

Family Law

The Custody Evaluation: Family Law's Dirty Little Secret

By Cathryn A Mitchell

I have written many articles for the *New Jersey Law Journal* over the past 15 years. Typically, I write about intellectual property. But over the past three years, I added to my repertoire two articles about family law. I suppose you could say I am an intellectual property lawyer with some experience in the family law arena. My choice of the word “arena” is intentional.

Yes, family law is an “arena” in the classical sense: by one definition, the central area of an ancient Roman amphitheatre, in which gladiatorial contests and other spectacles were held; by another, a central stage, ring, area or the like, used for sports or other forms of entertainment, surrounded by seats for spectators. It is a center stage, often entertaining; often combative; filled with conflict; often bloodied participants as in a boxing match; and, in many cases, a circus.

This setting would be appropriate for family law matters, *if* the contests were between two knowing and consenting adults with equal power, and there was no collateral damage, such as harm to dependent spouses and their children.

Let me first issue a few disclaimers

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before I continue with what I expect will be a provocative article on a sensitive subject. First, I believe that the courts of this state do not intend to cause children or parties harm when they order a custody evaluation performed in a matrimonial case. I believe that courts intend to use custody evaluators who are qualified, competent and unbiased; and I believe it is possible that children could potentially benefit in certain cases where custody evaluations are ordered. I also believe that, in many instances at least, courts appreciate the information provided by the experts as being helpful to the decisions the courts will make regarding custody of minor children in divorce.

However, and here is where the train often falls off the tracks: as well-intentioned as the courts may be, often the parties are not; and as good and qualified and erudite and unbiased as the “custody evaluators” may appear on paper, sometimes they are none of these things. Which means that a custody evaluation can be nothing more than a costly, stressful weapon in the arsenal of an unscrupulous party, whose sole motive is to limit the amount of alimony and child support he ultimately pays, or otherwise shore up his leverage to obtain what he perceives will be a more favorable financial settlement when a marriage unravels.

I also believe that what has become fairly routine conduct in these matters violates the New Jersey Rules of Professional Conduct, and may subject every practicing family lawyer to malpractice liability, as well as to liability under tort theories, such as intentional infliction of emotional distress.

So where do we, as lawyers, come in?

What It Is Supposed To Be

Typically, it is expected that a custody evaluation will be a detailed and thorough examination of all members of a family to determine the best interests of the children involved. Sometimes the evaluation includes psychological tests — many different tests, in some cases — administered by a forensic psychologist selected to perform the evaluation.

The scope of the custody evaluation can vary widely. This can be affected by many factors, including the protocol used by the particular evaluator.

Protocols vary, and yes, there is right and there is wrong. It is the job of the family lawyer to know which protocols are appropriate, which are not, and to be prepared to challenge an evaluator who goes off the rails.

One example of “going off the rails” would be administering psychological tests to parties that are either not considered conclusive of anything, or are otherwise highly prejudicial. Do not allow your client to go blindly into the evaluation without an understanding of what he will encounter in his meetings with the evaluator. That, in itself, is potentially grounds for a claim of malpractice.

The evaluations also generally include detailed interviews of all caregivers, including new partners; interviews of children four years and older; observation of the children with each parent in a neutral setting; interviews with the children's therapists, doctors, teachers and others who know the children well and are familiar with the parents; and criminal record check of parents, stepparents or any other adult who is considered a party to the custody dispute.

Amazingly, even a party "against whom" a custody evaluation is being sought must often pay half of what can be close to \$20,000 for the custody evaluation, and the process can take as long as a year.

What It Is — Sometimes

Sometimes, one or both parties in a divorce scenario decide to make the fate of the children an issue in the divorce. This is often less driven out of concern for the fate of the children, per se, than the fate of the pocketbook of the party who believes he may *not* "naturally" have primary parenting responsibility for the children going forward.

So imagine this scenario: one of the parties decides to be clever and "doctors" evidence for a custody evaluation. What could this look like?

Well, for starters, let's say they begin secretly tape recording their spouse. They cause an argument, or perhaps ignore the spouse or say something provocative in front of the children. Then, they switch on the tape recorder when the spouse starts to scream. Then they weave multiple "halves" of conversations together into a mosaic that makes your client sound like a raving lunatic, all for the benefit of playing it for the custody evaluator.

The unscrupulous spouse may also comb through the personal files and records, including computer files, of your client looking for potentially prejudicial information.

All of this can then end up in a report that is skewed against your client as a result of manipulation by what is often an abusive and unbalanced spouse.

The Role of the Family Lawyer

Our job entails more than helping our client accomplish his or her objectives. We are not mercenaries, but professionals. We are bound, above all, by the Rules of Professional Conduct, which apply not only to our representation of our own client but also to our involvement with third parties.

We need to keep this at the forefront of our minds, particularly when considering requesting a custody evaluation in a divorce case. If this is a strategic maneuver designed to torment the party who is "naturally" likely to gain primary custody — generally the mother — be careful. Besides the moral implications of intentionally harming others for our client's perceived financial gain, there are ethical implications as well, for example:

- *RPC 3.1. Meritorious Claims and Contentions.* "A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous...."

This means, in the case of a custody evaluation, that the lawyer must *know or reasonably believe* that a custody evaluation will advance the best interests of the children. This is a high standard that many cases in which evaluations are requested or threatened cannot meet.

- *RPC 4.4. Respect for Rights of Third Persons.* "(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person...."

A custody evaluation can potentially terrify a litigant and children, and cause substantial financial hardship, particularly where the evaluation is being sought by the monied spouse, and the nonmonied spouse is dependent on the other for financial support. This strategy can delay the proceeding of the matrimonial case, and burden at least one of the spouses.

Tort Claims

We should not be surprised if the

unscrupulous efforts to use custody evaluations to extract financial leverage yield physical and emotional harm to our adversary's clients and their children. When this happens, we open ourselves up to claims for intentional infliction of emotional distress, where: (1) we acted intentionally or recklessly; (2) our conduct was extreme and outrageous; (3) our actions in requesting the custody evaluation were the proximate cause of plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

In many feigned "custody" battles, these elements can be met sufficiently to withstand a motion to dismiss.

No Confidentiality of Psychological and Medical Records

You should also tell your clients that those counseling records they thought were confidential will come into a custody evaluation as evidence to be used against them. Yes, the "custody evaluator" will demand signed releases to obtain all psychological and medical records for the past five years or more. If your client refuses to sign the release, the evaluator may seek a court order requiring the treating physicians to turn over the records. As such, your client's attempt to seek help to deal with an abusive spouse, for example, or to treat breast cancer, may be turned against her and she may risk losing her children precisely because she had the courage to seek help.

What It Will Be, Hopefully, One Day Soon

What has in many instances been a "dirty little secret" among family law circles will hopefully come into the light as there is more writing and speaking on the subject. Family lawyers have legal and moral obligations to become familiar with what custody evaluations entail before requesting them or consenting to them on behalf of their client.

And those family lawyers consulted well in advance of a planned divorce must advise clients with children to expect and prepare for a custody evaluation — and explain all that is involved — or face potential claims for malpractice.■