1. Please rank each of the following factors on a scale of 1 to 5 with 5 being **most persuasive** and 1 being **not persuasive**.

For example, if you think the "opinion of a retained expert as to custody" is not persuasive to you, you would circle the "1" by that factor.

- 1 2 3 4 5 parenting skill or capacity
- 1 2 3 4 5 parenting style
- 1 2 3 4 5 parent & child bond
- 1 2 3 4 5 young child's preference for one parent
- 1 2 3 4 5 older child's preference for one parent
- 1 2 3 4 5 willingness to work with the other parent/encourage involvement by the other parent
- 1 2 3 4 5 parent actively disparages other to child
- 1 2 3 4 5 opinion of court appointed expert as to custody
- 1 2 3 4 5 opinion of retained expert as to custody
- 1 2 3 4 5 alcohol/substance abuse by parent
- 1 2 3 4 5 ability of parent to financially support child
- 1 2 3 4 5 parent's work schedule
- 1 2 3 4 5 parent is dating another during marriage (infidelity) outside the presence of the children
- 1 2 3 4 5 parent is dating another during marriage (infidelity) in the presence of the children
- 1 2 3 4 5 parent is living with another after marriage
- 1 2 3 4 5 mental health of parent
- 1 2 3 4 5 possession calendars
- 1 2 3 4 5 family videos
- 1 2 3 4 5 photographs
- 1 2 3 4 5 private investigator reports on the other parent
- 1 2 3 4 5 other \_\_\_\_\_

2. What three factors are the most persuasive to you in deciding custody cases?

- 1. \_\_\_\_\_
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_

## Appendix "B"

## Ten Tips For Divorcing Parents

Divorce is never easy on kids, but there are many ways parents can help lessen the impact of their break-up on their children:

Never disparate your former spouse in front of your children. Because children know they are "part mom" and "part dad," the criticism can batter the child's self-esteem.

Do not use your children as messengers between you and your former spouse. The less the children feel a part of the battle between the parents, the better.

Reassure your children that they are loved and that the divorce is not their fault. Many children assume that they are to blame for their parents' hostility.

Encourage your children to see the former spouse frequently. Do everything within your power to accommodate the visitation.

At every step during your divorce, remind yourself that your children's interests - not yours - are paramount, and act accordingly. Lavish them with love at each opportunity.

Your children may be tempted to act as your caretaker. Resist the temptation to let them. Let your peers, adult family members, and mental health professionals be your counselors and sounding board. Let your children be children.

If you have a drinking or drug problem, get counseling right away. An impairment inhibits your ability to reassure your children and give them the attention they need at this difficult time.

If you are the non-custodial parent, pay your child support. The loss of income facing many children after divorce puts them at a financial disadvantage that has a pervasive effect on the rest of their lives.

If you are the custodial parent and you are not receiving child support, do not tell your children. It feeds into the child's sense of abandonment and further erodes his or her stability.

If at all possible, do not uproot your children. Stability in their residence and school life helps buffer children from the trauma of their parent's divorce

American Academy of Matrimonial Lawyers

## APPENDIX

## "C"

## Children's Bill of Rights

Every kid should know he or she has rights, particularly when their mom and dad are splitting up. Below are some things parents shouldn't forget - and kids shouldn't let them when the family is in the midst of a break-up.

You have the right to love both your parents.

And you have the right to be loved by both of them. That means you shouldn't feel guilty about wanting to see your dad or your mom at any time. It's important for you to have both parents in your life, particularly during the difficult times, such as a divorce.

You do not have to choose one parent over the other.

If you have an opinion about what parent you want to live with, let it be known. But nobody can force you to make that choice. If your parents can't work it out, a judge may make the decision for them.

You're entitled to all the feelings you're having.

Don't be embarrassed by what you're feeling. It's scary when your parents break up, and you're allowed to be scared. Or angry. Or sad. Or whatever.

You have the right to be in a safe environment.

This means that nobody is allowed to put you in danger, either physically or emotionally. If one of your parents is hurting you, tell someone - either your other parent or a trusted adult, like a teacher.

You don't belong in the middle of your parent's break-up.

Sometimes your parents may get so caught up in their own problems that they forget that you're a kid, and that you can't handle their adult worries.

Grandparents, aunts, uncles and cousins are still a part of your life.

Even if you're living with one parent, you can still see relatives on your other parent's side. You'll always be part of their lives, even if your parents aren't together anymore.

You have the right to be a child.

Kids shouldn't worry about adult problems. Concentrate on your school work, your friends, activities, etc. You mom and dad just need your love. They can handle the rest.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

Appendix "D"

**HOLLY vs. ADAMS 544 S.W. 2D 367 (Tex. 1976) at 372**

- A. the desires of the child;
- B. the emotional and physical needs of the child now and in the future;
- C. the emotional and physical danger to the child now and in the future;
- D. the parental abilities of the individuals seeking custody;
- E. the programs available to assist these individuals to promote the best interest of the child;
- F. the plans for the child by these individuals or by the agency seeking custody;
- G. the stability of the home or proposed placement;
- H. the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- I. any excuse for the acts or omissions of the parent.