The Expert's Recommendation in Custody Cases[1]

The adage "bad facts make bad law" is anchored in legal lore like any codified principle. **[**Hailing such law as representative of new legal breakthroughs erodes otherwise tenable principles because they slowly but invariably seep in as settled premises and hard to change precedents.**]** No louder does this ring true than in *John A. v. Bridget M.*,[2] the much celebrated case which fueled sensationalist journalism. This case has, also, achieved prominence regrading concerns over the extent of expert opinions/conclusions in custody cases. In three concurring opinions, four appellate judges rallied around a reversal of the custody award to the father.

The 'John A.' Case

John A.'s holding pivoted about Justice Sullivan's observations[3]:

> ... the ultimate decision as to the key issue in this case, i.e., whether to award custody to the father because of the mother's attempts to undermine his relationship with the children, was made on the basis of the experts' testimony. Courts should be ever mindful that, while the forensic expert may offer guidance and inform, the ultimate determination on any such issue is a judicial function, not one for the expert."[4]

In this regard, it should be noted that there is an ongoing debate in both the legal community and the mental health profession as to the implications of expert psychological opinion in custody litigation, especially when the opinion is a conclusion as to the ultimate determination as to where to award custody so as to serve the child's best interest.

This article examines: (1) the potential ramifications arising from the Appellate Division's observations regarding the issue of false allegations of sexual misconduct lodged against a non-custodial parent, and (2) the appropriateness of the forensic expert's opinion as to the ultimate question in child custody cases.

The facts (recited in detail in a 36-page Family Court opinion[5]) are: the father, John A., a married man residing in California and the father of four adult children, impregnated Bridget M., an unmarried woman, during a business trip to New York. Upon learning of that woman's pregnancy, John's wife filed for divorce in California, which, although "never pursued [was] never withdrawn." The relationship between John and Bridget rapidly declined after the

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[1] N.Y.L.J., June 30, 2005; **Cited:** Olivier A. v. Christina A., 9 Misc.3d 1104(A), 806 N.Y.S.2d 446 (N.Y.Sup. 2005).

[2] John A. v. Bridget M., 791 N.Y.S.2d 421 (1st Dept., 2005).

[3] Custody Ruling Addresses Reliance on Expert Opinions, NYLJ, 4/4/2005.

[4] Significantly, Justice Friedman emphasized that Family Court did not abdicate "its role as judge of the children's best interests to one of the experts."

[5] John A. v. Bridget M., 4 Misc.3d 1022(A) (Fam.Ct. NY Co. 2004).

children's births once Bridget learned of John's intention not to divorce his wife.

Upon confirmation of paternity, Family Court granted Bridget's request for only supervised visitation based on her allegations of the father's sexually inappropriate manner with the children. The mother eventually filed two allegations of sexual abuse of the children against the father.[6]

Family Court's decision is awash in supporting evidence. The court meticulously assessed the credibility of the parties and *all* their witnesses, after which it applied governing law that "a custodial parent's interference with the relationship between a child and a non-custodial parent is 'an act so an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [parent] is unfit to act as a custodial parent.'" Following a lengthy trial, the father was awarded full custody. The First Department reversed.

The assembly of concurring opinions unanimously agreed with Family Court that the allegations of sexual misconduct against the father were untrue. Justice David Friedman observed, *inter alia,* that: (1) the mother's own expert "recognized that the [sexual] accusations were made in a manner consistent with coaching", (2) the mother's eventual cessation of inducing false sexual allegations allowed the children to enjoy a loving relationship with their father, and (3) the mother had brought the crisis upon herself.

Pivotal to the reversal was the father's extensive distant business travels which would relegate the children to being "raised by the father's wife [in California] or by paid caregivers" because although "such individuals may be able to provide adequate care, the children are entitled to be raised by a parent." The curious irony underlying this observation is that many contemporary custody disputes involve affluent/professional parents whose retained help are typically the primary or significant caregivers, thereby reducing the implicit question in those instances to which nanny should be awarded custody.

Justice Joseph Sullivan's opinion is puzzling in its parsing of the expert's report, excluding the part that endorsed custody to the father,[7] while, nevertheless, relying on the very same report to sustain the reversal of the custody award.[8] Moreover, Justice Sullivan's further

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[6] There was conflicting testimony regarding the father's activities with the children when in New York.

[7] Two other forensic opinions, similarly, supported the custody award to the father.

[8] John A.: "Notwithstanding Dr. Billick's conclusion that the mother had engaged in conduct undermining the father's relationship with the children, he found nonetheless that: the children functioned at an appropriate level; Amber had a positive relationship with the father; the children want to see the father, enjoy being with him, and are comfortable with him; they have a warm attachment to the father and showed no adverse behavior towards him and even have affection and fondness for the father's wife. Thus, despite the finding that the mother was attempting to undermine the relationship between the father and the children, the relationship

observation that Family Court rejected its expert's opinion regarding the children's relocation to California, indeed, supports the independence of the trial court's conclusion.

Also disquieting was Justice Sullivan's comment, shared by Justice David Saxe in a separate opinion, that "two instances of false accusations" should "not lead inexorably to the conclusion" favoring an automatic transfer of custody. Although Justice Saxe's disagreement with the weight assigned by Justice Friedman to false sexual allegations is somewhat unsettling at first blush, like Justice Sullivan, Justice Saxe underscored that custody cannot be determined on the weight of one issue alone, even if "abhorrent", but rather on the totality of the circumstances on a case by case basis. Significantly, the wronged parent must simultaneously be found to be "substantially capable of ensuring that the best interests of the child are being met."[9]

John A. nearly augured a devastating bright line that two false reports of sexual misconduct are free from consequences because custody transfers are remote once children have bonded with the offending parent, an outcome noted in other concurring opinions. It is not an epiphany that children schooled to falsely accuse a parent of vile conduct usually bond and identify with the accusing parent. Grafting such trauma onto children's minds, in some cases during the earliest stages of their recorded memories, distorts their cognitive perceptions and leads to the inevitable schism between fear (of the non-custodial parent) and a feeling of safety (with the custodial or accuser parent), which is emblematic of a broad and destructively premeditated scheme. The pattern is never limited to two disjunctively isolated allegations. Rather, the coopting process represents a complex weave by the accuser of alienation from and contempt for the other parent.

Case Law: 'Ultimate Question'

A difficult issue lurks below the surface of custody cases: is a court's decision, even if amply substantiated by other evidence and testimony, compromised or otherwise tainted if an expert has articulated a recommendation as to the ultimate question of custody? Case law suggests not.

The core components for admissibility into evidence are relevance, materiality, and competence. Forensic testimony concerns competence. Expert opinion is intended to clarify "professional or scientific knowledge or skill not within the range of ordinary training or

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was, in fact, a healthy one, one that even yielded affection and fondness between the children and the father's wife."

[9] Justice Saxe: "... coaching a child to make assertions of abuse against the other parent is [in]excusable, or ... abhorrent ... such misconduct may or may not harm the child or interfere with the child's relationship with the other parent. Justice Friedman: 'it is psychologically abusive for a parent to plant in the mind of a three- or four-year-old the false notion that the other parent is sexually abusi[ve] ... as if this is an absolute fact, the question of the effect, of such coaching on a child must be decided in each case."

intelligence."[10] Expert testimony, by its very nature, not only invades the bailiwick of the trier of fact because it "is used in partial substitution for the jury's otherwise exclusive province...to draw conclusions from the facts but it is a kind of authorized encroachment,"[11] that may rely on data which would ordinarily be incompetent hearsay. In *People v. Stone*, the Court of Appeals observed that "making available to our triers of fact the information available from the arts and sciences remains one of the continuing challenges of the law."[12]

The appointment of an expert evidences a judicial declaration that the subject matter is beyond the common ken, and requires assistance from a credentialed specialist in the discipline. To appoint an expert to no more than present raw data and/or test scores without a synthesis of the data strips the court of valuable and necessary input – it is like hiring a master chef to shop for raw food without actually preparing the dish.

Although experts may not present legal conclusions as they are beyond their realm,[13] the Court of Appeals has, nevertheless, held that "if the jury [trier of fact] requires the benefit of the expert's specialized knowledge, the expert's opinion should be allowed even when it bears on *an ultimate question*."[14] Significantly, there is a presumption that judges presiding in bench trials (e.g., custody cases) have considered only competent evidence.[15] **[**It is settled law that a "court [is] not obligated to accept the recommendation of [its] court-appointed forensic expert.[16] In *Zapata v. Dagostino*,[17] a custody case, the Second Department held:

> A jury [the trier of fact] is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony and/or the facts disclosed on cross-examination ... Indeed, a jury [the trier of fact] is at liberty

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[10] Dufel v. Green, 84 N.Y.2d 795 (1995); De Long v. Erie County, 60 N.Y.2d 296 (1983); De Long v. Erie County, 60 NY2d 296 (1983).

[11] People v. Lee, 96 N.Y.2d 157 (2001).

[12] People v. Stone, 35 N.Y.2d 69 (1974).

[13] M&E Mfg. v. Frank H. Reis, 258 A.D.2d 9 (3d Dep't 1999).

[14]Dufel v. Green, 84 N.Y.2d 795 (1995); People v. Miller, 91 N.Y.2d 372 (1998) "... opinion testimony ... may be admissible where the conclusions to be drawn from the facts depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence ... It was an appropriate exercise of discretion to conclude that such matters are beyond the ken of the average juror and permit expert testimony as to the estimated time of death even if the conclusion is the ultimate issue of fact to be determined at trial."

[15] People v. Gilbert, 239 A.D.2d 906 (4th Dept., 1997).

[16] Vinciguerra v. Vinciguerra, 294 A.D.2d 565, 743 N.Y.S.2d 139 (2nd Dept., 2002); Zafran v. Zafran, 761 N.Y.S.2d 317, 306 A.D.2d 468 (2nd Dept., 2003).

[17] Zapata v. Dagostino, 265 A.D.2d 324, 696 N.Y.S.2d 194 (2d Dep't 1999).

to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion.**]**

[In *Cohen v. Merems*[18], another custody case, the Second Department held that "Although entitled to some weight ... expert recommendations need not be accepted or followed by the court, *provided they are not arbitrarily disregarded* ((emphasis provided)."**]** Accordingly, unless otherwise evident from a court's decision, expert testimony beyond permissible parameters should either be deemed as having been rejected, or treated like a non-binding advisory opinion.

That experts cannot forecast with precision the effects of different factors on the future well-being of a child, such as the placement of a child with a parent diagnosed with a specific pathology, does not invalidate the value of the opinion/recommendation because it also goes to relevance. The reality remains that the best interests test is nothing more than a judicial prognostication and prayer, if neither parent is desirable and the issue is reduced to the lesser of the evils.

Fluid Approach

Significantly, the Court of Appeals has adopted a fluid approach to determine "the best interests of the child": (1) " ... best interests of the child ... is a term that pervades the law ... appearing innumerable times in the pertinent statutes, judicial decisions and literature – yet eludes ready definition",[19] and (2)"[A]ny court ... must make every effort to determine ...what will best promote [the child's] welfare and happiness... *there are no absolutes in making these determinations*; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests ..."[20] Clearly, this must all occur within evidentiary parameters.

The significant failsafe of having the expert distill the data in order to "distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely" was not lost upon the Court of Appeals.[21] The Court of Appeals has noted that CPLR §4515's emphasis on cross-examination of the expert's "data and other criteria supporting the opinion" represents a Legislative effort "to strike a balance between potentially conflicting factors of the medical soundness and legal admissibility of a psychiatrist's expert opinion."[22] In *People v. Stone* the highest court stressed:

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[18]Cohen v. Merems, 2 A.D.3d 663, 768 N.Y.S.2d 637 (2d Dep't 2003); Maysonet v. Contreras, 290 A.D.2d 510, 736 N.Y.S.2d 263 (2nd Dept., 2002).

[19] Matter of Michael B., 80 N.Y.2d 299 (1992).

[20] Eschbach v. Eschbach, 56 N.Y.2d 167 (1982).

[21] People v. Sugden, 35 N.Y.2d 453 (1974).

[22] People v. Wernick, 89 N.Y.2d 111 (1996).

> ... the jury should be informed of [the psychiatrist's] sources and how he evaluated those sources in arriving at his conclusion. On cross-examination, the validity of his reasoning process may be probed and any shaky factual basis of the opinion exposed.[23]

The Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, is the diagnostic manual relied upon by every mental health professional (MHP) when assigning diagnoses in child custody forensic reports. Most significantly, no supporter of *Daubert v. Merrill Dow Pharmaceuticals*[24] who opposes expert conclusions/recommendations grounded in clinical observations has yet assailed the diagnostic validity of the DSM notwithstanding: (1) its inability to fully satisfy all the criteria in *Daubert*, and (2) the undisputed fact that the DSM is not the product of pure empiricism but rather of clinical observations.

[Furthermore, the strict reading in *Daubert* notwithstanding, the United States Supreme Court stated in *Kumho Tire Co. v. Carmichael*[25] that "the test of reliability [in *Daubert*] is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination", to wit, "the trial court has broad discretion in the manner in which it determines reliability in light of the particular facts and circumstances of the particular case."[26] Mr. Justice Antonin Scalia emphasized that "[the] discretion in choosing the manner of testing expert reliability--is not discretion to abandon the gatekeeping function [of scientific validity[27]] ... as the Court makes clear today, the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."

It is also to be noted that *Daubert* and *Kumho Tire* devolved entirely about the testimony of privately retained expert witnesses (by the parties), *not* court appointed experts. This distinction is significant because it is nearly inconceivable that a judicially appointed expert would have his or her opinion rejected as scientifically unsupportable by the very court that made the appointment, thereby severely hamstringing even the most valid challenge to the expert's conclusions.**]**

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[23] 35 N.Y.2d 69 (1974).

[24] 509 US 579 (1993).

[25] 526 U.S. 137 (1999).

[26] Wahl v. American Honda Motor Co., 181 Misc.2d 396, 693 N.Y.S.2d 875 (Sup.Ct. Suffolk Co. 1999).

[27] See, Daubert: "Faced with a proffer of expert scientific testimony ... the trial judge ... must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue."

In a cogent monograph, Robert Dobrish, Esq., demonstrates, *inter alia,* that under controlling law "the broad acceptance of mental health disciplines has an important corollary. Once an expert's specialized knowledge and methodology have been accorded validity, s/he may give an opinion about a range of issues, including impressions as to which parent could better promote a child's best interest."[28]

To fetter an MHP's extensive training to a mechanical reading of treatise definitions of conditions and/or behavioral patterns insulated from any correlation or synthesis to parenting issues, might as well convert such testimony to a courtroom coffee klatch, thereby leading to an implausible sequence of events: (1) following the taking of testimony and introduction of evidence, the expert introduces raw psychometric scores and other raw data, (2) relevant scientific texts/treatises/manuals are marked into evidence, (3) the court retires to interpolate the texts/treatises/manuals[29], and (4) generates a decision without the benefit of the expert's opinion, notwithstanding the lay judge's inability to interpret complex testing methodologies and apply them to the evidence.

Tort trials and other actions requiring scientific or other specialized analytical training would be reduced to legal rubble were experts precluded from expressing their opinions, or in the negative words du jour, their "conclusions" or "recommendations." An extension of this notion would effectively eradicate expert testimony regarding enhanced earning capacity of newly licensed professionals where experts freely bandy about myriads of Nostradamus-like predictions, regarding longevity, success, health, interest rates, inflation, etc.

Custody Issues Are Revisited

The key distinction, however, is that custody issues may always be revisited, unlike the dreaded finality of property distributions which may never be reconsidered, irrespective of how wildly inaccurate real life shows the expert to have been.

Furthermore, the argument that only a judge may opine as to a child's best interest requires semantic housekeeping. There is a critical distinction between the casual use of "opine" and "opinion" in common parlance and their specialized meanings within legal context. An expert giving an opinion supported by data proffers no more than a professional analysis devoid of any legal merit or consequence until a court incorporates some portion of that analysis into its own legal opinion, i.e., the decision/judgment, based on the totality of the evidence.

It is, also, unrealistic to believe that excising "recommendations/conclusions" from reports will eliminate such communications because experts can skillfully craft their reports to

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[28] Mental Health Professional Testimony in Child Custody Cases, 4/13/2005 NYLJ.

[29] See, George D. Marlow, From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence during the Decision Making Process, 72 Spousal tort. John's L.Review 291 [spring 1998].

easily telegraph their recommendations. Even a bare outline at a report's end detailing behavioral pathology(ies) as characterized in diagnostic treatises/manuals is a transparent facade of a "neutrally skewed" recommendation.

Conclusion

Finally, looming in this debate is the critical issue raised by bench and bar regarding the kneejerk assignment of MHP's when no allegations of mental impairment are present[30] and the dispute can be resolved during a fact based evidentiary hearing as to who has been and will best remain the primary caregiver.

[30] Gonzalez v. Gonzalez, 15 A.D.3d 481 (2nd Dept., 2005); Stern v. Stern, 225 A.D.2d 540 (2nd Dept., 1996).