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COMMENTARY

Publicly criticizing custody professionals: Where is the line between activism and defamation?

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Tragically, a court makes a misguided decision in a particularly contentious custody battle. After the decision is finalized, one of the parents harms, or even kills, their own child. The innocent parent whose child's life has been adversely affected or cut short, berates the court. Also taken to task through social media, the parent laces into the custody professional who recommended the child placement arrangement that

turned out to be unsound. Seeking to alert others to what the parent believes was a wholly inept or corrupt custody professional, public ridicule erupts. Sadly, this public evisceration can take place in less dramatic circumstances as well.

While the innocent parent's reaction is understandable, the possibility of becoming the recipient of a defamation lawsuit may have unknowingly begun. Attorneys know that defamation is the act of damaging the reputation of a person or business. It can take the form of slander and/or libel. Slander is done by saying something defamatory; libel is done by writing and publishing the defamatory act. Laypeople may not realize that their social media activism may, indeed, be actionable.

In Texas, the elements required to prove a defamation allegation include:

1. The defendant published a false statement that defamed the plaintiff.
2. The false statement must have been made with the requisite degree of fault regarding its truth.
3. The statement must have occasioned damages for the plaintiff, unless the statement constitutes defamation per se.
4. For defamation per quod (distinguishable from a comment that would be considered defamatory per se), the plaintiff must prove actual damages related to loss of reputation, mental anguish or economic loss.

In the case of *Reddy v. Karr*, 102 Wn. App. 742, the Washington appellate court held that:

"Ch. 26.12 RCW authorizes superior courts to appoint family court investigators to assist in carrying on the work of the family court. Family court investigators, who are appointed by the court, and who serve at the pleasure of the court, perform court-ordered parenting evaluations in order to assist the court in developing such orders as the court deems necessary regarding parenting plans for minor children whose parents are becoming divorced. We hold that family court investigators performing court-ordered parenting evaluations act as an arm of the court and accordingly are entitled to quasi-judicial immunity from civil liability for acts undertaken in performing such parenting evaluations."

What are the issues? Typically, at least one parent turns away from a child custody evaluation feeling that their concerns were not heard, the evaluator did not review their evidence, listen to them or their collaterals, liked the other side better or was friends with the other parent's attorney. So, as a result of these biases, they "lost." That parent is often angry—so angry that they begin to post things online about the child custody evaluator directed at the evaluator's process, methods, personality and impartiality. Publicly criticizing individuals by posting negative reviews online—regarding child custody professionals such as mental health professionals who conducted child custody evaluations, and others, including attorneys ad litem, guardians ad litem and social workers who represent child protective services—can raise questions about the line between activism and defamation. The critique often revolves around concerns about bias, lack of scientific validity, financial interests, and potential harm to families and children associated with custody evaluations.

While activism aims to bring attention to systematic issues and advocate for change, defamation involves making false statements that harm someone's reputation. It is crucial to ensure that statements posted online are based on factual information and do not cross the line into making unsubstantiated claims that could damage the reputation of individuals or organizations involved in evaluating parties seeking custody of children in litigation. The parents posting these comments and criticisms believe that their "truth" is factual and their perceptions of bias are factual.

Striking a balance between raising awareness about legitimate concerns and avoiding defamatory statements is essential in order to promote the best interests of children weighed against assuring accountability for the professionals involved. Transparency and accountability are key.

What's the issue with one or two snarky posts? Other parents, ordered to go to that same mental health professional for an evaluation, go online to search up the evaluator, and see a less than flattering review of the mental health professional. Those other parents then call their attorney(s) in a huff, contending that the court or their attorney wants them to go to an incompetent person. Such commentary can color the evaluation process and the demeanor of the parties to the custody case. The evaluator has to work even harder to gain the parties' trust, to assure the parties will be treated equally, that one party or the other is not trying to coerce the children in some way, to evaluate the parties, their psychological profiles, and their children. Numerous mental health professionals, sorely needed to act as the arm of the court and assist in custody cases, shy away after being caught in the crossfire. Mental health professionals entering the field choose not to engage in custody work

because of the very real possibility of being attacked for doing their job well.

Many parents find the child custody evaluation process intrusive and are not keen on exposing what they perceive to be their dirty laundry. Evaluations are expensive, and potentially add months to the process of finalizing a divorce, modification and/or termination of parental rights case. Parents express serious reservations not only about the process, but about the impact of the process on their children and the functionality of their family relationships. Yet, courts should benefit from the information gleaned from evaluations. Evaluators can help the court discern whether there are bona fide concerns in a given case regarding addiction allegations, domestic violence allegations, allegations that a party's mental health issues may impair their ability to parent and protect children, and address the fitness of a given individual to parent. Evaluators can also assist the court in ascertaining the impact of a potential relocation of one parent, and the impact of that relocation on the parties' children, to the extent that the move may present issues that take a psychological toll on the children.

Often parents can reach their own agreement as to custody. Those cases tend not to be high conflict cases. Parents have a way of resolving issues as to major decisions regarding the children, where the children will live, with whom, where they will attend school, which doctors they will see, whether there is a need for counseling—"ED/MED/HEAD."

The evaluator often serves as a professional consultant for the judge, giving the judge insight to the functionality—or lack thereof—of a given family unit. Is there a loyalty bind in a given case? Is a child being

squelched emotionally? Is a child being thrust in the position of being a confidant to the parent? The evaluator is in the unique position, provided the parties are cooperative, in seeing all the players in a given case. The evaluator must maintain impartiality throughout the process. Often parents either express that the evaluator is inscrutable, or that it is clear to the parent that the evaluator favors one party. A parent's perspective may obviously be tainted, as they are in fact being judged.

In *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994), a Texas Supreme Court case, a psychologist named Esther Bird was charged with examining a child to determine if the child displayed indicia of having been sexually abused. On the conclusion of her examination of the child, she concluded that the child had been sexually abused, and further, that the child's natural father, W.C.W., abused the minor child. The psychologist signed an affidavit in which she set out her conclusions. The child's mother, in turn, filed Bird's affidavit in family court in support of a request for modification of child custody and access orders, modify child custody and visitation orders. All issues, civil and criminal, were based on the assertion that the natural father had committed child abuse; however, all charges against the natural father were dropped. The father then sued Bird and her employer, Kenneth Wetcher.

The Texas Supreme Court grappled with the issue of whether Bird, a psychologist, "owed a professional duty of care to the natural father to not negligently misdiagnose the condition of the child. In defense, the psychologist asserts there is no professional duty running to third parties as a matter of law, and regardless, the affidavit asserting the natural father to be the abuser of the child was used as a part of the court litigation process, and consequently, the statement was privileged as a

matter of law." Bird and Wetcher were granted a summary judgment in their favor by the trial court. The court of appeals reversed and remanded for trial on the merits. The Texas Supreme Court held that the trial court granted summary judgment in favor of Bird and Wetcher. The Texas Supreme Court held that "as a matter of law there is no professional duty running from a psychologist to a third party to not negligently misdiagnose a condition of a patient. We further reaffirm that a statement in an affidavit filed as a part of a court proceeding is privileged. Consequently, we reverse the judgment of the court of appeals and render judgment that the plaintiff take nothing".

Justice Craig Enoch also noted in *Bird v. W.C.W.* that:

"Psychology is an inexact science. There is an inherent risk that someone might be falsely accused of sexually abusing a child; in such cases, injury is almost certain to result. The magnitude of the burden of guarding against the injury is also uncertain. While mental health professionals may be able to conduct tests to determine whether there is indicia of sexual abuse, the quality of information they can acquire is limited. The child is often the main source of the information, and young children can have difficulty communicating abuse of that nature. Thus, while the risk of injury to an accused parent is real, it is only part of the equation."

The inexact nature of science has been recognized by the Texas Legislature in Texas Family Code Section 107.009, which provides in pertinent part as follows:

"Fam. Code Section 107.009

Immunity

(a)A guardian ad litem, an attorney ad litem, a child custody evaluator, or an amicus attorney appointed under this chapter is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, child custody evaluator, or amicus attorney.

(b) Subsection (a) does not apply to an action taken, a recommendation made, or an opinion given:

(1)with conscious indifference or reckless disregard to the safety of another;

(2)in bad faith or with malice; or

(3)that is grossly negligent or wilfully wrongful."

In the more recent case of *In Re C.J.C.*, No. 19-0694 (Tex. Jun. 26, 2020) the Texas Supreme Court grappled with the issue of:

"… whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order that names a parent as the child's managing conservator. Because a fit parent presumptively acts in the best interest of his or her child and has a fundamental right to make decisions concerning the care, custody, and control of that child, we hold that it does."

Child custody evaluators typically take at least six months to evaluate parties to a suit affecting the parent child relationship. Is that enough time to truly come to know the parties? Their children? Can every evaluator set aside latent and/or obvious prejudices to consider each party and each child in a way that any other professional could or would?

There may be times when an evaluation is not warranted, or is simply difficult to complete. Often parents are better able to co-parent when they have resolved their issues, rather than relying on a court and/or the evaluation process, which the parents perceive as having terms imposed on them. The courthouse provides a bloodletting of sorts. Recovering from such battles is not easy. There are times, particularly when a parent is impaired in some way, that the parent simply refuses to cooperate with the evaluation process. In addition, if parties happen to live in a remote area, it may be difficult to find an expert with the necessary skills to evaluate the parties.

Some may recall times when court bailiffs were routinely dispatched to do evaluations. Indeed, consider someone who works as a hostage negotiation lead for the Dallas Police Department SWAT for many years. That SWAT officer is quite equipped to evaluate all types of situations, and people, quickly. Not every "expert" appointed to conduct a child custody evaluation has the same experience nor credentials. TRE 702 says nothing about an expert having a bunch of letters after their name. Instead, an expert is someone who has "knowledge, skill, experience, training, or education" provided that person has "scientific, technical, or other specialized knowledge" that "will help the trier of fact to understand the evidence or to determine a fact in issue."

Who is the client for the evaluator? The judge? The family unit? The AFCC Model Standards, a yardstick for the evaluation process since 2006, suggested that evaluators possess—at a minimum—a master's degree in mental health, and further, that such individuals participate in continuing education in areas that impact families and child custody issues. The evaluator works as the arm of the court. Note that evaluators

are not to engage in ex parte communications about a case with the judge or with the attorneys representing the parties. This often now translates to evaluators asking to speak to all attorneys involved in the case contemporaneously. Consult the rules in your state to ascertain basic criteria for child custody evaluators.

In Texas, basics include, per Tx. Fam. Code 107.104:

1. “Full time experience, working at least 30 hours per week;
2. In a discipline that is in the human services field, such as counseling, family therapy, psychology or social work;
3. Having at least a master’s degree from an accredited college or university in one of those areas, or being licensed as a social worker, a professional counselor, marriage and family therapist, or being a licensed psychologist or licensed physician authorized to practice in Texas;
4. After becoming licensed:
    a. practicing for two years under the supervision of another professional in regard to how to evaluate intellectual, social, physical and/or psychological functioning, as well as developing an understanding of how to meet physical and social needs; and
    b. Performing at least ten court ordered child custody evaluations under the supervision of someone who is qualified pursuant to the statute to do such evaluations; or
    c. Is employed by a domestic relations office; provided, however, that the evaluations pertain to individuals who have been court ordered to participate in the evaluation process.

5. Someone with a doctorate in human services may also complete a social study if they have completed professional development coursework and have professional experience tied to child custody evaluations, which can include internships, practicums and other preparatory activities completed by the individual in the course of completing their doctoral study."

A well-done custody evaluation can be of assistance to those involved in the case. The judge can learn about how each parent has and currently functions emotionally, how each of the children is adapting to the significant change in family structure that divorce brings, what parenting plans are likely to be most effective and what interventions may be helpful to bring about the "best interests of a child." But, a parent's emotional hurt at "losing" a custody case can unleash pent-up frustrations and underlying issues that can often be unseen during the evaluation.

Mental health professionals are not clairvoyant. They are not perfect. Research can only indicate what may be likelier than not. The majority of evaluators in the collective experience of the authors try to do a good job. They keep up with relevant research and attend continuing education. The disgruntled actions taken by a few custody litigants can cause damage not only to the individual evaluator but to the profession as a whole. In doing so, while often well-intentioned, some of those litigants may wind up in the courts they just walked away from.

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