

**MENTAL HEALTH ISSUES AND THE USE OF MENTAL
HEALTH EXPERTS IN CUSTODY CASES**

A. Use of the Mental Health Expert.

There will never be more critical witnesses in an contested custody action than those witnesses who are considered to be experts under the law. In most custody cases, this will consist of a guardian ad litem and a psychologist or a psychiatrist. By virtue of their expertise, courts frequently give substantial weight to their testimony and often times they are the key to success or failure in the trial of your case.

Many contested custody cases involve a court-appointed psychologist to evaluate the parties and children and to make a report to the court. On occasion, you will still find the "hired gun" psychologist who appears in court in an effort normally to counter the court-appointed psychologist's recommendation. The Georgia Psychological Association's recommendation for psychologists involved in child custody cases discourages this type of practice. These regulations stress the importance of a psychologist having access to all information and remaining neutral as opposed to conducting purely a fitness evaluation.

As with any area of expertise, all psychologists are not created equal. Specialized competence is required and attorneys often become involved in the selection process and check out any potential evaluator prior to agreeing to them serving in this capacity. Once a psychological evaluation is ordered, the evaluation process can, on occasion, create a substantial delay in the litigation which may be an advantage to a litigant, if that party has temporary physical custody of the child. Additionally, when selecting a psychologist, it is important for a good order to be entered that provides appropriate protection for all parties involved.

Any order requiring a psychological evaluation should have the following issues resolved:

1. The Purpose of the Evaluation. Never assume that a psychologist knows what you intended them to do regarding an evaluation.

2. Require the complete cooperation of both parties.

3. Authorize a psychologist to obtain access to school records and contact other potential witnesses and conduct whatever testing he or she deems appropriate. A psychologist should have access to any mental health professionals who have been treating the child or children or either of the parties.

4. Specifically authorize a psychologist to conduct testing that they believe is necessary. Tests provide the nearest thing to an objective method of answering questions and set forth an individual's personalities, strengths, weaknesses and traits. They also provide a tangible record which you can use to support your case or attack depending on the results of the testing.

5. Provide that the attorneys as well as the court will have access to the written report at least thirty days prior to the trial of the case.

6. Specify under what conditions and terms the attorneys will have access to speak directly to the psychologist involved.

7. Determine who is responsible for the payment of expenses and fees.

Attached is a proposed order for convenience.

Attorneys should try and maintain a good relationship with the psychologist, contact them immediately and begin to provide them with information regarding their client's position. They should determine what information the psychologist needs and have their client provide this on a

prompt basis. Psychologists frequently wish to see copies of depositions as well as other evidence that can be helpful to a party.

The best method for making the most of an expert witness such as a psychologist is to provide them with a good foundation, all of the information that a party has available to support their case, and cooperate with them whenever possible.

In order to fully utilize the psychologist, an attorney should make certain that whatever report is ultimately supplied to the court is full and complete and provides good detail and recommendations if at all possible. The attorney does not have control over what the psychologist puts in the report. However, he or she may be able to ask them to set forth specifically what recommendations they make regarding custody and visitation. This can help avoid litigation and future disputes over what the psychologist really meant if matters are spelled out in detail initially. If the psychologist is supporting a position which is advantageous to one party, it is wise to have a proposed custody and visitation order for the psychologist to review. It is helpful to everyone involved and convenient for the court if an attorney can introduce into evidence a proposed custody and visitation order and have the psychologist indicate that this is what they recommend as the proper result in a particular case.

Unfortunately, on occasion, the psychologist is not going to be favorable to an attorney's client's position. The attorney is then left with the task of cross-examining an expert in an effort to make the most out of their testimony that she can. If this is the case, it is important for the attorney to conduct a discovery deposition prior to confronting the expert in court for the first time at trial.

When cross-examination is required, it is often best to approach the cross-examination without trying to challenge the expert in their opinion too strongly. Like most people, psychologists,

when challenged, often become more defensive and will defend their position strongly. However, as cross-examination continues, the attorney can afford to be more challenging of the witness based upon the types of responses that are being received.

The attorney should try and bring out any bias that may be inherent in the situation and whether or not there may be any type of relationship between the therapist's testimony in this particular case and their testimony in other cases. It is imperative to bring out the fact that therapists' opinions are not based upon facts, but upon what they believe the facts to be based on what they have been told. This will allow an attorney to attack the underlying facts if there are errors.

An attorney should also find out the number of evaluations the psychologist has performed and how many times the psychologist may have recommended custody be placed in the father or mother or jointly. It is essential to subpoena the entire file of the psychologist and take an opportunity to review this information prior to trial. A psychologist will not release test results directly to an attorney, but will release them to another psychologist who can be retained to review the tests and to provide advice regarding the testing. Most attorneys do not have the skills to review the testing themselves anyway and the use of an expert to assist in reviewing the testing of the court-appointed psychologist can be of tremendous benefit.

The psychologist's file may also contain many documents which may have been submitted by a party of which the attorney has no knowledge. This may include histories of the marriage or diaries. Some testing such as sentence completion tests are easy for even attorneys to understand and can provide useful information. At the beginning of the evaluation, some psychologists require a parenting questionnaire to be completed by both parties, which is comprehensive and which can provide good information for cross-examination purposes. It can also be used to impeach information

that is set forth in the report and to try to show that the psychologist may have relied upon information from a party that was false or incomplete.

Yet another reason to depose the psychologist prior to trial if their report is unfavorable to your client, is that many psychologists will write their report in a more polite fashion than their testimony will be. It is an extremely unpleasant experience to begin cross-examination of an expert whose report may be against a party but is somewhat mild in comparison to the testimony that is being presented on the witness stand.

In cross-examining the expert, the key is to remember limitations. An attorney should make an attack only upon areas that she can legitimately attack, but should not engage in an argument with a psychologist or discussions of theory regarding psychology. Simply put, the psychologist knows more about these topics than the attorney and it is not a battle that the attorney can win.

Utilizing experts effectively in the trial of a custody case is normally the easiest part of the process. The difficulty is in doing the preparation and laying the foundation to hopefully ensure as good a recommendation as can be received under the facts of a particular case. Good preparation remains the most significant key to a good result.

B. Preparing for Psychological Evaluations.

Custody evaluations are complicated, time-consuming, and stressful for all parties. An attorney can help by preparing their client for the process. Many parents fear meeting with a mental health professional, which is understandable. An attorney should encourage them to be themselves. Often times, when a party feels that he or she must cram for a psychological test or evaluation, for example, they may make a grave error. People who try to outwit the examiner often forget to sell themselves as parents.

Perhaps the best way clients can prepare is to think of the evaluation as competition for a promotion. Previous on-the-job performance is important, since a bad track record may be a high hurdle that cannot be cleared. However, the mental health professional will identify both parents' strengths and weaknesses. Clients should realize that behaviors such as finger-pointing and making grandiose promises will not help them obtain custody of their child. Instead, custody will be placed in the best-qualified individual who understands that the requirement is rearing a child who functions well and is intellectually, emotionally, and socially healthy. The custodial parent must also have the desire and skills to assume responsibility, and must recognize the importance of other significant people (relatives, teachers, and so on) in the child's life.

Like family lawyers, custody evaluators realize that relationships are two-way streets. Most marriages fail for a variety of complicated reasons. Both parties usually have played a major role in the failure of the marriage, though the party seeking a divorce is often perceived as having caused it. An attorney should encourage their client to discuss their feelings openly and honestly and give them emotional support. It is also important to explain to clients that it is inappropriate to try to enlist the custody evaluator as an ally in "poor me" or "get the spouse."

Any information divulged during a custody evaluation may be noted in a report or subsequent testimony by the mental health professional. Additionally, any information from an evaluation may be discussed with the other party to clarify a position or elicit information from the other side. Before evaluations, the attorney shall apprise her client of this possibility. Off-the-record comments cannot be honored. If personal information that is probably irrelevant to the evaluation might prove embarrassing, clients should not disclose it. On the other hand, deliberately omitting relevant

information creates significant problems. Custody recommendations made with inaccurate or insufficient information are neither credible nor useful.

During the referral process, issues such as alleged spousal abuse or child molestation should be communicated. By addressing them early with the evaluator, they can be resolved in a timely and appropriate way. Highly regarded custody evaluators may be reluctant to accept a case involving issues in which they lack expertise. They will probably refer those clients to another custody evaluator or consult with an expert.

Psychological testing of the parents can provide useful, unbiased information. The results should not, however, be viewed as the last word. The parent with fewer psychological problems may not be the most appropriate custodian. For example, a psychologically healthy father who travels Monday through Friday cannot provide the daily monitoring and emotional contact needed by a preteenager who is acting out. The results of any tests should be evaluated along with the interview information, history, and so on.

Remember that not all behavior is psychologically determined. Psychologically “normal” people can and do behave irrationally and in ways that cannot be explained by their psychological makeup. These behaviors are situationally determined. Just as otherwise normal people may commit crimes during domestic disputes, parents involved in a custody dispute may exhibit deviant or pathological behavior.

The parents' understanding of and relationship with the child are also important factors. Good parents combine love, nurturing, and behavior monitoring (e.g., school attendance, homework) while encouraging independence. Parents who fail to promote peer relationships limit their children's development. Emotional well-being and social skills are outgrowths of peer relationships. Watching

each parent's interaction with the child is useful in determining whether there are problems and whether their interactions are consistent. Problems may be indicated by a parent's request that the child perform tasks that are too difficult or by the parent's inability to get the child to cooperate in a task.

Before a custody evaluation, the children should be told that an evaluator helps parents decide what is best for children. Parents should be strongly discouraged from coaching children or burdening them with making a choice. Children's feelings are important, but custody decisions are not popularity contests. Further, in many cases a parent who denigrated the other parent or tries to destroy the other parent's relationship with the child is not the best choice for custody. A parent who tries to limit the evaluator's contact with the child is suspect as well.

In addition, parents should be advised not to panic when they learn that their child has positive and negative feelings toward them; this is normal. A child's rigidly positive or negative view of a parent signals the need for further investigation.

An attorney should educate her client about the evaluator's role. A custody evaluation, like the impending investigation, is a frightening process during which parents' mistakes and errors in judgment, and inaccuracies will be examined and revisited. No one is immune from feeling vulnerable, threatened, and out-of-control. Lawyers' allegiances are obvious, but the custody evaluator's allegiance is to the child. Regardless of the ultimate result, the evaluator is neither an advocate nor an enemy of either parent.

C. The Final Trial of a Custody Case

If the evaluations and investigations that have taken place prior to the final trial of a custody case have gone well, then, hopefully, a final trial is never necessary, and the parties will be able to

reach a reasonable settlement of the custody and visitation issues. Frequently, when the guardian ad litem tenders his/her report to the court, and the psychological evaluations are in, the parties then settle matters since the result is frequently very clear.

In the event a final trial is necessary, the key is, as it was for the temporary hearing, preparation. More often than not, if psychological evaluations have taken place, a guardian ad litem has also been appointed, in which case, the guardian's report and the psychologist's recommendations are often aligned. At a final trial, different judges allow the guardian ad litem to serve different roles, and this will effect your preparation and how you handle the presentation of your case. Some judges believe that the guardian has the authority to act as an attorney and to question witnesses, and then to be put on the witness stand as an expert and examined regarding their report. This appears to be the most common scenario that you are likely to encounter.

In the event the guardian ad litem and the psychologist are in agreement regarding their recommendations, the case may for all potential purposes be over. Absent some unusual circumstances, it is rare for a judge to ignore both experts. At trial, it is wise to, again, present the court a proposed custody and visitation order to simplify the court's task. The attorney should try and stress the reasonableness of the proposed order and how it protects primarily the children, but both parties' rights as well.

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

_____	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	FILE NO. _____
	:	
_____	:	
	:	
Defendant.	:	

ORDER FOR CUSTODY EVALUATION

It appearing that the parties agree to a custody evaluation to assist the Court in determining the issue of custody of the parties' minor children, it is hereby

ORDERED that _____ is appointed to conduct such evaluation. In the course of her evaluation, _____ shall interview both parties, the minor children, and such other individuals as _____ deems necessary.

_____ shall be entitled to access to all medical and educational records of the minor children, as well as all medical, psychological and psychiatric records of the parties, and she shall conduct such testing and utilize such other clinical tools as she shall deem necessary to do a full and complete evaluation.

The parties shall cooperate fully with _____ concerning the evaluation and shall make the children available to _____ as requested. Both parties have waived for themselves any privilege of confidentiality with _____ and do waive on behalf of their minor children any such privilege of confidentiality.

CONSENTED TO:

Georgia Bar Number
Attorney for Plaintiff

Georgia Bar Number
Attorney for Defendant