Forensic Evaluations in Custody Cases
By Joel R. Brandes

New York policy regarding forensic evaluations of the parties and their children in custody cases has evolved slowly since the 1960s when traditional adversary procedure was adapted in Kesseler v. Kesseler, 10 N.Y.2d 445, 225 N.Y.S.2d 1 (1962)), to serve the "best interests of the child."

In Kesseler v. Kesseler, supra, the Court of Appeals held that in a custody proceeding, the Court may order forensic evaluations by impartial professionals who would be available to be called as an expert witness and testify in accordance with the common-law rules of evidence. The Court held that even without the consent of the parties, the Court may direct a probation officer, family counselor attached to the Court, or other qualified and impartial psychiatrists, psychologists, or other professional medical personnel to make investigations, although they may not report to the Court. The report could be used to furnish leads for the introduction of common-law evidence. The Court of Appeals went on to state that there was no reason which would prevent the Court, in the proper exercise of judicial discretion, from calling upon such persons "to examine the infant or to examine the parents also if they will submit to such examination. However, the psychologists, psychiatrists, or other medical personnel could not report to the Court in the absence of a stipulation by the parties.

In Family Court custody proceedings, it became customary for the Court to order mental health examinations under Family Court Act §251, conducted by clinicians on the staff of the Family Court Mental Health Services Clinic or by another mental health expert, such as one selected and agreed to by both parties. Family Court Act §251 provides, in part: "After the filing of a petition under this act over which the family court appears to have jurisdiction, the court may cause any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court when such an examination will serve the purposes of this act ..." Under Family Court Act §251, the Family Court could sua sponte order the examinations or order them in response to a motion by one of the parties.

Mental Health examinations became available in Supreme Court matrimonial actions, and custody cases after the Court of Appeals affirmed an order requiring a wife to submit to a physical examination in response to a notice pursuant to CPLR 3121(a). (Wegman v. Wegman, 37 N.Y.2d 940, 941, 380 N.Y.S.2d 649 (1975).) CPLR 3121, which is applicable in matrimonial actions, provides that a party may be required to submit to a pretrial physical, mental or blood examination conducted by the other party whenever the physical or mental condition or blood relationship of that party "is in controversy." Service of a notice to submit to a mental examination, pursuant to CPLR

3121(a), became a useful tool for many years to compel the adverse party to submit to a forensic evaluation by a party's own expert. (See, for example, Proschold v. Proschold, 114 Misc. 2d 568, 451 N.Y.S.2d 956 (Sup 1982)).

However, the right to conduct a forensic examination pursuant to CPLR 3121(a) was restricted by the Appellate Division in Rosenblitt v. Rosenblitt (107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dep't 1985)) where the issue was whether the noncustodial spouse could obtain an order directing that the custodial spouse be examined by a psychiatrist designated by the noncustodial spouse, after evaluations of the parties and the children had already been conducted by the Forensic Division of the Department of Social Services, although not yet submitted to the Court. The Second Department held that where forensic examinations have been conducted, and there is no showing that such examinations were in any way inadequate or deficient, it is an abuse of discretion to compel one particular party to submit to further evaluations at the insistence of the adverse party, where not a single reason is presented in support of the application. (To the same effect, see Forrest v. Forrest, 131 A.D.2d 425, 516 N.Y.S.2d 79 (2d Dep't 1987))

After Rosenblitt ended the practice of obtaining a mental health examination by a psychiatrist or psychologist retained by one of the parties, courts started to appoint independent psychiatrists and psychologists to perform custody evaluations.

In 1988 the Appellate Division, First Department observed that notwithstanding the absence of any explicit statutory authority, courts had been routinely appointing independent psychiatrists and psychologists in custody proceedings since 1962 when the Court of Appeals recognized its inherent power to do so in Kessler v Kessler. (Zirinsky v. Zirinsky, 138 A.D.2d 43, 529 N.Y.S.2d 298 (1st Dep't 1988)). Since that time, it has become a common practice in contested custody cases for attorneys to move for an order of the Court directing that there be forensic evaluations by impartial professionals, although occasionally, the Court will order a forensic evaluation on its own motion.

In 1989, 22 NYCRR §202.18, titled “Testimony of court-appointed expert witness in matrimonial action or proceeding,” was adopted as part of the Uniform Rules for Trial Courts. As amended on November 18, 2008, it provides that “In any action or proceeding tried without a jury to which section 237 of the Domestic Relations Law applies, the Court may appoint a psychiatrist, psychologist, social worker or other appropriate expert *to give testimony* with respect to custody or visitation, and may appoint an accountant, appraiser, actuary or other appropriate expert to give testimony with respect to equitable distribution or a distributive award. In the First and Second Judicial Departments, appointments shall be made as appropriate from a panel of mental health professionals pursuant to 22 NYCRR Parts 623 and 680. The cost of such expert witness shall be paid by a party or parties as the Court shall direct.” (emphasis supplied)

On December 23, 2022, Domestic Relations Law § 240, subd.1 (a-3) was added effective on June 21, 2023 (Laws of 2022, Chapter 740). It deals with the appointment of a child custody forensic evaluator on behalf of the Court *to evaluate and investigate the parties and a child or children* in a proceeding involving child custody and visitation.

Domestic Relations Law § 240 Subd.1 (a-3) provides that the Court may appoint a child custody forensic evaluator to evaluate and investigate the parties and a child or children in a proceeding, provided the individual is a psychologist, social worker or psychiatrist who is licensed in the state of New York, has undergone required biennial domestic violence-related training, and has received a certification of completion within the last two years, for completing the training program pursuant to Executive Law § 575 subd. 3 (o). (Domestic Relations Law § 240, subd.1 (a-3) (1)).

Domestic Relations Law § 240, subd.1 (a-3) overlaps and supersedes the portions of 22 NYCRR 202.18 which authorize the appointment of a psychiatrist, psychologist, social worker or other appropriate expert "to give testimony" with respect to custody or visitation. It makes the certification of New York licensed forensic evaluators in accordance with its provisions a requirement in all custody and visitation cases where a psychiatrist, psychologist, or social worker is appointed "to evaluate and investigate" the parties and children.

Domestic Relations Law § 240, subd.1 (a-3) applies in Family Court custody and visitation proceedings by virtue of Family Court Act §651(b), which provides that when initiated in the family court, the family court has jurisdiction to determine the custody or visitation of minors, including applications by a grandparent or grandparents for visitation or custody rights pursuant to Domestic Relations Law § 240, subd.1.

The Office of Court Administration opposed this legislation. It believed, among other things, that "judges in appropriate cases must enjoy the discretion to appoint forensic evaluators who have not completed the requisite pre-and in-service training envisioned in this measure." Some cases may require national or even international experts to evaluate the specific special needs of a child or specific unique aspects of a case, and these experts are not always found in New York. Restricting appointments to those who have completed the training program is not practical. It felt that "should it become law, [it] will create real problems." (2022 Sess. Law News of N.Y. J. Memo Ch. 740)

Domestic Relations Law § 240, subd.1 (a-3) does not authorize the admission into evidence of the reports of the forensic experts appointed under its provisions, nor their appointment by the court to give testimony. Nor does it prevent a party from offering the testimony in a custody or visitation case of an independent child custody evaluator who the court does not appoint in a custody or visitation case.

Forensic reports are hearsay, and under the Court of Appeals holding in Kesseler v. Kesseler, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962)), they are not admissible in evidence absent a stipulation of the parties agreeing to their admission.

Moreover, 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. The current rule in New York custody cases is that it is error for a trial court to base its custody determination on reports not revealed to the parties or counsel unless the parties stipulate otherwise. (See Fellows v. Fellows, 25 A.D.2d 865, 270 N.Y.S.2d 143 (2d Dep't 1966); Isaacs v. Murcin, 38 A.D.2d 673, 327 N.Y.S.2d 126 (4th Dep't 1971); Sauer v. Sauer, 67 A.D.2d 1082, 415 N.Y.S.2d 129 (4th Dep't 1979); Chrisaidos v. Chrisaidos, 170 A.D.2d 428, 565 N.Y.S.2d 536 (2d Dep't 1991)).

The Supreme Court may not direct the parties and their counsel to execute a stipulation providing that "The contents of the report shall be confidential and shall be used by the Court and shall not be divulged to the parties or their attorneys. "(Baumgartner v. Baumgartner, 64 A.D.2d 880, 408 N.Y.S.2d 99 (2d Dep't 1978)).

While the Court's power to direct a Probation Department investigation or a psychiatric examination to aid it in the determination of issues of custody or visitation is not dependent upon the consent of the parties, the Second Department has held that absent such consent the results of the investigation or examination cannot be deemed confidential and "must be made available to the parties and their attorneys." (Waldman v. Waldman, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2d Dep't 1983)).

Parties in a contested custody case have the right to call their own forensic experts. The Uniform Rules for Trial Courts which are applicable in matrimonial actions and custody cases (22 NYCRR 202.16(g)) provide that each expert witness whom a party expects to call at the trial must file with the Court a written report, which must be exchanged and filed with the Court no later than 60 days before the date set for trial. Reply reports, if any, must be exchanged and filed no later than 30 days before trial. Failure to file a report in conformance with these requirements may, in the Court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties are the only reports admissible at trial. Late retention of experts and consequent late submission of reports is permitted only upon a showing of good cause as authorized by CPLR 3101(d)(1)(i).

Section 202.16(g) of the Uniform Rules for Trial Courts provides that at the discretion of the Court, written reports may be used to substitute for direct testimony at the trial of the party's expert witnesses, where the expert submits the reports under oath, and the expert is present and available for cross-examination. The Second and Fourth Departments have held that it is error for a court to admit into evidence a report that is submitted under oath where the expert was not "present and available for cross-examination. (Rodriguez v. Bello, 100 A.D.3d 641, 953 N.Y.S.2d 269 (2d Dep't 2012); Avdic v. Avdic, 125 A.D.3d 1534, 4 N.Y.S.3d 792 (4th Dep't 2015)).

The Third Department has held that although the reports were not submitted "under oath" as required by 22 NYCRR 202.16(g), it was not error to admit them

because the expert was subsequently called, she testified under oath, and she was available for cross-examination. (Sheridan v. Sheridan, 129 A.D.3d 1567, 12 N.Y.S.3d 434 (4th Dep't 2015); See also Raymond v. Raymond, 174 A.D.3d 625, 107 N.Y.S.3d 433 (2d Dep't 2019)).

The circumstances upon which these forensic reports and the underlying data "must be made available to the parties and their attorneys" has been the subject of much dispute. For many years, courts have disagreed about the circumstances under which the parties and their counsel may have copies of the reports and review them in preparation for trial. It appears that the current state of the law is unsettled with regard to whether the parties themselves are entitled to copies of the independent forensic reports ordered by the Court rather than just their attorney and the circumstances under which they are entitled to have access to the reports. (See Scuderi-Forzano v. Forzano, 213 A.D.2d 652, 624 N.Y.S.2d 942 (2d Dep't 1995); Isidro A.-M. v. Mirta A., 74 A.D.3d 673, 902 N.Y.S.2d 362 (1st Dep't 2010); Sonbuchner v. Sonbuchner, 96 A.D.3d 566, 947 N.Y.S.2d 80 (1st Dep't 2012); Raymond v. Raymond, 174 A.D.3d 625, 107 N.Y.S.3d 433 (2d Dep't 2019).; and Viscuso v. Viscuso, 129 A.D.3d 1679, 12 N.Y.S.3d 684 (4th Dep't 2015).

Ten years ago, Assembly Bill A8342 proposed an amendment to the Domestic Relations Law and Family Court Act which would give the parties and their attorneys the right to have copies of forensic reports and the underlying data and specified that the admissibility of these reports into evidence would be subject to the rules of evidence and subject to cross-examination. The Assembly Memorandum in support of the legislation more than justified the legislation. It stated, in part:

…, forensic reports are often not subjected to the rigor of evidentiary laws and procedures.

Forensic reports are lengthy, and complex and contain facts, scientific and/or other data, and conclusions of the evaluator based on the data. A thorough analysis of the reports requires a lot of time and even expert resources. These reports generally contain substantial hearsay and hearsay-within-hearsay. The reports also contain subjective information and may contain biased or inaccurate information. Since the parents are most familiar with the facts of their lives, they are best positioned to identify factual errors in the forensic report. The help of professionals with specific expertise in the areas covered by the forensic report is also important to properly evaluate the report and its conclusions. In order to challenge the accuracy of the report on the facts, data and on the conclusions, and to prepare for an effective cross-examination of the forensic evaluator, the parties and their counsel must have complete access to the report and underlying data with the ability to share the report and underlying records and data with professionals retained to assist them, including those with expertise to help analyze the report. "

Despite this compelling justification for passage of the legislation, the bill never passed both houses of the legislature. Similar versions of the bill have been introduced

in subsequent legislative Sessions in both the Assembly and the Senate and have met the same fate.

Conclusion

Forensic reports are hearsay. They frequently contain substantial hearsay, and they may contain biased or inaccurate information.

Stare decisis requires that the decisions of the Court of Appeals which have not been invalidated by changes in statute, decisional law, or constitutional requirements must be followed by all lower courts. It appears that 22 NYCRR 202.16(g) contravenes stare decisis and the Court of Appeals holding in Kessler v Kessler, supra, that forensic reports are not admissible in evidence. The Constitution only permits court rule-making "consistent with the general practice and procedure as provided by statute or general rules" (N.Y. Const. art. VI, § 30). The doctrine that courts have an inherent jurisdiction to mold the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of persons or property. (McQuigan v. Delaware, Lackawanna & W.R.R. Co., 129 N.Y. 50, 29 N.E. 235.) No court rule can enlarge or abridge rights conferred by statute, and this bars the imposition of additional procedural hurdles that impair statutory remedies. (People v Ramos, 85 N.Y.2d 678, 687–88, 628 N.Y.S.2d 27, 33, (1995)).

The parties and their attorneys should have complete access to forensic reports and their underlying data, with the ability to share them with experts they retain to assist them in challenging the report's accuracy and help them prepare for effective cross-examination. The Domestic Relations Law and Family Court Act should be amended to give the parties and their attorneys the right to have copies of forensic reports and the underlying data and to require that the admissibility of these reports be subject to the rules of evidence.

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