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The Oz Illusion:

The Expert Behind the Curtain

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[5] Notwithstanding all the criticism of baseless opinions expressed in courts by experts, more often than we would wish to contemplate, case outcomes are dictated by expert witnesses and some of those witnesses have no empirical basis for the opinions that they express (Eaton, L., 2004. For arbiters in custody battles, wide power and little scrutiny. *The New York Times,* 5/23, p. 1.)

In what is, perhaps, the most famous case, Andy Barefoot was sentenced to death based largely on predictions of his future dangerousness, offered by psychiatrists neither of whom had examined Barefoot. In 1978, Barefoot was convicted by a Texas jury of capital murder. Subsequently, the same jury had to determine whether or not the death penalty should be imposed. The State called two psychiatrists, John Holbrook and James Grigson, both of whom, in response to hypothetical questions, opined that Barefoot was likely to commit further acts of violence. On the basis of the experts' testimony, the jury imposed the death penalty.

When the case found its way to the United States Supreme Court, the American Psychiatric Association, participating as *amicus curiae,* made known its view that predictions of long-term future violence are wrong more often than they are right. The Supreme Court was not swayed by the psychiatric association's modesty. Justice White, writing for the Court declared: "Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time" (*Barefoot v. Estelle*, 103 S.Ct. 3383 (1983), at 3398)

If, in a capital murder case, the bar for admitting an expert's testimony is set at getting it right some of the time, it should not surprise us that judges presiding over custody cases are often willing to transform the custody evaluator into "the most important person in determining who gets custody, and on what terms" (Eaton, 2004, p. 1)

Consider the exchange that follows, taken from the trial transcript in a custody case. The judge interrupts an ongoing cross-examination with a let's-cut-to-the-chase type question.

The Court: So, Dr. Ball, who do you think is telling the truth here?

Expert: Well, it seems to me that Mrs. Smith has been more candid with me.

Cross-examining attorney: What basis do you have for that opinion, Doctor?

Expert: Well, I really can't put my finger on it. It's one of those things that requires clinical experience.

Cross-examining attorney: [to the court] Your Honor, if Dr. Ball is unable to provide any basis for his opinion, I ask that it be stricken.

The Court: But he did provide a basis for his opinion. His opinion is based upon his clinical experience.

Cross-examining attorney: I don't think that's sufficient, Your Honor, and I renew my objection.

The Court: First, counselor, this is the court's appointed expert. Second, we're dealing here with issues of weight not issues of admissibility. I'll take it for what it's worth.

It is my hope that readers of *The Matrimonial Strategist* are able to realistically assess "what it's worth". Mental health professionals should not present themselves to courts as experts unless they have a reasonably sufficient knowledge of the published research in their fields of expertise.

Custody evaluators ought to be familiar with the extensive body of research that consistently demonstrates that they are no more effective at identifying lying than non-experts are. To suggest that they can do so is to deceive the court. Courts don't like to hear experts say "I don't know" and experts are reluctant to say it. But when it's the truth and when you've taken an oath to tell the truth, it's what must be said.

The admonition to do no harm applies not only to the families with whom evaluators work but to the justice system as well. Evaluators do harm to the operation of the justice system when they deliberately or unintentionally lead courts to believe that they know more than they do, that their assessment devices are more reliable and precise than they are known to be, or that clinical intuition is a suitable substitute for opinions based upon empirical data.

When experts decline to opine or when they offer candid statements concerning the limits of their data, courts may decide that the experts' input has not been helpful, but at least the input has not been harmful. Expert testimony is harmful when experts who should not opine do so anyway or when experts suggest that their methods have been reliable when the methods have not been reliable.

The task of the evaluator.

An evaluator should have in depth understanding of the family being evaluated and of the pertinent research. The evaluator's task is to decide what research is applicable to the specific family that is the focus of the court's attention, to apply the research, and to explain how the cited research sheds light on the particular issues in dispute. [Some evaluators do not cite research and some assert that judges have let them know that the judges don't wish to read reports that seem more like term papers than like advisory reports. Whether research is cited or not, I submit that applicable research must be drawn upon. The evaluator who is not guided by the research is flying blind, and the judge is in the passenger seat.]

The task of the reviewer.

A reviewer (not to be confused with a second evaluator) should focus exclusively on the methodology employed by the evaluator and should never attempt to formulate an opinion concerning the most suitable parenting plan for the child(ren). A reviewer **[6]** should not utilize information beyond that obtained by the evaluator. Reviewers seeking to secure additional information are aided in their search *only* by the retaining party. Thus, the newly acquired information is likely to be information that bolsters the position of the retaining party. An imbalance in information considered dramatically increases the probability that the reviewer's opinions will be flawed. More tests do not produce a better data set if the tests are unreliable. Similarly, more information does not provide a more sound foundation for opinion formulation if the information is skewed.

In 2001, Dr. Jan Grossman, a Pennsylvania psychologist functioning as a case reviewer, was disciplined by the Commonwealth's Bureau of Professional Affairs for a failure to maintain appropriate role boundaries. In the Grossman case, the State's expert testified that Dr. Grossman had "moved from evaluating existing data to creating his own data."

The case-blind didactic expert.

A case-blind educator provides information concerning some well-researched dynamic and leaves it to the court to decide how (if at all) the dynamic that has been explained is applicable to the issues in dispute. Other writers have used the term "social framework testimony". My term, case-blind didactic testimony, emphasizes the importance of diligently maintaining constructive ignorance of the facts of the case.

Often, when framework testimony is offered, the expert is familiar with many (but never all) of the facts of the case. In offering testimony, the expert is at least implying (if not directly opining) that the framework being described is applicable to the facts of the case. The case-blind didactic expert, in contrast, makes clear that s/he knows nothing about the case and has simply been retained to explain some psychological dynamic to the court. In such cases, it is obvious to all that the parties who retain such experts believe that the psychological dynamics being explained are applicable to the case being adjudicated, but the experts do not opine on the issue of applicability and make it clear that they are unable to do so.

All of this leads us to the *Oz Illusion* – the illusion that the testifying expert knows more than s/he does, can reliably offer the predictions that will form the basis of a parenting plan (when s/he cannot), and can resolve the complex issues facing the court. Mental health experts are aware that a misleading aura of precision is often created when experts utilize assessment devices that produce scores. Similar harm is done when experts imply (or courts infer) that expertise forms the basis for an expressed opinion when, in fact, it does not. An expert opinion rests on the firm foundation of specialized knowledge that has been slowly and carefully developed over many years by members of the profession with which the expert is affiliated. Experts who see no need to draw upon the knowledge base of their respective fields and who confidently express opinions based solely on their own experience, skills, or insight are using smoke and mirrors and a large curtain. Look behind the curtain.

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