The Devil's Advocate

For some years we have had a special interest in the law pertaining to child custody and visitation and the obvious need of courts for expert opinion as a guide to decision. We have not hesitated in gadfly fashion to criticize lawyers, courts, and the adversary process for their bungling of such issues, and have insisted that there is no substitute for meticulous fact-finding and an evaluation by the court of all relevant evidence.[1]

We also have advocated a modification of the adversary process in custody disputes to give the court unquestioned access to investigations, evaluations, and reports, so that an informed decision may be reached which one hopes will be in the best interests of the child. In order to have a free flow of information, it is necessary to suspend or make an exception to traditional hearsay objectives which otherwise would bar input from investigations and reports.[2] This may be done by (1) requiring the authors of such reports to be available in court for cross-examination, and (2) by giving all parties an opportunity to introduce rebuttal evidence. This approach may be authorized either by the inherent *parens patriae* power of the court or by court rule or statute. Since in most states custody disputes ordinarily are decided by the court rather than by a jury, and since one purpose of the hearsay rule is to keep such material from a credulous jury, a relaxation of the rule makes sense provided that cross-examination and the opportunity to present rebuttal evidence remain intact as checks on opinion and gossip, and as an assurance of reliability.

Other critics of the adversary process in child custody cases advocate its complete abandonment. The most frequent suggestion is that custody and visitation issues should be turned over to an expert panel, or perhaps to a referee who is a specialist in law and behavioral science.[3] Dr. Lawrence Kubie, a leading champion of this approach, also recommended that divorcing parents appoint a psychiatrist as arbitrator for subsequent disputes over custody or visitation.[4] There are, however, constitutional and due process limitations on any such scheme, and probably any out-of-court determination must be subject to judicial review.

The main reason the Devil's Advocate recommends a modification of the adversary process in custody cases, rather than abandonment, is that reform is politically possible, while abandonment of the adversary process, even if constitutional, is unlikely to occur. The Devil's Advocate also is not sure that behavioral experts on their own would do any better than judges on their own. Predicting the future behavior of specific individuals is a risky business for any professional. The judge, who supposedly reflects the conscience of his community, should decide the

custody case, since it involves a conflict of competing interests and the kind of issue that courts adjudicate.

Moreover, the fact-finding function should not be abdicated by the court. Although the European system of forensic institutes has a certain appeal, when one looks closer he learns that the senior professor rarely is challenged even when juniors disagree with him, if they dare, or even if his opinion is highly controversial. There is no cross-examination as we know it, nor is the check of *habeas corpus* available. The official expert's word becomes law. The Devil's Advocate does not have that much faith in any expert, particularly where assumptions and speculation form the basis for the expert opinion. Experts should be seen, heard, and carefully examined.

The campaign for taking custody issues out of the courts bears some resemblance to what happened to the *Durham* rule. Judge Bazelon, with great effort and great sincerity, went through the maze of *M'Naghten, Durham, Washington, Brawner, et al.*, and to his sorrow learned that he was unable to get psychiatrists to stick to their last.[5] Regardless of their own predilections, psychiatrists kept being asked questions regarding social responsibility and moral accountability as to which they had no special expertise. The decision as to placement of a child, no less than the issue of criminal guilt, involves a social and moral judgment for courts to make. Under our system of judicial supremacy, that's where the buck stops.

Those who recommend ceding jurisdiction of child custody disputes to the "experts" may start with the false premise that the sole and exclusive concern in such cases is the child's welfare. Although the best interest of the child is and should be the paramount concern, that concern is not the only one, despite its importance. Really four parties are involved in custody disputes: the two contending parties, the child, and the state. Each has a legitimate concern which should be recognized by the court.

Hal Painter, in tragic circumstances, entrusted the care of his three-year-old son to the maternal grandparents on the *express understanding* that he would pick Mark up when he had recovered from his grief and had settled down. Hal Painter did not abandon Mark, he never relinquished his parental rights, and he was not an unconcerned or unfit father. Dr. Glen R. Hawks, a competent child psychologist, was the only expert witness, and while on the stand he was permitted to testify freely, without any meaningful cross-examination. A few years later, the Devil's Advocate was on a panel with Dr. Hawks at a law school seminar on child custody and asked Dr. Hawks about the case. Dr. Hawks said that he got carried away, that he had said things he had not intended to say, and he admitted that his testimony would have carried more weight had he examined Hal Painter instead of only Mark and the maternal grandparents. The trial judge found for the father, but the Iowa Supreme Court reversed, relying heavily on the testimony of Dr. Hawks, which had failed to persuade the trial judge.

The Iowa decision in *Painter v. Bannister*,[6] also involved a misapplication of the best interest of the child rule. American cases support the proposition that before that test is triggered off there must be proof of parental unfitness, abandonment, abuse, or some extraordinary circumstances for which the parent is responsible. See *Bennett v. Jeffreys.*[7] Otherwise, there could be a game of "musical chairs" with children being shunted about from one person to another (as frequently happens in foster placements) according to the then perceived best interests of the child. *Painter v. Bannister* was useful in putting an end to the automatic supremacy of the parental rights doctrine, but it did a great disservice by abandoning one absolute for another. There should be no absolute or automatic rule of thumb; experts should be heard with a healthy skepticism but not listened to with a closed mind.[8]

There is still another area of profound disagreement with regard to child custody cases. The psychiatric viewpoint has been expressed that the child's need for certainty and stability in his environment is such that modification of prior custody/visitation orders should not be permitted, or, if ever permitted, only in extreme circumstances.[9] Existing law is that a substantial change of circumstances affecting the child justifies a new hearing and redetermination. That legal rule is the source of great satisfaction to most judges because they are aware that if they make a mistake, it may be rectified. Admittedly, mistakes are made. The Devil's Advocate favors the legal rule, although he regrets that modification powers occasionally are abused by courts for punitive or other poor reasons. The burden of proof is and should be on the one seeking modification, and it should be a heavy but not impossible burden.

Critics of the legal process in child custody cases also fail to note that in over 90 per cent of the cases the custody/visitation issue is resolved by agreement. The hotly contested child custody case is but the tip of the iceberg. *Kramer v. Kramer* is not typical. It must be conceded, however, that the contested cases (and statutes) set the rules for negotiating agreements and that disposition of the issue by agreement has both advantages and disadvantages. Settlement avoids the trauma of courtroom theatrics, but at least some settlements also involve the use of children as pawns in the fight over financial terms. Perhaps divorce courts should have a "watchdog" to check out the custody/visitation terms of private agreements.[10]

In that small percentage of child custody disputes which end up as contested cases, there also is the problem of the appropriate role of the expert psychiatrist or psychologist. The expert may be one selected by the court, or he may appear on the witness stand at the request of one of the contestants. Family system experts are apt to insist upon an examination and evaluation of all parties and the child, but some, like Dr. Hawks in *Painter v. Bannister,* do not see the complete family constellation. The experts also differ as to the amount of time spent in interviewing, evaluating, and reporting, and as to whether their reports are merely

conclusory or factual and related to the dynamics of the family. These differences are so substantial that it would be naive to suggest the elimination of cross-examination and rebuttal. As is true of any other profession or occupation, a little knowledge may be a dangerous thing.

Personal experience with court-designated experts has increased the skepticism of the Devil's Advocate. The problem becomes acute when the court-appointed expert has a preferred status (or "mantle of infallibility") and is regarded by the court as impartial while other experts produced by the parties are considered to be "hired guns." In fact, as Dr. Milton Halpern enjoyed saying, there are no impartial experts — at least in the pure sense. Most recently it has come to our attention that some experts accept Goldstein, Freud, and Solnit's *Beyond the Best Interests of the Child* as gospel from cover to cover. The doctrine of that book, especially page thirty-eight and following, is being uncritically accepted by some experts as a reason for the recommendation given to the court, which in turn accepts the recommendation.

In one recent case, from our admittedly partisan point of view, the court went overboard in embracing the psychiatric report and recommendation of its staff psychiatrist. Our client was the father of a nine-year-old son who had been taken by the mother and concealed since age four. She had gone underground with the child and had cut off all contacts with the father and with her own relatives as well, fleeing from city to city and apartment to apartment. The father, who had a modest income, spent over $15,000 in the five years trying to trace them, and by sheer luck, finally learned that they were in an ultra-Orthodox community and that the son was enrolled in a yeshiva. Before the flight, none of the family had been observant.

The mother violated both an agreement and a court order when she went underground. Because she feared that she might be found, she changed her name and that of the child. Understandably, a symbiotic relationship developed between the mother and her son; each became overly dependent upon the other. Until they were located, the mother and son shared the same bedroom and the same bed. In surveying the facts, the expert concluded that there was considerable pathology but that due to the length of the relationship and the son's current religious commitments and lifestyle, the situation should not be disturbed. Adverse possession was nine parts of the law. He recognized that the boy had encopresis, but brushed it aside. He disregarded what the mother had done to the boy by going underground, and recommended that the mother retain custody but that both mother and son should undergo therapy. Since the court made it clear that it would rely upon its own expert, and since the father had limited funds, the case was settled, the mother begrudgingly agreeing to visitation rights with the father (mostly on her own terms). The father consoled himself with the thought that perhaps in a few years his then adolescent son might make his own choice as to custody and visitation.

Of course, the above is only a synopsis of a few of the relevant facts, and to preserve anonymity, details have been left out. The psychiatric report in question did not back up its recommendations with reasons, other than to say that the boy had a need for continuity and stability and that removing him from his mother, school, and lifestyle would be detrimental. But some five months later, neither the boy nor the mother have had professional help and the boy still has encopresis. It is likely that they will be back in court.

The use of slogans by courts or experts is highly objectionable. A judge should give reasons for his decision and the expert for his recommendation. The use of *a priori* assumptions is unprofessional. There is many a slip in going from the general to the particular. This particular boy had demonstrated considerable adaptability and resiliency during his nomadic five years, and the mother had demonstrated her egocentricity. But fear of another change in the boy's lifestyle was the basis for decision. *Sed quaere.*

In another case the court's expert became the mother's expert. The father had refused to cooperate with him, so the court's expert teamed up with the mother's counsel and sat at the counsel table during the hearing. When he took the stand, this expert recommended that for an experimental period of six months the father should be barred from all contact with his two young children. The reason was that the mother needed such time to repair her bad relationship with the children. After six months, it was proposed that the court should have another hearing to see whether the father should or should not have any visitation. No reason was given for the recommendation other than a paraphrase of page thirty-eight of *Beyond the Best Interests of the Child.* There was no critical cross-examination of the expert by the father's counsel.

A few months later the father changed counsel. It was learned that the mother had seen the children only on one occasion, and then had staged quite a scene. Nothing had been done to improve her relationship with the children, and they had been farmed out to a family friend while the mother supposedly got herself together. The appellate court was appalled and reversed the "experimental decree" which had made orphans out of the children, and they went back to the father. The expert had overlooked the extent of the mother's pathology.

The above experiences are set forth to illustrate the need for cross-examination and the danger of uncritical acceptance of expert testimony. It also is asserted that *Beyond the Best Interests of the Child* should not have the status of Biblical authority.

Fortunately, most courts have not blindly followed the more extravagant notions these set forth. [See, for example, *Pierce v. Yerkovich,* 363 N.Y.S. 2d 403, and Crouch, "An Essay on the Critical and Judicial Reception of *Beyond the Best Interests of the Child,*" *Family Law Quarterly,* vol. 13, pp. 49-103 (1979).] It is no improvement to substitute vague and inflexible psychiatric theory for ambiguous and

rigid legal principles. There should be no automatic rules; each case should be carefully examined, by both the expert and the court.

As long as the adversary system is with us, whether adapted or modified or not, it entails clearly defined roles. The judge and counsel must fulfill their assigned functions. The whole process is corrupted if cross-examination is waived or if the judge accepts without question any psychiatric opinion. This does not mean that the proceeding must be acrimonious or that the judge should have a closed mind with regard to the testimony of any expert witness. Reports, evaluations, and recommendations are needed to aid the court in reaching a sound decision. But it is a judicial function, where there is no jury, to find the facts in the light of the evidence and to render a fair decision.

Although it is true that many potential expert witnesses avoid the courts because of dislike of cross-examination and what they regard as a contentious atmosphere, that does not mean that a decision such as child placement should be made by committee. Many competent professionals are willing to take part in the administration of justice, and some may even welcome the experience of being subjected to cross-examination if they are adequately prepared and have reasons to back up their expert opinions. It also should be remembered that it may be a healthy thing to have one's opinions tested in this way. Andy Watson a few years ago noted the difference between social work reports that were submitted to a court, and those prepared for other social workers. The latter were loaded with hearsay and gossip. The ones made to the judge were far more detailed and accurate.[11]

The conclusion of the Devil's Advocate is that psychiatrists and others must play by the rules of the adversary system, and that the court had best not abandon them. The whole system breaks down when the equilibrium is upset by court, witness, or counsel. There may be other "truths," but the adversary process is at the heart of our system of justice, and "truth" ordinarily will emerge if the system is in working order. Obviously, there are many answers to the jesting question "What is truth?" but courts are concerned with legal truth, which is not the same as "psychiatric truth" or "scientific proof," even though the latter may and should enter into the resolution of human and social problems.

HENRY H. FOSTER, ESQ.

References

1. *See* Foster: Family law, 1960, Annual Survey of American Law, 36 NYUL Rev. 629, 635 (1961), in which it is said, "Perhaps the major impediments to a sound solution of custody issues are the meaningless generality of such principles as the 'best interests of the child' and the persistence of the insensitive sentimentality that 'blood is thicker than water.' Unfortunately, these general propositions too often decide concrete cases. For a wise and just disposition of custody cases, such abstractions need particularization, and standards are needed to spell out amorphous concepts even though detailed rules are impracticable. Moreover, the assistance of social scientists and experts is essential if the decision is in fact to be in accord with the 'best interests of the child.' "
2. *See* Foster and Freed: Child custody, NYUL Rev., 39:615 (1964); and Comment. Use of extra-

record information in custody cases, Univ of Chic Law Rev 24:349 (1957)

3. The Family Law Section of the New York State Bar Association in cooperation with the New York state legislature currently is studying and holding hearings on taking custody cases out of the adversary process. This study was instigated by Judge Sol Wachtler of the Court of Appeals, and Judge Bernard S. Meyer recently joined in demanding procedural changes, but Judge Meyer stresses the child's need for independent counsel in custody cases.
4. *See* Note, Alternatives to parental right in child custody disputes involving third parties, Yale Law J 73:151 (1963), and Kubie: Provisions for the care of children of divorced parents: A new legal instrument, Yale Law J 73:1201 (1964)
5. *See* Bazelon: The role of the psychiatrist in the criminal justice system. Bull Am Acad Psychiat Law 6:139 (1978); and Perr: Psychiatric testimony and the Rashomon phenomenon, Bull Am Acad Psychiat Law 8:83 (1975)
6. 140 N.W. 2d 152 (Iowa 1966), cert. denied 385 U.S. 949 (1966)
7. 40 N.Y. 2d 543, 387 N.Y.S. 2d 821, 356 N.E. 2d 277 (1976)
8. *See* Foster HH: book review, Beyond the Best Interests of the Child. Bull Am Acad Psychiat Law 2:46 (1974)
9. *See* Goldstein, Freud, and Solnit: Beyond the Best Interests of the Child, p. 38 *et seq.* (1973); Watson: Psychiatry for Lawyers p. 261 (rev ed. 1978)
10. The concept which is gaining momentum is that in disputed custody cases the child should have his own independent counsel, if necessary supplied to him at state expense if the parties cannot foot the bill, and that following the Wisconsin model the court should have its staff check out the terms of separation agreements to make sure that the welfare of children is protected in uncontested divorce cases. Judge Bernard S. Meyer of the New York Court of Appeals has advocated this position, but many lawyers are opposed to it.
11. *See* Watson: The Children of Armageddon: Problems of Custody Following Divorce, Syracuse Law Rev 21:55 (1969)