LAW AND THE FAMILY

COURT-APPOINTED EXPERTS IN CUSTODY DECISIONS

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WHEN IT COMES to custody disputes, the courts are congested with emotionally devastating, financially ruinous and legally baffling cases. Such cases have all the trappings of a battlefield: explosives, warring sides, generals, soldiers and even innocent victims ... the children. As on the battlefield, often the solution is having a neutral party enter the picture to help resolve the issues.

Although a party to a custody or visitation proceeding has no inherent right to insist on the free services of a psychiatrist to prepare for the case, [FN1] the courts can and do order forensic evaluations by such professionals. [FN2] In fact, it can be considered an abuse of discretion for the court not to order a psychiatric evaluation in a custody case in which psychological factors are critical. [FN3] As fairness and justice require that the use of secret reports by the trial court be prohibited, and that the parties and counsel have access to the material relied upon by the court, such reports may only be read and considered by the court where the parties so stipulate. [FN4] It is error for the trial court to order the parties to execute a stipulation to the confidential use of investigations and reports. [FN5]

Investigation as to relevant facts bearing on parental fitness and home environment may be conducted by either a party or by the court's professional staff, or by both. [FN6] Understandably, courts tend to place greater confidence in the reports and advice of their own staffs or in experts of their choosing than in the reports, recommendations and testimony of outside experts. Where there is a psychiatric evaluation, courts give little weight to it when the expert did not examine both parties and the children. [FN7]

Weight of the Evidence

Although there is plethora of decisions setting forth the standards for appellate review of custody determinations, nonetheless it is a tricky issue. On the one

hand, case law tells us, that when the Appellate Division reverses a custody award made by the trial court, its function is to decide, taking into consideration the best interests of the child, whether the determination of the court below comports with the weight of the evidence. [FN8] The State Constitution indicates that the authority of the Appellate Division in custody matters is as broad as that of the trial judge.

The Court of Appeals has held that in a matter that turns almost entirely on assessments of the credibility of the witnesses and particularly on the assessment of the character and temperament of the parents, the findings of the nisi prius court are to be accorded the greatest respect. [FN9] Thus, custody determinations should be affirmed on appeal if they have a "sound and substantial" basis in the record and are not contrary to the weight of the credible evidence. [FN10]

On the other hand, an appellate court would be seriously remiss if, simply in deference to the findings of a trial judge, it allowed a custody award to stand where it lacks a "sound and substantial" basis in the record. [FN11] In awarding custody, the court must comply with the duty imposed upon it by Civil Practice Law and Rules 4213(b) to state the facts that it deems essential to the custody determination in order to enable an appellate court to review its determination. If an appellate court concludes that the determination reviewed is not supported by the weight of the evidence, it must reverse for lack of a sound and substantial basis or as contrary to the weight of the credible evidence.

It has been held by the Court of Appeals that the trier of facts is to determine weight to be given the testimony of an expert witness. [FN12] Expert testimony may be rejected by the trial court "if it is improbable, in conflict with other evidence or otherwise legally unsound." [FN13] The fact that an expert has been designated or appointed by the court, does not, in any way, require that the accept the opinion of that expert. [FN14]

Impact of Court-Appointed Experts

Recently two First Department custody cases have evoked much comment with regard to the effect, if any, they have on the weight to be given to the testimony of court-appointed experts in custody cases. [FN15] It has been suggested that these cases support the proposition that "the independent findings of the court-appointed forensic should be given even greater weight than the findings and opinion of the trial judge" and "as between the mental health expert and a judge, the mental health expert is to be the final arbiter." We reject this notion and insist that neither of these cases supports such a conclusion.

In Rentschler v. Rentschler [FN16] the Appellate Division modified, "on the law and on the facts and in the exercise of discretion" an order of the Supreme Court, New York County that, among other things, awarded custody of two children to the mother. The Appellate Division awarded custody to the father, with liberal

visitation to the mother. In its brief memorandum opinion, which does not discuss the facts of the case, the court stated:

Inasmuch as this court's authority to consider the question of custody is as broad as that of the IAS court (Matter of Louise E.S. v. W. Stephen, S., 64 NY2d 946), we find that the IAS judge's determination was not warranted by the evidence, particularly since there is much support in the record for the opinion of the court appointed psychiatrist, and the evaluation by an independent expert should not be readily set aside (Giraldo v. Giraldo, 85 AD2d 164; Asher v. Asher, 79 AD2d 904). We have considered the remaining issues raised on this appeal and find them to be without merit.

Justice Asch dissented in a memorandum stating that it was not erroneous for the trial court to credit the testimony of the mother's treating psychiatrist as well as the mother's expert and depart from the recommendation of the court- appointed expert.

While there is general dicta in the opinion that "the evaluation by an independent expert should not be readily set aside" the facts of the case are not stated, and the opinion does not indicate the weight to be given to the testimony of the court-appointed expert.

In re Application of Renee B. v. Michael B., [FN17] the same court modified "on the law and the facts, and in the exercise of discretion," an order of the Family Court, New York County, which, among other things, denied the father's motion for a transfer of custody of his daughter from her mother. The Appellate Division granted the transfer to the father.

At the hearing, the Clinical Director of the Family Court's Mental Health Service, who was qualified to testify as an expert in clinical psychology, testified that he had met with the child on three occasions for a total of three hours and with her and each parent for about 40 minutes. He also had met with each parent separately for about seven hours.

He concluded that the child's best interests required the transfer of custody to the father with liberal visitation for the mother, noting that the father was a much less detrimental influence on the child than was the mother; that he was less likely to cause long-term harm to her than was the mother; that the child perceived him as more loving than her mother; and that she had a more profound bond with the father. The child made it clear to the court-appointed expert that she would prefer to live with her father; the mother's spanking, slapping and locking of the child in her room was difficult for the child to comprehend.

A second psychiatrist recommended a change in custody, for the "main reason" that the mother tried to exclude the father from the child's life. He believed that the father as the custodial parent would give better access to the noncustodial

parent. A third witness, a supervising social worker employed by the Legal Aid Society, also recommended that custody be transferred to the father.

Finally, the law guardian, believed that the father was more likely to foster the non-custodial parent's relationship and concluded that the transfer of custody to him was in the best interest of the child.

The mother's expert witness, a psychiatrist retained by her, testified that custody should be continued with her. He had spoken only with the mother and with people to whom he was referred by her, but not to the child or the father.

No Sound Basis

The trial court denied the father's motion and left custody with the mother finding the testimony of the Clinical Director, the psychiatrist and the Social Worker not credible. The Appellate Division noted that they were the only experts making a custody recommendation who had spoken to all three family members and found that by discounting the testimony of these three witnesses, the trial court essentially left itself without expert testimony on the child's preferences and the quality of her relationships with her parents. Since the mother's psychiatrist had not interviewed the child or the father, little weight was to be accorded to his recommendation that custody be awarded to the mother.

The Appellate Division found that the testimony of those experts favoring custody of the child to the father was convincing. In contrast, the court gave little weight to the testimony of the mother's retained psychiatrist, as it was based only on meetings with her, individuals selected by her and with certain of her therapists. The Appellate Division thus concluded, based on the weight of the credible evidence in the record, that trial court's custody award lacked a sound and substantial basis in the record and should not be allowed to stand.

Nowhere in its decision does the Appellate Division give greater weight to the testimony of court-appointed experts because they are court-appointed experts, nor do Asher or Giraldo, the two cases cited in Rentschler, seemingly support the proposition that the testimony of court-appointed experts is entitled to greater weight than ordinary experts opinions.

In Asher v. Asher, [FN18] the first case cited in Rentschler, the Appellate Division modified an Order of the Supreme Court, on the facts and in the exercise of discretion, to, among other things, strike the award of temporary custody of the parties' child to the father and award him permanent custody. It found that the history of this case was one of instability on the mother's part and that the original expressed intention of the trial court to award custody to the mother was changed in midstream on its apparent realization that the trend of the psychiatric evidence would not support such a result.

The trial court expressed its inclination that following a year of this arrangement, applications for permanent custody would again be entertained. The order reviewed required visitation with the mother during all periods other than the days when the child was in school: every weekend (another Justice did award the father two June weekends), every holiday, the entire summer vacation, except Father's Day. The Appellate Division held that this was unfair to the father and obviously detrimental to the child's well-being, physical as well as emotional, for the mother lived in Allentown, Pa., where the visitation was to take place. The court noted that the child preferred to be with the father and further stated:

The order does not comport with the expert psychiatric opinion which appears in the record. A psychiatrist retained by each side testified, as would be expected, in favor of the position of the employing party. But a third psychiatrist, selected by the court, recommended, in effect against what the court actually did, but his advice was not followed except in one respect, that the child should have psychotherapy. This is provided, but we are not aware of the extent to which such treatment is helpful in the atmosphere in which the child must live under the instant decree. We perceive no reason why the applications for permanent custody should not have been decided without temporizing for a year. However, on the basis of all the evidence available to Special Term, we are of the firm opinion that it justifies our conclusion that the father should have permanent custody, with liberal visitation, as indicated, to the mother.

The appellate court in Asher gave no greater weight to the testimony of the court-appointed expert, as the weight of the evidence in the trial court was found by it to be against the mother.

Colombian Separation

In Giraldo v. Giraldo [FN19], a per curiam opinion, the father brought a proceeding in the Family Court to obtain custody of his three daughters. The parties were married in New Jersey in 1968. During the marriage, the parties resided in Colombia. On Aug. 20, 1980, the parties entered into a separation agreement in Colombia, which was to control their conduct for six months. Under the agreement, the mother, an American citizen, was to retain custody of the children in an apartment. The father, a Colombian citizen, was granted the right to visit with the children and take them as long as he did not interfere with their schooling and did not jeopardize their moral, mental and physical well-being.

The mother traveled with the three children to New York City on Dec. 19, 1980, while the agreement was still in force. It was her contention, at the Family Court hearing, that she executed the agreement under duress and that she fled Colombia to avoid petitioner's violent conduct, which he denied. On the second day of the hearing the mother's attorney asked that the parties and the children be directed to submit to psychiatric and psychological evaluations by the court. The court denied the request on the basis that it was belated and that it would cause about a six-

week delay. Both parties mentioned that they had letters and reports from various doctors. These documents were never accepted into evidence. In camera testimony of the parties' oldest child supported the mother's claim of physical abuse.

The Family Court granted custody to the father with visitation rights to the mother in Colombia. It found that neither parent was unfit in any definitive fashion. The mother's credibility was found to be extremely low, and it was found that she fabricated much of her testimony. On almost every disputed point in the trial, the court credited the testimony of the father.

The Appellate Division determined that the narrow issue before the Family Court was whether the mother was justified in fleeing Colombia, and it reversed the hearing court because it abused its discretion in not granting the motion for psychiatric evaluations once it became evident that the decision would hinge on psychiatric factors. It held that "once it became evident that its opinion would turn upon such an evaluation, the hearing court was required to decide very difficult factual questions on the limited evidence of the testimony of the parties and their oldest child.

Because witnesses, who otherwise would be called, were not called because they resided in Colombia, many issues that would normally be resolved through the aid of objective evidence, were decided solely through the subjective evaluation of the hearing court. Under such circumstances the Appellate Division did not believe that "the critical question of custody should be decided upon such limited evidence when independent evidence could have been obtained in the near future through the reasonable efforts of the parties and the auxiliary services of the court system."

The court noted that both parties saw one psychiatrist for over a one-year period in Colombia and "... reasonable efforts should have been made by both parties to examine that psychiatrist so that his testimony would be admissible at the hearing ..." It also pointed out that the psychiatrist's testimony would have thrown light upon many areas of the parties' relationship and would have served as an independent predicate for the determination." It held that the hearing court "should have realized the need for independent opinion when it eventually found that the child who it interviewed in camera, was "brainwashed," as until that part of the record, there was no evidence from which to draw that conclusion.

FN1. See D v. K, 131 Misc2d 775.

FN2. Kessler v. Kessler, (1962) 10 NY2d 445, 225 NYS2d 1, 180 NE2d 402, remittitur and 11 NY2d 716, 225 NYS2d 996, 181 NE2d 220, held that in a custody proceeding the court may order forensic 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.

FN3. See Giraldo v. Giraldo, (1982, 1st Dept.) 85 AD2d 164, 447 NYS2d 466.

FN4. See Kessler v. Kessler, supra.

FN5. Baumgartner v. Baumgartner, (1978, 2d Dept.) 64 AD2d 880, 408 NYS2d 99; Waldman v. Waldman (1983, 2d Dept.) 95 AD2d 827, 463 NYS2d 868.

FN6. See CPLR s3121 (a), 22 NYCRR 202.18 and Zelnick v. Zelnick 196 AD2d 100, 601 NYS2d 701.

FN7. In Walden v. Walden, (1985, 2d Dept.) 112 AD2d 1035, 492 NYS2d 827 it was held that it was within the trial court's discretion to give little weight to the testimony of the father's psychiatric witness who had never had an interview with the mother. In Alan G. v. Joan G., (1984, 1st Dept.) 104 AD2d 147, 482 NYS2d 272, later app (1st Dept.) 125 AD2d 216, 508 NYS2d 967, in reversing, the Appellate Division found that the trial court relied too heavily on the reports of the father's psychiatrist, which contained a biased description of the father and ignored his misconduct. He never interviewed the mother. In Gloria S. v. Richard B., (2d. Dept., 1981) 80 AD2d 72, 437 NYS2d 411, the Appellate Division reversed a custody award that was based on 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."

FN8. Louise E. S. v. W. Stephen S., (1985) 64 NY2d 946, 488 NYS2d 637, 477 NE2d 1091.

FN9. Re O., (1975) 38 NY2d 776, 381 NYS2d 865, 345 NE2d 337; Eschbach v. Eschbach, (1982) 56 NY2d 167, 451 NYS2d 658, 436 NE2d 1260.

FN10. Parsons v. Parsons, (1984, 4th Dept.) 101 AD2d 1017, 476 NYS2d 708, later op (4th Dept.) 115 AD2d 289, 496 NYS2d 138;

Pacifico v. Pacifico, (1984, 4th Dept.), 101 AD2d 709, 475 NYS2d 952.

FN11. S.v B., (1981, 2d Dept.) 80 AD2d 72, 437 NYS2d 411; Skolnick v. Skolnick, (1988, 2d Dept.) 142 AD2d 570, 530 NYS2d 235.

FN12. 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).

FN13. Desnoes v. State of New York, 100 AD2d 712, 713.

FN14. State of New York ex rel H.K. v. M.S., 187 AD2d 50, 592 NYS2d 708. Alanna M. v. Duncan M. ___ AD2d ___ 611 NYS2d 886.

FN15. See Jacobson, "Appointed Mental Health Experts and Determinations of Custody," New York Law Journal, Aug. 23, 1994, P.1,

Col.1, at page 3; Felder, "The 'Rentschler' and 'Renee B.' Revolution," NYLJ, Oct. 3, 1994, P.1, Col.1, at page 5.

FN16. (1994 1st Dept.) ___ AD2d ___, 611 NYS2d 523.

FN17. (1994, 1st Dept.) ___ AD2d ___, 611 NYS2d 831.

FN18. (1st Dept. 1981) 79 AD2d 904, 434 NYS2d 245.

FN19. (1st Dept. 1982) 85 AD2d 164, 447 NYS2d 466.

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