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Validating Hocus Pocus

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RICHARD COULD NOT be consoled. His five-year-old son had been kidnapped; at least that is how he saw it. Before Tyler could pull back his words, they had become the catalyst for a full-blown investigation by Child Protective Services, followed closely by a neglect proceeding.

From the date that proceeding was commenced, Richard was confined to supervised visits with his son by a myopic consensus reached by the prosecutor, law guardian and judge. And when it was all over, Richard had spent 12 agonizing days on trial, spread over an indifferent 13-month Family Court calendar.[1] Six months have passed since the trial concluded and still no decision.

The accusations were incredible. Evidently, in the midst of fending off a rebuke from his mother, Tyler blurted out that Mary, Richard's new wife, had "touched" him. He could not remember, however, the last time it had occurred. When asked what his father had done in response, Tyler said that he made his stepmother stop.

The pediatrician found nothing to physically corroborate Tyler's now robotic chant of abuse. Contaminated before the county's petition was even filed, Tyler had repeated the story to three CPS workers, two police officers assigned to Sex Crimes, an Assistant District Attorney, and a host of other concerned intervenors and family members. His accusations were now so deeply implanted that he could not be expected to recant.

By themselves, Tyler's out-of-court statements of alleged abuse would be insufficient to support a finding of neglect against Richard. Essential to sustain such a petition is corroboration. A decade ago, a key change in how that word was defined became new law and, ultimately, a powerful weapon in the hand of the prosecution.

In 1985, amidst a wave of charges of abuse against day care workers, the Legislature passed, with near unanimity, an amendment to Family Court Act §1046(a), created in large part to facilitate convictions in child abuse cases. That amendment revised the old law by obviating the necessity of the child's in-court testimony and by redefining the corroboration necessary to convict. The amended statute loosely denominates corroboration as any evidence "tending to support the reliability of the previous statements . . ."[2] Commenting at the time on how broadly the statute's corroboration component could be interpreted, one Family Court judge went so far as to suggest that the results of a failed lie detector test might pass for corroboration in her courtroom.[3]

BECAUSE THE CORROBORATION necessary to prove neglect was no longer restricted to what might otherwise be admissible evidence on its own, self-proclaimed child sexual abuse experts or "validators" sprang up, all willing to endorse their personal version of a psychoanalytical lie detector test for children. While the New York courts have held that a validator's testimony may be admitted to corroborate the out-of-court statements of infant victims of child abuse,[4] the validator is confined to rendering an opinion only as to whether a child suffers from sexual abuse syndrome. Were the validator to focus on the "credibility" of the child instead of addressing whether the child manifests sexual abuse syndrome, her proffered testimony, if admitted, would usurp the role of the trier of fact, and therefore would be inadmissible as a matter of law.[5] The "hocus pocus" occurs in divining the difference between that expert's inquiry and how an intelligent lay person might test a child's credibility.

Fairness would seem to require that the court adhere to stringent requirements regarding who will be cloaked with the title "validator". Unfortunately, the reality is much different. In fact, there are no set requirements.[6] Although, a so-called expert will be subject to cross-examination regarding her education and training, there are no established guidelines that the validator be a psychiatrist, licensed psychologist or even a licensed therapist. Rather, a modest history in the field, together with an adherence and familiarity with validator protocol and procedures, portend to separate expert testimony from conclusions that may represent little more than a subjective belief.[7]

The standards utilized in assessing the existence of abuse are even more tenuous. The psychiatric literature concerning the validation of child sexual abuse seems to rely on an analysis of indicators drawn from observations of the child, which tend to support or refute the existence of abuse.[8] Indeed, Arthur H. Green, a professor of psychiatry at Columbia University, sets forth a table entitled "Characteristics of True and False Cases of Child Sexual Abuse,"[9] listing indicators attendant to true cases on the left, and false cases on the right, as if something so complex as determining the existence or non-existence of sexual abuse can be accomplished by adhering to a quasi-scientific checklist.

RIVAL PSYCHIATRIC literature criticizes this "trend toward overly simplistic approaches to validation" and indicates that the "formulation of characteristics that allegedly differentiate true from false cases of child sexual abuse contradicts (the authors') experience as researchers and clinicians."[10] Since the result of an erroneous validation will likely jeopardize the well-being of a child, or devastate one's life, experts in the field have warned that "it is important not to oversimplify this exceedingly complex problem of clinical assessment or reduce the process of diagnosis to a checklist approach."[11] Unfortunately, while this "validation-by-numbers" approach is easiest to implement, the use of these indicators falsely imports a mathematical precision that is belied by such a subjective analysis.

Focused primarily on protecting the abused child at all costs, the Legislature apparently accepted the consequential erosion of an accused's right to due process, thus opening the door to a now topical form of abuse that is equally heinous. By way of example, an insidious ex-spouse need only motivate, inadvertently or otherwise, an already troubled child to utter allegations of abuse for the court to curtail an accused's custody or visitation rights. Disposed to err heavily on the side of protecting the alleged child victim, judges too often discount the ultimate damage done to the parent-child relationship by an elongated interruption in custody. Innocent parents sacrificed at this cautiously constructed altar surely deserve far more protection than the courts have been willing to afford.

One way to change the judiciary's approach is to require immediate in-camera interviews with the allegedly abused child,[12] especially in cases where the only potential corroboration is the validator's testimony. Permitting a judge and counsel an opportunity to then engage the child, in-camera, especially when a bevy of abuse supporters has already been allowed that opportunity, gives due process substance and the court greater insight. The fear that the child might be further traumatized by this moderate intrusion is certainly outweighed by the harm suffered when a child is separated from an innocent parent.

> Allegations of child sexual abuse are among the most serious charges that can be made. It is the court's responsibility to protect children from such conduct where competent evidence indicated that it has occurred: and it is likewise the court's responsibility to protect the accused where no such evidence is offered. As observed in *Matter of Smith* [citations omitted], ' a child abuse finding against a parent or parents where no child abuse has occurred is as harmful and as devastating to the subject child as is the failure to find child abuse where the same has occurred.'[13]

(1) While the names are fictitious, the facts closely resemble those of a trial in which I represented a respondent-parent charged with neglect.

(2) Family Court Act §1046(a)(iv).

(3) Justice Karen K. Peters (now of the Appellate Division, Third Department), "An Act to Amend the Family Court Act in Relation to Evidence In Proceedings Involving Child Abuse and Neglect," S. Doc. No. 5210-A, A. Doc. No. 6555A (1985).

(4) *Matter of Nicole V.*, 71 NY2d 112, 518 NE2d 914, 524 NYS2d 19 (1987); *Matter of Linda K.*, 132 AD2d 149, 521 NYS2d 705 (2d Dept. 1982).

(5)*People v. Parks*, 41 NY2d 36, 48, 359 NE2d, 358, 367, 390 NYS2d 848, 858 (1976); *People v. Fogarty*, 86 AD2d 617, 334 NYS2d 91 (2d Dept. 1982).

(6) *But see* Matter of R/M Children, NYLJ, May 2, 1995, p. 25 (Family Court, Kings County) (J. Segal).

(7) Id.

(8) See Arthur H. Green, M.D. "True and False Allegations of Sexual Abuse in Child Custody Disputes," *Journal of the American Academy of Child Psychiatry* 25, 4:449-456, 1986; S.M. Segrol F.S. Porter, L.C. Blick, "Chronicle Intervention in Child Sexual Abuse," *Handbook of Clinical Intervention in Child Sexual Abuse*, pp. 39-79 (Lexington Books 1982).

(9) Segroi et al., at p. 455

(10) Corwin, Berliner, Goodman, Goodman, White, "Child Sexual Abuse and Custody Dispute," *The Journal of Interpersonal Violence*, Vol. 2, No. 1, pp 91-105 (March 1987).

(11) Id. at 92

(12) In-camera interviews have long been accepted in custody cases (*Lincoln v. Lincoln*, 24 NY2s 270 (1969) but do not properly serve as corroboration of the child's out-of-court statements since the interview is not "additional" evidence of a "different type" within the accepted definition of corroboration (See *Ballentine's Law Dictionary*, 3d ed. p. 27). The in-camera interview can, however, properly be considered as affecting the weight accorded to the child's prior out-of-court statements. *Matter of Tara H.*, 129 Misc. 2d 508, 494 NYS2d 953 (1985).

(13) *Matter of R/M Children*, n.6 supra, at p. 25.

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