A legal note from Marshal Willick about ensuring that the input of psychologists is restricted to a correct – and quite limited – place in making child custody and relocation decisions.

A recent case has re-emphasized the vigilance necessary by lawyers – and especially judges – to ensuring that the legal process is not distorted by, or surrendered to, mental health professionals who are not qualified to make legal determinations relating to child custody.

I. THE LEGAL BACKGROUND

A. CUSTODY GENERALLY

For many decades, Nevada has proclaimed by statute and case law that a child's best interests are paramount when considering issues of custody and visitation. NRS 125.480(1); *Culbertson v. Culbertson*, 91 Nev. 230, 233, 533 P.2d 768 (1975). As stated by the Nevada Supreme Court, "[i]n custody matters, the polestar for judicial decision is the best interest of the child." *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1270-71 (1991).

The Nevada Legislature has set out a specific list of factors in NRS 125.480(4) that a trial court ***must*** consider in any case involving determination of the best interest of a child:

(a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.

(b) Any nomination by a parent of a guardian for the child.

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

(f) The mental and physical health of the parents.

(g) The physical, developmental and emotional needs of the child.

(h) The nature of the relationship of the child with each parent.

(i) The ability of the child to maintain a relationship with any sibling.

(j) Any history of parental abuse or neglect of the child or a sibling of the child.

(k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

(l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

In any given case, factors can militate in different directions. It is the task of the trial court to properly weigh all of them – and any other relevant information presented in the case – in order to fulfill the mandate of issuing an order intended to serve the best interest of the child.

B. RELOCATIONS

The Nevada Supreme Court has long recognized the multi-faceted balancing of rights and responsibilities in play in every case where a parent seeks to relocate with a child to another jurisdiction:

> The proper calculus involves a balancing between "the custodial parent's interest in freedom of movement as qualified by his or her custodial obligation, the State's interest in protecting the best interests of the child, and the competing interests of the noncustodial parent."

Davis v. Davis, 114 Nev. 1461, 1465, 970 P.2d 1084, 1087 (1998) (quoting from *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991)).

Such cases are not a simple pick between parents' conflicting desires, but require a much more subtle balancing of multiple viewpoints and interests, some of which are of Constitutional dimension (*e.g.*, freedom of movement and right to parent).

II. THE PROPER ROLE OF PSYCHOLOGISTS AND RELATED PROFESSIONALS

In the polarized and contentious world of custody and relocation cases, judges are often faced with allegations of lousy parental behavior and its impact on children. Judges are quite appropriately reluctant to put children on the stand or otherwise involve them in the legal proceedings any more than necessary.

This often leads to utilizing mental health professionals in an array of possible tasks, from child interviews on contested questions of fact, to full-blown custody evaluations involving subjective observation and objective testing of some or all of those involved in a case. This input can enter the litigation in a variety of ways, from a background report to testimony at an evidentiary hearing.

The February, 2009, "Guidelines for Child Custody Evaluations in Family Law Proceedings" approved by the American Psychological Association ("APA") Council of Representatives correctly notes that "Psychologists render a valuable service when they provide competent and impartial opinions with direct relevance to the 'psychological best interests' of the child." *See* 65 American Psychologist No. 9 at 863-67 (Dec. 2010).

An informed opinion as to such "psychological best interest," accompanied by any objective data uncovered by a mental health professional as to the ability of the parents to function as care-givers, provides a trial court with ***one*** piece of the information the court must weigh in making either a custodial or relocation decision, along with others.

Or, as the APA Guidelines put it:

> The extensive clinical training of psychologists equips them to investigate a substantial array of conditions, statuses, and capacities. When conducting child custody evaluations, psychologists are expected to focus on factors that pertain specifically to the psychological best interests of the child, because the court will draw upon these considerations in order to reach its own conclusions and render a decision.

Given the emotional intensity of the proceedings and the importance one or both sides tend to put on outsourced evaluations, etc., it is no great wonder that some mental health professionals get a little carried away with their importance in family law matters. Shrinks are hardly immune from human nature, and the impact of fearful, anxious people putting great stock in one's opinions cannot help but have an influence on those whose opinions are solicited.

Unfortunately, it has led some mental health practitioners to misconstrue their role in legal proceedings, ceasing to see themselves as contributing a piece to a puzzle, and instead seeing themselves in the role of decision-makers.

III. AN ARROGANT ASSERTION OF SELF-IMPORTANCE, AND (PARTIAL) RETREAT

A. NATIONALLY

A couple of years ago, the APA issued proposed new guidelines, quietly dropping the word "psychological" from their task in evaluating families – from "best psychological interest" to "best interest."

Changing a single word can mean a great deal, and the use of the identical term to what courts try to determine was not accidental. The purpose was to put psychologists in the role of directly informing courts what to do, altering and elevating their position from that of "expert" to that of "arbiter."

Some of those interested in the field – both psychologists and legal scholars – noticed, and complained. Among attorneys, Lynne Z. Gold-Bikin of Pennsylvania was among the most vocal in opposition to the proposed change. She spoke eloquently about the foolhardiness of having mental health professionals address a legal standard. Many mental health professionals – among them the well-respected Jonathan W. Gould, David Martindale, and Jay Flens – also provided feedback to the committee drafting the guidelines, either formally or informally.

The APA committee changed course. The ultimate 2009 Guidelines acknowledge that a psychological recommendation is not appropriate at all in some cases, and:

> If a recommendation is provided, the court will expect it to be supportable on the basis of the evaluations conducted. . . . If psychologists choose to make child custody recommendations, these are derived from sound psychological data and address the psychological best interests of the child. When making recommendations, psychologists

> seek to avoid relying upon personal biases or unsupported beliefs.

Emphasizing the direction for psychologists to do such work with a humble concept of place rather than an arrogant presumption of knowledge they in fact lack, the Guidelines also add the sage advice that "Psychologists are encouraged to monitor their own values, perceptions, and reactions actively, and to seek peer consultation in the face of a potential loss of impartiality."

The Guidelines reflect on their face the back-and-forth debate recounted above, citing commentary critical of the proposed arrogation of directly commenting on legal standards, and noting that:

> The specific nature of psychologists' involvement and the potential for misuse of their influence has been the subject of ongoing debate (Grisso, 1990, 2005; Krauss & Sales, 1999, 2000; Melton, Petrila, Poythress, & Slobogin, 2007).

See Tippins, T.M., & Wittman, J.P. *Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance* (Family Court Review, 43, 193-222, 2005).

But the 2009 Guidelines were a committee project, and those striving to elevate the position of psychologists in evaluations peppered the final work product with some foretastes that they might try again:

> Although the profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (i.e., "ultimate opinion" testimony), psychologists seek to remain aware of the arguments on both sides of this issue (Bala, 2006; Erard, 2006; Grisso, 2003; Heilbrun, 2001; Tippins and Wittman, 2006) and are able to articulate the logic of their positions on this issue.

B. LOCALLY

The fallout from this conceptual struggle is definitely being seen in Nevada family courts. It is not universal, of course – several local psychologists display a keen grasp of the legal process and their appropriate place in it. However, I have cross-examined a number of psychologists hired by counsel – or appointed by the court – to perform custody evaluations in this State whose testimony indicates that some of them don't get it.

In my experience, most psychologists (with some notable exceptions) have no clue what the legal factors for a "best interest" custody determination might be – and they don't care. The problematic ones perceive no conflict between that ignorance and making a best interest custody recommendation anyway, based entirely on their ***own*** standards and factors, and generally not even acknowledging the difference between "psychological best interest" and ***legal*** "best interest" determinations.

Similarly, psychologists have readily admitted on cross-examination that they have no idea what the legal standards for granting or disallowing relocation requests might be – and again, they don't care. A recent case of mine involved an outsourced evaluation that attempted to arrogate judicial responsibilities at least three separate ways.

First, the psychologist proposed an entirely new and original test for when a relocation is "appropriate" – which was primarily notable for having nothing to do with the Nevada Supreme Court's holdings on that subject.

While it is an aside, the danger of a psychologist purporting to apply a legal test was immediately apparent from the report having screwed up its own analysis: after confirming a history of domestic violence, the report concluded that the history was a "risk factor [militating against] relocation." The Nevada Legislature, of course, has found as a matter of public policy that a history of domestic violence should disqualify a parent as a primary or joint custodian, and the Nevada Supreme Court has opined that domestic violence by the left-behind parent is a factor ***favoring*** a relocation request. NRS 125.480; *Hayes v. Gallacher*, 115 Nev. 1, 972 P.2d 1138 (1999).

The psychologist went even further, however, explaining in some detail "disagreeing with" current relocation law, and stating that in the psychologist's opinion, "a high standard should be established for [relocation] in custody dispute situations."

So instead of the balancing test set out by the Nevada Supreme Court (see above), the psychologist apparently sought to directly tell the judge what to order based on a variation of the "Relocation Risk Assessment" ("RRA"), allegedly used by some in the psychological community for determining "long term behavioral outcomes of a child" after relocations, but which grew out of a limited sample group that should not be relied upon for much. The conclusion of such an analysis uses the same ***language*** as the legal determination ("relocation should be . . .") but has essentially nothing to do with the factors in the legal analysis.

If anything, the RRA analysis could be ***part*** of the process of crystal-balling the "long term psychological best interest of the child" – providing ***one*** component of the legal analysis. In the real world, however, application of the factors to the facts tends to be distorted and biased (as here), and because its results are phrased the same way as the legal determination, it is more likely that the inclusion of an RRA analysis in a report could cause a judge to improperly confuse it with the final determination the court is supposed to make in making the ultimate (and mandatory) ***legal*** best interest and interest-balancing relocation decisions.

The facts made it clear that the mother had always been the children's primary caretaker, so it was not terribly surprising that the psychologist suggested that a schedule leaving the children with the mother most of the time was appropriate, "given her bonds with the children and her historic primary caretaker role." What ***was*** surprising – in fact, astonishing – was the statement in the report that the court should only do what was best for the children "if it does not present an advantage to [the mother] in seeking relocation."

Virtually every aspect of the parts of the report recounted above was improper, bordering on the edge of unethical. First, the psychologist's personal "feelings" about Nevada law – like that of any ***other*** unqualified layman – had no place in any document placed before the court. If anything, the psychologist, under the APA guidelines, should have self-reported the existence of a personal bias on that issue, and said nothing further about it, or self-disqualified from involvement entirely.

Second, that the psychologist did not confine remarks to "psychological best interest," but purported to instruct the court as to the ultimate issue of best interest, was an unwarranted and remarkably arrogant attempted usurpation of the core judicial function.

Finally, the offhand urging of the court to ***subordinate*** the best interest of the child to indulge the psychologist's disfavor of relocations was absolutely breathtaking in its wrong-headedness, from any conceivable legal perception.

The report in this case was not a fluke, and not an exception. Several psychologists issuing child custody evaluations in Nevada's family courts seem to have no proper conception of the limitations of their role, and the acceptable bounds of their reports. But I have yet to see a Nevada judge act on – or even ***note*** – this pervasively corrosive influence on the integrity of child custody and relocation proceedings, and on the legitimacy of the resulting orders. It is past time for that to change.

C. QUALIFICATIONS AND THE ABUSE OF PSYCHOBABBLE

Misuse of psychological tools and terms is not limited to psychologists.

There is a tendency in family court to use Marriage and Family Therapists ("MFTs") or other counselors wherever possible, instead of psychologists, because they are cheaper. That, in and of itself, is okay, but such practitioners cannot properly administer objective test instruments or make diagnoses, and they should ***not*** be asked (or permitted) to perform tasks outside their professional training and expertise.

Some such practitioners, however, cannot seem to resist the urge to do so anyway – and their attempts endanger the legitimacy of every legal determination based on their reports. "Half-priced shrinks" can no more be expected to perform all the tasks required for full outsourced custody evaluations than "half-priced lawyers" could be expected to have the experience and skill of certified specialists. One may, or may not, get what is paid for, but certainly no more, and it does a disservice to everyone involved to pretend otherwise.

One jurist, possessing a bare minimum of training in psychologically-related matters, has purported – both on and off the record – to make unsubstantiated and uninformed snap "diagnoses" of "personality disorders" on the part of litigants, and even of various members of the Bar.

Such cloaking of subjective bias, prejudice, and personal opinion under a veneer of psychological labeling fools no one, but it is problematic when indulged in by a person in a position of authority, since such pronouncements, no matter how outrageous, are unlikely to be contradicted by those dependent on pending rulings. There is the real risk that such a person can come to believe their own propaganda, and cease doing the actual work of judging in favor of the arrogant – if not irrational – belief in some inherent personal ability to perceive "the truth." This defect will lead, sooner or later, to disaster of smaller or larger proportion.

The point here, however, is the rampant misuse of "psychological" labels and conclusions in our

family courts to disguise mere personal bias. Trial courts of this State are bound to apply statutes, case law, and the rules of evidence to reach ***legal*** conclusions in the cases brought before them. The irresponsible – and lazy – substitution of psychologists' personal opinions and arm-chair diagnoses by the unqualified, in place of solid legal reasoning and results, reveals poor performance by lawyers, and especially judges, who should be far more jealously safeguarding the legitimacy of the processes by which legal decisions are reached.

IV. RECOMMENDATIONS

Shakespeare wrote that "All the world's a stage / And all the men and women merely players." If so, in the adversary system, we all have our parts to play. Mental health professionals, brought in to objectively evaluate psychological dysfunction in individuals by use of instruments they are qualified to apply, and divine the psychological best interest of children, should do so – and keep their remaining opinions to themselves.

The gross and pervasive failure of various mental health professionals to perceive and fill their proper place in the legal process is lamentable, but understandable. The true fault lies with lawyers too lazy to learn the relevant guidelines and standards, and insist that they be adhered to – and with judges, who have ceded their authority on ultimate issues to laymen with no legal expertise, and thus endangered the legitimacy of every custody and relocation decision unduly influenced by such reports.

Lawyers should be much more willing to object and move to strike "expert" reports going beyond the legitimate role and knowledge of the experts submitting them. And judges should sustain those objections and ***grant*** those requests to strike.

Much can be smoothed at the outset by judges more properly giving direction to mental health professionals when evaluations are commissioned – expressly confining them to appropriate tasks, and reports. And the reports should be strictly required, as the APA itself dictates, to contain conclusions firmly supported by the facts, as opposed to being vehicles for expression of what mental health professionals "feel" is true, or best.

Judges should require these things as if the legitimacy of their rulings is at stake. It is.

V. QUOTES OF THE ISSUE

"The difference between the right word and the almost right word is the difference between lightning and a lightning bug."
– Mark Twain.

"No psychologist should pretend to understand what he does not understand.... Only fools and charlatans know everything and understand nothing."
– Anton Chekhov (1860-1904).

"You're readin' my mind you won't look in my eyes
You say I do things that I don't realize
But I don't care it's all psychobabble rap to me."
– Alan Parsons Project, *Psychobabble* (EYE IN THE SKY, Arista Records 1982).

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