

In the Best Interests of the Child

Parental Rights and Psychoexperts

In considering psychological factors affecting the best interests of the child, the psychologist focuses on the parenting capacity of the prospective custodians in conjunction with the psychological and developmental needs of each involved child.

American Psychological Association Guidelines for Child Custody Evaluations in Divorce Proceedings, *American Psychologist*, 1994

CUSTODY WARS AND THE EXPERT WITNESS

In a 1990 custody case in New York State the mother lost custody of her five-year-old son after a psychiatrist, hired by the father, told the judge that the mother incessantly demeaned the father, even in front of the child.

The mother's expert witness, also a psychiatrist, recommended that the parties be given joint custody. Although he alternately suggested that the mother be granted sole custody, he conceded that if such an award were made and the mother continued her barrage of negative comments about the father in the child's presence, the child could become extremely disturbed. He further conceded that if the mother were awarded custody, she might interfere with the father's visitation of the child. (*Gage v. Gage*, 1990)

What is going on here? Nothing special. It is par for the course in modern custody fights. Every year, more than a million children under the age of eighteen are affected by family dissolution. It is extremely hard to determine the total number of these cases in which child custody is disputed because many cases—even those involving court-appointed or parent-hired expert child evaluators—do not go to trial. Nationally, it is certainly well into the hundreds of thousands.

Psychological professionals are hired by the warring mother and father or appointed by the court—often both—to evaluate the worth of both claims and claimants, absolutely and relatively. In a national sample of judges who hear custody cases that come to trial after the failure of bargaining between the divorcing spouses, 25 percent of the judges said that the testimony or report of a mental health professional is presented as evidence in a majority of contested custody cases in their courts.

Since there are usually two experts hired, one per parent, and quite often another appointed by the court, sometimes as a guardian *ad litem*, the costs of all this psychological expertise mount up pretty quickly. Let us assume that those one million children of divorce are the products of 500,000 divorces a year, and assume further that custody is disputed in about one quarter of those divorces, some 125,000 a year, and that psychoexperts are used in about one quarter of those contested cases (31,250 divorces). With three experts per divorce, each charging about \$200 an hour and spending about five hours each per case to interview the parties and write up the report, then we get a dollar figure of \$3,000 for psychoexperts in each case. We arrive at a total national cost of using psychological experts in custody disputes of around \$93.75 million annually. That is not a bad piece of change if you are in the expert business, although it probably seems rather appalling if you are one of the divorcing spouses.

The results of psychoexperts' contributions to resolution of custody disputes are often quite a shock to the parties involved. Many previously unaware people are brought to a stunned realization of the awesome power accorded the professional psychological decision maker in our legal system. Accustomed not only to making their own decisions about what is in the best interests of their children, but to the respect society accords parents faced with those daily decisions as well, parents in disputed custody proceedings are

often affronted and outraged to find themselves the target of a stranger's evaluation for parental fitness. Bewildered and incredulous, they find that statements they make about their children, about their own lives, and about the lives of their ex-spouses will be weighed by a professional psychological evaluator frequently held by the courts to have a special lock on the truth.

In a transfer of custody case that would remove a girl from the home of her mother with whom she had always lived to the home of her father one thousand miles away from the mother, the Wisconsin Court of Appeals considered testimony from a psychologist who had not actually even met with the mother or the child, but testified that, hypothetically speaking:

anxieties would normally be expected on the part of the child who has maintained a close association with the noncustodial parent on being suddenly deprived of that association. . . . According to Dr. [Linda] Marinaccio, if contact is not maintained with the noncustodial parent, the child often tries to form a new family and may substitute a stepparent, pretending that the noncustodial parent does not exist. (Pamperin v. Pamperin, 1983)

The family court took custody away from the mother, who lived with her new husband in Tennessee, and gave it to the father, who lived with his new wife in Wisconsin, the site of the original family home.

The mother appealed, contending that the psychologist's opinions were nothing but responses to hypothetical questions and did not take into account the actual persons involved. Moreover, she said that an expert's answers to hypothetical questions provided an insufficient basis to change custody.

As the court of appeals put it so succinctly, "We disagree."

The appeals court ruled that the trial judge was quite right to give custody to the father since the mother had shirked her duty of having her parental fitness weighed by a professional psychologist. They also had no objection to the psychologist offering "hypothetical" opinions about the mother she had never met. After all, they seemed to say, whose fault was it that they had not met?