

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

FILED

JUN 18 2001

KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of the County of Santa Clara
BY CMN DEPUTY

In re the Marriage of K [REDACTED])
)
Petitioner: PAMELA K [REDACTED])
)
Respondent: MICHAEL K [REDACTED])
)
_____)

No. 1-94 FL 043 [REDACTED]

PROPOSED
STATEMENT
OF DECISION — **Excerpts**

A very substantial amount of testimony and numerous exhibits were presented during the course of the trial towards the goal of casting doubt on the value of Dr. Johnston's initial August 27, 1995, report. This evidence primarily centered around Dr. Johnston's use of psychological testing information to allegedly corroborate, correct or adjust her clinical observations, the case history, and other available evidence, along with guiding her inquiries. The issues in regard to her use of psychological testing can be placed into one of three broad categories: 1) that Dr. Johnston either lacks understanding of the basis for, or the limitations of, such psychological tests; 2) that the scoring of such tests was defective, either in terms of the deficiencies of the computer scoring service utilized, or Dr. Johnston's lack of knowledge as to how the tests should be scored which prevented her from properly supervising those who actually performed the scoring services; and, 3) that these questionable test results were utilized, not only in terms of extensive copying, but in acceptance of their defective analytical structure. Particularly with regard to the use of the BehaviorDyne computer scoring service for the MMPI-2 tests, despite the fact that Dr. Johnston states that she no longer utilizes this service or has made adjustments to account for its deficiencies, her testimony at time of trial was that her observations did not conflict with either these or any other test scores.

Without responding in depth to all of these contentions, aspects of which clearly transcend the issues of this case, the Court, after hearing and considering all of the evidence, makes the following three determinations deemed to be most persuasive with regard to the use of Dr. Johnston's initial report of August 27, 1995, if any, in this case only. First, that the use of the BehaviorDyne scoring process was inappropriate in that (issues such as representativeness, lack of description of norms, and the inability to demonstrate validity or reliability aside), it is gender-biased, causing substantially different results and diagnoses for identical answers based solely upon whether a male or a female is responding. Second, that there was extensive copying directly from, and non-analytical acceptance of, these inappropriate BehaviorDyne test results in such a fashion that it formed virtually the exclusive basis for the entire initial evaluation report. And, thirdly, that there was little evidence that such pervasively used test results were only tangentially utilized to either confirm, or were consistent with, other observations and information.

Having made the foregoing determinations, it would be a relatively easy matter to exclude Dr. Johnston's initial report, and subsequent updates (they being viewed as either offering little substantive change from the initial report, or continued to repeat the same unreliable conclusions made in the first evaluation), in addressing the custody determinations to be made herein, but rather to simply rely upon the other evidence received during the course of the trial. However, to do so, without further comment, would not permit an accurate understanding of the dynamics involved herein as a consequence of the mere presence of such an initial evaluation.

First, separate from the testing deficiencies, and probably most significant is the disparate treatment found in this initial report. Aside from, in effect, placing Mrs. K [REDACTED] in a "hole" from which she found herself constantly trying to "climb out of," the initial evaluation, which created the fundamental basis for, and which very much set the tone of, the events which were to occur in this matter thereafter, demonstrates a rather substantial unevenness in its approach. At the onset of the case, and prior to all of the myriad of issues relating to how it was created being raised, an initial blind reading of this first evaluation caused the undersigned to be struck with a strange uneasiness that something was "not right." Various shortcomings were pointed out as to each individual, however, as to Mrs. K [REDACTED] they seemed to be characterized as being significantly detrimental and, in effect, non-reversible, whereas for Dr. K [REDACTED] they were either ignored, minimized, or viewed as being transitory. The good points as to each were treated in a somewhat reverse fashion -- given little weight as to Mrs. K [REDACTED], and repeatedly extolled as to Dr. K [REDACTED]. The initial explanation by Dr. Johnston that observations, histories, and the like, called for such disparate conclusions, at first assuaged these concerns.

However, during the course of the trial others appeared to have perceived the evaluation in a similar fashion as the Court, and had previously raised the same concerns (i.e., "Declaration of Anthony Atwell, M.D." (Exhibit "26").) This uneven approach (the basis of which continues to be uncertain) is similarly noted in subsequent evaluations to the extent that one begins to develop a hesitancy to accept Dr. Johnston's continued and persistent glowing characterizations of Dr. K [REDACTED]'s efforts on behalf of his children, and repeated accounting of Mrs. K [REDACTED]'s shortcomings, due to a possible lack of objectivity. Unfortunately, it is primarily the lack of a basis or justification, for what may in fact be accurate characterizations, that creates what could be an inaccurate perception of bias. However, aside from whether the content of these evaluations are accepted as being valid or not, the point being made is that it is the perceived biased manner in which such issues were presented by an impartial "court expert" that continued, in and of itself, to be an aspect in driving the actions of the parties herein.

Secondly, one of the factors the Court must consider in assessing what is in the “best interest of the child” under California Family Code section 3011(c), being “(t)he nature and amount of contact with both parents.” could not be found in the initial evaluation, despite repeated re-readings. Dr. Atwell similarly observed that Dr. Johnston “has made little mention of the children’s relationship to each parent and has not addressed the children’s attachments nor the history and pattern of care taking.” (Exhibit “26,” page 2, paragraph 9.) Regardless of the fact that we have a stay-at-home-since-birth mom, and a successful physician who oftentimes is compelled to work long hours, and the attachments that these now 12- and 14-year-old children have formed to each in light of such circumstances, as not being discussed in any significant fashion in the report, casts further doubt upon Dr. Johnston’s contentions that her initial report drew upon her observations, or reflected the histories of the parties, or similar confirming evidence.

Finally, the total failure of the initial evaluation to address domestic violence in any appropriate fashion created various problems. Again, in considering the “best interest of the child” under California Family Code section 3011(b)(2), the Court must specifically consider “(a)ny history of abuse by one parent against . . . (t)he other parent.” In her initial evaluation, Dr. Johnston notes that Mrs. K [REDACTED] describes her marriage as one where “she was a victim of both verbal and physical abuse.” Although stating that “(t)here was no disputing that one incident of physical conflict occurred between Mike and Pam,” Dr. Johnston dismisses it as being a “culmination of a history of demands, frustrations, evasions and denial on both parents’ parts,” and that “there is absolutely no indication of a pattern of aggressiveness” on Dr. K [REDACTED]’s part. However, Dr. Johnston does not point to any evidence that supports these particular conclusions, in fact, the evaluation strongly suggests to the contrary when it notes, with regard to Stephen, that “he speaks of being afraid that his father will kill his mother, linking this fear to his witnessing the one-time physical battle in the home,” and Sean when she says “(t)here is no doubt but Sean feared his father in the past.”

In addition to being a shortcoming in the initial evaluation, subsequent re-evaluations also do not appropriately address the allegation(s) of domestic violence. Following the initial report, Dr. Johnston was given a copy of Mrs. K [REDACTED]’s autobiographical statement (Exhibit “36”) that further details this “one-time physical battle in the home,” along with a pattern of verbal abuse (and indications of further inappropriate physical contact) from Dr. K [REDACTED], which continued to be ignored. Similarly, statements from Stephen in the second evaluation of June 5, 1997, that “(h)e gets frightened when his father is angry, and he fears that his father will hurt his mother” (Exhibit “D,” page 7), are not even commented upon, let alone viewed as being a “red flag,” which would call for further inquiry. Even if one were to take the position that this is simply a

recounting of the earlier “one-time physical battle in the home,” the fact that it continues to be of substantial concern to Stephen almost two years later points to its significant impact and the need to adequately and fully investigate the allegation. (It is doubtful that the point can be made any more emphatically than to have Stephen, at age 6, expressing concern about his Mom going to heaven, and making a cross (Exhibit “81”) for when she would die.)

In the fourth, and last, evaluation of November 3, 1999, Dr. Johnston states in her own words that Mrs. K [REDACTED] “again spoke of her belief that Mike has been a physically, verbally and emotionally abusive man and that he still was abusive towards her,” with absolutely no comment whatsoever from Dr. Johnston. (Emphasis own.) The detailed physical and verbal abuse claims that accompanied an “Order to Show Cause” filed December 5, 1996, in this very action, in support of Mrs. K [REDACTED]’s attempt to obtain a domestic violence restraining order, and which resulted in, among other things, a curb-side drop-off/pick-up restriction on child custody exchanges order being made on January 24, 1997, is similarly not even mentioned (regardless of the validity of these claims) in any of the three evaluations that followed. This failure to even investigate the issue is despite the fact that Dr. Johnston had assisted in preparing a “Domestic Violence Education for 730 Child Custody Evaluators” program in March of 1998, wherein she specifically stated that, among other things, the goals of this “workshop” were “to present techniques for early identification of cases involving domestic violence, . . .” (Exhibit “30.”)

This failure to properly address the issue of claimed domestic violence is viewed as a disservice to both of the parties, and the children. If untrue, it acts as an unjustified and egregious claim that, at the very least, clouds Dr. Killion’s efforts with regard to his children. If true, in terms of this proceeding, could give rise (at least by current standards) to a circumstance that the Legislature has deemed to be “detrimental to the child” and bears on this Court’s basic ability to make “any orders regarding the physical or legal custody or visitation of the children.” California Family Code sections 3020(a) (Emphasis own), 3044(a) and (d.) At a minimum, the previously-cited section 3011(b)(2) requires that the Court consider such conduct in determining the “best interests of the child.”

Aside from not providing information to assist the Court in its determinations herein, this repeated omission, among other things, fueled concerns of Mrs. K [REDACTED] that her issues were being ignored or deemed unimportant, and justifiably raised doubts in her mind as to the value of any further involvement with Dr. Johnston. Being at a loss to adequately explain the reason for all of the

various evaluations' significant shortcomings (the extensive court testimony of, and credentials possessed by, Dr. Johnston notwithstanding), this Court, too, has serious doubts as to the value of Dr. Johnston's views that she did provide as possibly assisting the Court in this proceeding. Consequently, the Court intends to proceed without the benefit of the assistance of a "court expert," and to shift the focus to the real issues in this action by looking at the children as they are today -- not over six-and-one-half-years ago when the dissolution was filed, or four years ago, but today.

Stephen, who is 14, is presently described as maturing both emotionally and socially; doing extremely well at (and very involved in) school (Exhibit "85") and venturing into ice hockey; soft-spoken, yet self-assured; calm and thoughtful. Dr. Atwell, who is the only professional, aside from Dr. Johnston, who provided the Court with a relatively current (at least as of December, 2000), assessment of the progress and evaluation of the children, found no evidence of "adjustment reaction," even though there were continuing parental conflicts. These ongoing difficulties between his parents, being termed by Stephen as more "annoying" than anything else, caused Dr. Atwell to observe that Stephen was able to not only keep such conflicts in perspective, but to view them objectively. Although not wanting to hurt either parent, and clearly loving both, Stephen had conveyed to Dr. Atwell that his Mother was the more "nurturing attentive, receptive and understanding parent" (Exhibit "22," page 2) -- this opinion being not a mere "parroting" of Mrs. K█████'s contentions, but under circumstances that Dr. Atwell found that Stephen could "verbally express (his) own feelings and views candidly without influence from either parent." Ibid.

Per Dr. Atwell, these observations as to the parent who is viewed as more understanding, are echoed by Kathleen when she says that Mom "is the loving person who listens to her," whereas Dad is "Mike," and does not listen (the one thing about him that she would correct if she had just one wish to make as to him.) Kathleen, who is 12, is repeatedly referred to as "sturdy," is starting to be impacted by her rebellious teen years, but is, nonetheless, described as witty, charming, and loves life. She is more verbal than Stephen, speaks her mind, calls herself "stubborn," and is certainly not a "puppet" of Mom's. She, like Stephen, is also described as showing "increasing maturity and emotional growth," termed "outstanding" as to her work in school (Exhibit "84"); and, is involved in sports, with volleyball being the current focus. Like her brother, Kathleen also loves both of her parents, and has also indicated a preference to Dr. Atwell that nothing change with the current visitation, with the exception that while with her Father that she have more one-on-one time with him.

Based upon his assessments of each child, Dr. Atwell in his December 18, 2000, report, stated that "I strongly opine that continuation of the current custody and access arrangements under which these two children have thrived is in their overall best interests." (Exhibit "22," page 2.) As noted at the onset, this "current custody and access arrangements" is primarily a "temporary" time sharing schedule that the parties have been functioning under for over three-years. Although recognizing that such "temporary" orders hold no precedential value in ultimate custody determinations, there is, nonetheless, a "(p)aramount need for continuity and stability in custody arrangements – and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker – weigh heavily in favor of maintaining ongoing custody arrangements." In re Marriage of Burgess (1996) 13 Cal.4th 25, 32-33. At the very least, its duration and how the children are doing under it, weigh heavily in determining the "best interests of the child" in terms of viewing it as either going towards "(t)he health, safety, and welfare of the child," or "(t)he nature and amount of contact with both parents." California Family Code section 3011(a), (c.)

The over three-year history of the current custody arrangement aside, there is a fundamental fact that Mrs. K [REDACTED] has been the primary caretaker of these two children for their entire lives. This aspect has a certain overriding significance in that, as Dr. Atwell testified, "relationship" is the most important feature in a parent-child situation, and is the basis for a child's emotional structure both in and out of the family setting. Consequently, as Dr. Robert Geffner testified, when a child's environment is disrupted under such life-long circumstances, there can be a significant impact. Dr. Geffner continued by stating that this bonding process, which he also deems as being the key issue in parenting and child-rearing, should not be disrupted.

Dr. Atwell also testified that equally important with the aspect of "relationship" is the "history" of caretaking, followed by its "quality." As to "history," it is worth noting once again that we are talking about the past which cannot be changed. Who is to say that Dr. K [REDACTED], if given the opportunity to be a full-time-stay-at-home-Dad from the onset of the children's lives, that the results that these remarkable children have demonstrated to date would not have been similarly achieved. But we will never know because the reality is that it is Mrs. K [REDACTED] who filled this role. The nature of the children's bonding that has occurred to date as to each parent is based upon the circumstances that have existed to date, and upon the type of contact (in terms of time and quality) each has had with their parents. Regardless of how one may view the fairness of this, it is, nonetheless, the "hand that each party has been dealt," and cannot be changed.

However, as noted at the onset, the responsibility of this Court is to address the issues of custody and visitation prospectively -- something that can be changed. But, the initial response to whether the present circumstance should be changed is "why?" Although recognizing that in making a permanent custody determination that "changed circumstances" are not a prerequisite, one is still struck with the threshold inquiry of "why?" With Mrs. K [REDACTED] basically requesting that the current arrangement remain in effect, it is clear that it is Dr. K [REDACTED] who seeks the change. However, is it in the "best interests of the children" to disrupt their present "relationships" under which they are currently "thriving" through a "reversing" of the current custody arrangement, or by moving to a "50-50" time-sharing situation, or to some other arrangement? Again, is it for the "best interests of the children," or for some other reason?

To answer this question, unfortunately, places the Court in the position of attempting to determine the motives of Dr. K [REDACTED] in seeking such a change. In carefully listening to Dr. K [REDACTED]'s testimony, the following impressions were very clearly conveyed by him to this Court:

1. He persistently speaks of his attempts at "co-parenting," however, it became clear that his version of "co-parenting" is that Mrs. K [REDACTED] should do exactly what he wants, and falling short of that is deemed a desire on her part to not "co-parent." This term repeatedly (and almost exclusively) came up when Mrs. K [REDACTED] refused, or was non-responsive, to one of his demands.

2. He has attempted to control the conduct of the children when in Mrs. K [REDACTED]'s custody (and to varying degrees Mrs. K [REDACTED]'s conduct also.) . . .

3. Despite occasional statements to the contrary, he truly does not grasp that it is the children's best interest, and not his, that is paramount.

-Issues are constantly couched in terms of what his needs are, or what he is missing or has missed.

-Virtually everything starts out with phrase "I want," and not what the children need. . . .

5. Not once did he admit that he was wrong as to anything. . . .

6. There was not an acknowledgment by him as to any association between his conduct and the children's problems.

7. Finally, and most importantly, this well-educated, very articulate physician, after having been formally involved in these legal proceedings since November 14, 1994: . . .

the following testimony occurred that was initiated by his own counsel:

Question: (By Ms. Olson) "If you had a change in the current visitation . . . what would you choose to have as a visitation plan?"

Answer: (By Dr. K██████) "I didn't know you were going to ask me that question."

Then the judge asked, + he responded:

Answer: "Well, I have to tell you I didn't come here with the idea that I would be asked to work that out." (Emphasis own.)

The foregoing, and the last point in particular, makes it clear to the Court that the reasons for seeking custody in the fashion proposed by Dr. K██████ is not based upon the "best interests of the children." And, consequently, with Dr. Geffner's and Dr. Atwell's admonitions about the importance of maintaining "relationships" in mind; and, the fact that the children have been "thriving" under the extended temporary order that they, themselves, do not want changed; and, there being no habitual or continual use of controlled substances or alcohol abuse that is at issue, it is specifically determined by the Court that the "best interests of the children" would be best served by the continuation of Mrs. K██████ having primary physical custody and adopting the visitation schedule which is presently in effect, and which reflects the contact that is typically afforded Dr. K██████.

The issue of abuse by one parent towards the other parent, being a factor that the Court must consider in determining the "best interest of the child" under California Family Code section 3011(b)(2), although discussed in a significant fashion at the onset in regard to Dr. Johnston's evaluations, and otherwise not noted until now, was, in fact, considered in making the foregoing physical custody determination. The process by which this was done is that despite the issue of Dr. K██████'s abusive conduct being repeatedly raised by Mrs. K██████ (the import of which would go towards a limitation of Dr. K██████'s involvement with his children), and with Mrs. K██████ not seeking further limitations on physical custody beyond the basic temporary order currently in place, the Court views this as her requesting that it not take such issue into consideration as to physical custody.

The Court is willing to do so with the clear understanding that victims of domestic violence often make such requests, and that it is typically in the best interest of the victim to ignore their request and to independently pursue the

allegations on their behalf. The Court also views the obligations imposed upon it under California Family Code section 3011(b)(2) as an independent one that does not require the prior consent of the parent who may be the victim (it being the "best interests of the children," and not the parent, that is at issue), and is aware that per Dr. Geffner, joint custody is not appropriate when domestic violence is present, there being problems with power and control being present without proper intervention. In this instance, however, the Court is satisfied that adequate professionals who recognize the significance of the issue, over the course of time, have become available to assist Mrs. K [REDACTED]; that she possesses sufficient self-esteem at this stage of her life to appropriately confront such situations; that protections are in place such as the continuation of the curbside drop-off/pick-up requirements, which this Court specifically adopts as part of this order, to minimize such potential confrontations from arising; and, that further restrictions on visitation, beyond requiring that Dr. K [REDACTED] participate in appropriate domestic violence counseling (the Court finding the testimony of Mrs. K [REDACTED] credible that the factors giving rise to such abusive conduct are still present), would not be in the "best interests of the children."

As to the issue of legal custody, the Court takes a different view on the issue of one parent's abuse towards another parent. In doing so it recognizes that the "key" in abuse situations (which is a subcategory of domestic violence), is, per Dr. Geffner, "holding power over the other." As noted on the "Power and Control Wheel" (Exhibit "46") this can be accomplished through various means such as economic control, coercion and threats, isolation, using "male privilege," systematic control, intimidation, and emotional abuse. As demonstrated by the impressions of Dr. K [REDACTED]'s testimony noted previously, together with other evidence received during the course of the trial, and by the very manner in which the court processes itself have been utilized, it is clear to the Court that intimidating, controlling conduct has, and is to this very day, been occurring by Dr. K [REDACTED] towards Mrs. K [REDACTED].

In support of the foregoing contention concerning "control," the Court was presented with numerous examples, which causes it to find that Dr. K [REDACTED] has mischaracterized information to suit his needs and then claim that Mrs. K [REDACTED] was ignoring the issue; that he periodically used the ability to withhold financial support; that he had disseminated confidential information pertaining to Mrs. K [REDACTED] to school, church and community members to either discredit her, or gain some form of advantage; that he had provided false, or at the very least erroneous, information as to people Mrs. K [REDACTED] was dating to, again, discredit her and her judgment; and, during the course of the trial itself, it came to the Court's attention, that Dr. K [REDACTED] attempted to threaten, or at a minimum was verbally abusive towards, Mrs. K [REDACTED]. It is this repeated and continuing pattern of "control" that has built mistrust and is, strongly believed, to be a substantial basis for the claimed

“delays” in Mrs. K [REDACTED]’s responses to Dr. K [REDACTED]’s requests that have resulted in his pursuing prior court hearings.

Counsel for Dr. K [REDACTED] has asserted that all of these contentions of abuse were previously determined in Dr. K [REDACTED]’s favor in that no prior findings of domestic violence were made at two earlier court hearings. However, counsel does not distinguish between a specific finding that no domestic violence had actually occurred, and simply no finding having been made. Without second guessing the previous determinations (the exact nature of which is uncertain in that the orders referred to, being Exhibits “N” and “U”, made no mention of domestic violence at all), the Court is very mindful of the stigma that can attach by making such a finding, and that if the issue can be appropriately addressed by other means, that it will do so without reaching such an ultimate conclusion. It is in that same vein that the Court herein is, similarly, ~~not making a specific finding of domestic violence, at this time.~~

Consequently, the Court is not convinced that it would be in the “best interests of the children” to give the exclusive control of health and education issues to Dr. K [REDACTED], the Court, among other things, being unwilling to accept Dr. K [REDACTED]’s representations that he would only exercise such authority after first consulting with Mrs. K [REDACTED], and is convinced that such authority would be used as yet another means to “control” Mrs. K [REDACTED]. The Court also recognizes that joint legal custody, in light of the contentious history of the parties, has been unworkable, even with the assistance of a third party to mediate disputes. Consequently, pending, among other things, Dr. K [REDACTED]’s completion of suitable domestic violence counseling, the Court specifically finds that the “best interests of the children” at this time would be best served by awarding sole legal custody to Mrs. K [REDACTED], her exercise of which requires that she consult with Dr. K [REDACTED] in advance of exercising such authority.

The Court makes the foregoing determination despite the fact that Mrs. K [REDACTED] is not without her own shortcomings. In fairness, the Court notes its impressions of Mrs. K [REDACTED] as follows:

1. There is a strong sense that if the Court orders her to do something, that she would not comply with it if she disagrees.
2. That caring for the children is repeatedly referred to as filling her day. It seems to take more effort for her than most, and by the end of the day things seem to always remain uncompleted.

-Although, when compelled to do so, she can be organized, however, it is clearly not something that comes naturally to her.

3. Prompt follow-up is also an uncharacteristic trait for her.

4. It was observed, and testified to, that she can readily drift into a trance-like appearance, which can give rise to concerns about how much is "getting through" to her, and whether things called to her attention will really be addressed as she says they will. Coupled with her follow-up difficulties, this can create problems, particularly with regard to conveying intentions.

5. Her current mental and emotional state appears to not be nearly the "victim" that she portrays herself to be, or, at least, is not as much of one as she might have been at the onset of the dissolution proceeding.

-She is much stronger now, but still is not as strong as Dr. K [REDACTED].

6. She is overly conspiracy-minded (everything is a "covert manipulation.")

-Everything that is done or not done by Dr. K [REDACTED] is supposedly "sending a message" to her.

-Her resulting responses, or lack of a response, not only does not diffuse the particular situation, but tends to exacerbate it.

-Even if this mind-set is justified, it would be detrimental to herself and, ultimately, the children to continue to function long-term in this fashion.

7. Communication, or oftentimes failing to communicate at all, is a problem.

Although several of these points go towards the issue of physical custody, and were considered in reaching the physical custody determination herein, several points, such as the court order compliance and communications observations were of concern in reaching the legal custody determination. It was weighed very carefully with all of the issues discussed herein, and an extensive review of all of the testimony and documents, balancing various factors, before reaching the final legal custody determination.

Decision in this matter becoming final, Petitioner's counsel is to resubmit a second Proposed Order consistent with the terms of said Statement of Decision.

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DATED: June 18, 2001


HON. THOMAS WM. CAIN