Custody Cases and Forensic Experts

By Bari Brandes Corbin

At the recent Annual Meeting of the Family Law Section of the New York State Bar Association, Justice Sondra Miller of the Appellate Division, Second Department, stated that the Matrimonial Commission, which she chairs, is now taking a close look at one of the more controversial topics in matrimonial litigation: the use of forensic experts. A survey on recent experiences with experts in matrimonial and family law proceedings revealed that the use of forensic experts in child custody cases is causing concern, not only in the judiciary, but in the mental health professions as well. In the past, many judges simply accepted with few, if any, questions the expert's opinion on what constitutes the best interests of a child. Now, with some prominent psychologists questioning whether their profession is equipped to address such an abstract and unscientific question as a child's best interests, judges are taking a more skeptical view. *See* Caher J: "Judge Smith Says Marriage 'Contract' Favors Women." *New York Law Jour*nal, 1/28/05. It has thus become necessary to look back to the basics for deciphering just what constitutes an admissible expert opinion, and how to get that evidence admitted at trial.

Rules of Evidence

The usual rules of evidence, including the rule against hearsay, are applied in custody cases, although the need for reliable data, as an aid to decision-making in custody and visitation cases, has led to a relaxation of the traditional adversary procedure. Nevertheless, an award of custody will be reversed if based on hearsay, unless the error is harmless. In *Siegman v. Kraitchman*, 30 A.D.2d 979 (2d Dept. 1968), an award of custody to the father was reversed because of the admission of hearsay evidence regarding the son's mental condition and because the mother had been denied an examination of psychiatric reports concerning herself, the father, and the son. *But see Rush v. Rush*, 201 A.D.2d 836, 608 N.Y.S.2d 344 (3d Dept. 1994), where the error was harmless.

A Multi-Level Process

Laying a foundation for the introduction of expert testimony is a multi-level process. First, if novel scientific evidence is offered, the court must determine whether it is generally accepted in the relevant scientific community. In *People v. Wesley*, 83 N.Y.2d 417 (1994), the New York Court of Appeals has held that the "Frye Rule" is the appropriate standard for determining the admissibility of new or novel scientific evidence in New York.

In *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the issue was whether an expert witness would be permitted to testify regarding the results of a systolic blood pressure deception test. The court held that, in order for scientific evidence to be admissible, it must have gained "general acceptance in the particular field in which it belongs" Whether expert testimony on a particular issue is to be admitted is within the discretion of the trial court. *Dufel v. Green*, 84 NY2d 795 (1994); *De Long v. County of Erie*, 60 NY2d 296 (1983); *Selkowitz v. County of Nassau*, 45 NY2d 97 (1978). In determining the admissibility of expert testimony, the guiding principle is that the expert testimony should be received "when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v. County of Erie, supra*.

The Expert's Expertise

Once the court decides that it will listen to expert testimony on a particular issue, it must determine whether the proffered expert is qualified to render an opinion with a degree of "professional certainty." The question of whether the witness is qualified to testify as an expert is for the trial court, and it may use its discretion. There is no specific rule as to

how an expert witness must have acquired his or her skill. The expert may be qualified from actual experience, observation, or study. *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389 (1941). An expert witness must possess sufficient skill, training, education, knowledge, or experience from which it may reasonably be inferred that the information the expert imparts, and any opinion that the expert states, is reliable. *Matott v. Ward*, 48 NY2d 455 (1979). The qualifications of the expert may be demonstrated by showing practical experience in the field. *See Caprara v. Chrysler Corp.*, 52 NY2d 114 (1981); *Locilento v. John A. Coleman Catholic High School*, 134 AD2d 39 (1987); *McGovern v. Riverdale Country School Realty Co.*, 51 AD2d 894 (1976).

An otherwise qualified witness who is not licensed in the field may still give expert testimony; for example, a physician who is not licensed to practice in New York may be permitted to testify as an expert, with the weight to be given to his or her testimony being for the jury to determine. *Selleck v. Board of Education*, 276 App Div 263 (1949). A physician need not be a specialist in the pertinent field of medicine to qualify as an expert and to offer an opinion. *Forte v. Weiner*, 200 AD2d 421 (1994); *Farkas v. Saary*, 191 AD2d 178 (1993).

The Basis of the Opinion

The expert may render an opinion after being qualified by the court and accepted as an expert, and he should state that his opinion is given with a "degree of professional certainty." The expert's opinion must not be based on supposition or speculation. *Matott v. Ward*, 48 NY2d 455. As a general rule, an expert opinion must be based upon facts disclosed by the evidence or known by the witness personally. *Sawyer v. Dreis & Krump Mfg. Co.*, 67 NY2d 328 (1986); *Hambsch v. New York City Transit Authority*, 63 NY2d 723 (1984); *Cassano v. Hagstrom*, 5 NY2d 643 (1959). Where an expert bases the opinion on facts that are within his or her personal knowledge but which are not yet in the record, the expert must testify as to those facts before the opinion can be received in evidence. People v. Jones, 73 NY2d 427 (1989). An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion. *Quinn v. Artcraft Constr.*, 203 AD2d 444 (1994); see *Wright v New York City Housing Authority*, 208 AD2d 327 (1995) (expert may not create facts upon which conclusion is based).

There is also a general rule that if an expert relies on impermissible hearsay in reaching the opinion, the opinion is not admissible. The expert's opinion must be based only on evidence that is in the record and that is also from his or her personal knowledge and observation. *People v. Keough*, 276 NY 141 (1932). However, an expert may base an opinion on circumstantial evidence, and his lack of direct evidence will simply affect the weight of the opinion. *Soulier v. Hughes*, 119 AD2d 951 (1986).

The general rule concerning exclusion of hearsay evidence is subject to two narrow exceptions; an expert may testify to an opinion based on material not in evidence if the material "comes from a witness subject to full cross-examination on the trial" ("standard of helpfulness") or if the material "is of a kind accepted in the profession as reliable in forming a professional opinion" (test of reliability). In *People v. Stone*, 35 NY2d 69 (1974), the court held that a psychiatrist's opinion was not rendered inadmissible simply because he had interviewed third parties who had not testified at trial. The opinion was deemed admissible because the witness testified at trial that the additional information was not necessary to the expression of his opinion with professional certainty, and that he had conducted the interviews merely to "confirm" the expert's conclusions. The court in *Stone* held that in " ... evaluating the worth of [an expert's] opinion, the jury should be informed of his sources and how he evaluated those sources ... on cross-examination, the validity of his reasoning process may be probed - and any 'shaky factual basis' of the opinion exposed ... The jury may then take the opinion for what [it thinks] it is worth."

In *People v. Sugden*, 35 NY2d 453 (1974), the court held that the expert's opinion could be based on the statements of third parties so long as those third parties appeared and testified at the trial and the opposing party was afforded the opportunity to cross-examine such third parties with respect to the out-of-court statements on which the expert had relied. The court allowed the expert to "rely on material, which ... does not qualify under the professional test [but] comes from a witness subject to full cross-examination on the trial." The *Sugden* court also held that a psychiatrist could rely on information contained

in medical and/or psychological records and reports pertaining to tests and examinations performed, even where those records were never introduced into evidence, but the data relied upon must be of the kind ordinarily accepted by experts in the field as reliable. (*But see People v. Ricco*, 56 NY2d 320 (1982) (psychiatrist improperly permitted to state opinion as to a person's sanity where the only basis for such opinion was a police detective's testimony); *People v. Wilson*, 133 AD2d 179, (1987) (it was error to allow psychologist to give opinion as to defendant's mental capacity based on expert's courtroom observations of defendant where no evidence of the scientific acceptance of the reliability of this procedure was presented).)

Application of the Rules to Forensic Experts

If an expert's testimony is to be based upon "professionally reliable" sources, as is the case with forensic experts in custody cases, that party's attorney must be prepared to satisfy the trial judge that the information to be used by the witness meets the test of being "accepted in the profession as reliable." Reliability can be established at a preliminary hearing by testimony, by reference to the available literature on the subject, or by judicial notice. The test of reliability "is not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally accepted as reliable." *People v. Middleton*, 54 N.Y.2d 42 (1981).

While the expert witness' testimony of reliance on out-of-court material to form an opinion may be received in evidence (provided there is proof of reliability), testimony as to the express contents of the out-of-court material is inadmissible. Expert opinion based on unreliable secondary evidence is nothing more than conjecture. Admission into evidence of a written report prepared by a non-testifying person would violate both the rule against hearsay and the best evidence rule. Inasmuch as such a written report is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence. *Wagman v. Bradshaw*, 292 AD2d 84 (2002).

Courts may order forensic evaluations by experts in custody cases, but fairness and justice require that the use of secret reports by the trial court must be prohibited absent the parties' consent, and that the parties and their counsel must have access to the material relied on by the court. The Court of Appeals held in the landmark decision *Kessler v. Kessler*, 10 N.Y.2d 445 (1962), that the parties may stipulate that a probation officer, family counselor attached to the court or other qualified and impartial persons may make investigations and report, but absent a stipulation of the parties, such report cannot be considered by the court, or received into evidence, although the person who made the report can be called to testify under the common law rules of evidence.

In *Kessler*, an order directing a change in custody was challenged mainly on the ground that the court erred as matter of law in considering the reports of a psychiatrist and of a psychologist, and in its refusal to allow the parties or their counsel to see these reports or the report of the investigation made by the family counselor of the court, who was authorized by a written stipulation to make any relevant investigation and inquiry that the court might deem appropriate. The Court of Appeals pointed out that the parties did not have to stipulate that the report of the family counselor should be made to the court.

The court could have directed her to make an investigation, and then could have left her testimony to the parties to deal with under common-law rules, in the absence of their consent. Even without their consent, the report might have been used to furnish leads for the introduction of common-law evidence. Nor was there any reason that would prevent the court, in the proper exercise of its judicial discretion, from calling upon qualified and impartial psychiatrists, psychologists or other professional medical personnel, to examine the infant or to examine the parents. In such a case, the psychologists, psychiatrists or other medical personnel could not report to the court in the absence of a stipulation by the parties, but would be available to be called as witnesses by either party, subject to cross examination by the other party under common-law evidence rules. The order was reversed and a new trial was directed.

The *Kessler* rule is based, among other things, on the rule of evidence that says where an expert bases his or her opinion on facts which are within the expert's personal knowledge, but which are not yet in the record, the expert must testify as to those facts before the opinion is received in evidence. *People v. Jones*, 73 NY2d 427 (1989). Thus, the report of a

court-appointed psychiatrist is not admissible in evidence without the consent of the parties, since such reports contain inadmissible hearsay. *See also Kahn v. Dolly*, 774 NYS2d 365 (2d Dept. 2004); *Chambers v. Bruce*, 292 AD2d 525 (2d Dept. 2002); *Wilson v. Wilson*, 226 AD2d 711 (2d Dept, 1996).

Court Rules appear to permit the admissibility of professional reports in evidence as long as the parties have an opportunity to cross examine the court-appointed expert and submit other evidence. They appear to be admissible pursuant to 22 NYCRR 202.16(g) and 22 NYCRR 202.18, without consent, as the equivalent of the expert's direct testimony, subject only to the right of each party to cross examine the report.

The procedures in 22 NYCRR 202.16 (g)[2], which are rarely followed, do not provide for the admission into evidence of court-appointed expert reports. That rule deals with the parties' own expert witnesses, and is so difficult to comply with as a practical matter, that if it were strictly adhered to it would probably put an end completely to the admissibility of expert testimony at trial. It requires that the parties exchange and file their expert reports no later than 60 days prior to trial, and requires that reply reports are to be exchanged no later than 30 days before trial. The court is given the discretion to preclude the use of the expert for failure to comply with this rule.

These experts' reports are the only reports admissible at trial, unless good cause is shown. In the discretion of the court, written reports may be used to substitute for direct testimony at trial, provided that the report is submitted by the expert under oath, and further provided the expert is present and available for cross examination. This rule does not apply to independent forensic evaluations. 22 NYCRR 202.18 authorizes the court to appoint a psychiatrist or psychologist to "give testimony with respect to custody or visitation." It does not authorize the admission of psychiatric or psychological reports rendered by court-appointed experts into evidence. The admissibility of the reports of such experts is not mentioned in this rule.

Conclusion

To summarize, to be admissible, expert opinion evidence must be based on one of the following: 1) personal knowledge of the facts on which the opinion rests; 2) where the expert does not have personal knowledge of the facts on which the opinion rests, the opinion may be based on facts and material in evidence, real or testimonial; 3) material not in evidence, but only if the out-of-court material is derived from a witness subject to full cross-examination; or 4) material not in evidence, but only if the out-of-court material is accompanied by evidence establishing its reliability. *Jemmott v. Lazofsky*, 5 A.D.3d 558 (2d Dept. 2004). The expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided that such material is of a kind accepted by the profession as reliable as a basis in forming a professional opinion, and there is evidence presented establishing the reliability of the out-of-court material referred to by the witness. *Hambsch v. New York City Tr. Auth.*, 63 N.Y.2d 723 (1984).

A motion to strike is the appropriate remedy to deal with inadmissible expert testimony that has been admitted. Expert testimony may be rejected by the trial court "if it is improbable, in conflict with other evidence or otherwise legally unsound." *Desnoes v. State of New York*, 100 AD2d 712 (1984). 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. *State of New York ex rel H.K. v. M.S.*, 187 AD2d 50 (1993). If the testimony is admitted and then rendered inadmissible by cross-examination, the proper way to deal with it is to move to strike such testimony.

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