

Admissibility of Psychological Testimony

Presented by:

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Road Map

- When might a psychologist be needed?
In family law and elsewhere.
- Practical Aspects
- The Mental Health Privilege
- Psychologists as Evaluators
- Custody Evaluations vs. Fitness Evaluations
- Nuts and Bolts
- Procedural Considerations
- The Down-Side of Psychological Evidence
- How to Undermine a Negative Evaluation



When Might a Psychologist Be Needed?

My perspective: Family Law Cases

- To assist client with the emotional stress that accompanies family law issues;
- Custody Evaluation– an evaluation of the parties' relationships with the child and each other; the evaluator then makes a recommendation to the Court based on her findings;
- Fitness Evaluation– assesses the mental health and parenting capabilities of the parties.
- To confront an opposing expert.



When Would a Psychologist Be Needed in a Family Law Case?

Maybe when your clients are....



Storms Media Group (top left), Maciel-MBF/X17online (top right), Jeff Steinberg/INFphoto (bottom)

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Or maybe one of these?



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Practical Aspects of Using Psychological Evidence

- Judges are prone to admit any evidence that will help them make a decision (*especially for custody*).
- Example: GAL reports
 - Filled with hearsay!
 - GA Superior Court Rule 24.9
 - Allows GAL report to be admitted into evidence and to be used for impeachment.
 - Allows GAL to include all the information she obtained upon which her findings were based.
- This rule is very telling.....



GA Superior Court Rule 24.9

- A GAL shall receive such training as provided by or approved by the Circuit in which the GAL serves.
 - Doesn't sound like that passes Daubert?
- The GAL is qualified as an expert witness on the best interest of the child(ren) in question.
 - Guess that skips Daubert?
- At trial, the report shall be admitted into evidence for direct evidence and impeachment purposes, or for any other purposes allowed by the laws of this state.



And, under that same USCR 24.9:

- **Requesting Mental Fitness and Custody Evals:**

Based upon the facts and circumstances of the case, a GAL may request the Court to order the parties to undergo mental fitness and/or custody evaluations to be performed by a mental health expert approved by the Court. The Court shall provide for the parties' responsibility for payment of fees to the appointed experts.

- Query: If judge appoints a GAL who then requests these evaluations, what are the chances the judge may then exclude them?
- **Zero%**



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"What you say here remains confidential. Except what I tell my wife and she dishes to her gossipy girlfriends."

The Mental Health Privilege

- What is it?
 - O.C.G.A. § 43-39-16: “The confidential relations and communications between a licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client; nothing in this chapter shall be construed to require any such privileged communication disclosed.”
 - O.C.G.A. § 24-9-21 provides that communications between a psychologist/psychiatrist/social worker and their patients are excluded on grounds of public policy.



The Mental Health Privilege

- When does the privilege arise?
 - When treatment is “contemplated” or “given”.
 - Privilege applies whether treatment is voluntary or involuntary (court-ordered therapy for abused kids, e.g.)
 - The Catch: Must be treatment, not an assessment for court-purposes only.
- How strong is the privilege?
 - Unless waived, the privilege is absolute. See Hicks v. Talbott Recovery, 196 F. 3d 1226 (1999).
 - Policy: We want to encourage patients to speak openly and honestly with their psychologists for the purpose of therapeutic treatment without losing the element of trust.



But in GA, it is protected.

- Even if it was Family Counseling and one parent says “I waive the privilege”:
- The psychiatrist-patient privilege is not diminished by the fact that the patient sought or contemplated treatment jointly with other persons, or primarily for the benefit of another person who is in treatment by the same psychiatrist. **The object of the privilege is to encourage the full trust of the patient so as to persuade him to reveal his innermost feelings and private acts so that the psychiatrist may give the most effective treatment.** MROZINSKI v. POGUE, 205 Ga.App. 731, 423 S.E.2d 405 (1993)



Mrozinski continued

- “Perhaps nowhere is the patient more reluctant to reveal his true feelings and thoughts than in family therapy; for that very reason the viability of the privilege is essential.”
- “The strongest public policy considerations militate against allowing a psychiatrist to encourage a person to participate in joint therapy, to obtain his trust and extract all his confidences and place him in the most vulnerable position, and then abandon him on the trash heap of lost privilege...”



The Mental Health Privilege

- How it may be waived
 - Expressly through waiver.
 - Informed consent? Waiver signed by patient as condition of mental health treatment-- appellate courts have not addressed whether or not this constitutes a valid waiver of the privilege for admissibility purposes in court over objections of patient.
 - Implicitly-- Yes, where patient chooses to have an expert testify as to his or her mental health. (see Kennestone at 148)
 - BUT NOT through inaction of procedural omission.
- Who has right to waive?
 - Parents.
 - What if divorced / never-married?
 - No Georgia authority supporting concept that custodial parent has right to waive, but noncustodial parent does not.



The Mental Health Privilege

- How might the court circumvent the privilege?
 - O.C.G.A. § 19-9-3: “The duty of the judge in all custody cases shall be to exercise discretion to look and determine solely what is in the best interests of the child and what will best promote the child’s welfare and happiness.”
 - The judge may consider:
 - The capacity of each parent to give love, affection, & guidance.
 - The capacity of each parent to provide for the child’s needs.
 - The home environment of each parent.
 - The mental and physical health of each parent. 19-9-3(a)(2)(I)



Other states have allowed the privilege to be broken:

Where the issue of the mental state of a party to a custody suit is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychologist-patient privilege must yield.

Harbin v Harbin, 495 So.2d 72 (AL, 1986)



Texas Rules of Evidence Rule 510

(d) Exceptions to the privilege in court or administrative proceedings exist:

(5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense . . .

Texas courts have interpreted this statute to mean that mental health records of parties and non-parties are not privileged in custody cases.

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Atwood v. Atwood

- Kentucky custody case.
- “Of major importance, in resolving a custody dispute, is the mental and physical health of all the parties and whether the child is in an environment likely to endanger his physical, mental, moral or emotional health.”
- “In seeking the custody . . . appellant made her mental condition an element to be considered by the court in awarding her custody.”
- Therefore, no psychiatrist-patient privilege.

550 S.W.2d 465 (1976)

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So again, I ask, is the privilege absolute in GA?

Seems so, but.....

The duty of the judge in all [custody] cases shall be to exercise discretion to look to and determine solely what is for the best interest of the child and what will best promote the child's welfare and happiness and to make his or her award accordingly.

OCGA §19-9-3(a)(2)



Psychologists as Evaluators

- Psychologists perform two roles:
 - Therapeutic– involves treatment of the patient's mental health issues on a private level.
 - Forensic– the court hires the psychologist to formally evaluate the parties for litigation purposes.
 - In this case, the mental health privilege does not apply!
 - For example, custody and fitness evaluations.



Psychologists as Evaluators

- O.C.G.A. § 9-11-35
 - Upon showing of good cause, a court may order the examination of a party when that person's physical/mental health is at issue.
 - Psychologist must produce her findings to the Court and the opposing party.
 - The examinee waives the mental health privilege.
 - This provision also applies to parties who submit to an examination by agreement.



Fitness Evaluations vs. Custody Evaluations

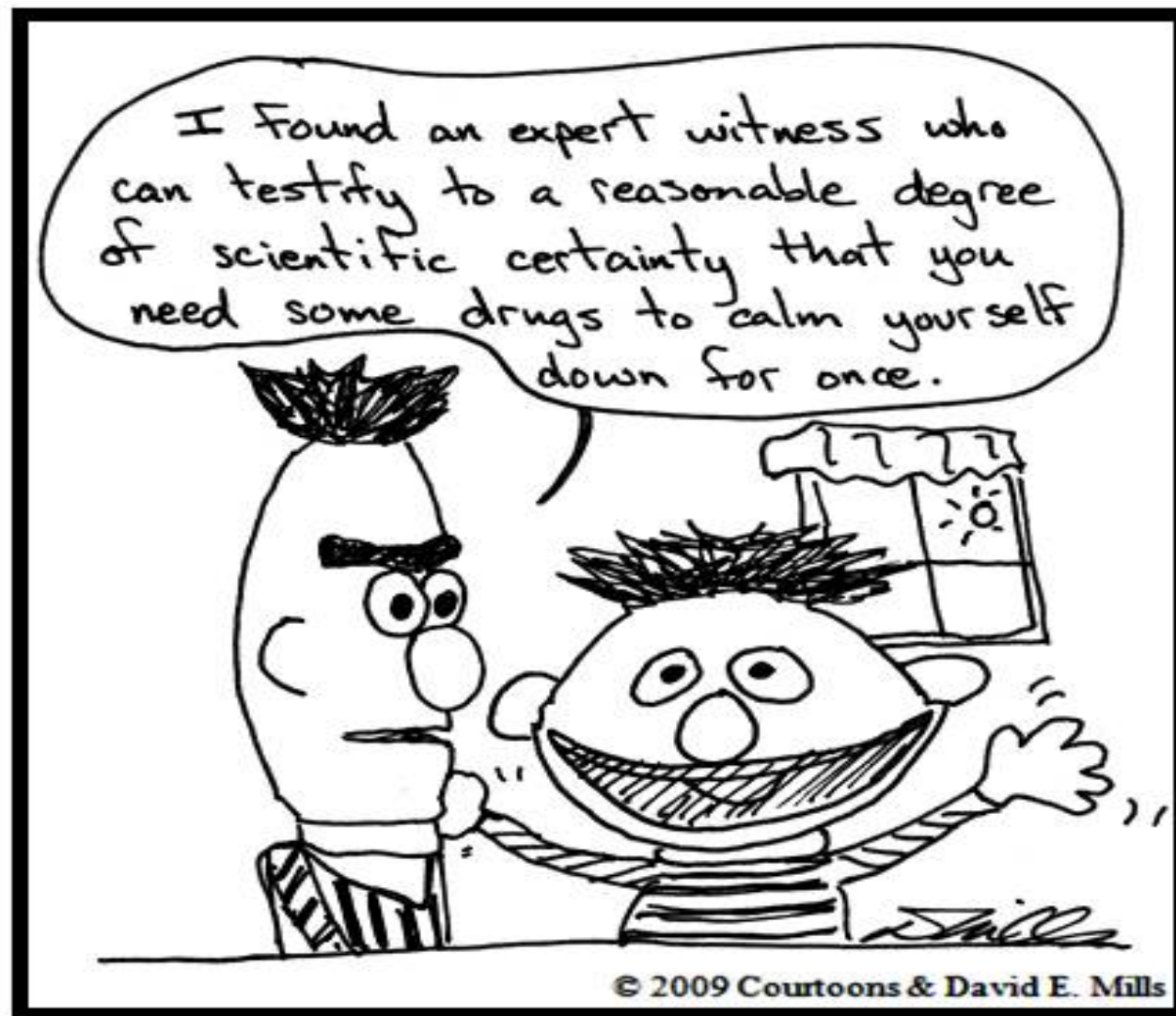
- Fitness Evaluation
 - Purpose: to determine whether a person is “fit” to be a custodian of the child.
 - Usually requested by one party when he/she feels that the opposing party has issues that require a professional inquiry/evaluation.
 - Requires less time and money.
- Custody Evaluation
 - Purpose: to examine the parties, the child, and the environment to determine which custody situation is in the child’s best interest.
 - Can be requested by one/both parties or ordered by court.
 - Very time-intensive and expensive.



Nuts and Bolts

- As you know, Georgia has adopted a version of Daubert. See O.C.G.A. §24-9-67.1
 - Daubert Factors considered by the Court include:
 - Whether the test/theory has been peer-reviewed;
 - Whether the test/theory has been accepted in the scientific community;
 - Is the theory capable of being tested/ has it been tested.
- To satisfy Daubert, the scientific test must be valid and reliable.
 - Valid: The tests measures what it purports to measure.
 - Reliable: The results will be the same if the test is given today or in six months.





Daubert and Ernie

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Nuts and Bolts

- The tests relied upon by the expert were not developed specifically for custody disputes...
- But, they were developed to help us recognize personality traits and likely behaviors which will assist the trier of fact in determining what is in the best interests of the children.
- Example: Minnesota Multiphasic Personality Inventory (MMPI-2)
 - Commonly used in custody evaluations to determine specific personality types of the parents and how the aspects of their personalities affect their parental capabilities.



Example MMPI-2 Results from Custody Evaluation

The MMPI-2 is a self-report inventory developed to determine the degree of psychopathology that might be interfering with an individual's ability to function. Ms. [REDACTED] clinical profile was marginally valid, because she was very careful in describing any problematic symptoms or behaviors that she might have. Such a carefulness may reflect intentional defensiveness or self-deception. Such a stance is characteristic of individuals who are attempting to maintain the appearance of adequacy and self-control. It is also not particularly unusual in a custody evaluation. Such individuals tend to deny problems and are not particularly introspective or insightful about their own behavior. Consequently, this clinical profile may be an underestimate of any psychological problems Ms. [REDACTED] may have. Individuals with this profile are often described as rigid and inflexible in their approach to problems. They may not be open to psychological self-evaluation. They are likely to project an excessively positive self-image and to be viewed as somewhat arrogant and intolerant of others' failings. Ms. [REDACTED] described herself as being highly satisfied with her current life and presented herself as being very calm. Individuals with such a profile appear to have no unmanageable psychological conflicts or threatening stressors in their lives. They view their personal adjustment as adequate and feel they are dealing effectively with situational demands. Persons with a profile such as this do not appear to be overly anxious or prone to develop unrealistic fears. Any fears they report are likely to be viewed by them as reality based rather than internally generated. This profile was further suggestive of individuals who are seen as rather noncompetitive and passive. They view themselves as being generally easy going and uncritical in interpersonal situations. They describe themselves as rather conservative and disliking risk taking. She further considers herself to be in good health and reported no somatic complaints at this time.



Nuts and Bolts

- Tips for attorneys:
 - Be familiar with the examinations which are commonly given to clients in a custody or psychological evaluation.
 - Understand how the results are interpreted.
 - Research any potential flaws in the test.
 - Be prepared to off-set any bad results with intense cross-examination and other impeaching evidence.



Procedural Considerations

- Two ways to have a custody/fitness evaluation:
 - Parties request one;
 - Court orders one.
- Parties can request a psychological evaluation of the other party but must show:
 - Physical/mental condition of the other party is in question;
 - Good cause exists.
- In custody cases, either party may request a custody evaluation prior to trial, but must submit pleadings and other docs in support of the request.



The Down-Side

- Psychologists' recommendations can make or break your case, yet they spend very little time with the parties.
- A client must be willing to communicate with the therapist openly and honestly for treatment/evaluations to be accurate; When courts order therapy, some clients may be unwilling to participate.
- With respect to custody, the evaluator may be unable to tell the extent, if any, to which a child has been “coached” or influenced by a parent.
- Many psychologists are so determined to be a good “advocate” that they forget their role as a neutral evaluator.



The Down Side

Results like this can be detrimental to your case, especially for custody:

Behavioral/Emotional Functioning: Mr. [REDACTED] responded to the Minnesota Multiphasic Personality Inventory–2 (MMPI-2) test items by claiming to be unrealistically virtuous, possibly with the intention of deliberately presenting an overly favorable impression of himself. He presents himself in a highly moralistic manner, denying even the most common human faults and frailties. He appears to be consistently trying to maintain a façade of adequacy and control and are admitting no problems or weaknesses. Such individuals have a serious lack of insight into, and understanding of, their own behavior and are typically very defensive. Prognosis for psychological intervention with similar individuals is usually very poor due to their lack of insight. Thus, it is possible that the clinical scales reflect an underestimate of any emotional disturbance that he may be experiencing.



How to Undermine a Negative Evaluation

- Use the APA guidelines on cross-examination:
 - Ex. APA Guideline No. 12 prohibits a professional from “over-interpreting or inappropriately interpreting clinical or assessment data.”
 - Use of MMPI at all is over-interpretation because it was not designed for divorces.
 - Ex. APA Guidelines No. 16 requires psychologists to maintain written records.
 - However, psychologists frequently testify that they “keep no notes.”



Questions Before We Wrap Up?

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FINAL TIPS

- Perhaps agree to admissibility in advance.
- Be sure that the report is prepared well before trial (so there is an opportunity to depose the expert).
- Maybe do a fitness evaluation only.
- Have a client undergo a private psychological evaluation before asking the court to order one for the other party.



Last bit of humor

lunchtime by cta



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