
LAW AND THE FAMILY

"Child Custody Evaluations"

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Matrimonial lawyers are unanimous in agreeing that the cost of custody litigation has skyrocketed to the point of making it prohibitive for many parents to seek custody of their child.

In a recent article, we pointed out that the appointment of a competent law guardian at the parent's expense has become routine in contested custody cases. We neglected to mention that courts are also routinely ordering child custody evaluations (called "forensic evaluations") in such cases, at the parents' expense, since a party to a custody or visitation proceeding has no right to the free services of a psychiatrist. [FN1]

The 'Kessler' Case

In 1962, the Court of Appeals held in *Kessler v. Kessler*, that in a custody proceeding the court may order psychiatric, psychological or other medical evaluations by impartial professionals who could not report to the court in the absence of a stipulation, but who would be available as a witness. [FN2] It has been held to be an abuse of discretion for the court not to order a psychiatric evaluation in a custody case once it became evident that the decision would hinge on psychiatric factors, and we agree that

such evaluations should be ordered when psychological factors are in issue. [FN3]

However, we also believe that such evaluations should not be required unless it is first demonstrated that psychological factors are involved in the custody dispute, and that less-limited and less-expensive evaluations should be ordered where indicated. The court may also order an investigation as to relevant facts bearing on parental fitness and the home environment of the parties. [FN4] In many cases it may only be necessary to order a home study, school inquiry or other similar investigation, rather than a "forensic evaluation," the scope of which has yet to be defined by our courts.

The Court of Appeals in Kessler held that expert reports may only be read and considered by the Court where the parties so stipulate. [FN5] It is error for the trial court to order the parties to execute a stipulation to the confidential use of investigations and reports. [FN6] Where there is a psychiatric evaluation, courts give little weight to it when the expert did not examine both parties and the children. [FN7]

It has been held by the Court of Appeals that the weight to be given the testimony of an expert witness is for the trier of facts. [FN8] Expert testimony may be rejected by the trial court "if it is improbable, in conflict with other evidence or otherwise legally unsound." [FN9] The fact that an expert has been designated or appointed by the court, does not, in any way, require that the court accept the opinion of that expert. [FN10]

When a custody evaluation is directed the practitioner should make sure that it conforms to generally recognized standards before relying upon it.

The American Academy of Child and Adolescent Psychiatry has developed extensive "Practice Parameters for Child Custody Evaluations." They indicate that the evaluator should clarify the exact questions being asked and determine whether he or she can provide an answer or opinion. The approved "summary" of these parameters suggest that:

In the parent interviews, each should be asked to address the following: a description and history of the marriage and separation; the parent's perception of his or her relationship with the child; the parent's understanding and sensitivity to any special needs of the child; the parent's specific plans for the future should custody be awarded or not awarded; the parent's history, including family of origin, social history and psychotherapeutic experience, if any; the developmental history of the child; and the usual routine of the child. Explore any allegations parents make against each other. Each parent should be given the opportunity to respond to allegations raised about him or her by the other parent. Observe which subjects the parent focuses on and which he or she ignores. It is not necessary to render DSM-IV diagnoses of the parents in a custody dispute, and in most cases, psychological testing of the parents is not required.

The evaluator should conduct a psychiatric evaluation of each child, with diagnoses when appropriate. Children as young as 3 years usually can be interviewed alone if they can separate from the parent. Consider seeing the siblings together at the outset, to allow them to be supportive of each other. Each child is usually seen twice, since he or she should be brought to one appointment by the mother and to another by the father.

During the interview with the child, the purpose of the evaluation and the role of the clinician should be explained. The evaluator should explore the child's perception of the family situation and what he or she thinks is going to happen. The quality of the child's attachment with the parents should be assessed through discussion and projective techniques. Depending on the circumstances it may or may not be appropriate to ask about the child's preference. If the child volunteers a custodial preference, explore this further, including the child's reasons for the preference, the child's fantasies about what life would be like with a particular parent, and indications that the child has been coached.

The interview with parent and child may occur in the office or be one part of a home visit. Some evaluators have each parent and the child perform a task together, which indicates how they work together, whether the parent is responsive to the child's lead, the parent's patterns of discipline, and other aspects.

Other information should be gathered as relevant. All pertinent legal documents, such as court orders, affidavits, and motions should be obtained. It may be desirable to interview other individuals who figure prominently in the child's or family's life, either in person or by telephone: stepparent, potential stepparent, grandparents, babysitters, extended family, friends, neighbors, school personnel, etc. These interviews may or may not be helpful. Consider whether a home visit to one or both homes would be helpful. It is important to contact current and former psychotherapists of the children or the parents.

A less-detailed set of guidelines for conducting child custody evaluations within the context of parental divorce have been developed by the American Psychological Association (APA) for psychologists. These guidelines indicate that the focus of the evaluation is on parenting capacity, the psychological and developmental needs of the child, and the resulting fit. The values of the parents relevant to parenting, ability to plan for the child's future needs, capacity to provide a stable and loving home and any potential for inappropriate behavior or misconduct that might negatively influence the child also are considered. Notably, while psychopathology may be relevant to such an assessment, insofar as it has impact on the child or the ability to parent, it is not the primary focus.

The APA guidelines specifically define the manner of conducting the child custody evaluation after the scope of the evaluation is determined by the evaluator, based on the nature of the referral question.

Multiple Methods

Guideline 11 states that multiple methods of data gathering is important:

11. The psychologist uses multiple methods of data gathering. The psychologist strives to use the most appropriate methods available for addressing the questions raised in a specific child

custody evaluation and generally uses multiple methods of data gathering, including, but not limited to, clinical interviews, observation, and/or psychological assessments. Important facts and opinions are documented from at least two sources whenever their reliability is questionable. The psychologist, for example, may review potentially relevant reports (e.g., from schools, health care providers, child care providers, agencies, and institutions). Psychologists may also interview extended family, friends, and other individuals on occasions when the information is likely to be useful. If information is gathered from third parties that is significant and may be used as a basis for conclusions, psychologists corroborate it by at least one other source wherever possible and appropriate and document this in the report.

Guideline 12 cautions the psychologist to neither over interpret nor inappropriately interpret clinical or assessment data. It provides:

The psychologist refrains from drawing conclusions not adequately supported by the data. The psychologist interprets any data from interviews or tests, as well as any questions of data reliability and validity, cautiously and conservatively, seeking convergent validity. The psychologist strives to acknowledge to the court any limitations in methods or data used.

Child's Best Interests

Guideline 14 adopts our public policy that recommendations, if any, are based on what is in the best psychological interests of the child. It states:

If the psychologist does choose to make custody recommendations, these recommendations should be derived from sound psychological data and must be based on the best interests of the child in the particular case. Recommendations are based on articulated assumptions, data, interpretations, and inferences based upon established professional and scientific standards. Psychologists guard against relying on their own

biases or unsupported beliefs in rendering opinions in particular cases.

Appropriate and competent child custody evaluations by impartial professionals are helpful in child custody litigation where they are necessary to aid the court in making its determination. However, they should never be a substitute for the considered judgment of the court and should be ordered only for the specific purpose for which they are needed.

FN(1) See *D v. K*, 131 Misc. 2d 775.

FN(2) *Kessler v. Kessler*, (1962) 10 NY2d 445, 225 NYS2d 1, 180 NE2d 402, remittitur and 11 NY2d 716, 225 NYS2d 996, 181 NE2d 220.

FN(3) See *Giraldo v. Giraldo*, (1982, 1st Dept.) 85 App Div 2d 164, 447 NYS2d 466.

FN(4) See CPLR 3121 (a), 22 NYCRR 202.18 and *Zelnick v. Zelnick* 196 AD2d 100, 601 NYS2d 701. See also *Kessler*, supra.

FN(5) See *Kessler v. Kessler*, supra.

FN(6) *Baumgartner v. Baumgartner*, (1978, 2nd Dept.) 64 App Div 2d 880, 408 NYS2d 99; *Waldman v. Waldman* (1983, 2d Dept.) 95 App. Div 2d 827, 463 NYS2d 868.

FN(7) In *Gloria S. v. Richard B.*, (2d. Dept., 1981) 80 A.D.2d 72, 437 NYS2d 411, the Appellate Division reversed a custody award which was based upon the testimony of a psychiatrist retained by one spouse who did not have an opportunity to evaluate or speak to the other spouse. The Court stated that "opinions formulated upon such one-sided and biased information are virtually worthless."

FN(8) In *Re City of New York*, 1 NY2d 428, 154 NYS 2d 1; *Commercial Casualty Ins. Co v. Roman*, 269 NY 451, 199 N.E. 658 (1936)

FN(9) *Desnoes v. State of New York*, 100 AD2d 712, 713.

FN(10) *State of New York ex rel H.K. v. M.S.*, 187 AD2d 50, 592 NYS2d 708. *Alanna M. v. Duncan M.*, 204 AD2d 409 611 NYS2d 886.

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