

Role of Mental Health Professionals in Child Custody Cases

Lawrence Jay Braunstein, Lyn R. Greenberg and Arnold T. Shienvold

November 25, 2014

Mental health professionals have long been involved with divorcing families, but recent years have seen an increase of sophisticated service models, along with some controversy about them. It is important for attorneys to be familiar with qualified professionals, the benefits they can offer to clients, ethical obligations of MHPs and potential controversies.

The Search for Bright Lines

Most attorneys are familiar with the roles of child custody evaluator and forensic expert, and the advanced levels of expertise expected from mental health professionals (MHPs) in those roles. Mental health experts may also be helpful in stabilizing high-conflict situations, assisting counsel, and providing direct assistance or intervention to clients. In their recent article "[Use and Misuse of Mental Health Professionals in Custody Cases](#)" (NYLJ, Aug. 29, 2014), attorney Stephen Gassman and psychologist David Martindale raised concern about some mental health services provided to litigants, and discussed the roles and ethical obligations of MHPs providing consultation or treatment services in child custody cases. They proposed possible criteria for suspecting that a parent is receiving "forensic coaching" to deceive an evaluator or the court. We provide some clarification and context here.

In 2009, The Association of Family and Conciliation Courts (hereafter AFCC) appointed a task force to consider the role of the MHP consultant in a child custody case. The task force did note the dangers of misleading the court when mental health expertise is misused, but did not reach consensus on professional guidelines or many aspects of the MHP consultant's role. The task force also noted several types of services that an MH consultant might provide to a litigant, under the broad heading of litigant education and support. These services include providing information to litigants about the custody evaluation process, developmental needs of children, factors that create risks to children and how to mitigate them, etc.

It is worth noting that some of the information that a consultant might provide to a litigant could also be provided by a highly skilled therapy provider, since psychoeducation is an

important component of many treatment models. Specialized knowledge of child custody issues is important for therapists assisting these troubled parents and families. That subject was addressed by a subsequent AFCC task force, as described below.

Most professionals agree that any attempt to perpetrate a fraud on the court by teaching a client to fake performance on a psychological test, a forensic evaluation, or courtroom testimony is a serious matter, and it is clearly unethical for a mental health professional (hereafter MHP) to assist in such an effort. There is an understandable temptation to propose criteria that would provide guidelines upon which suspicions by other forensic evaluators, opposing counsel or the court could be confirmed or denied.

Nevertheless, gray areas abound in this work. People in pain seek assistance from MHPs in a variety of ways, for a variety of reasons. Not all services are equally effective. Since children and families often bear the greatest emotional carnage from parenting conflict and child custody disputes, it is important that professionals not miss opportunities to create change that benefits or protects them. Years of research and professional development have taught us much about the process of divorce, psychological interventions with high-conflict families, the dynamics of seeking or accepting help, and the qualifications that may be required to help these difficult families.

Current knowledge must be applied to any review of professional conduct, and attorneys should be armed with this information so that they can both assist clients effectively and respond if a client or professional is unfairly accused. It may be necessary to assist the court in differentiating between child-centered interventions, even those conducted through the parents, and interventions designed solely to enhance a parent's position in litigation.

A great many factors complicate the search for bright-line boundaries between good practices versus perpetuating a fraud on the court system, but complexity is a reality in these cases. The overarching concern should be the importance and legitimate need for high quality mental health services to families in pain. Many types of professional assistance can be interpreted differently based on context, the role of the professional, and a number of other factors. At a minimum, professionals must be armed with current professional knowledge and information about the family, and an objective process of analysis that considers benign as well as ominous interpretations of mental health services. Otherwise, those arguably most in need of psychological assistance, and the children who depend on them, are less likely to receive the high-quality, appropriately informed services.

Coaching Versus Change

Historically, psychotherapy was viewed as a voluntary, confidential process entered into by a client who had reached the realization that he needed to make a change in his life. In the context of a child custody case, the analogy would be to a parent independently recognizing a need to change his/her parenting skills. Gassman and Martindale in the

NYLJ article suggest that it is unlikely that a litigating parent would seek this kind of psychotherapy during litigation, since litigating parents often trumpet their superior parenting skills in court documents. This may be true for some parents, and the discerning professional should consider whether 11th-hour behavior changes by parents represent crisis-motivated but genuine attempts to improve, or are simply attempts to gain advantage in the legal conflict.

Nevertheless, it is generally accepted that divorce is a process, and that family systems constantly evolve and change. Parents' perceptions and motivations may also evolve as they deal with changes in their lives and crises created by the custody dispute. Of course, some litigants will only consider changing their behavior if their current approach (often denying personal difficulty) is no longer working for them. The crisis of impending litigation or evaluation might prompt this, and one might argue that an effective and appropriate intervention by a consultant might include persuading a parent to consider such assistance. Fundamentally, this does not make the litigating parent different from the therapy client who accepts anger management therapy to avoid losing his job, or the alcoholic who attends AA to avoid losing a spouse. Both initially may deny personal responsibility for their problems. Nevertheless, it is well established in psychotherapy that insight can follow behavior change, once a client learns that more effective coping skills are possible and can make the client's life easier.

Treatment models have been developed for parents and families involved in custody disputes which include the recognition that parents who initially accept treatment based on a litigation agenda may nevertheless learn coping skills that make life easier for themselves and their children. Children often bear the brunt of parents' difficulties while litigation is pending, as parents may be less attentive, inconsistent with discipline, emotionally distraught, and extremely biased in interpreting their children's behavior. Parents who can learn to more effectively manage their own stress, or even to engage specialized independent treatment for the child, may offer enough relief to their children to provide critical developmental opportunities.

Engaging a mental health consultant as part of the "litigation team" to assist a parent certainly introduces complications, and is a topic of intense controversy in professional circles. Careful ethical decisions are required in these circumstances, and not every consultant rises to that challenge. Nevertheless, there is also a danger of being overly broad in casting suspicion. The careful evaluator may need to employ other techniques to determine whether a parent's professed change is really being applied in daily parenting of the child, and the likelihood that any positive change will endure.

Change initially undertaken for external motivations may become firmly established when parents realize that they, and their children, are happier. That benefits parents and children, regardless of the initial motivation. Objective and ethical analysis requires that all possibilities be considered based on current knowledge of interventions and how families change.

Qualifications

Most people seeking mental health services select a provider with expertise in the issues the client is facing. Custody litigants also need specialized practitioners, but may be accused of seeking "litigant coaching" because they sought qualified assistance. Gassman and Martindale seem to support this suspicion, suggesting that general clinical practitioners or parent educators are better equipped to assist an anxious litigant, or one who needs to improve his parenting skills, than are specialists who are familiar with the litigation process and have specific expertise in providing treatment to court-involved families. Current professional literature contradicts this assumption, as even well-trained clinical practitioners are often unprepared to deal effectively with a parent or family involved in a child custody case.

While we agree with Gassman and Martindale that a parent is unlikely to be accused of seeking "forensic coaching" if he requests services from a practitioner unfamiliar with child custody issues, a less qualified practitioner is less likely to help the parent. Failed or inadequate therapy has its own harmful consequences to parents and families. Parents should not be dissuaded from seeking high quality, specialized assistance, out of a concern that they will be accused of seeking coaching if they consult a specialist.

Based on the professional literature and a growing body of licensing complaints against unqualified practitioners, AFCC established a task force on Court-Involved Therapy in 2010 and later published guidelines for this role. The interdisciplinary task force included mental health professionals, attorneys and judicial officers with a wide range of experience with court-involved families. The resultant guidelines are firmly rooted in the American Psychological Association's Ethical Code and current professional literature. Both the guidelines and the literature supporting them contradict the assumption that a generically trained practitioner or family psychologist is the best option to provide sufficient, let alone superior, interventions for these court involved families.¹

Parents are most likely to consider changing their behavior when working with a professional who has both the relevant expertise and the trust of the parent. Experienced child custody attorneys may be in a position of recommending a qualified MHP to provide appropriate counseling. A recommendation for intervention by a consultant who was chosen by the attorney can carry a tremendous amount of weight with a parent, who may also place greater trust in a therapist recommended by counsel or the mental health consultant. Legitimate questions can be raised about how much intervention is proper from a MH consultant and when the client should receive a formal referral to psychotherapy from another MHP. Nevertheless, we cannot broadly endorse the suggestion that suspicions should be raised if counsel initiates the referral or recommends a qualified professional.

Prudent attorneys can, and probably should, become familiar with qualified MHPs who can assist their clients effectively. The best practitioners have knowledge of both

treatment issues and the special demands and dynamics of child custody cases. While a forensic specialist who never provides therapy might not be well qualified to improve a parent's behavior or symptoms, a therapist who is unfamiliar with the special needs of court-involved families could well be worse.

Dangers of Lowering the Bar

Parenting a child at the center of divorce requires some skills common to general parenting but also some unique skills. Anxiety related to litigation, mistrust of the other parent, or fear of losing custody of one's child must be understood within the context of the divorce and the court process. A therapist who just listens supportively while a client "vents" may not be providing the best assistance for a parent in the crisis of custody litigation. These parents need specific coping skills to manage the family transition while minimizing emotional damage to the child. These skills will also help them to work most effectively with counsel.

There currently exists both a dearth of qualified MHPs and a knowledge gap among the professionals, such that many attorneys and even other mental health professionals may not be fully aware of the ethical bounds of consultation or the difference between good and poor quality therapy. The literature on these issues is substantial, and ignoring it can cause real harm.

Parents may indeed come to MHPs with massive anxiety, parenting skills impacted by the parental separation and a desire that the MHP tell them what to do or say to avoid losing their children. Part of the distinction between effective intervention and inappropriate coaching is how the professional responds when such requests are made. The skilled and qualified MHP can help a parent to distinguish between legitimate and exaggerated concerns, to use restraint in interacting with the other parent or interpreting the statements of a child, and to focus on the needs of the child rather than the litigation agenda. The effective MHP must have a firm grounding in both general treatment research and the dynamics of custody disputes, as well as the strong ethical grounding necessary to redirect inappropriate requests.

Forensic psychologists have often led efforts to discredit therapists who are not qualified for the roles they undertake. It makes no sense to now suggest that parents would be better off with less experienced, ill-prepared professionals. Current literature does not support such a contention. The number of families who could benefit from child-centered interventions far outnumbers those with the motivation and the financial wherewithal to attempt to perpetrate a fraud upon the court.

Ethical Obligations

Attorneys and mental health professionals have both similar and dissimilar ethical obligations. Attorney efforts to provide the most effective representation may include obtaining psychological consultation, encouraging clients to seek mental health

services, and protecting clients from accusations that may be advanced by the opposing party.

Mental health experts, including those functioning as consultants, have the obligation to accurately represent the state of professional knowledge, express opinions only where qualified, and avoid actions that would obscure the truth or undermine the integrity of the judicial process. Those obligations apply to both the consultant interacting with a litigant and the consultant who may raise questions about another professional's conduct.

Attorneys have often observed that bad cases make bad law. We agree with Gassman and Martindale that coaching for fraud is unethical and should, whenever possible, be exposed. We also believe that one must take care not to miss opportunities for healthy change, nor to discourage specialized practitioners from providing the help families need.

Endnotes:

1. The guidelines and associated references can be found at:
[http://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/Guidelines for Court Involved Therapy AFCC.pdf](http://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/Guidelines%20for%20Court%20Involved%20Therapy%20AFCC.pdf).
-

Copyright 2014. ALM Media Properties, LLC. All rights reserved.

Reprinted with permission from the 11-25-14 edition of the New York Law Journal © 2014 ALM Media Properties, LLC. All rights reserved.

Further duplication without permission is prohibited. ALMReprints.com - 877-257-3382 - reprints@alm.com.