

Presented:

Innovations-Breaking Boundaries in Custody Litigation

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TRIAL STRATEGIES: LETTING YOUR DESTINATION DICTATE THE LITIGATION ROUTE

It's not unusual for a court, on its own or on a motion of one or both parties, particularly in high conflict custody cases, to appoint experts such as psychologists, psychiatrists, social workers and licensed mental health counselors, and to consider their resulting professional opinions on issues related to the custody of children. Nor is it unusual for one or both of the attorneys on such cases to also retain her own expert or experts to serve either as a non-testifying consulting expert or to serve as a retained testifying expert. Experts in the family law arena, whether court-appointed or privately retained, are critical resources for the family law litigator. Among the many questions to be considered when determining the use of experts are: who should consult and who should testify?; what are the goals for the end of the case?; what tools are available?; what tools are best suited to successfully navigate the path to the ultimate destination?

In examining the use of experts in the family law arena, we naturally turn first to the Texas Family Code. The only provisions that actually address qualifications and procedures in child custody evaluations are found in Chapter 107, Subchapter D, sections 107.0501 – 0514. The Texas Rules of Civil Procedure, also, in part, address the role of mental health experts in family law cases. Rule 204.4 in the Texas Rules of Civil Procedure provides, in relevant part, that:

“In cases arising under the Family Code Titles II or V, the court may – on its own initiative or on motion of a party – appoint (a) one or more psychologists or psychiatrist to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties...”

While Rule 204.4 clearly applies to Title II and V and works in conjunction with Rule 204.1, it is not clear from the rule itself, or the case law, that this particular statute authorizes the court to appoint a mental health expert to conduct a child custody evaluation. The Texas State Board of Examiners of Psychologists, in addressing the purpose of child custody evaluations, states that it “...is to access the individual and family factors that affect the best psychological interest of the child.” A mental examination of one party or the child would not be an assessment of the best interest of the child. Further, an examination of one party or the child does not meet the professional guidelines set forth for psychologists performing a child custody evaluation.

In the unreported custody case out of the Eastland Court of Appeals, *In re K.J.C.H. and S.K.V.S.*, not reported in S.W.3d (2002), appellant argued that the trial court erred in denying his request that a psychological evaluation be conducted upon appellee. In addressing this issue, the court stated succinctly, that “[t]he procedures for obtaining a mental examination of an opposing party in a child custody case are set out in TEX.R.CIV.P 204.1 and 204.4.

Unfortunately, there is little other statutory guidance in the family law arena upon which to rely. The opinions of experts on the issue of child custody come before the court in a number of ways, in a variety of forms and under various labels. In fact, across the state of Texas, from county to county, there exists a difference in terminology that is used when there is an order directing a mental health professional to perform an evaluation to make recommendations for custody and, or visitation. In some counties, an order may be for a ‘custody evaluation’ while in other counties, it may be an order for ‘psychological examination’ or ‘mental health evaluation’. In some counties, the court will only sign an order which appoints a psychologist to perform the evaluation, while another will only appoint a psychiatrist. In still other counties, the courts order a social study be conducted. Some counties order a social study be performed as well as a psychological examination. Regardless, in almost every case in which an evaluation is ordered, the court orders the ‘custody evaluation’, or ‘psychological examination’ or ‘social

study' so that there may be a person with specific expertise who can gather and sort through facts and data, which will be both relevant and reliable information and upon which the court may rely when making its final determination. Is a 'social study', a 'psychological examination' and a 'custody evaluation' the same thing? Despite how these terms are bandied about between attorneys, and courts throughout our State, are these truly interchangeable labels and designations? Does an expert appointed in a particular county know what the court, attorneys and litigants are expecting when they receive an Order for Psychological Evaluation? If the expert's next contact with the court comes by way of another case, another order – this one entitled, Order for Custody Evaluation, does this expert view this as the same? Does a 'custody' evaluation include making recommendations on rights and duties beyond that of residency? Visitation? What does a 'psychological examination' tell the court about a person's ability and skills to parent a particular child at a specific level of development? What does a DSM-IV diagnosis of a party reveal about that person's ability to meet a child's needs?

Is more statutory guidance necessary to define child custody evaluation qualifications and procedures?

Is there a need for uniformity across the state so that each judge, attorney, and litigant knows exactly what issues are in question and that the answers will be relevant and focused as to the needs of this case and these children?

After defining the goal of the case, the next question should be, is a court appointed evaluation helpful? Obviously, there are times that that decision is made by the court or by opposing counsel. Regardless, don't just accept any appointment and sit back and wait for the recommendation. Advocate for your client from the beginning by investigating a possible forensic expert to conduct the evaluation and be prepared to argue why that expert should or should not be appointed based on the special issues in a particular case for which that expert may or may not have special training, continuing education and proven expertise with those issues. In addition, a decision must be made as to whether you should retain your own expert as either a testifying or consulting expert. At that point, or later in the case, a decision may be made as to whether your testifying expert should be allowed to examine the other party pursuant to TEX.R.CIV.P. Rule 204.

What are the consequences if you decide that your consulting expert should become a testifying expert? Are the notes that pre-date the change of status discoverable? Can those notes be destroyed if created prior to the change of status? Are those notes that pre-date the change in status required to be legible pursuant to professional guidelines for forensic experts?

A testifying expert is an expert who may be called to testify as an expert witness at trial. TRCP 192.7(c). Testifying experts are either retained or non-retained. A retained testifying expert is one retained by, employed by or otherwise subject to the control of a party. Conversely, a non-retained testifying expert is one who is not retained by or employed by a party. Examples of a non-retained expert include an emergency care or clinic doctor or nurse, a CPS worker, a treating physician or therapist and a court appointed expert.

The evaluating expert cannot serve, or have served, as a therapist for one of the parties or the child involved in the suit. The dual role of therapist and evaluator compromises the evaluator's objectivity and creates serious limitations and possible biases inherent with providing testimony in a forensic capacity. The evaluator should decline the role and if the evaluator does not, then it is incumbent upon the attorney that she requests that evaluator be enjoined from testifying as an expert witness who gives a professional opinion regarding custody and visitation issues.

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