

CUSTODY AND ACCESS ASSESSMENTS

In the last three years, the Board has received an unprecedented number of complaints against psychologists by parents who have been involved with them in custody and access litigation. Typically, these complaints involve a psychologist who was ordered by the court, or who was hired jointly by the litigant parents, or their lawyers, to conduct an evaluation of the participants and to make recommendations to the court regarding custody of the children and visitation rights. Such parents are beyond mediation or believe that they have irreconcilable differences. Each parent hopes that the psychologist, or other mental health worker, who is conducting the assessment will agree with their position. Invariably, the complaints involve perceived bias or unfairness, and come from the parent whose wishes have not been favoured in the written report and/or the testimony of the psychologist. All such complaints are investigated and, since the issues involved are usually numerous and complex, this is an extremely time-consuming and expensive task. In those instances where the complaints are serious and the Board believes evidence in support of the complaints exists, a hearing must be held which is a very costly matter to all registrants, and a painful one to most participants. A review of recent experience suggested to the Board that a special caution be issued to registrants undertaking this type of work, together with some suggestions as to relevant literature and remarks as to some particular hazards observed by the Board.

RELEVANT LITERATURE

In Ontario the germane legislation is the Children's Law Reform Act, R.S.O. 1980, c. 68. Section 24 (1) of the Act asserts the primacy of the best interests of the child in evaluating applications for custody and access and Section 24 (2) specifies seven major areas of child need or circumstances to be considered. Four of these require the evaluation of relationships or family functioning, viz.: the affectional ties between child and other family members and other persons involved in the child's care and upbringing, the length of time lived in a stable home environment, the permanence and stability of the family unit with whom it is proposed that the child will live, and the ability and willingness of the persons applying for custody to provide the child with guidance, education, and to meet any special needs of the child. Some of the foregoing would also be informed by individual testing and

interview, but it must be recognized that the observation or other study of relationships assume major importance in custody assessments. The remaining areas of child need specified are those of the child's views or preferences, the plans proposed for the care and upbringing of the child, and the degree of blood relationship of the child to the litigants.

As is the case in a number of other jurisdictions, the Act specifies with sufficient generality that considerable leeway in interpretation is possible. It is understandable that the Courts frequently rely heavily on the assessments of mental health workers which, in particular cases, may make the general more specific and meaningful, and which may offer suggestions for reconciling the sometimes apparently conflicting areas of concern (6).

The relations between clients and the mental health workers are different from those encountered in other clinical relationships. The parents and children are likely to perceive their involvement as coercive. Both parents and children may attempt to deceive the assessor. Then too, it is clear that at least one parent must experience the outcome of the assessment process as a loss and may react with anger towards the assessor. Assessment for custody and access is a clinical task demanding of time and of care in the fairness and consideration that must be shown the participants. It is a task fraught with many ambiguities and hazards, and which, to be successful at all, must be pursued without losing sight of the primacy of the best interests of the children.

There are several books which offer guidance to mental health workers with respect to assessment. Of particular interest is the recent book by Ruth Parry and her colleagues in the Custody Project of Toronto (16). This work discusses the major issues in the area from historical, legal and mental health perspectives and gives detailed accounts of the practices of the multi-disciplinary group involved in this long-running study of custody assessment. Another book of particular interest to psychologists, is by Gardner (8) who describes his interview, observational and testing procedures and rationale in detail. Also of interest is the monograph of the G.A.P. Family Committee (9) which offers extensive discussion of the issues involved in custody assessment.

The generally relevant periodical literature is vast, and even the literature directly related to custody assessment is considerable, so that the

following is a selection of some of the most salient articles meriting attention. There are at least two recent critical reviews of the literature on custody evaluations (11,13); the former includes a discussion of the possible conflict of adversarial positions adopted by assessors and A.P.A. Ethical Principles and other professional standards of conduct, as well as extensive discussion of investigative procedures and report content. Several articles offer advice on investigative and analytical procedures in custody evaluations (3,10,14,15). Some authors have focused on procedures for evaluating family relations and functioning (4,7,12). Some articles offer discussion of theoretical models for custody evaluations which may be found of value (1,2). Space does not permit the citation of literature dealing with the problems of giving expert legal testimony; however, psychologists should be aware that lawyers are likely to have studied Ziskin's book (17) which suggests specific techniques for negating psychological testimony in various contexts, including that given in custody disputes.

From the Board's experience most complaints accuse the psychologist of bias against the complainant, or allege that insufficient attention was given to all possible alternatives for custody and visitation. The grounds for such complaints may be found in inadequate assessments, and also in prejudicial arguments and conclusions.

INADEQUATE ASSESSMENTS

Two frequently cited principles of custodial assessment are those of verification and fairness. Verification refers to the evaluation of assertions and opinions by the search for supporting evidence or consistency from several sources of information. Sometimes verification requires that permission be obtained to seek information from teachers, physicians or others. In some instances the confirmatory material may be sought in the results of psychological testing. Where inferences from psychological testing give rise to significant conclusions about the child or parents, confirmation in the form of consistency of test findings, or where possible, by verification from interview or observation, or from the reports of others, represent attempts to find verification. Failure to seek verification of information or inferences that play a key role in custody recommendations is incompetent and also suggests the likelihood of bias or prejudice. ▶

By fairness it is understood that the investigative procedures employed, and the processing of the information obtained, will be dealt with in an even-handed manner with respect to both parties in the dispute. For example, the interviews, testing, and situational observations carried out for one party should be carried out in a comparable way for the other party. Similarly, attempts to verify assertions made by, and about, parents should be comparable if fairness and competence is to be judged.

In instances where one of the parents refuses to participate in the assessment procedures there is the issue of whether a report, or any testimony, should be offered to the court. Professional opinion appears to favour professional withdrawal from the litigation process. If appraisal of the participant parent is carried out, any report or testimony submitted to the Court should carry the explicit recognition that it is incomplete and inadequate as a custody and access assessment.

In the analysis and discussion of long-standing and complex relationships, it is understandable that some misstatements of fact, some omissions of information may occur in the reports of psychologists, particularly when these errors have little or no bearing on the recommendations made and the reasoning underlying these. However, when the errors have direct bearing, or when the errors have minor relevance to the conclusions, but occur disproportionately with respect to one of the litigants, then there is incompetence and unfairness suggesting prejudice. While there are other ways in which assessments may fall short of professional standards, violations of these two principles account for the most serious inadequacies observed by the Board.

PREJUDICIAL ARGUMENTS

Having completed an assessment, professional opinion is divided as to the extent to which the mental health evaluator should strive to play the role of impartial expert or should permit themselves an adversarial position in their report and testimony. If an adversarial position

is adopted, then extreme care must be taken to argue the recommendations fairly and to recognize the limitations of one's evidence. Unless an adversarial position is based on adequate assessments that are carefully analyzed and discussed in an unbiased manner, the position is actually an antagonist one towards one of the litigants and is unacceptable.

In some instances bias may be shown by interpretations of test findings which are not in accord with professional literature or practice, but which do bolster a particular adversarial position adopted by the psychologist. In other instances, a given event may have occurred, or a particular assertion or a specific test inference may be valid, but, as is often the case, the implications that these have for the welfare of the child are ambiguous. If, in written or oral testimony, only one sort of implication is mentioned while others of equal or greater likelihood are ignored, and if the chosen implication clearly favours the wishes of one of the litigants, then unfairness may be judged. Sometimes psychologists will show a clearly adversarial position which is not based on fairly argued grounds. The implications of most of our findings, observations and conclusions are limited to a short forward time span. To insist on the long-range implications of much of our knowledge goes far beyond what is scientifically known or which is clinically reasonable. Similarly, when psychologists advocate a particular decision, but base this on arguments and assumptions that are not psychological in nature, then again the operation of prejudice is strongly suspected. These are some of the ways in which psychologists can go beyond reasonable limits of interpretation and argument and which may not be evident to the Court. The expectation of psychologists in custody and access disputes is that they will give expert professional opinion. Such opinion is expected to be an even-handed professionally informed consideration of the possible outcomes of alternate arrangements that may be before the Court. Expert mental

health witnesses are not in Court to express their personal views of social justice nor their personal evaluations of the litigants.

- Bruce Quarrington

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- 15) *MUSETTO, A.P.*: Standards for deciding contested child custody cases. *Journal of Clinical Child Psychology*; 1981, 3, 51-55.
- 16) *PARY, R.R. ET AL. (EDS.)*: Custody Disputes: Evaluation and Intervention. Lexington, Mass.: Lexington Books, 1986.
- 17) *ZISKIN, J.*: Coping With Psychiatric and Psychological Testimony (2nd. ed.). Beverly Hills, CA: Law and Psychology Press, 1975. ■

DISCIPLINARY HEARING

On October 2, 1987 a Tribunal of the Ontario Board of Examiners in Psychology heard evidence into a charge of professional misconduct against Dr. X.

It was alleged that Dr. X was guilty of professional misconduct under the Psychologists Registration Act, R.S.O. 1980, Chapter 404 in that he failed to maintain the standards of practice of the profession in his treatment of his client, Mrs. A.

The particulars of the allegation were as follows:

1. Sexual Impropriety

In or about May, 1978, in his office at _____ Hospital, he was sexually intimate with his client Mrs. A. in that he massaged parts of her body after instructing her to remove items of clothing.

2. Unprofessional and Improper Behaviour with respect to his Treatment and Dealings with Mrs. A.

In or about May 1978, he told his client Mrs. A, that he would be unable to provide

therapy to her at _____ Hospital. He further stated that Mrs. A could receive therapy from him through his private practice. He advised Mrs. A that his fee would be \$40.00 per hour and would not be covered by OHIP. Although Mrs. A advised him that she could not afford his fees, Dr. X failed to assist her in finding the needed services of another therapist.

Dr. X entered a plea of not guilty.

In reference to the first charge of sexual

impropriety there was a single witness, Mrs. A, who was also the complainant. Counsel for Dr. X did not cross examine the witness. Dr. X did not testify. The Tribunal found the evidence of Mrs. A to be undisputed and was satisfied that the events relating to the first charge did take place.

The second charge was dismissed on the recommendation of Counsel for the Ontario Board of Examiners in Psychology because of lack of evidence.

The Tribunal found Dr. X guilty as charged on the first charge of professional misconduct. In finding Dr. X guilty, the Tribunal considered principal 8 of the Standards of Professional Conduct (Revised December 1986) which reads:

"A psychologist shall not seek special benefit or advantage from relations with a client."

More specifically reference was made to 8.4 which reads:

"A psychologist shall not have sexual relations with a client"

Reference was also made to Principle 6(1) of the Ethical Standards of Psychologists (1977 Revision) which are published by the American Psychological Association and which are endorsed by the Ontario Board of Examiners in Psychology. This section reads in part:

"Sexual intimacies with clients are unethical."

The penalty awarded to Dr. X was as follows:

1. Suspension from the Register for a six-month period beginning October 2, 1987.
2. Before Dr. X's name is restored to the Register he must undergo a psychological evaluation and any treatment deemed necessary therefrom, to the satisfaction of the Ontario Board of Examiners in Psychology, by a therapist selected from a list provided by the Ontario Board of Examiners in Psychology.
3. Publication of the charges, the circumstances, and the findings of this Hearing with the names of the complainant and defendant deleted.

The Tribunal accepted the submission of

Counsel for the Ontario Board of Examiners in Psychology that the two major factors to consider in imposing penalty were individual deterrence and general deterrence. The profession of psychology must be aware that psychologists who engage in sexual behaviour with clients will face serious consequences. The Tribunal ruled that Dr. X must receive psychological evaluation, and, if necessary, therapeutic help and that before his registration certificate is re-instated, the Ontario Board of Examiners in Psychology must be satisfied that it is appropriate for him to resume practice. The therapist should be selected from a list of practitioners supplied by the Ontario Board of Examiners in Psychology.

As mitigating factors the Tribunal noted that Dr. X through his counsel had been unwilling to subject the complainant, Mrs. A, to any further stress through cross-examination. Mrs. A showed considerable distress throughout her testimony. It was also noted that the incident as described by Mrs. A was, as far as the Tribunal was aware, a single occurrence and that it occurred nearly 10 years earlier. ■

THE BOARD'S PROCEDURE FOR INVESTIGATING COMPLAINTS

The Psychologists Registration Act of 1960 did not establish a formal complaints committee or specify procedures for investigating complaints and determining their outcomes. It has therefore been necessary for the Board to develop its own. The following is a general description of the procedures the Board has adopted. It should be noted however that, depending on the nature of the complaint, they may vary.

1. All complaints are directed to the Registrar as set out in the procedures for submitting complaints on pages 157 and 158 of the 1988 Directory. The complaint is then usually referred to the Assistant Registrar: Professional Affairs.
2. The complainant is asked to consent to the release of a copy or a summary of the letter of complaint to the psychologist who is the subject of the complaint.
3. The psychologist is asked to respond to the complaint in a given period, usually from two weeks to a month depending on the complexity and seriousness of the complaint. The psychologist is advised that his or her response will be shown to the complainant.
4. The complainant is provided with a copy of the psychologist's response and is given an opportunity to comment.
5. The letter of complaint, the psychologist's response and the complainant's comments on the response are studied by the Registrar, the Assistant Registrar, one Board member (or on some occasions, two

members) and the Board's legal counsel. These four people function as the complaints committee. In some instances, and when it would appear to be useful, the Assistant Registrar will obtain additional information to clarify details of the complaint, or the psychologist's response, before forwarding the complaint file to the other members of the complaints committee.

6. The members of the complaints committee set the strategy to be followed in completing the investigation.
7. Usually it will be the responsibility of the Assistant Registrar to assemble the facts through correspondence or interviews, to document everything that is done, and to inform the committee of the findings. In the majority of cases it has not been necessary for the Board member to conduct the actual interviews with complainants, potential witnesses, or the psychologist. However, in some cases it may be decided by the committee that it would be useful for the Board member to meet with the complainant and/or the psychologist. The steps taken by the Board member are documented for the benefit of the rest of the committee, and the record.
8. When the relevant information has been assembled the Assistant Registrar submits the findings to the other members of the committee and summarizes the status of the allegations.
9. The committee members each give their

opinion on whether or not there is substance to the allegations and whether, if proved, they would constitute professional misconduct. Alternatively, they may decide that additional information is required. If necessary, an expert opinion may be obtained from a member of the profession who practises in the area in question.

10. Having evaluated the information that has been assembled, the committee then considers the manner in which the complaint can be resolved. Alternative steps that may be taken are: to lay charges and hold a hearing; to hold an Invitation (that is, a meeting with the psychologist without disciplinary consequences but possibly requiring an undertaking by the psychologist); to send a letter expressing the committee's concerns to the psychologist and extending a warning; or to dismiss the complaint as groundless, or not constituting misconduct. Ideally, a consensus is reached on the action it is appropriate, or necessary, to take. Practical limitations will play a part in this decision, such as the adequacy of the evidence, the credibility of potential witnesses and their willingness to testify.
11. Depending on the action to be taken, the members of the complaints committee will have the following functions:
 - a) If charges are to be laid, the Assistant Registrar or legal counsel may draft the Notice of Hearing and submit the draft to the other members of the complaints ▶

committee for their comments. The members of the committee participate in approving the draft, selecting witnesses and, in some cases, may advise legal counsel on points in the preparation of the case.

b) If an Invitation is held, it is conducted by the Board member with at least one other Board member or the Registrar in attendance. The Assistant Registrar may also attend and take notes and draft a

statement based on the recommendations made in the Invitation to be sent to the psychologist following a meeting.

c) If a letter is to be sent to the psychologist summarizing the Board's concerns, the Assistant Registrar drafts the letter after obtaining the comments of the other committee members.

12. In all instances under point 10 the complainant will be informed of the action taken.

13. It is imperative that a tribunal be unbiased. Therefore, information before the complaints committee is not discussed with other members of the Board in order that knowledge of this complaint will not disqualify a Board member from participating in any future disciplinary action in respect to this or other complaints against a particular psychologist. ■

PROHIBITION AGAINST COMPANIES ANNOUNCING PSYCHOLOGICAL SERVICES

The Board has been referred to several announcements and advertisements for psychological services that list only the name of a company but not the name of a psychologist. At its meeting on April 22, 1987 the Board decided that it is not appropriate for a company to announce that it provides psychological services. Since a company is not an individual and therefore could not hold a certificate of registration it is a violation of section 11 of the Psychologists Registration Act R.S.O. 1980, c. 404 for a company to announce that it provides psychological services.

Sections 11(1) and (2) of the Psychologists Registration Act state as follows:

11. 1) No person shall represent himself to be a psychologist unless he holds a certificate of registration.
- 2) A person represents himself to be a psychologist when he holds himself

out to the public by any title, designation or description incorporating the words "psychological," "psychologist" or "psychology" and under such title, designation or description offers to render or renders services of any kind to one or more persons for a fee or other remuneration.

Only a psychologist may announce a psychological service. If a company hires a psychologist to provide psychological services and wishes to announce this fact, the psychologist must be identified in the announcement so that members of the public will be aware that it is the psychologist who is responsible for the service. The psychologist must also ensure that the announcement is in compliance with Principle 4 and Appendices A and B of the Standards of Professional Conduct which deal with advertising and announcements. ■

STATUS OF REGULATION RESPECTING PROFESSIONAL MISCONDUCT

The proposed amendment to Regulation 825, R.R.O. 1980, made under the Psychologists Registration Act, to define professional misconduct, was reprinted in the February 1988 Bulletin for the information of psychologists registered in Ontario. The Board has been advised that the Regulation became effective on March 10, 1988 when it was filed in the office of the Registrar of Regulations as Ontario Regulation 136/88. ■

ADDITIONS TO THE TEMPORARY REGISTER SINCE FEBRUARY, 1988

Peter Bernstein
Clare Brandys
Diana Burt
Pamela Cooper
Karen Davies
Brian Doan
John Harris
Paul Hewitt
Joan Hulbert
Annette Lorenz
Rhonda Love
Wayne Meadows

Ali Mili
Janet Olds
Jonathan Quek
Illya Roumeliotis
Robert Saltstone
Alan Shapiro
Philip Smith
Maria Sudermann
Michael Sullivan
Page Westcott
Johnny Ngim-Kee Yap

CORRECTION

The Board regrets that it inadvertently neglected to delete Dr. Marta Townsend's name from its letterhead and the list of Board members in its February, 1988 issue of *The Bulletin*. Dr. Townsend, who resigned from the Board on November 18, 1987, has had no responsibility for the statements or policies of the Board since the date of her resignation. ■

ANNUAL RENEWAL OF REGISTRATION

Renewal notices were mailed to all psychologists registered in Ontario, between April 18 and 20, 1988. Payment should be postmarked no later than May 31, 1988; otherwise, a late payment fee of \$50 is required. The renewal fee for psychologists in Ontario is \$300 and for those practising outside Ontario is \$85.

The Board would appreciate it if each psychologist would correct and/or supplement the personal information sent out with the renewal notices, and return this form with their payment.

DR. A. IAN SMITH

The Board has learned with regret of the death of Dr. Ian Smith of Windsor, Ontario on January 4, 1988. ■

The BULLETIN

The Bulletin is a publication of the Ontario Board of Examiners in Psychology.

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THE BULLETIN

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