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Doubtful Family Violence? TEST!

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by Hon. Christopher C. Edwards

Objective psychological testing of the propensity for family violence is underutilized by the bench and bar. Move for these inexpensive objective psychological tests (not a psychologist's opinion even if based on tests).

We have all heard it hundreds of times: "I want custody because my ex-spouse is on drugs." Like family violence, claims of drug use can be real or not, difficult to prove or disprove, without testing. What testing? Shall you move for a psychologist's expensive interview and opinion on the parties' drug use? No, because the best science is an objective, quick hair follicle drug test. The drug test is an objective test, not just an opinion. Disputed paternity is resolved by objective scientific DNA testing. So, you already use objective scientific testing in your family practice. Likewise, objective psychological testing is available, but underutilized in family violence cases.

Like allegations of drug use, allegations of family violence can be faked, and its denial can be faked. The bench and bar abhor the prospect of false allegations to obtain quick, dramatic, inexpensive remedies, and false denials to avoid consequences. What can we do when family violence is a "she said/he said" credibility contest with no persuasive witness, no medical evidence, and no other persuasive corroboration? What about the case of seeming mutual family violence but no clear proof of who is the primary aggressor? The risk of misplaced judicial reliance on mere allegation and denial is tremendous.¹

Psychologists have long acknowledged that "robust specialized family violence instruments, tests, and questionnaires" are "underutilized" by the profession and there is a "need for developing practice standards in this domain."² The court may order objective psychological testing of both parties as expressly authorized by law³ to identify the psychological propensity for family violence, to aid in the determination of whether family violence occurred, and if so, to identify the primary aggressor.⁴ The judicial use of reliable objective social science to determine facts is gaining acceptance.⁵ "Considerable research ... shows that [psychological] clinicians' judgmental accuracy does not surpass that of laypersons."⁶ Objective scientific testing, not a psychologist's opinion, provides a faster proven more reliable, cheaper method to discover truth.

The tests mentioned below each have a test printout that shows a propensity for family violence, or for violence generally. Each test's own conclusion is easy to read and understand. For reasons explained below, it may be best to move for objective scientific testing *without* opinion and interpretation by a psychologist. Of course, the psychologist may be necessary to lay the foundation for admissibility of the test result in proving the testing

protocol and the peer reviewed validity of the tests, unless admissibility is stipulated in advance.

Why order only objective testing instead of a psychologists' subjective opinion?

Psychologists study psychologists, and psychologists conclude the opinions of psychologists offered in court are not as reliable as we think. Actuarial, or objective, testing is proven generally more reliable than a psychologist's opinion, *even when the opinion is ostensibly based on some testing*. "When actuarial procedures are applicable and intelligible to laypersons, the expert's involvement in the interpretive process is unnecessary. In fact, the expert will most likely move the jury further from the truth, not closer to it, given the common tendency to countervail actuarial conclusions and thereby decrease overall judgmental accuracy."⁷ "Forensic experts frequently appraise the potential for violent behavior... Studies on the prediction of violence are consistent: clinicians are wrong at least twice as often as they are correct."⁸ ". . . [A]ctuarial methods, which eliminate the human judge [psychologist] and base conclusions solely on empirically established frequencies, consistently equal or outperform professionals and laypersons."⁹ "In psychology, the selective pursuit of supportive evidence is especially pernicious ... clinicians typically expect to find abnormality, and a search for supportive evidence will almost always 'succeed' regardless of the examinee's mental health. In one study that enhanced the expectancy to find abnormality, every psychiatrist who heard a script portraying a well-adjusted individual nevertheless diagnosed mental disorder. This tendency to assume the presence of abnormality and then seek supportive evidence fosters 'overpathologizing', that is, the frequent misidentification of individuals as abnormal."¹⁰

In other words, the therapeutic and forensic uses of psychology must be distinguished. The forensic reliability of a psychologists' opinion is not proven by the psychologist's training, experience, or therapeutic effectiveness. If properly challenged, it is doubtful that much of the psychological testimony commonly admitted in Georgia civil cases without much objection would be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and O.C.G.A. § 24-9-67.1 (Effective Jan. 1, 2013), O.C.G.A. § 24-7-702 (Effective Jan. 1, 2013). Much psychological opinion testimony, such as "syndrome" opinion testimony, fails to meet the key Daubert criteria of falsifiability and reliable error rates.¹¹ The bench and bar should be aware of "expert evidence industries" with "product champions" ... who promote the use of a scientific idea as evidence", and the "social and political factors that shape the ongoing production of evidence for the court."¹² Objective psychological testing is proven generally more reliable than a psychologists opinion and it is certainly faster and cheaper.

Two objective psychological tests with internal truthfulness validity scales are particularly useful scientific measures of the propensity for family violence: first, the family violence inventory (FVI); and second, the Substance Abuse Questionnaire III (SAQIII). The MCMI is also useful to identify personality traits correlated to family violence.¹³ Typically, a psychologist can administer these tests for a few hundred dollars and, without further interpretation, simply print out the objective test result (not raw data, and not the psychologist's interpretation, but the easy to read test results). The internal validity scale means that if a test taker lies, or is very inconsistent for some reason, he or she gets caught "faking good" by inconsistent answers. Since faking good is common, the fee arrangement with the psychologist should include an agreement that each test will be re-administered once if the internal validity scale for truthfulness is compromised. Of course, invalid test results must also be printed and provided to show the test taker did not meet the test standards for consistency or truthfulness in administration on the first test. When filing a motion for these psychological tests, make sure you have a letter or email from a local neutral psychologist stating the total fee and willingness to administer the tests, and the fee to testify about the test administration and results if not stipulated in evidence in advance. You should also make sure your psychologist has purchased the tests and is ready to administer them. The judge is not going to do your calling around for you, and is not going to want a second hearing to decide who administers the test.

Any judge can read these objective psychological test results and be the judge, instead of deferring to the conclusions of experts "interpreting" a different result by offering opinions on what typically needs no interpretation. Of course, any party can offer any other admissible evidence on the tests or results. The gatekeeper may need to know what specific peer reviewed studies support the reliability of "interpreting" peer reviewed tests to vary the test result.

"As the courts and the public come to realize the immense gap between experts' claims about their judgmental powers and the scientific findings, the credibility of psychology and psychologists will suffer accordingly. Psychological research should eventually yield certain knowledge and methods that provide meaningful assistance to the trier of fact."¹⁴ In this simple inexpensive testing protocol, law and science meet, enhancing reliable judicial decision making. In this judge's experience, when two or more independent highly reliable objective scientific tests prove or disprove a propensity for violence, it is usual for the issue to be conceded one way or the other. Including objective scientific testing in the search for truth serves our duty to obtain just, speedy and inexpensive adjudication.¹⁵ *FLR*



Judge Christopher Edwards received his B.A. from Vanderbilt and his J.D. from Nova Southeastern Law School. He began his career as an Assistant District Attorney in the Griffin Judicial Circuit, and then continued as an Assistant District Attorney in the Brunswick Judicial Circuit. He

then served as a county public defender and also on an indigent defense panel program. After 17 years of jury trials as a lawyer, Edwards was elected Superior Court Judge in August 1998 and began his first four year term January 1, 1999. He was re-elected in 2002, 2006 and 2010 without opposition.

(Endnotes)

- 1 Twenty-two percent of murders are family violence murders. Matthew R. Durose et. al., Family Violence Statistics, U.S. Dept. of Justice, Bureau of Justice Statistics (2002), <http://www.ojp.usdoj.gov/bjs/abstract/tvs.htm>.
- 2 James N. Bow & Paul Boxer, Assessing Allegations of Domestic Violence in Child Custody Allegations, *Journal of Interpersonal Violence*, Vol. 18 No. 12, December 2003, at 1394.
- 3 OCGA §9-11-35; OCGA §19-13-4(a)(11). *Everette v. Goodlove*, 268 Ga. App. 536, 602 S.E.2d 284 (2004); *Rose v. Figgie International, Inc.*, 229 Ga. App. 848, 495 S.E.2d 77 (1977); *Roberts v. Forte Hotels, Inc.*, 227 Ga. App. 471, 489 S.E.2d 540 (1997).
- 4 Obviously no test can conclusively prove or disprove the actual occurrence of domestic violence. Psychological testing is a tool not a talisman, and undue reliance is no substitute for judicial decision making. Joan S. Meier, *Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 *Am. U.J. Gender, Soc. Policy, and the Law*, Vol. 11 No. 2 2002 at 657.
- 5 Monaghan and Walker, *Social Science and Law* (Foundation Press, 2011).
- 6 Faust and Ziskin, *The Expert Witness in Psychology and Psychiatry*, *Science*, vol. 241. p. 31, 1 July, 1988 at p. 34.
- 7 Faust and Ziskin, *Id.*, p. 33.
- 8 *Id.*, p. 32.
- 9 *Id.*, p. 32-33.
- 10 *Id.*, p. 33.
- 11 Gerald Ginsburg and James Richardson, 'Brainwashing' Evidence in Light of Daubert, *Law and Science, Current Legal Issues* 1998, Vol. 1 (Oxford University Press, 1998), p. 268.
- 12 Shirley A. Dobbin and Sophia I. Gatowski, *The Social Production of Rape Trauma Syndrome as Science and as Evidence*, in *Science in Court*, Chapter 7 (Dartmouth: Ashgate Press, 1998).
- 13 The personality disorders of antisocial, aggressive-sadistic, passive-aggressive, and narcissistic can also be identified by a third test, the Millon Clinical Multiaxial Inventory (MCMI). Robert J. Craig, *Use of the Millon Clinical Multiaxial Inventory in the Psychological Assessment of Domestic Violence: A Review*. *Aggression and Violent Behavior*, Vol. 8 No.3, May 2003, at 235.
- 14 Faust and Ziskin, p. 35.
- 15 O.C.G.A. § 9-11-1.