The Devil's Advocate

Blindfolded justice may need a seeing-eye dog but the blind should not lead the blind, especially down blind alleys. What we have in mind is the blind application of the platitude that courts need psychiatrists in order to provide the predicate for sound custody decisions. It all depends upon the judge and upon the psychiatrist.

A recent New York decision triggered off the latent skepticism of your Devil's Advocate. Usually that skepticism rises to the surface only when he reads opposing counsel's brief or listens to TV commercials. The case in point is *Strang v. Strang,* which appeared in the April 29, 1980 issue of *The New York Law Journal,* p. 14, cols. 4-6. A state supreme court justice had before him the question of whether or not an ex-husband, apparently a man of substance, should be required to pay some three to four years of arrears in child support. His agreement and the prior divorce decree obligated him to pay $300 a month child support until his daughter and only child was 17 years old and thereafter to pay $400 a month until she was 21 or sooner emancipated. Suzanne, the daughter, was 20 years old at the time of the decision.

On the surface it would appear that a psychiatrist would not be needed to advise on so mundane an issue. A computer would be more serviceable. However, the ex-husband interposed the defense of justification for his non-payment. He claimed that he stopped paying when Suzanne stopped visiting him, and that Suzanne stopped visiting because her mother had "brainwashed" her. In such roundabout fashion, a psychiatrist was introduced into the case. Obviously to the simple mind of a judge, a psychiatrist would be the qualified expert on "brainwashing." He was to be preferred over a Madison Avenue advertising executive, a politician, or Svengali.

As the judge recounts the testimony of the psychiatrists, the latter started out with the premise that for the child to turn against her father, either the father must have done something "terribly wrong," thereby driving the child away, or, in the alternative, the mother must have caused the alienation. No other possible alternatives were considered even though elsewhere in the stated facts it is said that the twenty-year-old daughter claimed she was bored when she visited her father and did not wish to see him, and in glowing terms talked about the good relationship she had with her stepfather.

Having commenced with a false dichotomy and having ruled out other possible alternatives, the stage was set for Catch-22. The court without batting an eye (under the blindfold) solemnly quoted the psychiatrist as

having testified that "the suggestion by the custodial parent that the child [now 20] could make up her own mind as to whether she would visit with the non-custodial parent is in reality a signal to the child that the custodial parent does not want the visitation to take place, and that by giving the child such a choice, the custodial parent actually causes the child to take sides and make a choice as between parents, which invariably results in the child taking the side of the custodial parent, as occurred here."

The court then went on to impose a strict liability that ordinarily is reserved for keepers of wild animals or the vendors of dangerous articles. To the judge it made no difference whether the mother deliberately "brainwashed" the child or did so inadvertently. The fact that it may have been unintentional "will not inure to her benefit." And such is true even though the mother did not intend total rejection of the father or may have felt subjectively that her interference was for the child's best interests. "The only justification for plaintiff's actions in depriving the defendant of his rightful visitation would be some real and pressing concern for the welfare of the child and proof that the visitation would be inimical to the welfare of the child."

Note the emphasis upon deprivation of the father's rights as compared with the express wishes of this twenty-year-old woman who had been a legal adult for the past two years, and was no longer subject to custody orders. Throughout the opinion, Suzanne is referred to as the "child." Would the judge take umbrage if someone called him "boy"?

The decision also discloses that there were protracted hearings over a two and one-half week period. A good portion of that time may have been taken up in qualifying the expert and recording his impressive credentials. It is difficult to perceive why anything else should have taken so long. The sum involved was not in dispute and in any event probably was less than the aggregate counsel fees. Really, what was at stake was a power struggle between affluent parents (listed in the Southampton Social Register) each of whom sought the court's Goodhousekeeping Seal of Approval. Within a matter of months the issue of child support would have become moot anyway when Suzanne reached 21.

Granted that court proceedings may be the better alternative to dueling, the fact remains that two and one-half weeks of valuable court time was spent to serve the personal spite of feuding parents. The father struck back at the mother by stopping support payments. The mother retaliated by suing him for arrears. And the court appointed psychiatrist abandoned his dignity to embark on an exercise in futility. He might better have counselled the feuding parents to compromise and call it quits and asked them to examine their personal motivations. He might also have explained to his honor that twenty-year-old Suzanne was no child. And if all that had been done, common sense rather than expert testimony would provide the basis for decision. The pathetic thing is that probably the judge and his expert congratulated themselves on their great teamwork in coming up with a scientific decision and as having advanced the cause of

forensic psychiatry and open-minded justice. In fact, the situation of a judge who lacked peripheral vision was not improved when he received myopic assistance.

HENRY H. FOSTER, ESQ.