The Use of Mental Health Professionals as Expert Witnesses in Family Law Litigation

If you are involved in a divorce, you are likely to face several difficult issues before the conclusion of your case. The most difficult issue you may encounter could involve a dispute concerning the custody of your child and how much parenting time each will be granted. If you are involved in a custody dispute, you may want to retain a mental health professional to act as an expert witness. These experts typically are psychiatrists, psychologists, or licensed family and marital therapists, who specialize in custody and family disputes. Often, mental health professionals are called upon by the Court, or retained by the parties, to act as expert witnesses to evaluate the "best interest" of a child with regard to custody and/or a parenting-time schedule. If you are faced with a custody dispute and entertaining the possibility of retaining a mental health professional to act as an expert witness, it is important to understand the issues that such experts frequently address, the tasks that they are commonly asked to undertake, and the guidelines with which they must comply.

Before retaining a mental health professional to serve as an expert witness, it is important for you to understand the functions that custody experts commonly undertake. Mental health professionals acting as expert witnesses are often called upon to evaluate what "custody" arrangement is in the best interests of the children. It is important to note that the term "custody," as used in family law cases, encompasses two distinct legal concepts. The first, "physical custody," generally involves how much parenting time each parent will have with a child. The second type of custody, "legal custody," refers to the ability and responsibility of a parent to make decisions on behalf of a child. When disputes involving physical or legal custody arise between parents, mental health professionals are often called upon to make recommendations to the Court as to what parenting time arrangement is in the best interest of the child and whether it would be in the best interests of the child to have one or both parents making decisions for the child. In addition to the ethical obligations that mental health professionals have imposed upon them by their respective professional organizations, the Rules of Court have recently been amended to affirmatively direct that all expert witnesses act in an impartial manner regardless of which party retains them.

Before you decide to retain a mental health professional to be your custody expert, you should become familiar
with the types of functions that he/she would undertake as an expert in a family law case. In almost all cases, a custody expert will submit a written report to the Court and the parties. In this report, the expert will render an opinion as to what custody arrangement is in the best interest of the child. In a smaller percentage of cases, when the Court is forced to hold a hearing on issues concerning custody, a custody expert may be called to testify in Court. When called to testify, the custody expert will have the opportunity to explain the factors on which his/her custody recommendation was based. Therefore, as you consider which mental health professional should be your custody expert, you will want to: 1) get recommendations from your attorney; 2) review the qualifications and background of the potential expert; 3) inquire as to the number of custody reports the expert has done, and whether the expert has ever been retained by your spouse's attorney in other cases - although this is not necessarily a determining factor; 4) find out the number of times the expert has testified in Court, especially in the Courtroom of the Judge who will preside over your case; and 5) interview the expert to make a final decision. An expert witness who is able to testify in a clear and concise manner, and who is confident when presenting his/her conclusions, will strengthen the credibility of his/her opinions.

When a custody expert is retained to render an opinion on the best interest of a child, there are specific criteria that must be utilized by the expert in reaching conclusions. Pursuant to the Rules of Court, the factors to be considered by a custody expert when making a recommendation to the Court are: 1) The parents' ability to agree, communicate and cooperate in matters relating to the child; 2) The parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; 3) The interaction and relationship of the child with its parents and siblings; 4) The history of domestic violence, if any; 5) The safety of the child and the safety of either parent from physical abuse by the other parent; 6) The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; 7) The needs of the child; 8) The stability of the home environment offered; 9) The quality and continuity of the child's education; 10) The fitness of the parents; 11) The geographical proximity of the parents' homes; 12) The extent and quality of the time spent with the child prior to or subsequent to the separation; 13) The parents' employment responsibilities; and 14) The age and number of the children. In addition, the expert is free to use any other information which he/she deems significant in determining the best interest of the child.

If you are involved in a divorce involving custody or parenting time, these issues are the most important you will face, not only in your divorce case, but in the foreseeable future. Resolutions of custody issues can be achieved through mediation, negotiation, or as a last resort, litigation. The decision you and your attorney make concerning a custody expert is a critical factor in a successful outcome.

**Practice:**