

The Impact of Internet Pornography Use and Cybersexual Behavior on Child Custody and Visitation

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Use of the Internet has been increasingly associated with sexual behaviors. Referred to as online sexual activity, these sexual behaviors include cybersexual behavior and pornography usage. Child custody evaluators are increasingly being asked to assess the impact of these behaviors on child custody and visitation determinations. In this article, we review the Internet-related sexual behaviors of cybersex and pornography usage, which have been associated with an increased risk of compulsive sexual behavior. Gender differences, general effects of pornography, and the effects of cybersex on the family are reviewed. Healthy sexuality and normative sexual behaviors in children are described. Legal issues and case law are comprehensively reviewed.

KEYWORDS *cybersexual behavior, child custody evaluation, hypersexual behavior, sexual addiction, pornography dependence*

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The Internet has progressively had an impact on society, with people spending more and more time engaging in online sexual activities. In 1991, the year that the World Wide Web went online, there were less than 90 adult magazines published in the United States (Ogas & Gaddam, 2011). Six years later, in 1997, there were an estimated 900 pornographic sites in the United States (Ogas & Gaddam). By 2011, filtering software called CYBERSitter blocked 2.5 million adult websites (Ogas & Gaddam). An estimated 50% of all Internet traffic is related to sex (McNair, 2002), and sex is the number one searched topic on the Internet (Cooper, 1998).

Increasingly, Internet-related behavior has contributed to increased marital discord, which has led to divorce. A November 2002 survey by the American Academy of Matrimonial Lawyers inquired from its members at its national meeting about the most frequent reasons for Internet-related divorces. It found that 68% of respondents indicated that a spouse had met a new love interest online, 56% reported the spouse had an obsessive interest in pornography sites, 47% reported that the spouse spent excessive time on the computer, and 33% that their spouse spent excessive time in chat rooms (Dedmon, 2002).

In child custody disputes, there have been a growing number of allegations that the spouse's use of Internet pornography and/or cybersexual behavior has had harmful effects on children or can create a risk to children (Black, Dillon, & Carnes, 2003; Schneider, 2000a). Increasingly, evaluators who are investigating parents who are engaged in such disputes have been given the task of assessing (a) the harmful effects that parental usage of Internet pornography or cybersexual behavior may have had on the child or children, and (b) the risk that a history of such behavior in a spouse may present to the child or children. During divorce proceedings, the parent who has not been involved in viewing Internet sex sites or seeking sexual contact through the Internet will often assert that the children are being harmed or have been harmed by the spouse's participation in one or both of these activities. Frequently, a parent will point to his or her child's sexual behaviors as proof that his or her offspring have been overly sexualized as a result of exposure to pornography by their partner. Since Internet pornography and/or cybersexual behavior are fairly new phenomena and their use by parents involved in child custody matters is also fairly new, many professionals who conduct child custody evaluations (CCEs) are uncertain about how to evaluate allegations that stem from parental use of pornography or involvement with cybersexual behavior and the effects of these behaviors on children (Ayres & Haddock, 2009). There is little empirical evidence on the effects of parental use of pornography or involvement with cybersexual behavior on children and little guidance in the peer-reviewed literature and professional practice guidelines about how to conduct evaluations of allegations stemming from a parent's use of pornography or cybersexual behavior and risk to children.

In this paper, we will present relevant information to inform such assessments, including a definition of cybersexual behavior, data on the occurrence of such behavior, and data on the risk of problems growing out of such behavior. Gender differences, general effects of pornography, effects of cybersexual behavior on the family, and healthy sexuality will be discussed. Normative sexual behavior of children, evaluation of children, and suggestions for an overall assessment will be presented. Finally, legal issues and cases relevant to Internet-related sexual behavior will be discussed.

DEFINITIONS

We have used the commonly defined terms related to Internet pornography in this paper. Online sexual activity (OSA) is defined as “the use of the Internet for any activity (including text, audio, graphic files) that involves sexuality for purposes of recreation, entertainment, exploration, support, education, commerce, and efforts to attain and secure sexual or romantic partners” (Cooper & Griffin-Shelley, 2002, p. 3). Cybersex is often cited as a subcategory of OSA (Cooper & Griffin-Shelley). Cybersexual activity includes many behaviors, such as looking at images, participating in sexual chat, exchanging explicit sexual materials, and “cybering,” meaning sharing fantasies over the Internet while masturbating (Cooper & Griffin-Shelley), a definition that we use in this paper.

There is no agreed upon definition of pornography (Brown, 2006; Daneback, Træen, & Månsson, 2009). Supreme Court Justice Potter Stewart’s definition of “I know it when I see it” is often used (*Jacobellis v. Ohio*, 1964). A 1986 Federal Government Commission on pornography defined the term as “material predominantly sexually specific and intended for the purpose of sexual arousal” (U.S. Department of Justice, 1986, pp. 228–229). This is the definition that we use in this paper. Additional definitions of pornography can be found elsewhere (Brown; Donnerstein, Linz, & Penrod, 1987; Malamuth & Donnerstein, 1984; Russell, 1995, 1998; Zillman & Bryant, 1988).

OCCURRENCE OF PORNOGRAPHY AND CYBERSEX

Daneback, Cooper, and Mansson (2005) looked at characteristics of those engaged in cybersex in Sweden. Data were collected through an online questionnaire to which participants responded about cybersex. It posted during a 2-week period on a Swedish portal site called “Passagen” (www.passagen.se). Cybersex was defined as “two or more people engaging in simulated sex talk while online for purposes of sexual pleasure and may or may not include masturbation” (Daneback, Cooper, and Mansson, p. 322). Of the total sample of 1,828, 30% of men and 34% of women reported that they

had engaged in cybersex. In this study, most of the cybersexual interactions took place in chat rooms (72%) followed by ICQ/Microsoft Messenger (52%).

Some studies have concentrated on online pornography only. Albright (2008), in a survey of 15,246 Internet users in the United States, found that 75% of men and 41% of women had intentionally viewed or downloaded pornography. According to a study by Fisher and Barak (2001), the most popular activity among Internet users was searching for sexually explicit material. Ogas and Gaddam (2011) reported on a study of different searches using search engines entered into Dogpile, which was described as a "meta-engine" that combined results from Google, Yahoo!, Bing, and other major search engines (p. 9). They examined Dogpile search results from July 2009 to July 2010. They found that of the 400 million searches that were collected, about 55 million (roughly 13% and representing roughly 2 million people) were searches for some sort of erotic content (Ogas & Gaddam). Of these searches for erotic content, two thirds were from the United States; others were from India, Nigeria, Canada, and the United Kingdom.

RISK OF PROBLEMS WITH ONLINE SEXUAL ACTIVITIES

Most researchers and clinicians have viewed cybersexual behavior as problematic, and in some cases, pathological; research has focused on the negative effects or addictive qualities of online sex (Cooper, Delmonico, & Burg, 2000; Cooper, Putnam, Planchon, & Boies, 1999; Cooper, Scherer, Boies, & Gordon, 1999; Philaretou, Mahfouz, & Allen, 2005; Schneider, 2000b).

However, several survey studies of Internet users have found that only a small percentage of users' behavior fell into the compulsive range of sex-seeking behaviors. In 1999, a large survey was conducted of adults who had used the Internet for sexual purposes at least once (Cooper, Putnam, et al., 1999; Cooper, Scherer, et al., 1999). This survey sampled 9,265 men and women from an MSNBC site. Most (92%) indicated that their online sexual behaviors were not problematic. Heavy users (>11 hours per week; 8%) reported significant problems correlated with the time spent online for sex. Male respondents (86%) outnumbered female respondents (14%). The authors concluded that the majority of men and women who visited sexual websites or chat rooms did so occasionally and without obvious problems.

A further evaluation of data from the above study (Cooper et al., 2000) looked at the characteristics and usage patterns of individuals who used the Internet for sexual purposes. The sample of 9,265 was divided into 4 groups using the Kalichman Sexual Compulsivity Scale. Results indicated that for most of the respondents, OSA neither interfered with (68%) nor jeopardized (79%) any aspect of their lives. For approximately 1% of the sample, however, OSA was clearly problematic with negative consequences in their lives.

Another study (Albright, 2008) found that only 8% of 15,246 respondents met the threshold of compulsive cybersex use, identified as 11 or more hours per week. A smaller percentage (2%) spent more than 11 hours on sex-seeking behaviors. Those admitting to compulsive use were more likely to be single and gay/lesbian or bisexual rather than heterosexual. According to Carnes, Delmonico, Griffin, and Moriarity (2001), 1% of Internet users had a profile of severe problems with sex on the Internet; 40% of these cases were female (p. 6).

There have been no large controlled studies that examine the reasons why some individuals who use the Internet would not develop problems and others would progress to have problems with cybersexual behavior. Cooper (1998) posited the “Triple-A Engine” (p. 187) of access, affordability, and anonymity as an explanation for the growth and power of OSA although this hypothesis is without systematic verification.

It should be noted that there has been a suggestion for inclusion of a new disorder, Hypersexual Disorder, for the upcoming 5th edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5; Kafka, 2010) published by the American Psychiatric Association. Criteria for this disorder involve 6 months of recurrent and intense sexual fantasies, urges, and behavior that are also associated with excessive time consumed by such activity; engaging in such activity in response to dysphoric moods or stressful life events; inability to control such behavior; and repetitively engaging in such behavior while disregarding the risk of physical or emotional harm to self or others (Kafka). Subtypes of this disorder include pornography and cybersex. This disorder is controversial because of limited empirical research and the possibility of misusing such a diagnosis in forensic or other contexts and may not be included in DSM-5, but the fact that it is being considered points to the emergence of such behavior as a problem (Kaplan & Krueger, 2010).

Other professionals have stressed the positive as well as the negative aspects of sexuality on the Internet. Morin (1995) wrote, “... porn is essentially fantasy, and fantasies can be beneficial, destructive, or innocuous” (p. 316). Leiblum and Döring (2002) described how the Internet gives people an opportunity and a safe way to explore their own sexuality, as an alternative for sexually disenfranchised groups or as a compliment to an already existing relationship. According to Daneback et al. (2005), “The medium [of cybersex] allows the user to play different roles and even pretend to be of the other sex and a different age” (p. 322). One of the earliest studies on Internet pornography (Durkin & Bryant, 1995) found that online sexual communication helped people maintain sexual fantasies.

GENDER DIFFERENCES

Early studies of sex and the Internet found that more males than females were users (Cooper, Scherer, et al., 1999; Laumann, Gagnon, Michael, &

Michaels, 1994). An online poll of 9,000 respondents found that 86% of males and 59% of females reported accessing pornography online (Cooper, 2000).

In recent studies, however, the percentages have changed. Daneback et al. (2005), in a survey of cybersex participants, found that 30% of the men and 34% of the women in the sample reported that they had had a cybersexual experience. This group also reported that women between the ages of 35 and 49 had significantly more experience with cybersex compared with men from the same age group. An earlier study of cybersex users found that women tended to be more interested in interactive OSA while men were more interested in visually oriented OSA (Cooper, Månsson, Daneback, Tikkanen, & Ross, 2003). Albright (2008), in her survey of 15,246 Internet users, found that clear gender differences emerged related to viewing erotic images or downloading pornography. Seventy-five percent of males and 41% of females had intentionally downloaded or viewed erotic images online. Females were only 20% as likely as males to view or download images. Females were more likely to chat about sex, and males were more likely to view erotic images or films. Only 2% of males and females were found to be compulsive users.

Several authors have stated that, in their opinion, there can be positive effects from use of the Internet by women. According to Leiblum and Döring (2002), "The sexual options available on the Internet offer women unique opportunities ... to act assertively as sexual subjects and protagonists rather than as sexual objects" (p. 43). Daneback et al. (2005) wrote that "The triple-A-engine allowed them to engage in a range of sexual activities without fear of violence, STI [sexually transmitted infections], pregnancy, societal censure or social stigmatization" (p. 326).

GENERAL EFFECTS OF PORNOGRAPHY

There is no consensus on the effects of pornography on adults; studies are conflicting. The 1970 Commission on Obscenity and Pornography found no causal links between exposure to sexually explicit materials and the development of sexual deviance or emotional disturbance (U.S. Government, 1970). In 1984, the Meese Commission, with dissenting members, issued a report that violent pornography was linked to acceptance of rape myths on the part of men (Condron & Nutter, 1988; U.S. Department of Justice, 1986). Research has not shown a direct causal relationship between pornography and sex crimes (Freeman-Longo & Blanchard, 1998; Rosenberg, 1989; Seto, Maric, & Barbaree, 2001). For the majority of American men, pornography exposure is not associated with high levels of sexual aggression (Malamuth, Addison, & Koss, 2000; Malamuth & Donnerstein, 1984).

EFFECTS OF PORNOGRAPHY AND CYBERSEX ON MARRIAGE AND THE FAMILY

The use of the Internet for non-sexual purposes has been associated with reductions in family interaction and increases in depression among family members (Kraut et al., 1998). When cybersex is added, consumers of cybersex may show loss of interest in partner sex and decline in relationship investment (Young, Griffin-Shelley, Cooper, O'Mara, & Buchanan, 2000). Manning (2006) conducted a comprehensive review of the research on the impact of Internet pornography on marriage and the family. She noted that the body of systematically focused research is sparse but revealed many negative trends, as have other researchers (Black et al., 2003; Schneider, 2000a, 2002). The severity or intensity of the impact of Internet pornography on the family, on the other hand, was moderated by the presence or absence of addictive behavior.

Most studies of pornography have focused on the affected partner's use and the consequences of such use. Daneback et al. (2009) examined the use of both printed and online pornography in 398 Norwegian heterosexual couples, aged 22 to 67. The majority (77%) of the couples did not report using pornography to enhance their sex lives. In 15% of couples, both had used pornography; in 3% only the female partner had used pornography, and in 5%, only the male partner had used pornography. In couples where only one partner used pornography, more problems were found related to arousal (male) and negative self-perception (female).

According to Brown's (2006) review of empirical research, prolonged consumption of pornography has affected perceptions of marriage and grounds for divorce. "Sexual infidelity became less accepted as suitable grounds for divorce among pornography users, and unacceptable sexual interest and initiative became more acceptable grounds. For reasons unrelated to sex, pornography consumption produced no differences in perceptions about grounds for divorce" (Brown, p. 285). Schneider (2002) wrote that there was disagreement about the meaning of the varieties of cybersex. "A wife's complaints about her spouses' cybersex use may simply reflect her own discomfort with pornography, but it also may be a sign of a significant cybersex problem in the family" (p. 181). In some cases one or more parents may be hypersexual, compulsively using pornography or engaging in cybersexual behavior, and this may affect the family environment. According to Friedrich (2007), "Hypersexual parents may contribute to a sexualized home environment. For example, they may misinterpret normative sexual behaviors exhibited by their child, or, conversely, their relationship with their child may become sexualized" (p. 72).

Goldberg, Peterson, Rosen, and Sara (2008) studied the impact of cybersex on marriage and the family by surveying with a mailed questionnaire 164 marriage and family therapists about their clients with cybersex problems. Most therapists in the study indicated concerns about the impact on family

members. Schneider (2003) surveyed therapists with an emailed questionnaire regarding their clients' cybersex addictions. Ninety-one women and three men aged 24 to 57 reported serious adverse consequences to their partner's cybersex addiction. Reported adverse effects on children included: (a) exposure to cyberporn and objectification of women, (b) involvement in parental conflicts, (c) lack of attention because of one parent's involvement with the computer and the other parent's preoccupation with the addict, and (d) divorce.

Schneider (2000a) reported on the effects of cybersex addiction on the family ($N=91$), including the impact on children ($n=70$). Her work focused on families that had been severely affected by OSA and provides some of the best information as to how OSA, including Internet pornography, can affect youth. She found the following negative effects in homes where a parent's compulsive or addictive behavior was occurring: decreased parental time and attention (from the consumer and the parent preoccupied with the consumer), encountering pornographic material a parent has acquired or encountering a parent masturbating, overhearing a parent engaged in phone sex, and witnessing or being involved in parental conflict.

Black et al. (2003) examined the reactions of 89 adolescents (age 13 or older) to being told of a parent's sexual addiction. Prior to a formal disclosure by a parent, 60 of 89 respondents reported that they already had known of their parent's behavior. This study also found that the disclosure or discovery of problematic sexual behavior often required a discussion of sex before the parent and/or the child was ready. Further, many of the adolescents in this study experienced anger for the pain caused to the family, embarrassment, and guilt. Other adolescents found relief at having the problem formally disclosed to them, as it validated the confusion, anger, and mixed messages that they had lived with for so long prior to the disclosure.

HEALTHY SEXUALITY

What is considered normal sexual behavior is dependent upon values, on what is socially acceptable, and on what is legal. According to Reynolds, Herbenick, and Bancroft (2003), research

generally supports that non sexually abused children engage in a range of overt sexual behaviors while very young, which become increasingly covert as the child ages (perhaps around age 4 or 5) and becomes aware of cultural norms and taboos. Also, advanced sexual behaviors such as oral-genital contact and anal or vaginal insertion of objects/fingers, while uncommon, do constitute a part of some non-sexually abused children's experiences. (p. 35)

Friedrich, Fisher, Broughton, Houston, and Shafran (1998) found similar results. Reynolds, Herbenick, and Bancroft (2003) conducted two studies of

recall of sexual events by adults (aged 18 to 22). In one of those studies, 1,869 undergraduate students were randomly sampled, mailed questionnaires, and then invited to participate; the final sample consisted of 154 females and 149 males (55% response rate). Results indicated that 43% of males and 30% of females reported the presence of pornography in their home during childhood; 80% of males and 49% of females reported having access to pornography during childhood at a friend's home. Males and females with access to pornography in or out of the home during childhood (pre-high school years) were not more likely to report childhood sexual experiences with peers in preschool years but were more likely to report childhood sexual experiences with peers in the elementary school period.

In sex research on very young children, parents often serve as informants (Meyer-Bahlburg & Steel, 2003). Early studies have shown an enormous range of mothers' reactions to their children's sexual behavior, from complete permissiveness to disgust (Sears, Maccoby, & Levin, 1957). There is a lack of empirical research addressing father's perception of their children's sexual behavior compared with mothers. According to Bancroft (2003), "Part of the 'moral panic' phenomenon is the assumption that 'normal' children are asexual and any evidence of sexual behavior or interest in a child tends to be interpreted as evidence that the child has been sexually abused" (p. 411).

NORMATIVE SEXUAL BEHAVIORS IN CHILDREN

Humans are sexual beings from birth onwards. "Penile erections occur in infants and children" (Bancroft, 2009, p. 151). "Some children are capable of genital response and orgasm prior to puberty" (Bancroft, 2009, p. 152). In a recent study of young adults (Reynolds et al., 2003), sexual arousal for the majority, comparable for boys and girls, occurred prior to puberty (average onset was 9.7 years for boys and 10.8 years for girls). A study by Rosenfeld, Bailey, Siegel, and Bailey (1986) examined parent's reports of occurrences of their children touching their parent's genitals. In this study of 576 children, aged 2 to 10, parents reported that such activity was not uncommon on an incidental basis, even among 10-year-old children. The authors concluded that these behaviors must be evaluated for the meaning that parents and children ascribe to them, in the context of a full evaluation. Friedrich and his colleagues also reported on normative sexual behavior in children (1998). It is clear that it is normative for children to exhibit a wide variety of sexual behaviors.

EVALUATIONS IN CHILD CUSTODY DISPUTES

Many children, especially young children, exhibit sexual behavior. A divorcing parent who has just become aware of explicit sexual material on his or

her partner's computer may become concerned about whether the children have been exposed to the material by his or her partner. The nonparticipating parent may also assert that the cause of his or her child's sexual behavior is the other spouse's participation in cybersex or pornography. The custody evaluator is asked to determine whether a child has indeed been directly exposed by accident or otherwise to sexually explicit information on the Internet or affected in some other way and, if so, what that means about the parent's ability to raise his or her child.

That question is not an easy one to answer. The parent who has not been involved in cybersex often assumes that their child's sexual behavior is the direct result of their partner's "misbehavior." As Friedrich et al. (1998) stated, a child's sexual behavior is related to a child's age, the level of family stress, family violence, family sexuality, maternal education, and the time a child spends in daycare. Johnson (2005) reported that she had identified the following factors related to children's sexual behavior: "(a) the size of the family's living space, (b) their neighborhood, (c) the age of siblings, (d) their level of sexual interest, (e) religious, societal, and cultural norms, and (f) parental values and attitudes regarding sex and sexuality" (p. 113). Additionally, Johnson hypothesized that family boundaries affect children's sexual behavior. She wrote, "The factors that have a far stronger relationship to an increase in [children's] sexual behaviors are the more explicitly sexual issues of witnessing intercourse in vivo or through the media, access to Internet pornography, and access to explicit television and videos" (p. 114). Friedrich stated that understanding a child's sexual behavior is largely the "function of the observer"; in other words, "Parental biases and attributions play a large role in what behaviors are noticed and how they are interpreted" (Friedrich, 2005, p. 43).

Indeed, according to a study of 1,114 children, aged 2 to 12, whose behaviors were rated by primary female caregivers, there are many normative sexual behaviors that children in this age range exhibited (Friedrich et al., 1998). The study concluded, "... children exhibit numerous sexual behaviors at varying levels of frequency. Sexual behaviors that appear to be the most frequent include self-stimulating behaviors, exhibitionism, and behaviors related to personal boundaries" (p. 6). The following Table 1 highlights developmentally related behaviors in this age range that were reported in 20% of the sample (Friedrich et al., 1998, p. 6).

Friedrich et al. (2005) stated, "At least half of sexually abused children do not exhibit sexualization" (p. 47). Thus, while sexual abuse does increase the likelihood of children exhibiting sexual behavior, observing sexual behavior in a child cannot be the sole indicator of whether or not the child was sexually abused. It is not a big leap to conclude that this is as true for the child exposed to explicit sexual materials on the Internet as it is for the child who has been directly sexually abused. Children who display sexualized behavior may be sexually abused, may have emotional/psychiatric

TABLE 1 Developmentally Related Sexual Behaviors

Question no.	Item	% Endorsement
2- to 5-year-old boys		
2	Stands too close to people	29.3
4	Touches sex (private) parts when in public places	26.5
7	Touches or tries to touch his mother's or other women's breasts	42.4
12	Touches sex (private) parts when at home	60.2
19	Tries to look at people when they are nude or undressing	26.8
2- to 5-year-old girls		
2	Stands too close to people	25.8
7	Touches or tries to touch her mother's or other women's breasts	43.7
12	Touches sex (private) parts when at home	43.8
19	Tries to look at people when they are nude or undressing	26.9
6- to 9-year-old boys		
12	Touches sex (private) parts when at home	39.8
19	Tries to look at people when they are nude or undressing	20.2
6- to 9-year-old girls		
12	Touches sex (private) parts when at home	20.7
19	Tries to look at people when they are nude or undressing	20.5
10- to 12-year-old boys		
35	Is very interested in the opposite sex	24.1
10- to 12-year-old girls		
35	Is very interested in the opposite sex	28.7

problems, or may come from family systems in which there is a high level of stress, conflict, and anxiety.

When a custody evaluator is asked to assess whether a child's sexual behavior is a result of a parent's involvement in cybersex, the formulation of their answer must reflect an investigation into the overall family environment. Johnson (2005) emphasized the importance of evaluation of boundaries with the child when allegations of sexual abuse have been made. Johnson has a list of questions that probe for potential boundary violations, as well as citations for other instruments to assess boundaries.

In families where there are concerns involving problematic Internet usage on the part of one or both parents, a child's safety is of paramount concern. Attention should be paid to any precautions that parents may have implemented in the home, such as monitoring of Internet content and chatting or blocking sexually explicit web sites. Beaver (2000) counted more than 30,000 domestic Internet pornography sites, not including international sites, interactive video chatting, or emailing. Parents can block most X-rated sites by the use of filtering software (although there can be workarounds),

by setting time control parameters, and by using software that reviews the teen's computer history. Parents are frequently not computer savvy, and these controls are not always easy for them to figure out. However, they can shield their child from sexually explicit Internet sites by using a password or by viewing those sites only when the child is not home or is asleep.

Sexual abuse prevention and education programs have been available for many years. Numerous books and pamphlets have been written for both parents and children about avoiding, preventing and detecting childhood sexual abuse (Freeman-Longo & Blanchard, 1998). For example, one of these, "Stop it Now!" (Henry & Tabachnick, 2002; Rice, 2009; see also <http://www.stopitnow.com>) includes warning signs in parental behavior that help inform lay people, adults, and children about problematic behaviors. A parent's participation in OSA in and of itself does not constitute a problem with parenting. The parenting becomes a problem when the child is exposed to the cybersexual material or when the Internet sexual activity creates an environment that exposes children to inappropriate sexual material and that violates the children's boundaries. When a custody evaluator is asked to assess if a child's sexual behavior is a result of his or her parent's involvement in cybersex, the formulation of his or her answer must investigate whether the child's behavior is caused by his parent's OSA; whether it is unrelated to it and quite possibly constitutes a developmentally appropriate expression of sexual exploration, feeling, or interest; or whether it is due to other factors (Friedrich et al., 1998; Johnson, 2005).

ASSESSMENT

Several authors have noted that false allegations may occur in the context of custody disputes (De Young, 1986; Gardner, 1989; Kuehnle & Kirkpatrick, 2005; Poole & Lindsay, 1998). When asked to investigate allegations that a child has been exposed to parental Internet pornography use, the court-appointed forensic evaluator must conduct a thorough assessment to ascertain the nature of the family, the quality of parenting, custodial capability, and whether it is likely that sexual abuse or exposure to inappropriate information on the Internet of the subject child(ren) has occurred.

According to Bow, Quinnell, Zaroff, and Assemany (2002), "The sole evaluator must ... have expertise in all phases of the evaluation (i.e., custody, sexual abuse, and sexual offender). If a sole evaluator lacks such expertise, a referral to an outside expert in that particular area should be sought or a team approach utilized" (p. 572). Additionally, we would suggest that an assessment should include an investigation of a parent's capacity to maintain appropriate family boundaries, especially with respect to OSA and other sexual behavior.

It is incumbent upon evaluators to have familiarity with up-to-date relevant literature and research in the above fields, in the field of children's credibility with regard to reporting of sexual abuse and of the professional guidelines that address these areas of expertise. Children's reports of sexual abuse are heavily affected by their suggestibility, the quality of the interviewing they undergo, and their memory (Bruck & Ceci, 1997; Bruck, Ceci, & Hembrooke, 2002; Kuehne & Connell, 2009). The professional guidelines include: *Psychosocial Evaluation of Suspected Abuse in Children* (2nd ed.; American Professional Society on the Abuse of Children, 1990); *Model Standards of Practice for Child Custody Evaluations* (Association of Family and Conciliatory Courts, 2006); *Guidelines for Psychological Evaluations in Child Protection Matters* (American Psychological Association, 2009a); *Guidelines for Child Custody Evaluations in Family Law Proceedings* (American Psychological Association, 2009b); Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused (American Academy of Child and Adolescent Psychiatry; 1997a); and Practice Parameters for Child Custody Evaluation (American Academy of Child and Adolescent Psychiatry, 1997b). When a judge orders an evaluation to assess whether a child has been abused or neglected by exposure to sexually explicit materials on the Internet, it is important for the evaluator to be aware of societal, cultural, and his or her own personal biases in order to examine parental behaviors in the appropriate context and with objectivity.

As stated in the American Psychological Association *Guidelines for Child Custody Evaluations in Family Law Proceedings*, "The purpose of the evaluation is to assist in determining the psychological best interests of the child" (American Psychological Association, 2009b, p. 5). As noted in those guidelines, "Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and to help facilitate a high level of practice" (American Psychological Association, 2009b, p. 5). These guidelines are consistent in principle on many facets of the assessments. All of the guidelines stress the importance of gathering data from multiple independent sources. These sources include: clinical interviews, direct observation of parent and child, psychological testing, interviews with collateral sources, and/or review of relevant reports.

When one parent alleges that the other has improperly monitored his or her child and thereby exposed him or her to sexually explicit materials on the Internet during the course of a custody dispute, both parents should undergo a thorough evaluation unless there are clear reasons for evaluating the "abusing" parent alone. The evaluator must focus on both parents' capacity to provide a safe, secure, nurturing, and developmentally appropriate environment for their child. The evaluator must specifically address whether a parent's use of pornography derived from the Internet or whether his or her cybersexual behavior falls outside the norm and as such affects his or her

ability to parent responsibly. If the answer appears to be “that the parent can parent responsibly,” then the evaluator must address why the other parent made the allegations that are not substantiated and if the alleging parent is attempting to thwart the other parent’s contact with his or her children.

We are suggesting that the evaluation of children in these cases must carefully examine both the general child custody issues and the specific question of whether it was likely that there was problematic exposure of that child to sexual materials from the Internet and its effect on the children. It is paramount that evaluators who are being asked to investigate a parent’s OSA must be experienced with interviewing children in ordinary custody disputes and have training and experience in interviewing children and adults in which there have been specific sexual abuse allegations. Additionally, the evaluators must be aware that they can never say for certain if information they receive in this setting is true. Children, and for that matter adults, are not necessarily reliable reporters of events. There is a strong body of research that shows that although even preschool children are able to accurately recall events, children’s recollection of events is affected by interviewer bias, suggestive questions, introduction of misleading information and linguistic factors such as the type of questions asked (Bruck & Ceci, 1997; Bruck et al., 2002; Ceci & Bruck, 2006; Ceci & Friedman, 2000; Gaven, Wood, & Malpass, 2000). If the custody evaluator is not the first to question the child about possible sexual abuse, there is less likelihood that the information received from the child will be accurate because of these factors. Once a child has been swayed to make false statements, he or she will continue to incorporate these falsehoods into future statements (Ceci & Bruck; Ceci & Friedman, 2000) Thus, it is important for the custody evaluators in these types of cases to examine all aspects of the family and each parent’s behavior.

It is only within the context of a complete evaluation of the family and each of the family members that OSA in the context of a custody dispute can be understood. Parental participation in OSA, per se, with no exposure of the child to that medium is neither an indicator of poor parenting nor of hypersexuality. As previously described, it is when OSA decreases parental time or attention or results in children being able to view or viewing online pornography or a parent masturbating or chatting while viewing online sexual sites that it is a problem. In these cases, the exposure of a child to Internet-related sexual activity is problematic at best and a likely indicator of impaired or poor judgment and parenting. When a parent does not provide appropriate safeguards and boundaries to avoid the child’s being exposed to this explicitly sexual material, it raises questions about that parent’s capacity to provide a developmentally appropriate, safe environment for his or her child. When OSA becomes a priority for a parent, it may be a feature of a hypersexual environment that is harmful to a child and should be viewed as neglectful and/or abusive behavior.

LEGAL ISSUES

Introduction

When determining the most appropriate child custody arrangement between divorcing or separated parents, courts consider a great many factors and make decisions based on the totality of the circumstances. The same holds true when the claims involve Internet pornography. Because custody determinations are governed by state law, not federal law, no single body of law applies across the nation. Judges, and not juries, make custody decisions, although there are some exceptions (such as in Texas). Throughout the nation, decisions are to be made in “the best interest of the child,” an amorphous standard best understood for the implicit distinction that it draws between the current focus on the child’s interest and the historic standards that focused on the rights of the parents. However, state statutes vary significantly in the level of specificity of the factors that courts must consider when deciding what exactly is in a child’s best interest and what weight to give to those factors. Where statutes are open-ended, the judges devise the standards that they apply.

Some states utilize statutory factors that must be considered and referred to by the court in its custody decisions. For example, the Minnesota Statute sets forth 13 different factors and states that the “court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child” (§ 518.17, 2010).

Other states’ statutes are more permissive in nature, providing guideline factors that the courts *may* consider while leaving much to the discretion and personal standards of each individual judge. (See, e.g., Mont. Code Ann. § 40-4-212, 2009, “The court shall consider all relevant parenting factors, which may include but are not limited to [the factors set forth in the statute].”) New York’s statute provides judges with no specific guidance beyond acting in the child’s best interests, except that they must consider the impact of domestic violence. See NY Dom. Rel. Law §240(1)(a) (2011). No single factor is determinative in a contested case, and statutes do not prescribe a formula for weighing the importance of various factors. Courts are generally expected to consider all relevant factors in relation to each other, rather than in isolation, to give each factor whatever weight the judge thinks appropriate in the overall context of the case.

Moral Fitness Standard

In certain states, the moral fitness of a parent is specifically identified in the statute as a relevant factor. (See, e.g., La. Civ. Code Ann. art. 134, 2012; Mich. Comp. Laws Serv. § 722.23, 2010; Utah Code Ann. § 30-3-10, 2010.) Similarly,

some states incorporate moral fitness into their judge-made rules. (See, e.g., *Albright v. Albright*, 1983.) Generally, the morality of a parent's conduct is relevant to the extent that it affects the child, leading to the broader question: Does "immoral" behavior in any part of a parent's life permeate all of his or her other roles and responsibilities (i.e., parenting) such that even private acts conducted outside the presence of the child can be judged as being detrimental to the child's best interest?

"Out of Sight, Out of Harm"

Some courts subscribe to the "out of sight, out of harm" principle; that is, if the children are not directly exposed to the parent's questionable behavior, then evidence of such behavior does not weigh heavily, if at all, upon the court's custody decision. An example of this line of reasoning first appeared in the case of *Dinkel v. Dinkel* (1975), where the court held that one parent's adulterous acts committed in the home, but not in the presence of the child, did not necessarily affect the child's welfare. Going further, in *Feldman v. Feldman* (1974), the appellate court held that the judgment of divorce, which had awarded custody to the father based solely upon the court's disapproval of the mother's lifestyle, was erroneous. The court in *Feldman* stated that "the right of a divorced woman to engage in private sexual activities, which in no way involve or affect her minor children, is within the penumbra of that yet ill-defined area of privacy mandated by the specific guarantees of the Bill of Rights" (*Feldman*, 1974, p. 511).

More recent cases also evince hesitation on the part of many courts to punish parents for private behavior that has no clear effect upon their children. In *Zepeda v. Zepeda* (2001), the mother had engaged in "explicit cybersex Internet conversations," as well as an adulterous affair in the home while the child was sleeping (*Zepeda*, 2001, p. 57). The trial court labeled the mother's conduct "potentially harmful" and "appalling," but found no "demonstrable effect on the child," and ultimately awarded custody of the child to the mother (*Zepeda*, 2001, p. 55). In reaching its decision, the court had also considered the expert opinion of a psychologist who had evaluated both parties and determined that the mother did not have an Internet addiction, and that she did not have any issues that would indicate an inability to provide adequate care for the child.

In *Petty v. Petty* (2005), an initial ruling requiring supervised visitation was overturned on appeal due to the lack of any recognizable threat to the subject children. The trial court had held that the father's "penchant towards pornography" and viewing Internet sites exhibiting material of a sexual nature required that his visits with his children be supervised (*Petty*, 2005, p. 1). However, the appellate court deleted the supervision requirement, holding that "[w]hile clearly Father's time could have been better spent in activities other than those described, no proof has been presented ... that any of

the activities ascribed to Father has [sic] affected his relationship with his children or that his children have been, or will be, exposed to any material which [is] pornographic" (*Petty*, 2005, p. 5). Similarly, in *Cooley v. Cooley* (2004), the court upheld an award of custody to the father where there was no evidence that the child had been exposed to or had access to the father's pornography or that the father's viewing of pornography had affected his conduct, his relationship with his daughter, his daughter's environment, or otherwise jeopardized his daughter.

Numerous other cases exhibit the courts' hesitation to limit parental visitation solely on the basis of the parent possessing pornography. In *Liebner v. Simcox* (2003), the mother sought to prohibit the father's visitation, in part because he possessed "pornographic materials." Although the court noted that the materials were "clearly inappropriate for young children" (the child was 11 years old at the time of the decision), it considered it important that "the materials ... had been hidden by [the father]. There was no evidence that [the child] had or has access to such materials" (*Liebner v. Simcox*, p. 612). The father was therefore given visitation with the child. In *Fast v. Mayer* (2005), the father sought unsupervised visitation with the parties' daughter, who was then approximately 5 years old. The mother objected on the grounds that she discovered pornographic files on the father's computer, including materials with underage or child pornography. The father admitted visiting pornographic websites approximately 5 to 10 times, and admitted that the computer he shared with others might have pornographic files, but he argued that the mother did not claim that the child ever saw the pornographic files and that the pornographic materials could not be established as coming from him. The trial court granted the father unsupervised visitation, and the decision was affirmed on appeal. Further, the mother's request to have the father's computer submitted for examination was denied on the basis of her failure to claim that the child had been exposed to any of its contents.

"Morality Matters"

In stark contrast to the "out of sight, out of harm" principle are cases that treat the parent's "immoral" behavior—regardless of when, where, or how it takes place—as affecting the parent-child relationship and therefore consider such behavior to be relevant to a custody determination. The case of *Anderson v. Anderson* (1999) involved a mother who engaged in troubling behavior such as cocaine abuse, lying to the police, making false allegations of sexual abuse against the child's father, and allowing her live-in boyfriend to operate an Internet pornography business out of their home. The question for the court was whether this behavior was legally insignificant because it occurred when the child was not present or was asleep. The court noted that the "out of sight, out of harm" principle, which originated in Florida in the *Dinkel* case (*Dinkel v. Dinkel*, 1975), *supra*, did not answer the question of

whether a child's welfare may still be affected by immoral parental behavior, especially as the child grows older and becomes aware of the hidden conduct, even if the child does not specifically witness the act. The court asked,

Does not such conduct evince contempt for the law, disrespect for women and disregard for committed relationships and thus permeate the environment where the caregiver lives whether or not the child 'sees it'? Morality is important; character does count in custody determinations. Children learn attitudes, good and bad, by osmosis-observation and emulation (*Anderson v. Anderson*, 1999, p. 55).

Exposure to Pornography

Whereas the courts have varying approaches to cases where parents view or possess pornography out of the presence of the children, when parents expose their children to pornography, the courts are less hesitant to deprive them of unsupervised access to the children. For example, in *Stark v. Stark* (2009), the father purposefully exposed the children to pornography, which was a factor the court relied upon heavily, but not exclusively, in changing custody to the mother.

In the case of *In re Marriage of P. I. M.* (1984), custody of the parties' two children was transferred from the mother to the father. The court found that although the mother cooked, cleaned, and made sure the children were adequately fed, clothed, and sheltered while in her care, her moral standards were "grossly deficient from those required of the custodian of a child of impressionable years" (*In re Marriage of P.I.M.*, p. 673). Starting with the premise that "the morals of the respective parents are an appropriate subject for consideration in child custody matters," the court went on to say that "where there are charges and proof of gross immorality on the part of a custodial parent, and such immorality takes place in the home in which the child is kept, it is not necessary to wait for manifestation of harmful consequences to the child before action is taken" (*In re Marriage of P.I.M.*, p. 672).

The conduct that concerned the court in *In re Marriage of P. I. M.* (1984) included, among numerous other things, the mother's collection of pornographic magazines that were kept in a magazine rack along with the younger child's coloring books and crayons and the pornographic movies with explicit images on the containers that were kept in places where they were found by the children. By contrast, the court described the father, a grain farmer, as stable and supportive of his children in all respects, and it noted that his sister and his mother provided him with domestic assistance.

Neglect of the Child

Even if the child is not being exposed to pornography, the courts may consider a parent's "immoral" behavior if it leads to the neglect of the child or to

placing the child in imminent risk of harm. In *Parker v. Parker* (1999), the court acknowledged that “sexual indiscretion does not, by itself, disqualify a parent from being awarded custody, but it may be a relevant factor if it involves the neglect of a child” (*Parker*, 1999, p. 563). An example of this occurred in *In re the Marriage of Chisholm* (2000). The mother had used the Internet to engage in sexually explicit conversation, and the father had used the Internet to exchange photos with a woman he had met in a chat room and to access a pornographic website. The court stated, “We will not pass moral judgment on this type of ‘entertainment’ by characterizing one use as more negative than the other. It is, however, appropriate and necessary to examine how each parent’s use of the Internet affected the children” (*In re Marriage of Chisholm*, p. 2). Physical custody was granted to the father because of the “critical difference” between the father and mother’s use of the Internet: the mother’s “personal rendezvous with her electronically introduced acquaintances.”

Without ever having met these people in person, she invited two men, on separate occasions, into the family home. These invitations put the children at great risk of harm, as strangers were given the family’s address and brought into the home (*In re Marriage of Chisholm*, 2000, p. 3).

In *Miller v. Miller* (2005), the appellate court upheld the trial court’s finding that placing the child in the custody of either parent “would place him in an unsafe environment with a real physical danger and an extremely questionable moral environment” (p. 235). Both parties testified as to their violent and tumultuous relationship that involved verbal and physical abuse, housekeeping issues and Internet pornography, as well as the mother’s relationships with other men.

In cases where there appears to be a potential for harm to the child, courts will assess and consider the immediacy of such threat. For example, in *Tousey v. Duigou* (2002), the mother sought a change of custody away from the father on the grounds that he was putting the child at risk. The alleged risk was that the father’s friend, who attended family functions, had been convicted of possession of child pornography. The court held that this alone was insufficient to show that the child was “subject to imminent harm” and denied the mother’s petition for a modification of custody (*Tousey v. Duigou*, p. 1).

Remedial Steps Improve the Outcome

Where children are exposed to pornography but remedial steps are taken, either by a court order or by the parent, to prevent further viewing by the children, the consequences of the exposure are rather limited.

In *Pedraza v. Collier* (2007), the potential negative impact of the mother’s home-based pornography website was mitigated by court order. For

many years, pursuant to court order, the father had custody of the parties' daughter during the school year, and the mother would have the child during the summer. However, when the father learned from a newspaper article that the mother was "running a pornography website business out of her home and the existence of web cameras and computers in her home used in developing her website," he filed a motion to restrict the mother's access (*Pedraza v. Collier*, p. 1). The court promptly issued a temporary order directing that the mother's visitation be reduced to a 2-week period "at a location other than in and around [her] home and the activities she has portrayed in her home" (*Pedraza v. Collier*, p. 2).

However, following a hearing on the matter, the court denied the father's motion to restrict the mother's access but ordered the mother to "remove from her home the cameras used in this line of business at all times when the child is in her home" and to ensure that the child did not have access to the materials on the mother's computers. The court held that terminating the shared parenting plan would not be in the child's best interests as there was no "showing that there has been a negative effect on the child as a result of [the mother's] new business" (*Pedraza v. Collier*, p. 2). Both at the time of the hearing and when the court issued its decision, "it was apparently believed by the parties that [the child] was unaware of her mother's sexual conduct and pornographic website business" (*Pedraza v. Collier*, p. 3).

In *Walter v. Walter* (2000), the court modified custody of the children to the father even though it was found that he possessed pornography on his computer. Of significance was the fact that the pornography was not on the computer as a result of the father's conduct, and the father took appropriate remedial steps to rid the computer of the material and to prevent future downloading of such material.

In *Liebner v. Simcox*, *supra* (2003), the father was awarded visitation despite the existence of pornographic materials because he had hidden them. In *A. S. v. J. S.*, (2008), the mother sought to reduce the father's visitation with the 14-year-old son, citing the fact that the child and his friend saw pornography on the father's computer and pornographic magazines in the father's bedroom. The child initially said that he was embarrassed by the incident. The father met with the child and the mother to discuss "his lifestyle choices," and he said that after this meeting the "child seemed okay with the situation" (*A.S.*, 2008, p. 3). Based on a host of factors, the court found that it was in the child's best interests for the father to have residential custody.

In *Gorman v. Gorman* (2008), the mother discovered photographs and other files on the father's computer that indicated that he "enjoyed sexual arousal from nontraditional means." The father's sexual activities included "professional sexual liaisons," and "erotic dances, some in the family home when the mother and child were absent," and "adult liaisons with nonprofessional women and one couple" in area motels (*Gorman v. Gorman*, p. 4). At the time of the court involvement, the father had no computer in his home

and no private access to a computer. The court concluded “there was nothing to connect the father’s behavior with a *present* risk to his son [italic in original]” (*Gorman v. Gorman*, p. 6). The father was awarded joint legal custody of his son; however, the father was prohibited from having adult guests in his home, except family members, during his parenting time. If the father purchased a home computer, he had to purchase software to block adult content, as the child was old enough to use a computer. Also, the father could not give his home address to adults he met on adult sites. Finally, in the best interest of the child, the father was ordered to continue therapy until discharged by his therapist.

Pornography Experts

In custody cases where alleged parental use of Internet pornography is at issue, parties will sometimes offer expert witness testimony regarding the potential effects on parental fitness to bolster their claims. In *Kay S. v. Mark S.* (2006), the mother had copied the web history and had accessed files from the father’s computer that established that the father had been viewing pornographic websites, and she alleged that the titles of some of the files suggested that he had been viewing child pornography. The father denied any viewing of child pornography and any regular or continued viewing of pornography. At trial, the court received testimony from Dr. Marlene Joy, a court-appointed custody evaluator, and from Dr. Steven Gray, the mother’s expert witness who was deemed a specialist in pornography addiction and its effects. Dr. Joy testified that in her conversations with Dr. Gray, he reported that a “CD of the web history from Father’s computer was ‘pretty straight up’ and not ‘deviant’ or reportable to the police” and that the local police “viewed the CD of Father’s web site history and found no deviancy” (*Kay S. v. Mark S.*, p. 376). Dr. Gray testified that while he had never examined the father, he could state in general terms that not everyone who occasionally views pornography has a personality disorder or a “characterologic” trait. The court took note of Dr. Gray’s testimony that the “subject matter of the pornography viewed and the frequency and duration of Father’s viewing were relevant factors in determining the existence and extent of any personality disorder or problem that could be correlated to pornography use. [Dr. Gray] testified that persons who have such dysfunctions can benefit through counseling and that persons who view pornography are frequently in denial about their behavior” (*Kay S. v. Mark S.*, p. 376).

The court also received testimony from the parties’ counselor, who testified that “he had counseled with both [parents] and that, while Father had viewed pornography in the past, Father admitted as much and sought treatment for it. He did not perceive Father to be in denial, and, while acknowledging that Father had some issues with intimacy, he thought Father was an effective parent for his children” (*Kay S. v. Mark S.*, 2006, p. 376). The trial court ultimately issued an award of joint custody, shared decision making,

and almost equal parenting time, and it did not order the father to engage in counseling related to his pornography viewing.

A. J. B v. M. J. B (2008) also involved expert testimony. There, the trial court denied the father's request to expand his visitation with his young daughter. In opposing the father's application, the mother offered the expert testimony of an expert in media studies who testified that "human brains respond to stimuli identically" and that "individuals who use pornography extensively often do not have or lose personal boundaries and are unable to distinguish between their 'pornographic world' and 'the real world' (*A.J.B. v. M. J. B.*, p. 750). This lack or loss of boundaries often leads to loss of judgment, which could obviously have a negative affect or impact on a child's welfare." The appellate court was highly critical of the expert testimony and held that its admission into evidence was erroneous but legally harmless. This case highlights the fact that cases involving pornography and its impact on custodial issues are as prone to evaluation through the lens of "junk science" as any other cases.

Alienation Cases

In many cases, allegations involving pornography arise within the complicated context of parental alienation. Numerous reported cases can be found that involve claims by alienating mothers that the father is sexually abusing the child. In *J. H. v. Y. A.* (2009), the father took the then 12-year-old child to R-rated movies and exposed him to computer pornography. However, those poor decisions paled in comparison to the mother's "emotional abuse" of the child, as she mistreated and infantilized the child by, for example, bathing the preadolescent boy, applying lotion to his entire body after bathing, brushing his teeth, continuing to sleep with him, and rendering his bedroom unusable, even after the child engaged in somewhat sexualized behavior toward her. The mother also demonized the father and attempted to alienate the child from him. The court awarded the father sole custody and limited the mother to once-per-week supervised visitation.

In *Khan v. Hillyer* (2009), a 9-year-old child, playing on his father's computer, accessed adult websites. Following that incident, the mother suspended all visitation between the father and the child, and the father thereafter filed a motion to hold the mother in contempt as well as a motion seeking to modify custody. The mother's argument for suspension of visitation relied, in part, on an incident that she claimed had occurred when the child was 2 years old.

Years earlier, the mother had claimed that the father sexually abused the child, a claim that the police rejected on numerous occasions as unsupported by any evidence. The mother continually made the same report of sexual abuse to the local child protective authorities, including reporting the alleged incident 6 times in a 2-month period when the child was 2½ years

old. Eventually, the court made several contempt findings against the mother for depriving the father of visitation.

Despite being held in contempt numerous times and the repeated unounding of her claims of sexual abuse, 3 years after the original report, the mother continued to make the same allegation to authorities. At a hearing, she introduced into evidence a writing that she attributed to the child that recounted the story of the father's sexual abuse of the child. This version of the story, for the first time, added a female participant and a gun, and it included details that were, in the court's judgment, too vivid and rich to be the work of a 9-year-old child remembering an event that allegedly occurred when he was 2 years old. The court concluded that the text was "probably" the mother's work, that the mother had used the child as an "amanuensis," and that she was attempting to estrange the child from the father (*Khan v. Hillyer*, 2009, p. 5).

The court ultimately viewed the "isolated instance in which a nine-year-old child accesses pornography on the other parent's computer" as an "event [which] should occasion dialogue between the parents and between them and their child," but it is "scant justification" for depriving a parent of visitation with a child (*Khan v. Hillyer*, 2009, p. 4). The court stated that whatever may or may not have happened to the child when he was 2 years old had been eclipsed by the mother's "invention, exaggeration, or exploitation of that 'event,'" and the court stated its concern at the mother's "failure to properly focus upon the child's development of a healthy attitude towards sexuality as he matures" (*Khan v. Hillyer*, p. 6). Notably, the court concluded that the case had "become less a custodial dispute between two competent adults, and instead a case in which unchecked and persistent psychological abuse of a child which may have gone on for several years leaves no remedy immediately obvious ..." (*Khan v. Hillyer*, p. 6).

The case of *Wolfe v. Wolfe* (1996) involved a custody dispute within the context of a matrimonial action. The father claimed that after the birth of the parties' child, the mother developed an unhealthy obsession with the child and refused to engage in sexual relations. After 4 years of celibacy, the father began an affair and "maintained a bag of sexual devices," which for the most part he kept in a locker at work (*Wolfe v. Wolfe*, p. 536). He brought the bag home once when the mother and child were away, and then later could not find it. The mother eventually found it, examined its contents, discovered his affair, and produced it in court, claiming that she found it on the child's bed. She filed for divorce and requested "termination of [the father's] parental rights" (*Wolfe v. Wolfe*, p. 537).

The court awarded the father visitation, and the mother then surreptitiously moved to New Zealand, where her mother lived, claiming that the move was temporary despite substantial evidence to the contrary. When the father secured visitation rights in New Zealand, the mother attempted to flee with the child to Australia. The New Zealand court documented numerous material false statements made by the mother, in particular regarding her

clear efforts to flee with the child. The custody issue was tried before a jury, pursuant to Texas law. The father “testified as to the full contents of the bag and what was depicted in the videotape” in the bag (*Wolfe v. Wolfe*, 1996, p. 540). “There was ample other evidence, including [the mother’s] own testimony, as to [the father’s] sexual misconduct” (*Wolfe v. Wolfe*, p. 540). The jury awarded custody to the father, and the appellate court affirmed.

In *Leegwater v. Leegwater* (2006), the court awarded custody to the father despite the fact that the father admitted to viewing Internet pornography. He was judged not to be a sexual danger to the children. On the other hand, the mother was engaged in a well-documented campaign to alienate the children from him.

Birdsell v. Birdsell (1983) involved a bad-faith claim that the father possessed pornography combined with a suggestion that the mother was attempting to alienate the children from the father. The father sought modification of the visitation provisions of the divorce decree because the mother was allegedly making it impossible for him to visit with the children in her home. A “pornography charge” had been filed against the father 7 years earlier and was dismissed.

The father, who was remarried, called upon the psychiatrist who had provided him and his then fiancée premarital counseling to testify. The psychiatrist testified that the father had a “slight interest in pornography that caused no difficulty.” In his testimony, the psychiatrist denied the existence of an “unhealthy situation” for visitation (*Birdsell v. Birdsell*, 1983, p. 81).

The mother testified that after the father had moved out of the marital residence, she discovered photographs and books “which she considered pornographic,” and she believed that the father had taken some of the photographs himself. She claimed that the children had found some of the photographs earlier during the marriage and brought them to her but that she “apparently left them in the house after she found them” (*Birdsell v. Birdsell*, 1983, p. 81). The mother admitted that she was aware of the photographs and books being in her home before the divorce. The court concluded:

[T]here is absolutely no showing of any relationship between that and the father’s fitness to have custody. For some reason the mother kept them and presented them long after the father was gone in order to defeat his motion [to modify the visitation order] [T]his pornography, which the mother wished to protect the children from, had been retained by her, in the family home, for several years (*Birdsell v. Birdsell*, 1983, p. 82).

Father’s Win Despite Evidence of Pornography

A substantial number of cases show that neither the allegation, nor even the confirmed possession or viewing of pornography, necessarily defeats a father’s right to visitation or custody of a child. For example, *DeVito v. DeVito* (2007) was a matrimonial action where the father was awarded custody of the

parties' child. The mother alleged that the father viewed Internet pornography on family computers and that he committed adultery. The mother's computer expert admitted that he did not know the proper protocol for ensuring the integrity of photographic images from a computer and that he could not identify the person responsible for placing the images on the hard drive. The mother therefore failed to prove that the father was responsible for the content of the computer's hard drive. She also did not prove that he committed adultery. On the other hand, she admitted her own adultery. The trial court awarded custody to the father on the basis of numerous factors including the mother's "unstable work history," her work hours, her "alcohol use and traffic violations," and her adultery (*DeVito v. DeVito*, 2007, pp. 74–76).

Numerous other cases stand for the same principle—that fathers' rights are not automatically terminated or curtailed simply on the basis of the use of pornography. *Walter v. Walter* (2000; custody changed to father), *Tousey v. Duigou* (2002; father's sole custody sustained), *Liebner v. Simcox* (2003; father granted visitation), *Fast v. Mayer* (2005; father granted unsupervised visitation), *Gorman v. Gorman* (2008; father granted joint custody), *A. S. v. J. S.* (2008; father granted residential custody), *J. H. v. Y. A.* (2009; father granted sole custody), *Kay S. v. Mark S.* (2006; father awarded joint custody, equal time, shared decision making), *Birdsell v. Birdsell* (1983; father granted visitation), and *DeVito V. DeVito* (2007; father awarded custody) all involved cases where a father was accused of having, and in several instances did have, pornographic materials, and in each case, the father was awarded custody or visitation with his child.

Even in cases where the children were potentially exposed to pornography, courts have refrained from restricting the father's access on that basis alone, such as in *Prior v. Prior* (2008). The father' computer had "a great many pornographic items ... to which the child was potentially exposed," but he had a host of other deficits (*Prior v. Prior*, p. 2). The court awarded the parents joint legal custody, with primary residential custody and final decision-making authority being granted to the mother. But the father had responsibility for the 5 children 2 days out of every 8 days from early morning to dinnertime.

SUMMARY AND CONCLUSIONS

The Internet has resulted in the creation of sexual websites that are increasingly being viewed and used and of cybersexual behavior that is becoming more prevalent. Most of the time, viewing of pornography and engagement in cybersexual behaviors are not harmful and can even be associated with personal growth and expression. However, in a small portion of individuals using the Internet, such behaviors can become a source of distress or dysfunction and can impact their lives and those of their family members in a

negative way. The growth of the Internet has resulted in an increasing number of custody disputes in which one parent alleges that such behaviors have adversely affected the other's capacity to parent. Forensic custody evaluators need to be careful in evaluating whether and how such behavior may have an effect on parenting and need to be able to evaluate the effects of such behavior on the child's welfare. While courts do not speak with one voice on the legal consequences of such behaviors, there appears to be an insistence that any restrictions on parental access to a child be premised on a demonstrated connection between sexual behavior and parenting ability. It is imperative that various disciplines that are involved in such cases work together to assure the best interests of the child.

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