FAMILY NEWS & VIEWS
A PUBLICATION OF AFCC-NEW YORK

THE FORENSIC REPORT:
A resource for facilitating resolution in child custody disputes

Hon. Matthew Cooper, Judge Supreme Court, Matrimonial Part, New York County

A forensic report is an integral part of a proceeding involving child custody, access or decision making. I believe that it in order to gain an understanding of the family dynamics, as well as to be able to get a glimpse into the personality and character of the parties and the child, it is necessary to have a psychologist or psychiatrist conduct a thorough investigation and then render a report.

Although many judges prohibit the forensic evaluator from making recommendations, I do the opposite: I specifically request that the report contain the evaluator's recommendations as to the matter under consideration, be it custody, access or decision making. In so doing, I regard the recommendations as being just that; I retain sole decision making authority and am in no way bound by the recommendation. I also read the report as soon as I receive it. This differs from some judges who believe they are not entitled to read the report until it is introduced in evidence.

As of recently, I have made a change to some of my forensic orders of appointment. As a result of participating in a program at the Interdisciplinary Forum on Mental Health and Family Law, I became aware that a judge in Westchester County Supreme Court had deviated from the standard instruction that there

Continued on page 2

Determining Custody in the Biased Interests of the Determinator

Robert Z. Dobrish, Esq. Partner, Dobrish Dobrish, Michaels, Gross LLP

Custody determinations seem to be following a pattern that is similar to hemlines. They are fashionable for a period of time and then they change. As we well know, in the eighteenth and nineteenth centuries, fathers were granted custody of their children since society was paternalistic. Men had all the rights and responsibilities and were in the best position to take care of things. And children were among those things.

Continued on page 7

IN THIS ISSUE

2016 Volume 1, Issue 2
AFCCNY.ORG

be no contact between the parties' attorneys and the evaluator. Instead, he substituted a provision in his orders that allowed the attorneys and their clients, with the approval of the court, to meet with the forensic in an attempt to resolve the case. I found that this made a great deal of sense, and, as I'll discuss further, have utilized the provision with positive results.

The rationale for treating reports the way that I do is the realization that regarding them simply as something to be taken into evidence at trial as part of the forensic testimony ignores the fact that so few of these cases are actually tried. In fact, over 95% of custody matters are resolved without a trial, so it is rare indeed when a forensic expert actually testifies. Thus, it would be difficult to justify litigants having to undergo the pressures of being subject to a forensic evaluation and incurring the often enormous financial costs associated with the process if the only purpose of a report is to be a trial exhibit. To my mind, a good forensic custody report serves many other valuable purposes.

Forensic reports can serve a variety of other important purposes outside of the narrow confines of the case itself.

Perhaps the most important thing a judge can do with a report is to use it as a tool for resolving a custody case. In fact, there may be no more effective tool – both for the court and the attorneys in the case -- than a thorough, insightful, and clearly written forensic report. In many instances, a party who has refused to acknowledge his or her own parenting deficiencies, or recognize the other party's parenting strengths, may be forced to come to terms with how the situation presents to the evaluator – a person whose opinion will figure prominently in a custody trial – once he or she sees it written in black and white.

I find that the settlement function of the report is enhanced by having the forensic make recommendations as to the issues they have been appointed to opine on. When evaluators are allowed to write reports that include recommendations, it seems that they feel less restrained as to what they can say and how they can say it. As a result, the language used in these reports tends to be more forceful and direct, and the parties are left with little doubt as to how the evaluator views the issues. This is opposed to the reports where evaluators are precluded from making recommendations, and the language they use tends to be more nuanced and indirect. In those situations, litigants are quick to seize on perceived ambiguities as supporting their positions, even when there is not a real basis to do so, and are thus less willing to make the compromises needed to reach a resolution.

A relatively new use for a forensic evaluation, which I mentioned earlier, is one that might be labeled the evaluator's "activist approach" to settlement. Here, in a radical departure from the traditional rules, the evaluator is permitted to meet with the parties, their attorneys, and the attorney for the child to try to resolve the custody related issues. My standard appointment order now contains this provision:

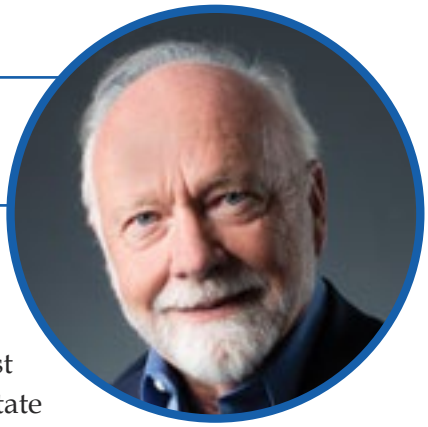
After the final forensic report has been issued, if any party believes that a meeting with the forensic evaluator may assist with the settlement of the issues that are the subject of the evaluation, then with the consent of the adverse party, the Attorney for the Child and the forensic evaluator, the parties, their counsel and the Attorney for the Child may meet with the forensic evaluator for the sole purpose of reviewing the report and discussing a resolution of the issues in dispute. If such meeting(s) takes place however, all discussions shall be for settlement purposes only, remain confidential, and may not be used for any Court related purpose, or be relayed to the Judge in any way. Payment for the forensic evaluator's time for such settlement meeting(s) shall be set by the forensic evaluator with approval of the Court.

Although I do not expect the provision being used frequently, it has nevertheless proved quite successful in at least one case so far. The case involved a heated struggle over access between two parents of a six-month-old where initially neither the parties nor their attorneys could agree on anything. Fortunately, once the forensic report was completed, all sides decided that working with the forensic evaluator might prove

helpful. After much effort, the parties were indeed able to enter a comprehensive parenting plan. There is no doubt that evaluator's bill for all the time he spent on the case was substantial. Still, it was probably less than what a full day of testimony at trial would cost, and the outcome – a negotiated settlement as opposed to a judicial determination following a contentious trial – was in the best interests of all concerned.

Finally, I believe that forensic reports can serve a variety of other important purposes outside of the narrow confines of the case itself. Under the appropriate circumstances, and after hearing from counsel on the issue, I have allowed reports to be released to therapists, parent coordinators and a child's therapeutic camp counselor. As long as the proper safeguards are implemented to insure that reports do not get into the wrong hands – and sensitive, often damaging material is not disseminated – there is little reason to prohibit it being used in ways that will benefit the family. After all, the forensic investigation was a long, grueling and expensive process for the parties. The report that resulted from that process should not automatically be sealed and locked away forever simply because that is the way it has always been done.

President's Message



Daniel O'Leary, Ph.D.,
Distinguished Professor of Psychology,
Stony Brook University

This Newsletter has very interesting articles that address controversial matters. The issues range from a novel and intriguing use of the forensic report and a challenge to make the forensic reports more functional (Hon. M. Cooper), bias by all professionals in the determination of custody (Attorney Dobrish), the controversial role of secretly recorded conversations by parents (Attorney Abbott), the quite differing opinions of mental health professionals (MHPs) and attorneys regarding whether MHPs should prepare litigants for child custody evaluations and the questions that should and should not be asked of litigants (Psychologist Yohananoff), the highly contested issue of what becomes of a couple's cryopreserved embryos in the event of divorce (Attorney Cirel), and how to assess for "structure" or tendencies and traits, and, after determining such evaluate whether those structures have a link to parenting (Psychologist Frank). Special thanks is due the above six authors.

I am grateful to Dr. Alberto Yohananoff (Editor) for reviewing and editing these articles. I also thank attorney Karen Simmons for her contribution to "Of News and Interest…" section of this newsletter. In that section of News and Interest, she noted that the spring program covered how the definition of the family is changing and the evolving use of ART (assisted reproductive technologies). On August 30, 2016, the New York State Court of Appeals expanded the definition of parenthood by ruling that a caretaker who is not related to, or the adoptive guardian of, a child could still be permitted to ask for custody and visitation rights. In short, the AFCC-NY spring program was addressing a real cutting edge matter.

To illustrate some activities of AFCC-NY, please note the Lunch and Learn program to educate judges and their staff about "hot topics." Such programs have been coordinated by Rodrigo Pizzaro, M.D., and, as you can see, they have now been presented in six different counties, and special thanks go to the various presenters of such programs. On November 18, 2016, there is an upstate AFCC program Domestic Violence Update, co-chaired by our Dr. Jeffrey Whittmann and moderated by our Hon. Jane Pearl. The program is to be held at the University of Buffalo School of Law, with a number of excellent faculty. Also, please plan to register early for our December 16, 2016 program at the NY City Bar that will feature the international AFCC President, Dr. Marsha Klein Pruett, and Featured Member of AFCC, Dr. Mindy Mitnick. Our spring program was oversubscribed at 300 people and we had to place people on a wait list!

The Court of Appeals Decision in People v. Badalamenti and Its Significance to Matrimonial and Family Law Practice

Barry Abbott, Partner, Mayerson Abramowitz & Kahn, LLP

The April 2016 Court of Appeals 4-3 decision in People v. Badalamenti[1] is of interest to matrimonial and family law practitioners because it will affect custody trial practice when certain types of recorded conversations are presented to us as potential evidence by our clients. The main controversy within the court is reflected in Justice Leslie Stein's minority decision in which she criticized the four Justice majority for encroaching on the legislature by reading in an exception to a criminal statute that the legislature had not included in the statute and accused the majority of judicial overreach. The second point of controversy – explored in this article - is Justice Stein's concern that the Badalamenti decision will encourage custody litigants to resort to taping their children's conversations (or, as more delicately stated by Justice Stein, they will be "less deterred" from such taping) and that, as a result, there will be increased use of those tapes at trial.

The purpose of this article is to provide a working analysis of the Badalamenti decision, to explore Justice Stein's concerns for the effect of the decision on child custody litigation and to make some practical observations about the impact and use of recorded conversations in child custody litigation.

The Badalamenti Decision

The issue presented in Badalamenti was whether a father illegally eavesdropped when he used an accidentally open phone line to record a "conversation" among his five year old son, his son's mother and the mother's boyfriend (Badalamenti) who were all together at the mother's apartment (i.e., the father called the mother, the mother's phone was answered unwittingly, and the father overheard what was going on in the mother's home. You can't make this stuff up.). The recorded conversation captured Badalamenti threatening to beat the child and the child's crying. Based upon a later complaint by a third party, Badalamenti was prosecuted for assaulting the child, child endangerment and other crimes. During the criminal investigation the father was interviewed and he provided the investigator with the recording of the conversation in which Badalamenti had threatened to beat the child. At the criminal trial, the prosecutor sought to introduce the recorded conversation into evidence and the defense objected to its introduction, claiming that the recording was the product of "eavesdropping," a crime under New York's Penal Law, and thereby inadmissible.

The crime of eavesdropping, a felony, is committed when a person who is not participating in a conversation or communication, "engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." PL §250.05. The Badalamenti majority decision (in which the court observed that there was "…no basis in legislative history or precedent for concluding that the New York Legislature intended to subject a parent or guardian to criminal penalties for the act of recording his or her minor child's conversation out of a genuine concern for the child's best interests") grafted a "vicarious consent" exception (for which there was non-binding case precedent) to the crime of eavesdropping[2] despite there being no mention of that exception in the statute. The "vicarious consent" exception, as defined by the Court of Appeals, allows a parent to avoid criminal liability for secretly recording (i.e., eavesdropping on) his[3] minor child's conversation with the child's other (non-consenting) parent (or others) under certain circumstances. The Badalamenti majority held that in order for the recording parent to successfully claim the protection of the vicarious consent exception, he must pass what the Court of Appeals described as a "narrowly tailored test" that is focused on the child's best interests and consists of two factual inquiries: (1) did the recording parent have "a good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child", and (2) did the recording parent have "an objectively reasonable basis for this belief"?

Justice Leslie Stein, an experienced family law practitioner and jurist, wrote the minority decision and upbraided the majority for, among other things, judicial overreach in writing an exception into a statute, an encroachment on the role of the legislature. On a practical level, Justice Stein warned that "parents in the midst of bitter custody disputes will now be less deterred from eavesdropping on and recording their child's conversations with the other parent, incentivized by the possibility of obtaining evidence prejudicial to the other parent."[4]

The question next addressed is why the "vicarious consent" exception to a criminal statute is relevant to matrimonial and family law practitioners.

Badalamenti's Relevance to Matrimonial and Family Law – CPLR 4506

The Badalamenti decision is relevant to matrimonial and family law practitioners who try custody and related cases because an illegally recorded conversation is inadmissible at trial pursuant to CPLR 4506, regardless of how probative it might be as evidence. CPLR 4506 provides that "The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury…." Thus, prior to Badalamenti, if a parent in a custody case sought to admit a secretly recorded conversation in which the child participated (and the recording parent did not participate), opposing counsel would object and argue that the recording could not be admitted into evidence because no participant (including the child) consented to the recording (i.e., it was an illegally recorded conversation). Post-Badalamenti, if opposing counsel objects to the secretly recorded conversation the trial court would then have to determine whether the parent-proponent of the taped conversation passes or fails that "narrowly tailored test." It is far more likely than not that this determination would require a motion in limine[5] and a pre-trial hearing or a separate hearing during the trial.

The "Narrowly Tailored Test"

As a preliminary matter, the proponent of evidence has the burden of proving its admissibility. If a parent in a custody case seeks to admit a secretly recorded conversation in which the child participated, the recording parent will have the burden of going forward as well as the burden of proving that he satisfies the narrowly tailored test by a preponderance of the credible evidence, i.e., that he had a "good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child" and that the recording parent had an "objectively reasonable basis for this belief." As noted, this would require a hearing at which the parent-proponent would testify and be subject to cross-examination.

At the hearing, the proponent-parent will have to give his reasons for recording the conversation, why the parent believed that it was in the child's best interests to record the conversation, and why the parent thought that there was an objectively reasonable basis for that belief.

One question about the scope of the hearing is whether the trial court will be able to determine whether the proponent-parent passes the "narrowly tailored test" without first listening to the recording. If the recording is played and the court later determines that the proponent-parent fails the "narrowly tailored test, ", does that disqualify the court from hearing the custody case because the court heard illegally obtained evidence that is likely to prejudice the court against one or the other parent? That issue will have to be addressed in future litigation and it will be interesting to see how a trial court will address whether it can disregard hearing a tape that is found to be inadmissible (i.e., "unringing the bell") and remain a neutral fact-finder and decision maker on the law.

Justice Stein's Concern That Parents Will Be "Less Deterred" From Eavesdropping

As noted above, Justice Stein voiced her concern that the "vicarious consent" exception fashioned by the Badalamenti majority will influence parents in the midst of bitter custody disputes and that they will "be less deterred" from eavesdropping on and recording their child's conversations with the other parent in an attempt to obtain useful evidence to support their custody claims. If, in her use of the delicate phrase "less deterred", Justice Stein was suggesting that parents would be more likely to eavesdrop on their children, I recognize that the possibility exists but believe that, in practice, there will be no significant increase in this type of conduct or the attempt to introduce these types of recordings. On a practical level, custody litigants who surreptitiously record their children or spouse will typically have no advance knowledge of the nuanced "vicarious consent" exception to the crime of eavesdropping. Moreover, parents motivated to litigate custody will not be deterred if they believe that surreptitious recording is justified in order to protect their children.

It is conceivable that attorneys may, in light of Badalamenti, advise a custody client to record conversations that the litigant is not a party to. I submit, however, that the circumstances that might justify surreptitious recording are few and far between and that responsible attorneys will tread carefully where the line between criminal conduct and a "vicarious consent" defense is thin and uncertain.

Moreover, the use of recorded conversations as evidence in a custody trial is relatively rare for the simple reason that the evidence, usually, is not persuasive. In a recent New York Law Journal article[6] Tim Tippins described his experience of the custody client who "triumphantly plops a recording on the desk, announcing with near royal fanfare that here they have the evidence that will win the case"

only for the practitioner to find that the tape is damning to his client and better forgotten. I share that experience and, in the very few instances where I have decided to try to introduce a surreptitiously recorded conversation into evidence, have found that the recording, once admitted, has little to no positive impact. One jurist who shared her experience with me observed that very often when parents introduce recorded conversations at a custody trial they "both sound awful."

Implications for Forensic Custody Evaluators

Custody litigants frequently give custody evaluators evidence long before a hearing is scheduled. If the evaluator receives a recording he would be well advised, as a preliminary matter, to make sure that both sides have the recording. Once that is done, the evaluator must then consider what steps should be taken before listening to a recording that the evaluator may choose to rely on in reaching a custody recommendation because doing so prematurely might place the entire forensic process in jeopardy: if a recording is relied on by the evaluator and the court later determines that the recording is inadmissible, the forensic report and the expert's opinion may be rendered tainted and inadmissible.[7]

A custody evaluator faced with any recording - and particularly a recording that is the product of eavesdropping - would be well-advised to notify the court and seek advice before listening to the recording.

Conclusions

Recordings of children are usually met with great skepticism because children are subject to manipulation and, for that reason, courts regard recorded conversations with children (and adults) with distrust. Unlike the usual recordings that come up in custody trials (parent recording parent), the recording of the child and defendant-Badalamenti was free of manipulation and the judges who discussed the case with me were not troubled by the majority decision or by its trial practice implications.

What will lead to more surreptitious taping of conversations (and the frequency in which attorneys will have to address whether the recordings should be used at trial) is the improvement in and miniaturization of recording technology that make recording a conversation so easy and routine. The value of the improvement in recording technology and its use in litigation is best illustrated by the numerous, recent videotapes taken by bystanders who witness violent encounters between the police and civilians, persuasive evidence that is not subject to manipulation. The recording in Badalamenti was not the product of manipulation and was similarly persuasive.

The "narrowly tailored test" crafted by the Badalamenti court will apply to a narrow quantity of cases. Those few cases will require thoughtful attorneys to carefully consider whether a secretly recorded conversation that includes the client's child is favorable to his client's case and, if favorable, whether his client can pass the "narrowly tailored test".

Barry Abbott, a partner in the firm of Mayerson, Abramson, & Kahn, LLP, has been practicing matrimonial and family law since 1981. He is the co-chair of the Interdisciplinary Forum on Mental Health and the Law, an "AV Preeminent" rated attorney. He is a recipient of the New York Super Lawyers Award, a member of the Executive Committee of the Family Law Section of the New York State Bar Association and of the New York City Bar's Committee on State Courts of Superior Jurisdiction. He is also a faculty member of the New York College of Matrimonial Trial Attorneys.

Endnotes

1. People v. Badalamenti, (2016), 2016 N.Y. Slip Op. 02556, NYLJ April 5, 2016.

2. Penal Law §250.05 provides that "A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." Eavesdropping is an E felony.

3. I am using masculine pronouns in order to avoid the clumsy his/hers, he/she, etc., and because the parent in Badalamenti was the father.

4. Badalamenti, supra, p. 12.

5. A motion in limine is filed before trial. Since custody cases are tried before a judge (and not a jury), the motion informs the trial judge that a party will seek to admit certain evidence at trial and that the trial judge should decide, in advance of trial, whether that evidence is admissible.

6. NYLJ, May 26, 2016 (Recording, 'Vicarious Consent' and Judicial Overreach; Matrimonial Practice).

7. Recordings are, by their very nature, out of court statements. Out of court statements are inadmissible hearsay unless a hearsay exception applies.

CONT'D FROM PAGE 1:

Determining Custody in the Biased Interests of the Determinator

Then came children's rights, child work laws, the development of the tender years doctrine and the acknowledgment that children - particularly young ones - could best be cared for by their mothers. It was generally acknowledged that children needed their mothers; that there was a maternal instinct that was natural to women and critical to child-rearing.

In the 1960's and 1970's, the world changed and so did attitudes about child custody determinations. The self-actualization movement, women's rights and fathers' awareness all coalesced. Equal rights considerations touched parenting, and a trend toward joint custody arose at the same time that a fathers' rights movement developed. In 1973, Joseph Goldstein, Anna Freud, and Albert Solnit advocated allowing the psychological parent to make all decisions arguing that a caring parent would, on the whole, make better decisions than a judicial officer even if some of those decisions were vindictive or flat out wrong.1 That well thought out concept was rejected.

In 1975, Robert Mnookin proposed a decision analytical framework that was somewhat similar to Goldstein, Freud and Solnit's modest proposal.2 It, too, got no momentum. To this day, gender equality, joint custody and the best interest of the child remain in vogue.

But just as with fashion, there are trends within the trends. In making "best interest determinations" courts have struggled with finding ways in which the decision making process can be more certain. There is recognition that custody decisions are difficult to make and standards are generally subjective. It is for that reason that judicial determinations have been questioned and alternatives have been proposed.

In 2001, the prestigious American Law Institute, recognizing the vagaries of the best interest standard and the need for prompt and certain results in custody disputes, proposed an approximation standard which measured the time spent by each parent prior to break up and attempted to replicate that post divorce.3 While the concept gained a little traction by being included as a factor in several states, only West Virginia utilizes the approximation standard as a method for resolving custody issues. Arbitration, mediation and diversion programs of every stripe have been recommended, and sometimes implemented, but have consistently been found to be inadequate.

Left with having to make decisions using a best interest standard, judges have tried to gain assistance from outside sources: mental health professionals acting as evaluators or attorneys acting as advocates for the children and both sets of professionals sometimes assuming the role of "guardian". In addition, legislatures and court decisions have explored the use of "factors" to serve as guides for custody determinations.

But the 21st century brought about some critical thinking relating to the influences on making judicial decisions, and outside sources have been seriously criticized for having no genuine basis on which to make recommendations about best interests. In 2002, an article appearing in the Journal of the American Academy of Matrimonial Lawyers written by some forward-thinking mental health professionals questioned the methodology that was being employed in forensic services to custody cases.4 What followed were articles, books and then judicial decisions that impugned what was deemed to be a non-scientific approach to those reports. A small, quiet, but effective, revolution followed, resulting in efforts by mental health professionals to be more professional and by judges to be more careful in relying on the recommendations made by outside sources. Standards were adopted by professional organizations and some psychological tests fell into disrepute. In many cases, mental health professionals were directed to refrain from actually making recommendations about custody outcomes, that being the sole province of judges. This, too, caused a debate.

Similarly, with regard to attorneys for children who were substituting judgment in cases where they believed their clients were not making "correct" choices - choices

deemed to be not in their best interests - a movement began to restrict such recommendations. Standards were adopted for substituting judgment, the strictest being that of the American Academy of Matrimonial Lawyers which recommended that an attorney never have that right because of a lack of expertise in that area.

The criticisms leveled against mental health professionals and attorneys for children were based on those professionals' inability to make unbiased determinations; their recommendations were based primarily on their "feelings", their predilections. While their recommendations sounded like something worthy of consideration, in fact, there was often little substance amounting to not much more than a rationalization for their biases.

Taking away the recommendations of mental health professionals and attorneys for children, however, leaves the decision-making solely for the judge. What training, what scientific method, what unbiased mechanism does any judge have for decision making in a custody case?

In fact, custody decisions have always been made based on biases - and they always will be. The written decision has never been more than a rationalization for a determination made from the gut. And, perhaps that is exactly what it must be.

In 2009, during the period when President Obama was vetting candidates for the U.S. Supreme Court, he spoke of Judge Sonia Sotomayer as a person who had "empathy", which he described as a quality he was looking for in a judge. This statement brought about significant criticism from the Right, where strict constructionists argued that empathy was no different from personal bias and had no place on the Supreme Court. If indeed empathy is similar to, or a form of bias, then in the field of custody litigation, where strict construction is virtually impossible, empathy is certainly a positive quality and something we want judges to utilize n making their decision.

To be brutally honest, bias is one of the most important determinants in every custody case. Gender bias was the sole factor in the early days of custody decisions. Gender neutrality is a legal concept, not a soulful one. While the tender years doctrine has been eliminated in the law do we really believe that judges, mental health professionals and attorneys are not still married to the concept that young children need "motherly love" more than "fatherly care", whether those qualities come from men or women? And, do we not recognize that qualities that are normally considered to be feminine, such as warmth, sensitivity and understanding, are also considered to be the qualities that make for a good parent.

What about cultural bias? Can we seriously argue that judges, mental health professionals and attorneys who are involved in custody determinations do not have a preference for behaviors that are favored in our own culture as opposed to cultures of which we know very little. Standards regarding breast feeding, discipline, leaving children with caregivers, medical treatment, accepting responsibility, sexual freedom and a raft of other important parental decision making responsibilities differ significantly in other cultures. No valid studies have been made testing which standards are preferable, yet which standards are to be followed often weigh heavily in a custody determination based on the beliefs of the decision maker. The same can be said of economic biases, racial biases, educational biases, and religious biases which all play a part in cases where those differences arise.

The best interests of the child is a standard that invites biased determinations, no matter how you slice it. If bias is inevitable, perhaps we should sit back and enjoy it.

Robert Z. Dobrish is the Senior Partner in Dobrish Michaels Gross, a boutique matrimonial firm in New York City. He is a fellow of the American Academy of Matrimonial Lawyers, one of the founding members of the Interdisciplinary Committee on Mental Health and Family Law, a frequent lecturer and writer on family law issues and a well-known provocateur in this area.

Editor's Corner

The Role of Mental Health Professionals as Consultants in Child Custody Evaluations

Alberto Avi Yohananoff, Ph.D. - Private Practitioner New York, NY

Mental health professionals (henceforth, MHPs) in custody proceedings are often used in the capacity of forensic evaluators but this is only one of the roles they can fulfill in the midst of disputed custody proceedings. In addition to serving as a neutral party in these legal proceedings, the MHP may be called upon to function in other more consultative capacities as well such as:

- MHPs can be hired by the attorney for one side, in the capacity of non-testimonial trial consultants, to assess a particular issue germane to the attorney's client (e.g., mental health).
- MHPs can also be hired as a "scientific expert" to provide information about certain topics relevant to the custody literature (e.g., parental alienation).
- Reviewing someone else's forensic report, or "peer review." Reviewing and critiquing a peer's product serves an important function as a "quality control" mechanism designed to preserve the integrity and quality of a child custody evaluation (CCE) by weeding out poor evaluations from good ones. (There are many instances in which an evaluator can be biased, may fail to consider plausible alternative hypotheses, misrepresents test findings, overlooks important collateral sources, or may be unaware of current research.)
- Assisting the attorney's client by preparing them for the forensic evaluation. Unlike in peer review, in this capacity the MHP can assist the attorney's client *before* the forensic evaluation commences rather that after it is concluded.

For the remainder of this short paper I will focus my attention on the important role that forensic consultants can play in the latter area, *preparing clients for forensic evaluations,* and the potential ethical dilemmas that such work entails. My comments will rely on a prior article published by the AFCC Task Force (2011) and by Robert Dobrish (2012).

At the outset it should be noted that MHPs and attorneys have different obligations to the parties involved in a custody dispute. Attorneys strive to represent their clients to the best of their ability. From an attorney perspective, their primary interest is to assist a client in presenting his or her case in the best way possible light. An attorney promotes this goal by helping the client to parse out favorable facts from unfavorable facts and by presenting evidence that highlights the strengths of the client's case in order to obtain a favorable outcome for their client (Dobrish, 2012). Seen from this perspective, when hiring a mental health consultant to prepare a client for a forensic evaluation an attorney may do so with the hope to gain a significant "advantage" over the opponent's side. Some attorneys may operate under the implicit expectation that a MHP may be able to "coach" a client on the "nuts and bolts" of the forensic evaluation process in order to provide their client with such an advantage.

In contrast, MHPs even when hired by an attorney as a consultant for a party who is about to undergo a child custody evaluation should avoid engaging in actions that may tamper with the integrity of the forensic process. Psychologists, in particular, are bound by their ethical standards, by which they are obligated to protect test measures they use (APA code section 9.11) and by extension maintain the integrity of any assessment protocol they use. Given the above, it is the undersigned's opinion, that a psychologist can discuss custody evaluations in general terms with an attorney's client but should not delve into details about the specifics of the evaluation because this is likely to compromise the evaluation.

Hobbs-Minor & Sullivan (2008) surveyed attorneys and mental health professionals about the role of consultants in CCEs. Results of their survey indicated that 44% of MHPs and 74% of attorneys thought MHPs should prepare litigants for CCEs. However, 55% of the MHPs perceived their role as consultants as being limited to discussing expectations and possible questions about the evaluation with their clients whereas 53% of the attorneys thought that MHPs should review commonly used tests. None of the surveyed MHPs thought that they should prepare litigants for evaluations by coaching them with regard to the specifics of how to answer particular questions. In a subsequent survey of legal professionals (Bow, Gottlieb, Gould-Saltman & Hendershot, 2011) Bow and his colleagues report that attorneys value consultants that offer specific suggestions to their clients which maximize the efficacy of their clients' presentation. Given the above, deciding how to prepare an attorney's

client for an evaluation can be a delicate task for an MHP because he/she comes to it from a different vantage point than an attorney might, yet the attorney is the one hiring the consultant. (A separate but worthwhile question – a subject for a different paper -- is once a consultant is retained, does the retaining attorney has an obligation to disclose such information to the opposing attorney?)

To muddy the picture further there do not appear to be specific regulations that MHP can follow that provide clear guidance, or govern the role of a mental health consultant in preparing the attorney's client for a child custody evaluation (AFCC Task Force report 2011). Still, there appear to be some common assumptions that attorneys and MHPs share as to what might be useful in preparing a client for a child custody evaluation. For instance, MHPs hired as consultants can educate and support the litigant during a child custody evaluation. In doing so the consultant demystifies the process of undergoing a forensic evaluation thereby reducing anxiety in the litigant (AFCC Task Force, 2011; Dobrish, 2012).

The ethical dilemma that arises for a MHP who is hired as a consultant in this capacity is where to draw the line in preparing a client for a child custody evaluation. There are those who might argue that there isn't anything inherently wrong about "coaching" a client on what specific responses one should provide to a child custody evaluator. They would point out that an attorney is expected to advise his client on how best to prepare for Court appearance (what to wear, where to stand, how to address Court) and how to approach questions in deposition or a trial. They would also point out that it is an accepted practice to have psychologists assisting attorneys in procedures involving jury selection or to provide advice (coaching) to a witness in order to enhance his/her credibility. Therefore, why should the standards for how to assist a client in preparing for a court mandated forensic evaluation be any different? Furthermore, there are websites that educate readers about child custody evaluations and in that sense "coach" a client. So an argument can be made that explicitly "coaching" a client to prepare for a custody evaluation should be regarded differently, if as Dobrish (2012) suggests this process cannot be effectively regulated.

As noted, the perspective shared by many professionals is that a MHP should limit himself/herself to provide general guidelines to protect the integrity of the evaluation process and avoid distorting the outcome of the forensic evaluation. If one accepts this framework, what kind of information would be acceptable or not acceptable to share in preparing a client for an evaluation?

In the acceptable categories the following should be included:

- Providing an overview of procedures so that litigants know what to expect (thereby decreasing their level of anxiety.)
- Discussing the role of the evaluator, the kind of information that is typically requested in a forensic evaluation, the limitations of a forensic study, and how the forensic opinion might be used in court.

Other issues might be considered more controversial. For instance, is it acceptable to prepare the client by emphasizing favorable facts or general themes that highlight the strengths of his/her case, and are likely to improve the efficacy of his/her presentation? Or how about assisting a client to develop themes about why he/she is likely to make the better custodial parent, or highlight concern about the other party's parenting? Wouldn't such assistance be likely to undermine the "genuineness" of the party being evaluated and in doing so compromise the information gathered in the course of the evaluation? Where does one draw the delicate boundary of assisting an attorney's client without compromising the integrity of the forensic process?

Another potentially controversial area for a consultant who is preparing a client for a forensic evaluation is to what degree it may be acceptable *to educate a party about a variety of parenting and divorce related issues.* While this seems to be a worthwhile endeavor, the potential problem with such an approach is how can one establish that the knowledge thereby gained by the client will be used for long term and constructive purposes (enhancing one's parenting) rather than for short term and *tactical advantages* (winning the custody proceeding). This dilemma is aptly illustrated by questions such as the following (AFCC Task Force 2011):

- To what degree is it acceptable to encourage clients to become knowledgeable about child rearing and development by talking with child development experts, through personal reading or through information gathered from web sites?
- To what degree is it acceptable to educate a party about parental conflict on children and how a child can be buffered?
- To what degree is it acceptable to educate a party about children's response to divorce and what factors might impact on it?
- To what degree is it acceptable to educate a party about attachment issues influencing parenting plans?

- To what degree is it acceptable to educate a party about the developmental needs of children at different stages?
- To what degree is it acceptable to educate how a child's needs may affect shared parenting arrangements?
- To what degree is it acceptable to educate a parent about factors that may lead a child to resist contact with the other parent?
- To what degree is it acceptable to educate a party about the potential impact of relocation on children?
- To what degree is it acceptable to discuss the pros and cons of different parenting plans?

These questions illustrate the slippery boundaries that confront the hired consultant: struggling with imparting pertinent knowledge while steering clear of steps that may compromise the integrity of the forensic process. Given that as part of CCE litigants are routinely asked general parenting questions that test their understanding of child development and parental approaches, to what degree the consultant in his/her *educational role* affects the quality/type of responses provided by the litigant in the course of the forensic evaluation? Does it impact on the *validity of the obtained data to such a degree that it undermines the entire process*?

Of note, although most members of the AFCC 2011 task force believe that the questions outlined above are within the bound of acceptable practices, it should be emphasized that the task force did not reach *a consensus* on the topics a consultant should cover with a litigant, underscoring the inherent ethical dilemmas in this area.

Having spoken about what is acceptable and what may be more controversial in preparing a client for a child custody evaluation, I would like to focus on the "red lines" that a MHP should not cross. Several examples of come to mind (AFCC Task Force 2011):

- Coaching litigants to respond to specific questions. The focus of the hired consultant should be on education and support, not coaching.
- Rehearsing a party's response to questions on psychological tests.
- Encouraging a party to make temporary and insincere changes for the purpose of positive management impression.

In summary, MHPs involved in child custody proceedings can fulfill multiple roles, in addition, to that of a child custody evaluator. This brief article focused on one such role – preparing a client for a forensic evaluation. In this role the forensic consultant is faced with significant challenges as he/she straddles between one's ethical obligations and the desire to disseminate appropriate knowledge that can assist the attorney's client who is about to undergo a forensic evaluation.

Avi Yohananoff is a private practitioner who specializes in forensic evaluations and in child custody evaluations. Dr. Yohananoff has served as a Senior Psychologist at Family Court Mental Health Services and was the Coordinator of the Forensic Psychiatry Program at North Shore University Hospital. Dr. Yohananoff is an Adjunct Professor at the City College of New York and has presented on a variety of topics related to forensic assessments and child custody evaluations.

REFERENCES

AFCC Consultant Task Force (2011). Mental Health Consultants and Child Custody Evaluations: A discussion paper. Family Court Review, Vol. 49, pp. 723-736.

APA Ethical Principles of Psychologists and Code of Conduct (2002)

Bow, J. N., Gottlieb, M. C., Gould-Saltman, D., J., Hendershot, L. (2011) Partners in the process: How attorneys prepare their clients for custody evaluations and litigation. Family Court Review, Vol. 49, pp. 750-759.

Dobrish, R.Z. (2012). Custody Evaluations: The propriety of preparation. New York Law Journal, February 6, 2012.

Hobbs-Minor, E. & Sullivan M. (2008). Mental Health Consultation in child custody cases. In L.B. Fieldstone & C.A. Coates (Eds.) Innovations in Interventions with high conflict families. (pp. 159-186). Madison, WI: AFCC.

The Intersection of Assisted Reproductive Technologies and Divorce

Alexis Cirel, Esq, Mayerson, Abramowitz, Kahn LLP

Recent innovations in assisted reproductive technologies (sometimes referred to as ART) and the attendant vast array of new child-related family-building alternatives are raising new and complex legal issues for family law practitioners in New York and around the country, both in the context of divorce and other areas of family law. With the increasing use of fertility procedures like in vitro fertilization (IVF) and "third-party" or "collaborative reproduction" arrangements (including sperm donation, egg donation and gestational surrogacy arrangements), and with other technological advances such as the ability to indefinitely cryopreserve genetic material created in vitro, reproductive possibilities are seemingly endless.

Indeed, today, more people are turning to ART and third-party reproduction arrangements to create families—whether it be to circumvent infertility, to preserve fertility prior to undergoing cancer treatment, to facilitate same-sex couple procreation, or for many other reasons—and, the fact cannot be denied that a rapidly growing number of children are born annually in the United States using ART.

These new and ever-evolving family building options challenge traditional legal assumptions and have far-reaching implications for conventional conceptions in the area of family law, including for matrimonial attorneys, particularly with respect to issues of parentage, child custody, division of marital property, and inheritance. This article focuses on one of the "hot topic" issues, which attracted national media attention and created celebrity headlines1—namely, what becomes of a couple's cryopreserved embryos in the event of divorce.

Basic Underlying Principles

Attorneys practicing divorce law are, of necessity, required to understand a few basic concepts in terms of the science and industry practices underlying the legal issues associated with ART.

First, an "embryo" is a fertilized ovum after it has begun the process of cell division (in lay terms, the mass of cells that is created when a man's sperm fertilizes a woman's egg). Second, while the fertilization process conventionally occurs inside a woman's body, through the use of ART procedures embryos are created "in vitro" (i.e., in a test tube, culture dish, or elsewhere outside a woman's body) and later transferred into a woman's body in the hopes that she will become pregnant.

Third, because ART procedures allow for the extraction of several of a woman's eggs at one time, multiple embryos are often created in one in vitro fertilization cycle. Fourth, after the removal and fertilization of eggs with the use of IVF, more health care professionals in the ART field are advocating "single embryo transfers" into the woman's body even when multiple embryos are available in order to reduce the heightened risks associated with multiple birth pregnancies.3 This often results in a "surplus" of remaining embryos, which may be set aside for future use or cryogenically preserved (in lay terms, "frozen") for years in a laboratory setting.

Fifth, prior to engaging in an ART procedure that may produce embryos, ART patients are often required by the IVF clinic to sign directive forms regarding the storage, use, and disposition of surplus embryos in the event of death, divorce, and disagreement as to their use for reproductive purposes.

Implications for Attorneys

What is the relevance of all this for a divorce lawyer? A recent study found that couples who experience failed fertility treatments are three times more likely to divorce.4 Thus, with the increasing prevalence of families built through ART procedures, and the knowledge that failed fertility treatments triple the risk of divorce, it is imperative that matrimonial attorneys are at least generally aware of the thorny legal issues that may arise when ART comes into play in a divorce.

Consider the example of the hypothetical married couple who for one reason or another has to resort to IVF to have children. They undergo an IVF cycle, which ultimately yields eight embryos, and elect to only replace one or two of the embryos into the wife's body in the hopes of becoming pregnant. The remaining "surplus" embryos are cryogenically preserved at the fertility lab and years

later the couple decides to divorce. What happens to the remaining six stored embryos? Because the law in this area is, for lack of a better term, still in its "embryonic" stage, from a legal standpoint, the query raises more questions than it answers, ranging from the philosophical (when does life begin?) to the practical. For example:

- Are embryos "children of the marriage" so that their "custody" is decided on the basis of a "best interest" analysis, or are they "marital property" such that they could be disposed of in a property settlement pursuant to the principles of equitable distribution, or neither (i.e., do they have a special status unto themselves)?

- If one of the divorcing spouses wants frozen surplus embryos destroyed, discarded or donated (to research or otherwise) but the other wants to use them or preserve them for future use in the hopes of having a child, which interest trumps? In other words, does one party's interest in becoming a parent outweigh the other party's interest in not becoming a parent?

- What role, if any, does a pre-conception directive form executed by the parties at the time of the ART procedure at the IVF clinic play in the resolution of these issues, and are they enforceable in all circumstances?

- Which party bears the cost of embryo storage fees?

Absent extensive case law or statutory guidance on the allocation of cryopreserved embryos in New York (and most other states), family law attorneys are left with the uncertainty of varying and oftentimes disagreeing decisions from courts of different states that have been called upon to resolve these and related issues in the context of divorce proceedings. Some trends in the little jurisprudence there is on these issues have emerged, however, and shed at least a little light on the measures matrimonial attorneys should take to ensure that in the event ART issues come into play the client's interests vis a vis the fate of his or her frozen embryos are protected.

Case Law

In general, courts have employed one of three distinct analytical frameworks in resolving disputes over the disposition of frozen embryos upon divorce: (1) a straight contractual approach, which strictly enforces the terms of the IVF clinic's directive as to what happens to the embryos upon death or divorce; (2) a contemporaneous mutual consent model, where absent joint consent, the embryos are kept in their cryopreserved state; or (3) a balancing of interests test, in which the courts would decide the fate of the embryos based upon the competing interests of the ex-spouses.

The Contract Approach. In Kass v. Kass, 91 N.Y.2d 554, 673 N.Y.S.2d 350 (1998), one of the seminal decisions applying a strict contractual approach, New York's Court of Appeals entrenched a growing view that control of frozen embryos rests with the participants who provide the sperm and egg cells for IVF (the "gamete providers"), not the courts. In that case, a husband and wife underwent IVF and ultimately ended up with five unused embryos for storage. The IVF consent forms signed by the couple in connection with the treatment provided that in the event of a divorce, the embryos would be disposed of by the IVF clinic where they were stored and could be used for research.

The couple later decided to divorce and signed an uncontested divorce agreement indicating that their stored embryos would be handled as initially indicated in the IVF consent forms and that neither party would claim custody of the embryos. A dispute arose when the wife later sought sole custody of the embryos and notified her IVF physician that she opposed destruction or research use, claiming that the embryos represented her only opportunity to achieve genetic parenthood. The court enforced the terms of the pre-divorce IVF consent forms, emphasizing the importance of the parties' manifested mutual intent in the context of reproduction.

The Mutual Consent Approach. In the 2003 case In re Marriage of Witten, 672 N.W. 2d 768 (Iowa 2003), in connection with a divorce proceeding, the wife sought "custody" of the couple's frozen embryos so that she could use them to bear a genetically linked child, and adamantly opposed any destruction or donation of the embryos. The husband, who opposed his former wife's reproductive use of the embryos, sought a permanent injunction prohibiting either party from unilaterally transferring, releasing, or utilizing the embryos without the written consent of both parties.

The Supreme Court of Iowa utilized the contemporaneous mutual consent model, and set forth the following general

principles: (1) the statute governing child custody did not apply to a frozen human embryo dispute; and (2) agreements entered into at the time in vitro fertilization is commenced are enforceable and binding, subject to the right of either party to change his or her mind regarding disposition of embryos.

Given the fact that the husband no longer concurred in the parties' prior agreement with respect to the disposition of their frozen embryos, and applying the foregoing principles, the court affirmed the trial court's ruling enjoining both parties from transferring, releasing, or utilizing the embryos without the other's written consent, and held that the party opposing destruction of the embryos should be responsible for any storage fees.

Interestingly, as part of its analysis, the court "considered and rejected the arguments of some commentators that embryo disposition agreements are analogous to antenuptial agreements and divorce stipulations, which courts generally enforce [because] [w]hether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are the subjects of antenuptial agreements." It likewise distinguished divorce stipulations, noting that while "such agreements may address custody issues, they are contemporaneous with the implementation of the stipulation, an attribute noticeably lacking in disposition [of frozen embryo] agreements."

The Balancing Approach. In Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012), the Superior Court in Pennsylvania upheld the trial court's use of the balancing approach and decision to award frozen embryos to a wife as part of her equitable distribution of marital property, noting that "[i]n the context of an equitable distribution of marital property, a trial court has the authority to divide the award as the equities presented in the particular case may require." 42 A.3d at 1137, quoting Schenk v. Schenk, 880 A.2d 633, 639 (Pa. Super. Ct. 2005).

Based upon the wife's testimony that the embryos were her only reasonable chance to procreate after surviving cancer treatments that rendered her infertile, the court agreed with the lower court's rejection of the husband's arguments that he did not wish to have a child with his ex-wife or to incur the financial obligation of an unintended child. Furthermore, the Superior Court affirmed the lower court's refusal to enforce a provision in the consent form signed by the spouses that the embryos would be destroyed after three years. Given the wife's promise to use all reasonable efforts to support the child without the husband's financial assistance, and her interest in achieving genetic parenthood, the court held that the balancing of interests tipped in the wife's favor.

Current Judicial Trends

As the cases discussed above begin to flesh out typically (but certainly not uniformly), courts called upon to determine what rights progenitors ought to have when they pursue in vitro fertilization and the allocation of embryos upon divorce, have enforced clear dispositional agreements between the parties at the time of undergoing IVF and, in the absence of such agreement, balanced the relative interests of the parties as to the disposition of embryos. More specifically, the current judicial trend can be summarized as follows: (1) in the first instance, courts will enforce as binding a clear directive or agreement regarding disposition of embryos reached by the parties at the time of IVF, if one exists between the parties; and (2) if there is no (or an unclear) agreement or directive as to dispositional consent, then courts will balance the parties' respective interests in procreating versus not procreating, with preference in favor of the person who does not want to procreate but also giving weight to weight to whether the party wanting to procreate has any other viable alternative to have genetically-related children.

In June 2015 an Illinois appellate court reached a decision in Szafranski v. Dunston, which emphasized the importance of honoring advance agreements between IVF participants as to disposition of embryos and put an end to a five-year legal battle over three frozen embryos created by Jacob Szafranski and his former girlfriend, Karla Dunston. The former couple created the embryos using IVF after Karla was diagnosed with non-Hodgkin's Lymphoma and was told that her chemotherapy treatment would likely result in a loss of fertility.

Prior to undergoing IVF Jakob agreed that Karla could use his sperm to create embryos for reproductive purposes and the parties later signed an "Informed Consent for Assisted Reproduction" form at the IVF clinic, which contemplated that the parties would reach a separate

agreement as to embryo disposition and provided form language as to the clinic's policies regarding its actions vis a vis the embryos in the event of death or divorce. Soon after completing an IVF cycle the couple broke up and Jakob filed a lawsuit seeking to enjoin his Karla from using the resulting embryos. Karla filed a counterclaim seeking sole custody and control over the pre-embryos. The court affirmed the lower court's ruling that Karla was entitled to sole control of the embryos under both a contract and balancing approach.

In particular, the court found that the evidence supported the circuit court's finding that the parties had formed an enforceable oral contract wherein they agreed that Jakob would donate his sperm so that Karla could create embryos to preserve her ability to have a biologically related child after chemotherapy, which embryos Karla could then use without limitation – i.e., without the need for Jakob's further consent. The court also agreed that the parties did not modify their oral contract when they later signed the consent form at the clinic because, among other things, unlike dispositional agreements that have been considered by other jurisdictions in disputed embryo lawsuits, that boilerplate form did not reflect the parties' dispositional intent in that it: (i) failed to specifically contemplate the circumstances in which the parties found themselves – i.e., an unmarried couple separating; and (ii) did not require that the parties affirmatively select from dispositional options (i.e., use, destroy, donate) in the event of their separation.

The court likewise held that while the lower court did not need to balance or weigh the parties' relative interest given the enforceable contract, it did not err in finding that Karla's interests should prevail based on evidence in the record that the embryos represented the woman's last and only opportunity to have a biological child with her own eggs.

Conclusion

In short, gone are the days in which defining the term "child of the marriage" was the simple part of a matrimonial attorney's job in drafting a prenuptial agreement, or a postnuptial agreement, or a marital settlement agreement. Today, families are built and exist in a myriad of previously "unconventional ways," including through ART procedures, and family law practitioners would be wise to maintain an awareness of the potential implications for their clients.

In the context of a divorce practice in particular, while there is little uniformity in the existing laws on the legal issues associated with ART, matrimonial attorneys should at the very least be guided by the trends identified above and inquire about a couple's fertility history (including whether consent or directive IVF clinic forms have been executed) or of spoken or other written evidence of plans to utilize ART procedures to have children.

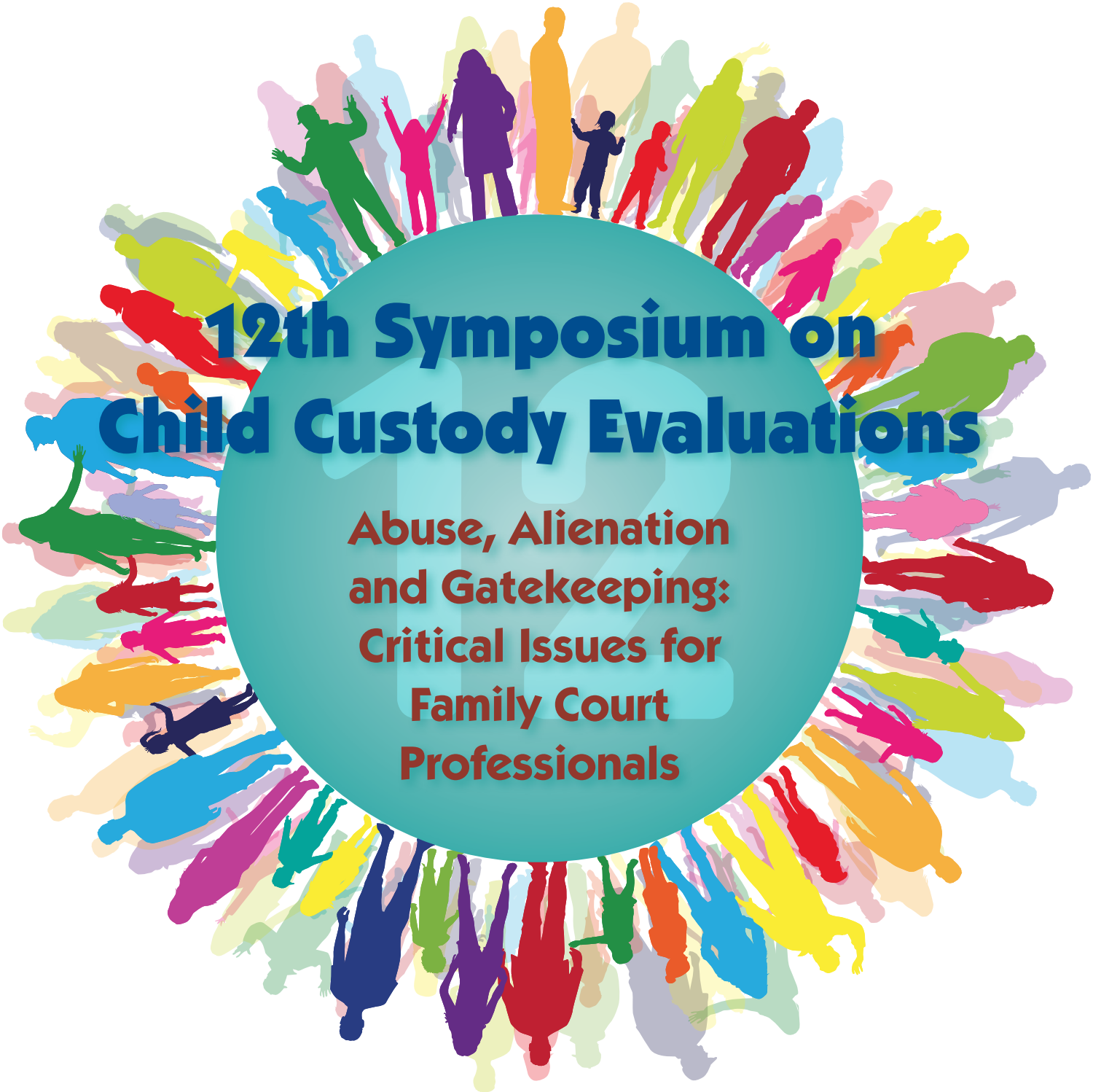
Alexis Cirel joined Mayerson, Abramowitz & Kahn LLP in 2014 eager to focus her passions and litigation experience on the practice of family law after having worked as a litigation associate in a large law firm in Manhattan and then as a principal at a small, boutique litigation firm. Her practice is primarily focused on matrimonial and related family law issues, and she is particularly interested in pursuing her personal and professional commitment to establishing and protecting the rights of clients building their families through the use of Assisted Reproductive Technology (ART).

ENDNOTES:

1. http://www.intouchweekly.com/posts/exclusive-court-documents-sofia-vergara-s-ex-nick-loeb-fights-to-save-frozen-embryos-56124
2. http://www.asrm.org/Topics/Embryo/
3. http://www.cdc.gov/art/patientResources/transfer.html
4. http://www.medicaldaily.com/ivf-and-divorce-couples-three-times-more-likely-break-after-failed-fertility-treatment-268184

ASSOCIATION OF FAMILY AND CONCILIATION COURTS

AFCC



12th Symposium on Child Custody Evaluations

Abuse, Alienation and Gatekeeping: Critical Issues for Family Court Professionals

Sheraton Atlanta Hotel • November 3-5, 2016

AFCC is an interdisciplinary, international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict.

Content and Structure in the Clinical Forensic Interview

Mitchell M. Frank, Psy.D, Private practice, clinical and forensic psychology, Forest Hills, Queens

In the course of the clinical forensic interview we seek information that bears on such structures or constructs as personality and defense. The focus of this article is the art of culling data about structure – defined for these purposes as any stable configuration of tendencies or traits – from inquiry directed at interview content.

We go about a clinical forensic interview with a plan, or strategy, but must be alert for data collection opportunities, or tactics, when they present themselves. What we are after is not tangible information – we are neither detectives nor fact finders and are not primarily out to 'get the goods' – but rather material to help us understand and assess. Consequently, by tactics I do not refer to anything that resembles confronting or interrogating. Especially in child custody evaluations in which the material we seek is often complex and subtle, I would argue that the most useful clinical stance is one of openness and curiosity.

Opportunities for inquiry in the interview arise out of the way our interviewee reasons. Reasoning contains in it assumptions that open doors to the person's implicit rulebook about the interpersonal world. The questions that form our inquiry are natural ones, and are aimed at eliciting a broadening of our interviewee's reasoning on a given topic.

In our interviewee's reasoning we may detect such tendencies as glib excuse making, attempts to turn the tables on accusers, excessive self-reference, mercurial changes of opinion and allegiance, helplessness, remoteness and the like, and the question arises whether these are mere expressions of a particular context, or whether they represent something more widespread and stable – such structures as personality, defensive characteristics, or what Shapiro described as neurotic styles (Shapiro, 1965). In everyday discourse, if we are truly seeking dialogue, we direct our comments at content, not structure. We ask our acquaintance what their reason was to act as they did, and not what their bias was in doing so, though their bias might be what we are trying to ascertain. Shortcutting by going directly to structure, such as bias, is likely to elicit defensiveness. Much as in everyday discourse, in the clinical interview our observation of what appears to be structure is what sets our inquiry into motion, but our question is best directed at the immediate content.

An example: A child custody litigant admits an incident in which he went after his wife, pushing a table, causing a flower pot to fall and break, leading to his shoving her, and says, "I won't lie, I was angry, but she…", and proceeds to focus on her alleged provocation and to point out that he stopped short of hitting her. Several possibilities present themselves for the clinician. First is no response at all – his account can simply be summarized in the eventual report as his side of the story to be compared with hers. An opportunity is lost thereby: A sample of his reasoning was offered us to be mined for underlying structure. The reasoning is his excusing his behavior as a natural response to his partner's provocation. His rationalizing has an antisocial quality and the impulsive nature of the act seems significant. But none of this can be assumed – after all, anyone can get angry, the provocation may have been genuine, and this might have been a one-time incident in which this individual was 'not himself'. To directly address what we suspect to be underlying structure would almost surely be useless –"do you often blow up like that?" or "don't you think that's just an excuse?" – leading to pointless denials or argumentation for which we cannot really fault the litigant in our report because we asked an unfair question. As in most circumstances, it is best to stay with the content and ask a question that brings the interviewee out on the structures that are of interest to us, in this case, impulsiveness and rationalization. Addressing the impulsive nature of the act, we might simply ask, "in that moment that you pushed the table, what were you thinking?" If the answer is, "I wasn't thinking anything", a natural follow-up such as, "well, something was in your mind at the moment, I wonder if you can put your finger on it" could ensue. This may or may not go far, but it does compel our interviewee to tell us what if anything filled the space between impulse and action at the time of the incident. At the very least, he may give us a sanitized version of what he thinks we want to hear – not so bad, as it could suggest a speck of insight and anyway would provide an opening to further clarifying questioning. At the other extreme, he could get impatient with the line of questioning and let us know that we don't understand, he wasn't thinking anything – sometimes people just blow up. In that case his disclosure has brought us closer to what we wanted to know: that for him, becoming explosive when angry is a given. As it happens, in this particular situation I did not go after the impulsivity, but rather the rationalization. I said, "I get it, you were provoked, but what do you

think, did you do anything wrong?" He opened his response cautiously: "I shouldn't have shoved her". But when asked in that case how he explains doing so anyway, he went on a harangue focused on her, not himself, all of which added up to an argument amounting to 'she had it coming' – just the sort of reasoning that distinguishes rationalization from merely acting with a reason. One cannot conclude that rationalization of antisocial behavior is a defense of choice for this individual based on the one example. But it is a useful piece of data.

The inquiry we employ in this sort of exchange can also be thought of as testing the limits of our interviewee's reasoning. There is an inherent logic to it. For example, where we suspect rigidity we might suggest an alternative perspective and see how much follow-up questioning it will take for our interviewee to accept it as a legitimate possibility, e.g. "don't you think it's plausible that …" Similarly, we might ask someone who acts with a sense of entitlement how much the other person is supposed to do for their sake and why. Where we find a pattern of irresponsibility our questions might put the interviewee up to recognizing the harm resulting from their actions. The follow-up for the latter examples may become confrontational. But this is not interrogative confrontation centered on what the person did or did not do, but rather on their logic where it fails, for example, if they deny that an irresponsible act resulted in harm to the other.

Questions whose answers seem self-evident can be another type of limits-testing. For example, after a litigant volunteered that he personally challenged the judge in the course of a hearing, I asked whether he thinks that this made a favorable or unfavorable impression on the Court. His surprising reply was that he believed the impression was favorable, because he had demonstrated how nothing will stand in his way when he is in the right. (If he had replied that he thought the Court's impression was unfavorable, follow-up questions could quite naturally examine his impulsiveness and insight). Here as in previous examples, a simple sounding question can invite the interviewee to reveal reasoning that sheds light on diverse areas, especially their constructs about the interpersonal world.

In all these cases, our questions are best framed around the content or specifics of the situation, allowing the structure we have begun to observe to further reveal itself. Where possible, we align our question with our interviewee's perspective, and certainly avoid labeling or tacitly commenting on it. Thus, with a person we believe to exhibit paranoid traits, we do not ask what made them mistrusting in the situation, but rather what they believe the other person they are describing was thinking, or how they 'know' what they are attributing. To someone who appears to have poor boundaries we might ask what advantage results from their intrusive act or words, with follow-up that explores whether they recognize any disadvantage as well. The all-purpose, "how do you think he/she felt when you did that?" is a good alternative. In each case, our questions and follow-ups invite the person to expound on their assumptions without arousing undue defensiveness.

Structures beyond personality and defense at the heart of a child custody evaluation, such as authoritarian parenting and parental alienation, lend themselves to the same inquiry methods. In the case of alienating tendencies, our interviewees may marshal strong sounding arguments for their cause when asked direct questions. But alienating behaviors have features that lend themselves more readily to exploration, such as possessiveness, rigidity, or being hypercritical. These traits are likely to appear in other contexts in addition to that of child alienation. Someone who is possessive, for example, often has difficulty accepting that a cherished other has their own volitional wishes, and someone who is hypercritical is likely to be so in a variety of contexts. To the extent that these tendencies appear in the interview, inquiring about situation-relevant content can lead to useful connections to our target construct of parental alienation.

What is challenging about inquiry tactics in the forensic interview is not so much finding the question to ask as recognizing the opportunity. The interview in real time is a flowing affair and often stressful. We are alerted by our developing impressions about structures such as personality or defense, and by our interviewee's assumptions. We can start by mirroring (Frank, 2001) what the interviewee is saying to make sure we are on the same page and to help them feel understood before taking the next step. The key is to find a natural sounding lead that invites the person to develop his or her reasoning. In so doing, implicit ideas and structures may become more explicit and demonstrable.

Where we succeed at eliciting data from the interview using the approach discussed above, it is important that we cross validate it with information obtained from other data collection modalities, including testing. More essential still is that we draw connections to parental decision-making as this is revealed across evaluative modalities, especially in semi-structured

interviewing directed at parenting concepts and capacity, and in the observation with the child. While structures such as personality and defense are stable enough to predict overall behavior, links must still be established between them and parenting in each individual case. The evaluation is a convergent effort drawing on different parts to make for a more compelling whole. But our most persuasive arguments are made by our litigants themselves, to whom we give voice in our interviews.

References

Frank, Mitchell M. (2001), On mirroring and mirror hunger, in Psychoanalysis and Contemporary Thought, 24:1, pp. 3-29.

Shapiro, David (1965), Neurotic Styles, Basic Books, NY.

Dr. Frank has held supervisory positions as a psychologist in educational and clinical settings in Israel and in clinical and forensic settings in the U.S. He is presently Associate Clinic Director at Queens Family Court Mental Health Services. His private practice is limited to child custody evaluations and individual psychotherapy with adults.

AFCC NY Lunch & Learn Program

AFCC NY started a new initiative in 2015 named the Lunch and Learn program. This initiative is designed to educate Judges and their support staff about various "hot topics" such as the (1) AFCC Model Standards for Custody Evaluation, (2) the advisability of overnight visits with young toddlers, (3) personality disorders and parenting capacity.

To date, AFCC-NY presented at a number of venues in the NY Metropolitan and its surrounding environs (Westchester, Nassau and Suffolk County) to Supreme and Family Court Judges. The presenters include:

Nassau Family Court: Paul Hymowitz, Ph.D. and Larry Braunstein Esq.

Manhattan Family Court: April Kuchuk, Ph.D. and Susan Bender Esq.

Westchester Family and Supreme Courts: April Kuchuk, Ph.D. and Susan Bender, Esq.

Brooklyn Supreme Court: Steve Demby, Ph.D.

IDV Manhattan: Rodrigo Pizarro, MD, MBA

Staten Island (jointly IDV, Supreme and Family Courts): Adam Bloom, Psy.D., ABPP

Suffolk Matrimonial Court: Avi Yohananoff, Ph.D. and Larry Braunstein, Esq.

More to come…..

Of News and Interest….

As of August 30, 2016, the definition of parenthood has been expanded and some say redefined in New York and the Association of Families and Conciliation Courts – New York Chapter "AFCC-NY" was examining those critical issues surrounding parenthood at our Spring 2016 conference program. The spring program, Will the "Real" Parent Please Stand Up! The Conundrum of the Biological, Psychological, and De-Facto Parent, was held on June 14th and had over 200 attendees from the bench, bar and mental health community join us at the New York City Bar Association. The program provided an overview of the issues confronted by the judiciary and legal and mental health professionals, as the definition of the family has changed due to the evolving usage of assisted reproductive technology (ART), same sex marriage, transgender parenting, and other alternative family structures. AFCC- NY will continue to look at how the new law impacts children and families.

Sights and Sounds

AFCC-NY Spring 2016: A resounding success!

AFCC-NY

Association of Family and Conciliation Courts
NEW YORK CHAPTER

co-sponsored by

AAML
American Academy of Matrimonial Lawyers
NEW YORK CHAPTER

SAVE THE DATE

FRIDAY, DECEMBER 16TH
8:45 AM - 3:30 PM

NEW YORK CITY BAR ASSOCIATION
42 W 44TH ST
NEW YORK, NY 10036

CME CLE CE CPE
CREDITS PENDING

ANNUAL FALL/WINTER PROGRAM

FEATURING SPECIAL GUEST SPEAKERS

Dr. Marsha Klein Pruett
National President AFCC

Dr. Mindy Mitnick
Featured Member of AFCC

AFCCNY.ORG

Editor-in-Chief

Alberto Yohananoff, Ph.D.

NYC Forensics LLC, 185 West End Ave., Ste. 1C New York, NY, 10023

Tel: (646) 284-5600 • Fax: (212) 706-9136 • Email: nycforensics@gmail.com

Thank you to Karen Simmons, Esq. for her contribution to "Of News and Interest".