

Crossroads in Court: Two professions set out to help children in family crisis. How does cross examination allow either profession to succeed?

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(Based on a presentation by the AFCC and AAML on Nov 20, 2015 on parents with personality, mental health or substance abuse disorders in custody cases)

More than 10% of American children live with a parent who has alcohol problems.¹ Illicit drug use is increasing in the US, especially among Baby Boomers.² Moreover, only approximately 8% of adults with a substance abuse issue receive treatment at a specialized facility.³

The courts deal with thousands of custody, visitation and neglect cases every day. Judges need help distinguishing cases involving parental mental illness, substance abuse and alcohol abuse, from those where a party makes such allegations for tactical advantage. Mental health professionals (MHPs) play a key role in separating fact from fiction. Lawyers use cross examination to test if the MHP based the evaluation on valid empirically grounded evidence or was, in effect, reaching conclusions based on personal opinion.⁴ The court will also want to know if the MHP relied on published, peer reviewed research to support his or her conclusions to confirm that the evaluation is based on accepted scientific principles.⁵

The Association of Family and Conciliation Courts (AFCC), the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry among other professional organizations, have issued standards and guidelines to assist MHPs in conducting custody and related evaluations. Some of these standards are binding on MHPs and a violation can result in professional discipline, while others are aspirational. Even the latter, however, provide helpful guidance to the MHP and the court.

For a custody evaluation to be useful to the court and withstand cross examination, it must focus on the psychological characteristics of the parents having to do with parenting skills and abilities.⁶ The MHP should be careful in ordering and using psychological testing unless these instruments are specifically designed for custody cases. Tests that are not created to assess parenting may still be useful. For instance, the MMPI-2 assesses the possible presence of psychopathology. While the MMPI-2 does not directly bear on parenting, it may still be relevant in a custody case, because the presence of mental illness may affect one's capacity to parent. The evaluation must also be balanced-- meaning appropriate, if not equal, time is devoted to each party and his and her witnesses and documents.⁷ Any imbalance will be construed by the party who dislikes the report as evidence of bias or favoritism, or just inadequacy of the evaluation.

The MHP should be careful when incorporating labels or diagnoses from

- 1 "Drug Facts: Nationwide Trends" issued by National Institute on Drug Abuse (revised 2015)
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- 2 "Alcohol Facts and Statistics" issued by National Institute on Alcohol Abuse and Alcoholism (March 2015).
- 3 "Drug Facts: Nationwide Trends" issued by National Institute on Drug Abuse (revised 2015).
- 4 AFCC Model Standards of Practice For Child Custody Evaluation Standard, Standard 5.6.
- 5 AFCC Model Standards of Practice For Child Custody Evaluation Standard, Standard 4.6(b).
- 6 Guidelines For Child Custody Evaluations in Family Law Proceedings, Guideline 3 (American Psychologic Association 2010).
- 7 AFCC Model Standards of Practice For Child Custody Evaluation Standard, Standards 5.5(a) and (b).

the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM5) because the purpose of the evaluation is to assist the court in its determination of custody and access issues, not to make a fully vetted clinical diagnosis. Such caution is necessary because there are significant disputes in the profession and the courts about some of the diagnoses in the DSM5.

The issue of disputes over diagnoses in the DSM5 frequently presents in NY courts in Article 10 proceedings involving sexual offenders at the end of their prison sentences. If, after a jury trial, the offender is found to suffer from one or more of certain mental illnesses having to do with sexual misconduct, he may be confined indefinitely for treatment. Some lower courts have used the DSM diagnoses related to sex offenders as a basis to continue confinement⁸ but at least one appellate court recently remanded the case for a hearing to determine if the diagnoses have achieved general acceptance in the psychiatric and psychological communities.⁹ The defendant's lawyers in the hearing to be conducted pursuant to the appellate decision hearing can be expected to aggressively challenge on cross examination the validity of the DSM diagnoses on which continued confinement was premised. The legal issue here would likely be applicable in a custody case in which a parent

was accused of sexual offenses. The question of whether a particular diagnosis is accepted as scientifically based and, therefore, reliable is not necessarily limited to Article 10 proceedings.

It is critical that the MHP corroborate his or her findings by using collateral sources -- generally witnesses suggested by each party, medical records, and court records and orders.¹⁰ Failure to take appropriate steps to corroborate

8 State v. Daryl W., N.Y.L.J., Nov. 3, 2015 (Sup. Ct., Dutchess Co.).

9 State v. Richard S. (Anonymous), N.Y.L.J., Nov. 16, 2015 (Sup. Ct., Queens Co.).

10 AFCC Model Standards of Practice For Child Custody Evaluation Standard, Standards 11.1 and 11.2.



allegations of a party can present major difficulties for the MHP when the report is challenged at trial on cross examination. Although the MHP may properly rely on hearsay in preparing the evaluation, the report must be founded on non-hearsay, admissible evidence. Although beyond the scope of this article, both MHPs and attorneys should be familiar with recent case law concerning the use of hearsay in forensic evaluations and at trial.¹¹

In one recent case, the wife had a serious drug problem.¹² She was also arrested 8 times for violating an order of protection. Although the husband previously abused drugs, he maintained his sobriety during the case. The custody evaluator testified that he was unaware of the wife's positive drug tests or criminal charges, all of which occurred during the litigation. His report was rendered useless because of these critical lapses in his knowledge of fundamental information about the wife's misconduct. One can imagine the MHP's discomfort as the cross examination elicited these shortcomings one by one.

One method used by MHPs to corroborate important facts is to talk with a party's treating physicians, including his or her psychologist or psychiatrist. Care should be taken by the custody evaluator since such a party's MHP may be biased about his or her client and perhaps more likely to believe information he or she has relied upon during treatment of the client. The evaluating MHP should take steps to confirm, if possible, any factual allegations about the other

party upon which the treating MHP has relied.

The custody evaluation report may sometimes be subject to attack through no fault of the MHP. It is not uncommon for a substantial period of time to elapse between the issuance of the report and the commencement of trial, or even if the trial has begun, when the MHP is finally called to testify. In *Noonan v Noonan*, the appellate court reversed the lower court's custody order because the wife abstained from drug use for 2 ½ years as of the date of trial, and the forensic report was more than two years old.¹³ It is not the province of the MHP to update the report. Where a substantial time period has elapsed since the report was issued, either the parties or the court should consider updating the report so the most current information is available to be considered. When it comes to the custody of children, courts are anxious to use the best, most recent information so the children's interests can be protected.

A MHP can also be asked to perform a peer review of a custody evaluation report. A proper peer review is limited in scope and does not involve making independent findings or consideration of evidence not presented to the evaluating MHP. Should the MHP doing a peer review exceed appropriate boundaries, cross examination will likely expose the MHP to criticism.

One final word of advice for attorneys who handle custody cases and for MHPs who advise patients involved in such cases. Their client's behavior in court observed by the judge is a factor the court can consider in evaluating the case. If the client acts out, tries to aggressively interfere with his

or her attorney's conduct of the case, or exhibits other unfortunate conduct, the court may be inclined to conclude that if they act this way in the courtroom under the watchful eye of the trial judge, then most likely they are very difficult at home where they are unconstrained by any authority to control their actions.¹⁴

In a contested custody case -- especially one involving issues of mental illness or alcohol or substance abuse -- the MHP likely sees his or her role as providing helpful analysis and recommendations to the court so that the children are placed with the parent and under conditions most suited to protect them from harm and provide the best living arrangements. For the attorney in such a case whose client is disfavored in the custody evaluation, the objective is to use cross examination to discredit the report, and possibly the MHP, so the client is rehabilitated or the other parent is made out to be equally or even more unfit. Ultimately, the burden falls on busy judges to make these hard but fundamentally important decisions.

11 State v. Floyd Y., 22 N.Y.3d 95, 979 N.Y.S.2d 240 (2013).

12 CM v. CM, 47 Misc.2d 1210(A) (Sup. Ct., Richmond Co. 2015).

13 Noonan v. Noonan, 109 A.D.3d 827, 971 N.Y.S.2d 158 (2d Dep't 2013).

14 In re Kira J, 85 A.D.3d 1030, 925 N.Y.S.2d 854 (2d Dep't 2011).

Announcements and Upcoming Events

SAVE
the **DATE**

JUNE 14, 2016 6 P.M.-9 P.M.

AFCC NY'S SPRING PROGRAM

Will the Real Parent Please Stand Up—The Conundrum of the Psychological, Biological, and the De-facto Parent



42 West 44th Street, New York, NY 10036

Congratulations

Marly Gonzalez, Esq., from Lawyers for Children, Awarded the second annual AFCC-NY Leonard Florescue scholarship to attend the 53rd AFCC Annual Conference in Seattle. The first award went to Natasha Wollaston-Stewart, LMSW, Esq., from The Children's Law Center.