

## **Testifying in Contested Custody Litigation**

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Testifying in court or at deposition is a challenging and at times, disconcerting experience even for the seasoned expert. For beginners, it is intimidating, daunting and often humiliating. The expert's knowledge is questioned and challenged under cross-examination, as the judicial system is inherently adversarial in nature (Poynter, 1997). Testifying in child custody hearings is relatively less traumatic if appearing for the court or for the Guardian Ad Litem (GAL) though the expert will be vigorously cross examined by attorneys for the petitioner and the respondent. One-sided experts may find it a bit more intimidating.

In child custody cases, there is a great need to be **decisive as to the best interests of the child**; however, this may generate strong feelings in one of the litigants. Schetky and Colbach (1988) identified numerous positive and negative counter transference issues confronting a forensic expert. Once the expert becomes aware of the issues such as strong feelings about authority; personal feelings about sexuality and aggression; and the diagnostic, predictive and therapeutic limits and uncertainty of psychiatry, the task becomes bit easier. Nevertheless, most child psychiatrists and child psychologists abhor testifying and avoid court appearances. On the other hand, it can be a highly rewarding experience for the not so meek, both professionally and personally.

As a child custody expert, the **primary purpose of the testimony is to educate, inform and** teach the court matters pertaining to the evaluation of the participants in child custody. The expert has to be persuasive and credible. Credibility depends on the expert's appearance,

language command, background, experience, education and body language and how the material is presented. The expert has to be knowledgeable about his/her own background and specific credentials. The expert who is able to accurately portray him/herself appears to be more credible and wins points with the fact finder.

The expert must be **impartial or neutral and** present materials with integrity. Leaders of the forensic field have questioned the fallacy of the impartial expert since all experts are somehow biased due their own personal, psychological, educational and cultural background and training. Yet, ethical guidelines of organizations such as the American Academy of Psychiatry and the Law implore forensic practitioners to strive for objectivity and neutrality (Katz, 1992). Diamond (1973) declared after many years of observing the court that "There is no such thing as an impartial expert witness; the objectivity of the expert witness is largely a myth." The experts should be committed to "honesty and to informing fact finders about the extent and limits of their scientific knowledge, the facts on which their opinions are based, as well as the scientific and value assumptions that underlie their testimony" (Katz, 1992).

#### *Conduct and preparation of the expert*

It is important to be professional and show respect to the court because the proceedings are serious in nature. Always maintain eye contact with the attorney asking questions and direct your responses to the judge. Maintain the appearance of relaxed confidence. Be conversational in your reply, but do not ramble. Express your ideas clearly and succinctly. It is not uncommon for the expert to carry an air of superiority but such demeanor is not conducive to effective and persuasive testifying.

The expert is expected to dress conservatively, look dignified and well groomed with no flashy jewelry. No fashion statements, miniskirt or unconventional attire is allowable. Do not take anything personally as each court officer is doing his/her job.

The key to being a successful and effective child custody expert is **thorough preparation**. Preparation involves familiarization and understanding the purpose and key issues pertaining to the hearing. The issue before the court can be **modification of visitation, full custody hearing, termination of parental rights, relocation, grandparent's rights or a dispositional hearing regarding an abuse complaint. It is always important to have a full understanding of the relevant statutory guidelines.**

Prepare in advance by meeting with the attorney who is requesting your appearance. Often, the custody report is very detailed and lengthy and therefore it is important to review the report the previous night and re-familiarize with the findings and recommendations. Be knowledgeable about the recent developments in the case because there is usually considerable delay between when you submit your report and the hearing. During the interim, there may be new developments such as fresh allegations of abuse, Ex -Parte orders, temporary change in placement, hospitalization of the child involved and change of therapist or other unexpected developments.

**Technical knowledge** on various topics relevant to child custody is crucial. This involves a thorough knowledge of theories of attachment, parental alienation, enmeshment, child development, normal developmental and behavioral variation, and normal psychosexual development. Reliance on outdated research and techniques may undermine the credibility of the expert.

The usual dictum for the expert in criminal and civil litigation is to refrain from volunteering any information. However, in child custody hearings, the evaluator should raise any crucial points (e.g., the dynamics of the individuals) that were not elicited by the attorneys' questioning. Always tell the truth, the whole truth and nothing but the truth because integrity is the only thing going for the expert.

Mental health experts are classified into three categories based on their functions: 1) **background witness, 2) case witness, or 3) evaluating witness** (Saunders, 1997). Background witnesses provide scientific data and explain scientific theories pertaining to a case. They do not review any case materials. Their opinions are based on specialized knowledge and expertise on the topic under inquiry. In child custody cases background experts provide opinions on methods of child custody evaluation, evaluative techniques for a child who is allegedly abused and guidelines of the evaluation. They may also be called to testify as to why certain phenomena occur as they occur. For instance, they may be asked why a child delays disclosure or recants his/her story in a sexual abuse allegation or why women who suffer from battered spouse syndrome tend to stay in an abusive relationship. Such information serves to educate the trier of fact regarding the topic under inquiry so that s/he can make a just ruling.

The case witness, on the other hand, reviews specific materials on a case. This expert does not examine the parties involved but he/she can provide scientific information pertaining to a relevant topic. In this situation the expert can make decisions and provide opinions on the basis of review of written reports, videotapes and police records and other relevant documents. In a typical child custody case, though it is not commonly practiced, an expert can theoretically review a prior evaluation by another expert and opine on the merits and demerits of the recommendations made previously. As noted, this is not a common occurrence. But in the case

of an abused child who delayed disclosure, opinions may be rendered regarding why this particular child delayed disclosure after reviewing the records.

The most common type of expert in child custody is the evaluating witness. Such a witness possesses the technical knowledge and expertise, reviews the case material and records and conducts a thorough evaluation of all the parties. In this way, the expert is well prepared and can opine specifically on the case in front of him/her. The evaluating psychiatrist or psychologist is not covered by physician/evaluator- patient privilege, but rather is covered by work product privilege and if he/she is called to trial such privilege is deemed waived.

#### *Organization of Hearing or Trial*

Almost all trials are before a judge and seldom do we see a jury trial. The judge decides questions of law and admissibility of evidence. In child custody cases, usually the party requesting a hearing is known as the petitioner (plaintiff) and goes first and the respondent (defendant) goes next. Parties will be represented by their attorneys. Children will be represented by a GAL. Occasionally there will be a separate attorney if a juvenile action is pending. Child custody experts may be called by the GAL or the attorney for whom the report is favorable. If there is potential for a criminal charge against one of the parents for alleged abuse, he/she will be represented by a criminal defense attorney who may or may not be present in court.

#### *Order of the Expert's Testimony*

Expert testimony proceeds along the following sequence: direct examination, cross-examination, re-direct examination and re-cross-examination. Direct examination is a process in which the attorney who called the expert to testify asks questions to present to the court the evaluation procedure, findings and conclusions and recommendations with regard to the best interests of the child. The testimony is elicited by open-ended questions rather than leading

questions. If the expert has to use medical and psychiatric terminology, it must be explained well. The first order of business during direct examination is qualifying the expert. If the expert is known to the court his/her qualifications will be stipulated and the expert's Curriculum Vitae may be admitted into evidence. In a deposition, the Curriculum Vitae are usually attached as an exhibit. Before the judge declares a witness qualified to testify on a certain matter, his/her qualifications may be questioned by the opposing attorney through a process known as *Voire Dire* (to tell the truth).

The purpose of the cross-examination is to detract from the story told in the direct examination. The areas of questioning are directly related to the topics covered under direct examination. No new topic is introduced. Here leading questions are permitted. The cross-examination is conducted by other attorneys.

Re-direct and re-cross-examination are processes by which further clarification of testimony is obtained. This process of questioning may be repeated until all issues are covered. Unlike in a criminal trial, the expert is frequently questioned by the judge. Often such inquiry is presented as a way of clarification on certain key points that the expert testified. In the author's experience, such inquiries center on various psychiatric issues particularly diagnosis of parents, special needs of the child and occasionally issues surrounding the ultimate question.

#### *Admissibility of Expert Testimony and Federal Rules of Evidence*

Admissibility of expert testimony is governed by rules of evidence and case law. Historically, the basis of expert testimony originated with the Frye test in 1923. In this case, a expert witness was not allowed to testify regarding a lie detector test (Systolic Blood Pressure Deception Test) because the test had “**not yet gained such standing and scientific recognition among physiological and psychological authorities.**” However, this case paved the way for

establishing **the standard of general acceptance theory** in relation to expert testimony. This test was replaced by Federal Rules of Evidence, which are widely used in state and federal courts. Federal Rules of Evidence 702, 703 and 705 define an expert and provide an explanation of the basis of expert opinion and disclosure of facts underlying opinion formation.

**Rule 702 states that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.**

Rule 703 dictates that the facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The facts or data need not be admissible in evidence if they are of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon a subject.

Rule 705 states that the expert may testify in terms of opinion or inference and give reason thereto without testifying to the underlying facts or data, unless the court requires him/her to do so. The expert may in any event be required to disclose the underlying facts or data under cross-examination.

The theory and methodology for reaching conclusions on which testimony is based must meet the **reliability standard** (Daubert V Merrill Dow Pharmaceuticals, 1993) and the general acceptance standard (Frye test, 1923) in the scientific community. The Daubert standard states that the **methodology on which scientific testimony is based must be replicated**. The validity and reliability of conclusions and findings must be based upon accepted and well-established research design. Is the Daubert standard applicable to mental health experts? Psychiatry and psychology are “inexact sciences,” and thus do not fully meet the Daubert standard. However,

the foundation on which psychiatric diagnosis is made has been found reasonably reliable. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV, APA, 1994) provides the diagnostic criteria for all psychiatric disorders and is reasonably reliable for making psychiatric diagnoses. Many of the psychological tests that form the basis of psychiatric and psychological opinions are scientifically valid and are reliable and meet the general acceptance standard in the community.

The expert testimony aids the fact finder significantly if the matter under consideration is beyond the general knowledge of the lay person. For instance, an expert may explain why a parent who suffers from Schizophrenia lacks certain parenting skills or that Bipolar Disorder patient can effectively parent their children during stable phases of the illness. In child sexual abuse cases, an expert opinion may be sought to explain delayed and incomplete disclosure of sexual abuse (Duckett v state, 1990) or why medical evidence is seldom present in sexually abused children.

***Who is a child custody expert?***

A child custody expert must have formal advanced training in psychiatry or psychology as part of psychiatric residency or a clinical psychology doctoral program. Specifically, formal training in child development, child psychopathology, adult psychopathology, psychological testing, and interviewing skills of children and adults is required. Child psychiatry residency or a child-oriented clinical psychology doctoral program will meet these requirements. He or she must have performed child custody evaluations under supervision in the beginning followed by independent evaluations. Experts must have experience in testifying in court in general, but past experience in child custody hearings is preferable. In addition, continuing education by participating in workshops and seminars on child custody related topics is essential. In child



custody cases complicated by sexual abuse, special expertise in diagnosing and treating children who have been sexually abused is required. In addition, continuing education in sexual abuse related matters will be helpful.

Courts have not been stringent in qualifying mental health professionals for testifying on child custody matters due to the fact there are not many child custody experts available in a given jurisdiction. As a result, less qualified and less trained professionals have been allowed to testify in custody matters. Sometimes courts exercise wide latitude in allowing experts to testify in select cases. For instance in a Mississippi child sexual abuse case a medical doctor's testimony was admitted on the basis that she had attended seminars on child abuse, done numerous examinations of victims of abuse, testified in several cases, had a wide referral base and had received several referrals (Crawford V state of Mississippi, 2001).

### ***Custody Expert in Court***

The proper role of psychiatric and psychological testimony in child custody has not been defined. The information purported to be provided by such testimony can be common knowledge and therefore is available to the decision-maker in every day experience. On the contrary, expert testimony about children's emotions, feelings, developmental needs, relationship issues and family dynamics and how those will affect the best interests of the child will be useful for the decision-maker. The best interest standard per se does not necessitate testimony by a mental health professional, but in actual practice child custody is *the only* procedure where such testimony is commonly used (Shuman & Weiner 1982).

The American Psychiatric Association task force report on child custody indicated that testimony in child custody may focus on the following three key areas: 1) the reciprocal attachment between parent and child, 2) the child's needs and adult's parenting capacities and 3)

relevant family dynamics (APA, 1981). Psychiatrists and psychologists are uniquely qualified to testify on personality disorders, mental illness, substance abuse and alcoholism and interpersonal dynamics of parents and children and how such factors affect the best interests of the children. Most issues addressed in various statutory guidelines in determining the best interests of the child are within their expertise. Mental health professionals are particularly qualified to opine on the mental health and developmental factors crucial to the determination of the best interests of the child. They can also testify on treatment needs and how such therapy to be obtained. Such issues as parental alienation, enmeshment, attachment and bonding also become the focus of testimony. Additionally, psychiatric or psychological testimony is particularly useful in cases involving nontraditional award of custody such as to a homosexual parent and grandparents (Painter V. Bannister, 1966).

### ***Restrictions and Limitations of Testimony***

There are significant legal restrictions and limitations on some key areas in a child custody litigation complicated by sexual abuse allegations. Testimony on the child's credibility is not admissible. Determination of credibility of a child witness is the province of the fact finder. Courts have jealously protected the role of the jury and the fact finder in disallowing any testimony regarding credibility of a witness (State V. Raymond, 1995). Permitting such testimony invites the decision-maker to abdicate his/her responsibility to determine the ultimate issue. There are also some restrictions as to admissibility of testimony about whether a child has been sexually assaulted. Again this can be viewed as usurping the role of the fact finder. Experts may testify on the symptoms of children who have been sexually abused. However, testimony regarding the characteristics of child victims of sexual abuse if it is proffered as child abuse syndrome may not be permissible because such a syndrome fails to meet the standard for

reliability established in *Frye v. United States* (*Commonwealth v Dunkle*, 1992). Sexual abuse syndrome was rejected by APA from inclusion in DSM-IV. All of the symptoms which are commonly seen in sexually abused children may also occur in other conditions including stress associated with divorce and family conflict and thus the syndrome lacks specificity. In a child custody case where alleged sexual abuse is a concern, it is permissible to testify about how certain symptoms may or may not be associated with potential genuine sexual abuse. According to Schetky, sexualized behaviors can be attributed to a number of issues such as family violence, family sexuality, hours spent in a day care etc. In child custody cases complicated by sexual abuse allegations, courts *have* allowed testimony on whether a father or rarely a mother fits the profile of a perpetrator.

Experts are advised to limit testimony to their areas of expertise. Psychiatrists may be allowed to testify on the general medical conditions of parents and special medical needs of a child and how such factors impact the custody decision. If the area of inquiry falls within the province another specialty, for instance neurosurgery or pediatric allergy, it is best left to those specialists. Likewise, general psychologists may not be proficient in neuropsychological assessments and interpretations. Child psychiatrists are qualified to testify on the emotional impact of chronic medical conditions, but they must defer it to the trained pediatricians to comment on the intricate physical findings of the medical condition. Likewise, trained pediatricians are better qualified to opine on Sexual Abuse Forensic Examinations (SAFE) findings, and physical injuries caused by child battering. However, a child custody expert in the field of psychiatry or psychology can testify on the motivation of the accused or the accuser, as well as the chronology and pattern of abuse allegation.

### *Issue of Ultimate Questions*

Many experts take the position that the opinions on ultimate legal questions are best left to the court. This is particularly true in criminal cases such as competency to stand trial, criminal responsibility, and future dangerousness of a detainee. Others argue that answering the ultimate question will assist the trier of fact as long as such opinions are supported by facts and well thought out reasoning. As a practical matter, in courts throughout the United States such opinions are sought and provided on a daily basis. In child custody cases, on a routine basis, attorneys and judges are quite interested in knowing what the child custody expert thinks about who should receive custody. Opinions on sole custody, joint custody and physical custody are routinely requested. Opinions on the parenting plan, visitation, and supervision arrangements fall under the expert's role as well. In the first author's experience, in 90% of cases where testimony was offered, an opinion on the ultimate question was sought by the attorneys and by the judges during the hearing. In select few cases, when the author was not permitted to testify on who should receive custody, testimony was limited to the relevant aspects underlying the statutory factors on which a decision was to be made. In those cases where the author was not allowed to testify on the ultimate question, the child custody reports were introduced minus the conclusion and recommendation section.

While an opinion on whether or not an individual has or has not sexually assaulted a child is not admissible in a criminal procedure, an opinion on whether a parent has been sexually abusive can be provided in the contested custody litigation. The opinion should be based on a comprehensive evaluation as noted in Chapter 5. Usually the opinion is expressed in terms of the likelihood of occurrence of the event(s), the proof being preponderance of evidence.

### *Controversy of Therapist v. Forensic Evaluator Roles*

A distinction has to be made between child therapists and forensic evaluators. It is customary and good practice to separate these two roles due to the delicate nature of the therapeutic relationship. Holding dual roles causes a conflict of interest (Gutheil, 1998). However, courts have used wide latitude in allowing therapists and treating psychiatrists to testify especially in child custody cases. In child and juvenile dispositional proceedings child psychiatrists and child psychologists are routinely asked to testify on behalf of the children they treat. The testimony is limited to matters pertaining to treatment issues and recommendations that would not create any significant conflict as the role played by the therapists and treating psychiatrists would be that of fact witnesses but not that of child custody experts. If a therapist provides an opinion on the best interests of the child, it places him/her in an untenable situation due to the fact that he or she is asked to provide a forensic opinion for which an adequate evaluation has not been completed. In addition, such an opinion has the potential to jeopardize the therapeutic relationship. Generally, the therapist or the treating psychiatrist would not use the rigor of a forensic evaluator when addressing the treatment issues and therefore would be handicapped in addressing the best interests of the child and (Strassberger, Gutheil, & Brodsky, 1997). For these reasons, therefore the dual role is best avoided.

The American Academy of Psychiatry and the Law takes a clear position on the issue of dual roles. As noted in the Ethical Guidelines for the Practice of Forensic Psychiatry, “A treating psychiatrist should generally avoid agreeing to be an expert witness or to perform an evaluation of his patient for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship.” The American

Psychological Association is not so strict in its guidelines as long as the role of the expert is clarified, he can function in dual roles in the same case.

When a therapist is cast in the role of providing opinions on custody matters complicated by various accusations, the lack of rigor in investigation or failure of investigation can cause significant problem. Failure to thoroughly investigate any forensic issue arising in the context of therapy may cause problems for the therapist as well (Althaus ex rel Althaus V Cohen, 2000).

### ***Nature and Type of Testimony Offered in Child Custody Litigation***

The primary role of the child custody expert in a contested case is to provide opinions with regard to the best interests of the child, taking in to consideration all statutory factors guiding such a decision. Therefore the focus of the hearing or trial will be custody, visitation, parenting plan and supervision requirements. The expert will be asked about factors affecting sole legal and physical custody, joint legal and physical custody, and temporary custody and non-custodial parental visitation. Which parent will be more capable and likely to provide medical care, housing and shelter and other issues pertaining to supervision and control will be queried.

Procedurally, the expert will be questioned about the validity and reliability of all procedures and methods that he/she used in arriving at the conclusions and opinions on the case and whether or not the methodology he/she used conforms to the accepted professional guidelines and common practice. A thorough knowledge of all the procedures will assist the expert in presenting his/her conclusions and opinions in a competent manner. This may include the nature, type and length of interviews conducted, records reviewed, collateral information gathered and lab tests if any.

The expert must also be able to testify about the validity and reliability as well as the forensic value of all psychological tests used in the evaluation. A reasonable and working knowledge of psychological tests such as MMPI-2, MCMI-III, BPS, ASPECT and any other tests used is extremely important. Furthermore, he/she should be knowledgeable about how such tests assist in reaching the conclusions. In this area, psychologists have an advantage compared to psychiatrists and most child custody experts are psychologists.

In addition, the expert should be knowledgeable about relevant statutes pertaining to custody and visitation in the state where he/she practices as individual states have differing statutory guidelines. The expert must also be prepared to testify about prior experience in testifying, particularly in custody matters, fee schedule and arrangements, and personal and professional bias regarding marriage, divorce, gay parenting, and religious beliefs.

The authors' clinic has performed approximately 300 custody evaluations during the past 20 years and the author has testified in court or by deposition in approximately 45 cases. Review of his testimony in these cases indicates that the focus of inquiry varies from case to case although the main issue is the determination of best interests of the child. This is expected since each contested custody case is unique and special, though factors or circumstances leading to the evaluation often fall in then ten categories discussed previously. Testimony is usually sought in the following areas 1) parental violence, physical and emotional abuse and future potential for abuse, 2) whether the alleged sexual abuse is false or genuine, 3) whether siblings can be split between the parents in a given case, 4) what will be the impact on the children if a parent decides to move out of state or considerable distance, 5) what would be the impact of a new step-parent, 6) what would be the grandparent's role and if they file a petition as intervenors, and 7) gay parenting.

### *General Areas of Testimony*

Although these specific topics have been discussed in prior chapters, there is a need to discuss more general areas of testimony. There are three key general areas that the expert may be asked to testify about. These include: 1) developmental issues, 2) issues related to parent and child diagnoses, and 3) treatment recommendation issues.

*Developmental topics.* Generally, areas subject to query are related to issues pertaining to the particular case in litigation. However, a child custody expert may anticipate questioning on attachment and bonding, cognitive development, psychosexual development and psychosocial tasks. In this regard, a basic and working knowledge of Bowlby's theories of attachment and bonding, Piaget's cognitive development, Erikson's stages psychosocial tasks and normal and abnormal psychosexual development are desirable.

Bonding and attachment issues may become the central focus in cases where the parents separated during the first 12 months of a child's life and the separated parent who did not have the primary custody during that period returned to seek custody at a later date because of changed circumstances. Although the attachment issues may not be the deciding factor, the expert can expect to provide testimony on this topic. In the first author's experience, questioning on attachment and bonding is commonly raised in cases in which: parental separation occurred in very early period of a child's life, outside agencies such as Division of Family Services are involved, and mothers have been the primary caretaker of the child in question.

Cognitive developmental issues may become the focus of inquiry when a child in litigation demonstrates regression in speech and language and other cognitive functioning during the period of parental separation and divorce. However, such issues are rarely raised in contested cases. Questions regarding psychosocial tasks and achievement are commonly raised in cases



where a preadolescent or early adolescent aligns with a parent and distances from the other parent. It becomes the central focus where “parental alienation syndrome” or parental alienation or loyalty conflicts become the basis of filing a petition for change of custody. The litigation is usually brought by the father in the majority of cases in which issues are raised regarding alignment, separation-individuation, and enmeshment.

A thorough understanding of the normal sexual behaviors and deviations from the norm is essential to withstanding the rigors of cross-examination in cases involving sexual abuse allegations. There are wide and varying beliefs among professionals and lay people who are not familiar with developmental issues as to what constitutes normal sexual behavior in children. For instance, a five-year-old child engaging in rocking movements of the pelvis or repeatedly touching himself or herself may be interpreted as signs of sexual abuse rather than normative behaviors in young children. Likewise, normal setbacks in toilette training in three or four-year-olds whose parents separated at the time when the setback occurred may be interpreted as yet another evidence of “stress” associated with sexual abuse.

*Diagnosis in both parents and children.* Although making a diagnosis of parents undergoing a custody evaluation is not the primary focus of the evaluation, it is advisable to strive to reach criteria-based diagnosis if assessment permits as the diagnosis provides a framework for testimony with regard to parental fitness and supervisory capacities of the parent. Most importantly, a functional assessment of parental capacity and fitness must be done based upon impairment and active symptoms. Consequently, the focus of testimony will be on how a parent’s functional capacity affects his/her ability to meet the best interests of the child. Vigorous direct and cross-examination can be expected on several issues in this regard. These queries may include: Is the mental disorder active at the time of seeking custody? How likely is it that the

mental disorder will remain active, recur or stay remitted? How do symptoms such as delusion, hallucination, blunted affect, depression, excessive anxiety, severe obsessions, loss of reality testing and other disabling symptoms affect a parent's judgment, behavior and decision making in day-to-day affairs of the children if potentially placed under his/her supervision? How do a mentally ill parent's symptoms affect his/her emotional and physical availability to the children? Are the children incorporated in their delusions and potentially endangered by them? Will the children potentially assume a parental role and be deprived of their childhood?

Diagnoses of personality disorders or substance abuse may be of particular interest to the court. The three most commonly diagnosed personality disorders among the custody litigants are Narcissistic Personality Disorder, Borderline Personality Disorder and Antisocial Personality Disorder. The expert must be able to answer questions as to the techniques and tests that formed the basis for such diagnosis and how the symptoms and manifestations of each of these personality types affect parenting capacities and supervisory functions. Particularly relevant are issues of control, entitlement and rigid thinking in Narcissistic Personality; emotional instability, mood changes and intermittent psychotic episodes in Borderline Personality; and repeated antisocial conduct and poor role-modeling in Antisocial Personality. Likewise, parental alcohol and other substance abuse and dependence disorders have a significant impact on parental fitness. Occasionally, specific parental behaviors could become the focus in certain cases such as emotional distancing, active and passive parental alienation maneuvers, visiting prostitutes, private pornographic interests and other sexually inappropriate behaviors not connected to the child, and life style issues such moving to a farm from city or urban life. The expert should be able to testify about their impact on parenting and particularly how such behaviors are tied to child's growth and development.

With regard to the children, the testimony is more likely to focus on diagnosis than that of parents since the expert is expected to address the special needs of the child in litigation and how such special needs will be met by the litigant parents. Questioning may focus on a wide range of psychiatric diagnosis including Cognitive disorders, Attention Deficit Hyperactivity Disorder, Behavior Disorders, Mood and Psychotic Disorders and Post Traumatic Disorders in traumatized children due to sexual or physical abuse or even false allegations. If a child is suffering from a chronic illness such as Crohn's disease, Down's syndrome, or other similar conditions, the expert may be queried on the impact of such illness and conditions on his/her mental status and which parent is best suited to meet his/her special needs.

*Treatment issues and therapy requirements and guidelines.* Time and again courts rely on child custody expert to provide directions and guidance regarding treatment for parents and children who suffer from psychiatric disorders and emotional conflicts and for problems which interfere with the growth and development of litigant families. The expert will be asked specifically about the type of treatment including medication management, psychotherapy, duration of therapy, costs for treatment, selection of treatment providers, potential outcome of treatment and finally, the likelihood of parental cooperation. Occasionally, an opinion may be sought as to whether or not certain treatments should be continued or terminated. This usually happens in false sexual abuse cases in which therapy continues to be provided with the assumption that sexual abuse occurred.

## Expert Testimony Case Vignettes

### *Case #1 M v. M*

***Issue: Mother's mental health problems and change of circumstances due to her recent remarriage***

In this case, the mother's fitness to parent her son was raised by the father as the primary issue due to her frequent contacts for therapy with a psychologist. Additionally, change of circumstances due to the mother's recent remarriage formed another basis for the petition for modification of custody. The court found that the mother was a fit parent despite her mental health care and that there was insufficient basis for a change of circumstance due to the mother's recent remarriage. Although not the main focus of testimony, the court was also interested in treatment recommendations for the child as he was found to suffer from Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. The court allowed the mother to retain primary physical custody but ordered her to follow treatment recommendations for the child suggested by the expert.

### *Case # 2 Wa V. Wa*

***Issue: Father's life style and potential for emotional abuse of child***

The primary issue was suitability of the father as a parent due to his "lifestyle." In addition, a concern was raised by the mother as to the likelihood of the father being emotionally abusive to the child. Based on the expert testimony that these issues did not reach sufficient threshold as to be concerned, the court awarded the custody jointly to both parents.

### *Case # 3 B V. B*

***Issue: Both parents having multiple problems and child with special needs***

This was a case where multiple issues and concerns were raised by both parents. The mother suffered from Major Depression, Recurrent type. It was established that she had significant inability to set limits on the child. The child suffered from severe ADHD and had various treatment issues. The father's prior lifestyle and current alcohol dependence was raised by the mother as significant concerns. The issue was which parent was better suited to take care of the child and serve his best interests. The litigation was initiated by the father after he got married to his new wife and therefore the role played by the child's stepmother in the litigation was a critical factor. The testimony addressed all of these issues. The outcome was that the child's primary physical custody was retained by the mother.

***Case # 4 Wi V. Wi***

***Issue: Mother's serious mental illness, alcoholism, and frequent legal encounters***

The primary issue was the mother's established diagnosis of Bipolar Disorder with psychotic episodes and Alcoholism. Additionally, she failed to receive adequate psychiatric treatment. She was also involved in excessive spending, frequent brushes with the law and incarceration. The mother alleged that the father was alienating the children from her. This protracted case involved several court hearings where the expert testified on several occasions about the effects of Bipolar Illness, alcoholism and failure to receive proper treatment. The court paid particular attention to the allegation of parental alienation but finally, the allegation of alienation was found non-meritorious. The father was awarded sole custody of the children involved.

***Case # 5 We v. We***

***Issue: Repeated allegation of physical abuse of children, father's cruelty to animals and mother's sensitivity to sexual abuse***

The mother repeatedly alleged that the father had been physically violent to the children and had made several hotline calls to the Division of Family Services. Although there was no evidence of physical abuse of the children, the father was portrayed as violent due to his history of animal abuse involving his cats. The mother also alleged that he was “potentially sexually abusing the children,” despite the absence of any behaviors or incidents which might be construed as abusive. During the trial, the mother’s sensitivity and concern for abuse was brought up as she was physically and sexually abused by an uncle and physically abused by her father.

The court raised a concern with the expert whether a history of animal abuse by the father was tantamount to a diagnosis of Antisocial Personality Disorder. Despite these allegations the children at issue never experienced any fear towards the father. The children were awarded sole custody to the father.

***Case # 6 S v. S***

***Issue: Sexual abuse allegation and stage by stage elaboration of abuse involving a daughter and expanded future allegation of abuse involving a son***

The mother suffered from Borderline Personality Disorder and possibly Delusional Disorder and obsessively ruminated that her daughter was sexually abused by the father. She was extremely hostile to the father. The father suffered from Alcohol Dependence. The mother brought up newer and newer allegations as the court proceeding were underway. In the final stage of the litigation, the mother “recalled that her son was inappropriately touched by the father several years before.” The mother, after losing faith with a local attorney, hired a “high powered attorney” from out of state for the final hearing. The expert appeared three times before the court: first to educate the court regarding the proper procedure to interview and evaluate a child

for sexual abuse, second to testify as to how to perform a custody evaluation in the context of sexual abuse accusations, and third to testify after completing the full evaluation. In other words on first two occasions the expert appeared as a background witness and the third time as an evaluating witness.

The court ruled that the sexual abuse allegations were all false but the primary physical custody was awarded to the mother with usual and customary unsupervised visitation by the father. After a fresh allegation was raised, during the final hearing, the father was awarded *SOLE* custody of both children.

***Case # 7 H v. H***

***Issue: False sexual abuse allegations***

This was a complicated and highly protracted case involving two very young girls. The court proceedings lasted approximately four years and involved repetitive unsubstantiated sexual abuse allegations, numerous hotline calls, prolonged Division of Family Services interventions, multiple psychological and psychiatric evaluations, several experts, special judges, intensive therapy for the children, therapist shopping, attorney shopping, and a “crusade for sexual addiction therapy” for the father. The cost of litigation ran into the tens of thousands of dollars. The mother suffered from Borderline Personality Disorder which was manifested in irrational thinking, delusions, and obsessive ruminations yet she appeared to be cognitively intact outside of the allegations. She was almost hysterical at the slightest thought of the father touching the girls. The author’s testimony during several trials covered procedural and methodological issues of evaluation, normal sexualized behaviors of children, profile of parents who falsely accuse the other parent, evaluation of people who present risk of sexual abuse and Borderline Personality Disorder and Psychotic Disorder NOS. The court after awarding the physical custody of the

children to the mother several times *finally* took the action of awarding the custody *SOLELY* to the father.

***Case # 8 H v. C***

***Issue: Sexual abuse allegation arising after the evaluation, testimony and court's decision to "split the children" between the parents***

This case involved two daughters who were approximately 6 years apart in age. Both parents had remarried and had additional children with their new spouses. Despite these changes and the passage of time, the level of interparental conflict had remained extremely high. Aside from their mutual antipathy, both parents functioned well as individuals and parents, however, and so the expert recommended continued joint physical custody in the evaluation report. Following the report, however, the older daughter was hospitalized for suicidality and the judge acquiesced at trial to her wish to live primarily with her mother. This resulted in the sisters being "split" during the week because the younger sister had a stronger relationship with her father.

Following the decision to split the sisters, the older sister disclosed that her father had been raping her during visitation for several years. The Division of Family Services immediately terminated her visitation with her father and removed her younger sister from his home, reuniting the sisters. The expert conducted a re-evaluation and testified a second time regarding the sexual abuse allegations. Because criminal charges had also been brought against the father, his criminal defense attorney and family law attorney were both present at the second family court hearing. The author testified that the sexual abuse allegations were falsely made by the older sister in reaction to the court's decision to split the siblings and because her prior hospitalization had been reinforced by the court in granting her wish to live with her mother.

***Case # 9 Co v. Co***



***Issue : Father's narcissistic personality and his litigiousness, teenage daughter's expressed preference and her attempt to assert independence***

This case involved a 14-year-old adolescent girl who loved her father but was quite distressed with him due to his litigiousness and paranoia involving her mother whom she loved as well. She categorically expressed her preference to live with her mother but showed some interest in spending more time with father. The father made it extremely difficult for her to spend time with him as he tied various conditions involving the mother for her visits. The father manifested features of Narcissistic Personality Disorder. The court after considering all aspects of the case gave significant weight to the teenager's wish in awarding primary physical custody to mother and joint legal custody to both parents.

***Case # 10 DL v.DL***

***Issue: Mother's sexual orientation (Lesbian) and father's Narcissistic Personality Disorder***

This case involved two young daughters and one son of Catholic parents of upper middle class background. The children were raised well and properly cared for by both parents. The mother "came out of the closet" after many years into the marriage and announced that she was a lesbian and began having a liaison with her female partner while providing excellent care and supervision to her children. The father had a history of litigation in his previous marriage. During the divorce proceeding, they lived in the same household. A comprehensive evaluation was completed by the author, which involved home visits and gathering collateral data from friends, relatives, teachers and neighbors as to the mother's parenting in addition to performing our standard procedure. The expert testified that her parenting was beyond reproach and conducive to proper growth and development of children. Many people who knew this loving mother testified in the custody hearing. The court was concerned about the potential to develop

homosexual tendencies in the children if raised by a lesbian parent. The expert presented testimony indicating that this was a myth based upon the available research findings.

The court ruled in the father's favor despite the mother's excellent parenting and relationship with children. It appeared that the court adopted *a per se rather than a nexus approach* in this case in deciding that the lesbian mother was unfit. The mother appealed the decision but the Western District of Missouri affirmed the lower court's decision.

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