CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 159 years

THURSDAY, JUNE 5, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 111

What's the proper use of custody evaluators?

Section 604(b) of the Illinois Marriage and Dissolution of Marriage Act allows courts to seek the advice of "professional personnel" regarding matters before the court such as child custody.

In conjunction with Section 604.5, this section is regularly used to engage the services of professionals (primarily psychiatrists or psychologists) to conduct child custody evaluations. These evaluations can be, and often are, given tremendous weight in custody disputes.

Where the mental health of parties or their children is at issue, the necessity of these reports, and the professionals who create them, is unquestioned. Counsel may take issue with the credentials, methodology or conclusions of evaluators on a case-by-case basis, but a properly credentialed psychiatrist or psychologist in good standing would undoubtedly hold up to a Frye or Daubert examination and qualify as an expert to opine on the mental health of litigants and any mental health issues affecting custody or parenting time.

Such expertise can be essential to a judge's understanding of the evidence before the court.

But what about cases where the mental health of the litigants is not at issue? Is expert testimony appropriate in such cases? In practice, most custody cases hinge on facts and preferences, not genuine mental health issues. So what "expert" opinion is actually being rendered in these matters?

Consider two healthy working parents and their well-adjusted child. They live in a Bucktown condominium. The child attends private school nearby. Father hopes to maintain the home with the child subject to mother's parenting time. Mother desires to move to Wheaton and enroll the child in public school. Both parents contribute to the upbringing of the child and have legitimate motivations for their respective plans.

Should this case be submitted to a mental health expert for a 604(b) custody evaluation?

According to Frye, expert testimony must be based on a foundational scientific principle that has achieved "general acceptance" in the particular field in which it belongs. No scientific methodology has gained general acceptance in the fields of forensic psychology or psychiatry that would allow an expert to opine in compliance with Frye on the appropriate custodial and parenting determinations for this family.

The custody evaluator would consider facts accumulated in interviews and observed interactions and opine based on what? Skill, experience and education? Frye and Daubert tell us this is not enough to qualify as expertise without the application of generally accepted scientific principles.

Too often, attorneys must deal with custody evaluations that lack grounding in scientific methodology, empirical data or relevant psychoanalysis. This creates serious due process concerns for clients, as many courts give significant weight to the opinions of custody evaluators, sometimes accepting their reports without proper critical consideration or using them to make decisions that are otherwise too emotionally difficult to make.

Fortunately, there is a viable alternative.

Most cases call for factual investigations, not scientific opinions. These cases should be dealt with through the appointment of a guardian ad litem.

The overreliance on expert opinions is most pronounced in Cook County where the appointment of the child's representative is far more common than in other jurisdictions. The guardian ad litem fills the role that courts use children's representatives and custody evaluators to accomplish: to be the eyes and ears of the court, to investigate the circumstances of a custody case and to report back to the court.

Through the GAL, investigation of schools, homes, social and familial contacts and other relevant considerations are presented on a factual basis without the trappings of perceived scientific expertise.

But the all-too-frequent appointment of the child's representative creates an unfortunate hybrid where the attorney operates as a pseudo-mediator, -investigator, -advocate. Such middle ground prevents the effective execution of any of these tasks because the child's representative must often temper his or her recommendations, or avoid making them altogether, for fear of undermining his or her own ability to remain a neutral settlement facilitator.

As a result, the child's representative often waits for the completed custody evaluation to use as grounds for his or her own recommendations, without the threat of being called to testify in defense of them.

By comparison, a guardian ad litem is statutorily obligated to investigate the factual circumstances and submit a written report to the court. That GAL is subject to deposition and cross-examination where the merits of the investigation can be considered in due process. Jurisdictions beyond Cook County less readily appoint children's representatives and therefore are often less in need of custody evaluations, allowing the GAL to fill that role. Cook County judges and attorneys should consider this alternative approach more often.

Further hampering Cook County is the abject absence of any coherent standards for appointment of custody evaluators. For comparison, examine DuPage County Local Rule 15.16, Lake County Local Court Rule 11.05 or Kane County Local Court Rule 15.22.

These local rules provide detailed guidelines for the qualifications of evaluators, their processes, usage of psychological testing and the like. By establishing guidelines for custody evaluations, these jurisdictions have taken some of the variability out the process and provided more certainty than Cook County can offer its litigants.

While custody evaluators provide a vital service to litigants, we should take time to consider their proper application in custodial litigation. If two relatively healthy parties cannot decide their own custodial terms, then the court should make that decision based on the factual merits of the case, not the perceived custodial expertise of a mental health professional.

MODERN FAMILY

JAY P. DAHLIN

Jay P. Dahlin is a partner at Schiller, DuCanto & Fleck LLP whose practice concentrates on financially complex divorce matters and contested custody litigation. He has tried numerous cases, winning custody and support for both fathers and mothers in Cook, Lake, DuPage and McHenry counties. He can be reached at jdahlin@sdflaw.com.