Limits of Parenting Capacity Assessments in Child Protection Cases

Carole Curtis[1]

1. INTRODUCTION

Expert evidence is occupying an ever-increasing place in the Canadian judicial system, in every aspect of trial work. In family law cases, it is now rare for a trial to proceed with no expert evidence whatsoever, especially if the trial concerns the care of and interests of children. This is particularly so in child protection or child welfare trials, in which the state is looking to remove children from the care of their parents on a permanent basis, as a result of allegations of abuse, neglect, or otherwise inadequate parenting.

It is extremely important for judges and lawyers to understand the culture of an assessment, including the process of the assessment and the language of the assessment, and to be able to critically examine assessments and the conclusions arrived at by assessors. The future placement of many children depends on this. It is necessary for judges and lawyers to look at who prepares assessments, how they are prepared and how to evaluate their contents.

Child protection cases and trials have grown in complexity and length. In some jurisdictions, it is not unusual for these trials to take 10-20 days of trial time. Often many witnesses are called by the child protection agencies. There can be many lawyers involved (a lawyer for the child protection agency, separate lawyers for each parent (and sometimes there are multiple parents involved), and in some jurisdictions, a lawyer for the child or even separate lawyers for different children). If

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a mental health professional has ever assessed or evaluated the child, this person is often a witness (or at least their report is used in evidence).

The last decade has seen a proliferation of mental health assessments about risk or about parenting capacity which has also changed the child protection trial. The test for permanent removal of children at trial is rarely about risk to the children, but is more usually about the children's best interests. This article will focus on the use of assessments at trial that evaluate the needs of the children and the parents' abilities to meet those needs and to parent their children, investigations and written evaluations which have become known as "competence assessments" or "parenting capacity assessments".

(a) The Parents Involved in Child Protection Cases[2]

The parents involved in child protection cases are unlike the parents involved in domestic family law cases. Many parents involved with the child protection system struggle daily with chronic poverty, family violence, employment difficulties, intellectual limitations, and serious emotional problems. They are often from a dramatically different socio-economic group than the judge, the lawyers, and the social workers in the case. They often have different values and a very different life experience. The impact of these differences cannot be over-stated. Other than in the courtroom, most judges and many lawyers will have had little or no previous contact with people from this part of society. The differences between the judge and the parent in education, standard of living, value systems, family history, and ethnic background are enormous.

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[2] This section "The Parents Involved in Child Protection Cases" is largely from two sources:

- a chapter written by Justice Mary Jane Hatton, Nicholas Bala and Carole Curtis in the book edited by Nicholas Bala, Michael Kim Zapf, R. James Williams, Robin Vogl, and Joseph P. Hornick, *Canadian Child Welfare Law: Children, Families and the State,* 2nd ed., Thomson Educational Publishing Inc. (Toronto) 2004, chapter 8, pages 261-279, and,
- the factum filed in the Supreme Court of Canada by LEAF, the Women's Legal Educational and Action Fund, the National Association of Women and the Law, and the Disabled Women's Network Canada, in the case *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46, 50 R.F.L. (4th) 63 (S.C.C.), for whom counsel were Carole Curtis and Anne Dugas-Horsman.

The behaviour of parents involved in the child protection system can be categorized this way:

- Those whose parenting is called into question due to their own active behaviour (abusers, alcoholics, drug addicts, those involved in crime, those with mental illnesses, and those openly at war with the protection agency); or,
- Those whose parenting is called into question due to their own passive behaviour (those unable or unwilling to perform what seem like simple tasks, those with marginal skills, those with limited cognitive abilities, and those with passive or dependent personalities).

There are socio-economic factors that have a disproportionate impact on many of these parents and become part of the overall problem.

(i) *Poverty*

It is hard to over-estimate the overwhelming impact of poverty on the lives of families. Many parents involved in the child protection system live in poverty.

- Some families live at the level of serious deprivation, where the family is lacking in the necessities for a healthy life (e.g., shoes, food, fuel, and would now include those described as homeless);
- some families live at a subsistence level, where life and health are maintained at a minimum standard, but the family lives with chronic insecurity and uncertainty about its ability to keep everyone clothed, housed, etc.; and,
- some families are part of the working poor.

(ii) *Transience*

For many families, a high level of instability in housing and frequent mobility is part of the problem. However, parents should not lose their children due to an inability to find or maintain adequate housing.

(iii) *Isolation*

Many parents involved in the child protection system have no community, no support network and are isolated. The parents may have no relationship with their own families of origin, or relationships with them that are fractured, dysfunctional or toxic. This often means that the parents lean on the child protection agency and other social agencies for help, and may even develop a network of agencies. Many parents are

extremely isolated from friends and families, even among their own peer group.

(iv) *Cultural bias*

Changing immigration patterns in Canadian society have resulted in immigrant populations in many cities encountering the child protection system. Parenting is a cultural norm and different cultures and communities bring different practices and standards to parenting. Different cultures also bring differing notions of family, household size and the amount of physical space needed by family members. These concepts can vary significantly from those in "Canadian" culture.

(v) *Powerlessness*

For many parents involved in the child protection system, powerlessness is a fact of their lives. Many such parents are people with very limited control over most aspects of their lives. For them, authority becomes one amorphous mass that they often resent, become hostile towards and resist. At times even their own lawyer is seen as part of that mass.

Judges and lawyers working in child protection may find this area of work disturbing, as one must deal with issues such as physical abuse, sexual abuse, parental neglect and traumatized and sometimes injured children. For those judges and lawyers dealing with child protection cases, it is important to develop a framework from which to approach this type of case.

First, in the majority of child protection proceedings there is a systemic bias against parents by other participants in the process. There is an assumption that, if the protection agency has become involved in a family's life, there must be good reason. The assumption implies that these parents cannot properly care for their children without some form of state intervention. The case should be approached from the viewpoint that state intervention is not required in a family's life, unless proven on credible evidence and after every opportunity has been given to the parents to care for their children without state and court involvement.

Second, most parents in child protection cases face overwhelming obstacles in their day-to-day lives which shape their personalities and the lifestyle choices they make. The court needs to identify and recognize

the parents' strengths and to deal with those aspects of their lifestyles and personalities that might seem sordid or distasteful.

Third, the judge and the lawyers must remember that to have a child removed from a parent's care is one of the most devastating experiences a person can ever face. State intervention must be absolutely necessary and no reasonable alternatives must exist.

2. CONSEQUENCES FOR THE ASSESSMENT PROCESS

Even middle class parents (in custody and access disputes, for example) can experience the entire assessment process as demeaning and extremely difficult. Middle class adults are used to having a higher level of control over their lives than is the case during an assessment. However, parents involved in child protection cases are unaccustomed to and unschooled about the type of interaction involved in the assessment process. They are unsophisticated. They are unlikely to understand the difference between mental health professionals called doctor and medical doctors, and may be deferential to all doctors. Many do not understand the difference between assessment and therapy (some are not capable of understanding this), and as a result, treat the assessor with a level of trust and intimacy that is clearly not in their interests. They are not accustomed to their views or opinions mattering, or even being solicited.

The existence of factual errors in an assessment report, for example, is a matter of great importance to many parents involved in child protection cases, even if those factual errors are seen by the assessor (or the court) as being minor or of little consequence. Parents are often quite distressed by factual errors, believing that the assessment recommendations are founded on the facts as collected or determined by the assessor, and that if those facts are incorrect, that the recommendations are suspect and should not stand.

(a) Why the Increase in Assessments and the Increase in the Use of Experts in Child Protection Cases?

There have been dramatic changes in the child protection field in the last two decades, which have influenced the way agencies care for children, the way they relate to the parents, and the way trials are therefore going to be conducted.

(b) Problems/Changes Regarding Access to Children in Care

(i) *Declining frequency and duration of access for parents*

Parents are getting less access to their children in care; they are seeing their children less frequently and for shorter periods of time. This will certainly have an impact on the outcomes of these cases. Standard access now is almost always once a week for 2-3 hours, which is much less access than was available to parents with children in care in the 1980s and even the 1990s. Child protection agencies would answer that this is resource driven, and that they offer as much as they can afford to offer. That sounds suspiciously like the tail wagging the dog.

(ii) *Children are placed in foster placements far away from where their parents live*

The difficulty in finding sufficient and adequate foster parents has meant that child protection agencies are looking for foster families in locations outside their usual areas of jurisdiction. The distances that are involved in finding foster placements for children, particularly those children who come into care in larger urban centres, has meant that children are sometimes placed in locations far from the cities where their parents live. The distance of these placements is having a direct impact on access. Access for these children is almost always restricted to once a week. As well, if the child has to travel long distances for access, or has to miss school and perhaps other activities, there is undoubtedly an impact on the child's desire for access. These circumstances will, of course, impact on the eventual outcome of the case.

(iii) *Access for infants*

Judges are starting to recognize the need for different access arrangements for babies in care. There needs to be more frequent access for infants (e.g., daily, or at least 3 times a week), particularly for newborns. However, this is not always being accommodated by child protection agencies and this too may impact on eventual outcomes.

(iv) *The end of unsupervised access*

There is now, in some jurisdictions, almost no access for parents that is unsupervised. Supervised access is used by child protection agen-

cies as an opportunity for evidence gathering. The requirement for supervision changes the entire structure of the access, and also limits the availability and frequency of the access. It is questionable whether this structure for access is actually in children's best interests.

There are also problems with who actually supervises the access. It is usually not the primary social worker (the family services worker) who supervises the access, as it once was. Agencies often out-source this task to outside resources. The personnel hired to supervise access are often undertrained, and when these cases go to trial, are being called on to give evidence, and their notes must be produced.

2. CHANGES IN THE ROLE AND PROFILE OF THE FRONT LINE SOCIAL WORKER

(a) The Changing Profile of the Front Line Worker

There was a time when there were front line workers in their 40s and 50s with many years of experience. The profile of the front line worker has changed dramatically. There is a proliferation of very young workers on the files (i.e., workers in their mid-20's), workers with little life experience, without graduate degrees in social work, and with no children of their own (which means the parents have no respect for their advice about parenting). They are assigned caseloads with difficult cases and they tend to burn out. And because the job is a difficult one, the first chance they get, they move into management or supervisor jobs.

(b) The Changing Role of the Front Line Worker

When the front line worker was a more mature worker with experience, they had a fair bit of responsibility and decision-making authority. The proliferation of younger and less experienced workers, coupled with an increase in inquests into baby deaths and a public demand for more accountability in child protection agencies, has resulted in much less authority resting with the front line worker for ultimate decision-making. Many front line workers have to seek the approval of their supervisor for decisions about the conduct of the file. There is also faster burnout and a higher turnover rate for front line workers than in the past.

There is a higher level of internal accountability and responsibility than existed previously. This structure changes the interaction between the worker and the family, and results in a front line worker with no

ultimate decision-making authority. Therefore, the person with ultimate decision-making authority (the supervisor) does not have contact with the parents, and is usually someone who is not providing front line services at all (not to this family and not to any other family; or, perhaps did so in the past, but not now).

As a result of this change in the line of authority, coupled with an over-reliance on experts, the front line social worker has less actual interaction with parents. In many agencies the front line worker doesn't even supervise the access. The front line worker has shifted from being a service provider to more of a services manager/co-ordinator. One by-product of this shift is that there is less of a relationship between the social worker and the parents, less contact, and perhaps, less trust.

(c) The Increasing Use of Experts by the Child Protection Agency

The decline in the level of experience and expertise in the front line worker came at the same time as an increasing reliance by child protection agencies in the use of experts: this cannot be a coincidence. The increased reliance on experts has consequences for parents in these cases and for the trials that result from these cases. There has been a diminishing level of accountability of the agency as the workers can now say they are following a particular path because "our expert told us to do that".

The increased reliance on experts by the agency results in increased length of trials and an increased cost of trials. There is never a level playing field for parents when the agency hires experts, as provincial legal aid plans generally do not fund private assessments for parents, or at least, do not fund them at the same level or frequency as the agency. Also, even if a full assessment were properly funded for the parents, parents cannot get sufficient access or any access to their children to permit an expert to conduct an assessment that includes the children.

(d) Changing Child Protection Trials

The change in the profile of and role of the front line worker, the change in the nature, frequency and of access, the fact of the increasing use of supervised access has all resulted in a proliferation of the number of agency witnesses at trial, as the agency calls as witnesses the several workers who have dealt with the family over the years, and the several people who supervise the access, and the expert(s) who have assessed

either the child or the parents or both. Trials take longer, in part because there are more professionals involved with families than in the past, and child protection agencies are calling more witnesses.

4. WHAT CAN JUDGES AND LAWYERS DO ABOUT IT?

These changes speak directly to the need for judges to exercise greater levels of control over the trial process, in all its aspects. Efforts should be made, through the use of pre-trial or settlement conferences, to limit/restrict the number of witnesses called by the child protection agency (or even by the parents, in appropriate circumstances), to encourage reliance on the report of the expert as the evidence in chief, and the production of the expert for cross-examination, if desired, and to encourage or court order the use of affidavits for the evidence in chief of the employees of the child protection agency.

(a) The Need for a Critical Analysis

The proliferation of experts in family law and child protection trials should not be viewed in an uncritical way. Assessments should be approached by the trial judge with a degree of caution, in part because they have become so influential in determining outcomes for families. Although an assessment report is just one piece of evidence in a trial, it is not, in terms of its potential impact, like other evidence.

Judges should consider how the assessment was obtained (i.e., on consent or by court order). Too often parents have consented to an assessment of their parenting. Do they even understand what that means? Do they know what use will be made of the fact of the consent in the case in the future? Were the parents represented by counsel when they consented?

In many cases, insufficient thought goes into the decision by parents and their counsel to consent to an assessment. Surprisingly, the majority of parenting assessments in child protection cases result from an agreement to the assessment (rather than from a court order resulting from a request by the protection agency, which is contested). The court should take a more expansive role in the ordering of assessments in protection cases.

(i) *What is an assessment?*

Assessors are not scientists. They are just professionals with a different training than lawyers or judges. They bring a different set of values and norms to the analysis of parents' behaviours. Their views are opinions and opinions only, just as the judge and lawyers will have opinions about the parents (or about the social workers, or other witnesses in the case). The assessor's views are not scientific findings.

Assessments in which the assessor makes specific recommendations about outcome should also be viewed with caution. Reviewing all the evidence and making a decision about outcome is the job of the judge, not the assessor. The assessor should be collecting and presenting evidence of a particular sort for the judge to consider, evidence which might not otherwise be available or presented. What can the assessor tell the court that the court could not learn from the evidence?

The critical question in a child protection case (and perhaps the only question that matters) is this: is inadequate parenting better than foster care? Assessments do not address this question. It is left for the judge to apply the facts presented to determine the answer to this question on a case-by-case basis.

(ii) *Who are assessors?*

Assessors are unregulated as a profession. The various mental health professions that perform assessments (social work, psychology, psychiatry) may individually be regulated. However, anyone can call herself an assessor. There is no way to know if an assessor is qualified or not. There is no specific training required, no internship or apprenticeship is required, there is no admission process, no licensing, no governing body, no code of conduct, and no professional regulation or discipline process.[3] It is a shockingly open field, considering the possible impact of the assessor's recommendations for a family.

(iii) *Who does the assessment?*

Who are experts? How do we define areas of expertise? How should experts be chosen in individual cases? In ordering an assessment for a

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[3] To understand the depth of this deficiency, compare the "regulation" of assessors to the regulation of lawyers.

particular case, the court should enquire as to what the area of expertise is of the person recommended, and what area of expertise is needed in this case. The court can narrow the focus of the assessment and the assessor so that the right person with the right skills is chosen. The fact that the parties agree on the name of an assessor does not bind the judge nor oust the jurisdiction of the court to question the appropriateness of that person to do the assessment.

There may be distinct issues around assessments prepared by treatment providers. If the threshold of admissibility is satisfied (i.e., is it relevant?) then the question for determination becomes one of weight. Judges should consider whether these evaluations are admissible at all.

(b) The Role of the Judge

(i) *When should an assessment be ordered?*

There is a legislative framework in each jurisdiction for the ordering of an assessment. But there are many other factors which should go into the judge's decision-making around assessments in child protection cases. The court should be involved in many aspects for the assessment being ordered.[4]

The first threshold is to determine whether an assessment should be ordered. The party seeking an assessment is required to justify the request and to establish that it is likely to provide information that pertains to the welfare of the child that would not be discoverable otherwise. There

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[4] For example, Ontario's *Child and Family Services Act,* R.S.O. 1990, c. C.11, as amended, s. 54, which section was amended in 2000 and again in 2006, contains very specific provisos regarding assessments, provisions which are more honoured in the breach than in the observance.

- The court is to name a specified person to be the assessor.
- That person must have consented to be the assessor.
- **The court order shall specify the time for completion of the assessment.**
- **The report shall be completed within 30 days** unless the court is satisfied that a longer assessment period is necessary (emphasis added).
- The possible types of assessments are listed: medical, emotional, developmental, psychological, educational or social.
- In addition to the person assessed, the parent and the child protection agency, **a child 12 years old or over who is assessed shall receive a copy of the report** (unless the court orders otherwise; the test for this is that the report would cause the child emotional harm) (emphasis added).

should not be a presumption that an assessment is appropriate or needed in a child protection case merely because the child protection agency has removed children from the care of the parents or because the agency has requested an assessment and the parents have not agreed. In fact, there should be no such presumption even if the parents have agreed to an assessment.

An assessment is not a dispute resolution tool. It should not be used as an aid to settlement. It is a far too invasive and potentially damaging process for the parents to be used in this way. The child protection agency has access to resources to pay for such an assessment, yet the parents rarely can afford to hire a subsequent assessor to respond to a damaging report. Legal aid plans are increasingly restricted in the funding available to them and by them for family law cases. It is very difficult for parents' lawyers to get authorization to hire a private assessor for the parents in a child protection case. Clinical observations may be helpful to the decision maker, but they should not be determinative. In addition, it is hard to be certain precisely what clinical observations mean.

There are cases and situations in which an assessment will be counter-productive. Assessments are intrusive, costly and time consuming. They enhance the status quo by adding time to the period of the status quo. In some cases, assessments can take up to eight months to complete (or even six months to start an assessment, in regions where wait lists are long). In these situations, process determines outcome, as the child may be bonding to the foster family while the time passes during an assessment.

What is the role of the court with respect to the appointment of assessors with parties who are represented and unrepresented? The judge should be more involved, both to help narrow the focus of the assessment and to ensure that the assessor chosen is an expert. The court should be involved whether the parents are represented by counsel or not. The assessor is really the court's expert, not the parties' expert.

(ii) *The Judge's role in the hearing regarding a request for an assessment*

The assessment is an investigation and report prepared for the use of the court at a trial. The format of the process and the questions asked and answered in the process should be those that meet with needs of the

court. The judge should be involved in structuring the process, choosing the assessor and preparing the questions to be asked and answered.

There are, of course, many kinds of assessments and many assessors. The court should ask, "What is it the parties are assessing?" and "What questions need to be answered?" Be sure the process is clear in what is being asked. Different assessors have different skill sets, produce different material and even different results.

(iii) *Who pays for the assessment?*

Who pays for the assessment may matter and may even affect outcome. With the decline in money available for family law legal aid, child protection agencies are now paying for the majority of assessments.

(iv) *Who drafts the questions?*

This is an extremely important part of the assessment process, perhaps the most important part. The one who prepares the questions to be answered has the potential to shape the outcome of the process. If the court is not involved in this process, the questions to be answered in a child protection case will be determined by the child protection agency, and will be presented to the assessor in the retainer letter prepared by the child protection agency.

The best process (the process most likely to result in an unbiased referral to an assessor) involves the court drafting the questions to be addressed in the assessment. Alternatively, the judge could require that the retainer letter be a joint document and that the questions be prepared jointly. In some cases, it is not reasonable to expect the parties to be able to agree on the questions to be asked of the assessor and nearly impossible for the sides to agree on the issues to be determined. In these cases, it will be necessary for the court to specify the questions to be answered and the issues to be determined.

(v) *Who determines what is sent to the assessor?*

In order to ensure a balanced referral, the court should also be involved in deciding what information and documents are provided to the assessor, and how the assessor should receive the information. It is critical to the fairness of the process that the information is provided to the assessor in a neutral way, including the issue of who sends the

assessor the information. In some jurisdictions, it is common for the front line social worker to provide the assessor with the entire agency file on a family (sometimes going back many years and dealing with previous generations). Consider carefully whether the pleadings are suitable or appropriate for the assessor to receive and read (especially since some jurisdictions permit liberal amounts of hearsay into evidence in the early stages of a child protection case, which could be a considerable period of time before the involvement of the assessor). If the court does not make a specific order setting out what information is to be provided to the assessor, the judge could require that the list of documents to be provided to the assessor be prepared jointly.

(c) Competing Assessments

(i) *How does the court deal with competing experts?*

A trial judge faced with competing assessors or experts will end up having to choose whose evidence (opinion) she accepts. It is tempting for a trial judge to choose which portions of which expert's evidence she will adopt or accept, particularly when there are specific sections in direct conflict. This is most difficult when it involves test results and the interpretation of test results. Although tempting, choosing which portions of an assessor's opinion to adopt may be a path to an appeal, as it leaves the decision open to attack and criticism.

(ii) *Critiques and second assessments*

There is an increase in the use of critique assessments or second assessments. Of course, judges can determine and have determined that such assessments are not admissible (as not relevant). However, if the first assessment is highly critical or damaging and has been admitted, it will seem less than fair to the party seek to admit the critique or second assessment if it is ruled inadmissible. Critiques of the methodology of the first assessment are most helpful.

(iii) *Assessments from other sources*

The judge and the lawyers should also be wary of the number of assessments from other sources which creep into the trial process. Child protection agencies are doing many assessments (internal and otherwise)

for their own purposes (extra-judicial assessments that make their way into court), e.g. where the agency has the child assessed.

(d) Lack of Recourse/Accountability: The Court is the Gatekeeper

One of the most difficult aspects of the assessment process for the parties involved is the lack of recourse for the parties or lack of accountability on the part of the assessors. Parents involved in child protection cases and subjected to assessments regarding their parenting may have little experience in and limited ability to deal with the numerous professionals with whom they will have contact.

Increasingly, there are mental health professionals describing themselves as parenting experts. Judges can more easily identify with the assessor, who is their peer socially and in terms of education. How often do judges adopt/follow the recommendations of an assessor (is there data about this)?

As mentioned above, assessors are unregulated as a profession. There is no outside or independent evaluation or monitoring of their work or performance. No one keeps track of the competence of a given assessor, and it is uncertain how competence could be measured or evaluated, in any event.

Nor does anyone keep track of the recommendations of a particular assessor. For example, do judges know (of the recognized assessors in their jurisdictions) how often a particular assessor has recommended permanent placement of children (for adoption)? How often the assessor has recommended returning the children to the parents? The record of recommendations of an individual assessor might disclose bias, or at least a pre-disposition to a particular outcome that would raise serious concerns about neutrality. How is neutrality to be evaluated, in any event? Evaluating neutrality is surely a more complicated process than merely examining recommendations. Surely, evaluating the process used is relevant to determining neutrality.

Some provincial bodies have published guidelines which attempt to set standards for the performance of assessments (including the minimum appropriate number of hours, who is to be interviewed, the appropriate process, a protocol for the report, etc.). However, these standards are guidelines only, and compliance with them is not mandated, nor is it over-seen or supervised by any body other than the court. In addition, the court's recourse in dealing with an assessment that falls short of the

process guidelines is to rule it inadmissible, or admit it and give it no weight. By then, the family has already invested considerable time in the process, during which time the children are usually languishing in foster care, and during which time the family has perhaps been negatively affected by the assessment process or the recommended outcomes.

Judges are the gate-keepers for the qualifications of and the quality of assessors. An assessor gives opinion evidence, and if not properly qualified as an expert, should not give this evidence. It is up to judges to determine if each individual offered as an expert meets the test.

(i) *Examine the assessment process*

In evaluating both the admissibility of and the weight to be given to an assessment report, the trial judge should examine and evaluate the assessment process itself.

- How do judges and lawyers evaluate the quality of the process? What process should be followed to maximize reliability? Do judges and lawyers understand the component parts of an assessment?
- How was information presented to the assessor? For example, did the assessor receive information from both parties in a fair and transparent way? Did the assessor receive only the information that was essential? What information was essential? Who determined what information was essential? How does the trial judge (or even the parties) evaluate the quality of the process?
- What do psychological/psychiatric tests tell us and why is it important that we understand the testing process? Do judges and lawyers understand the most frequently cited tests in assessments? Do judges and lawyers understand what those tests do and do not tell us?
- What are clinical observations? Are clinical observations a subjective or objective measure? Clinical observations are, in fact, a form of conclusion (a form of opinion). The judge needs to know what the assessor saw that led her to this conclusion, so that the judge can determine independently whether it is a conclusion that the court can rely on.
- What weight should be given to clinical observations? What weight should attach to clinical observations that differ from testing results? Is the assessment process an objective structure (that is, would a social worker, a psychologist and a psychiatrist assessor all follow the same assessment process)?
- If the clinical notes and records of the assessor are not produced (even for cross-examination purposes), how can the judge know what information was recorded and was part of the process but was left out of the report?

(ii) *Examine the assessment report*

- How do judges evaluate the contents of the assessment report? How much attention was given to testing? How much attention (i.e., weight) should the judge give to the testing results?
- What exactly do assessors evaluate? Do assessors investigate and report about some things that are of dubious relevance regarding parenting? This group of parents may not see the relevance of things like being on time for the assessment appointments, not cancelling appointments, not talking to the children about coming home to stay, etc.
- Is there data about the reliability and validity of assessments?
- What are the criteria the assessor is using as a comparative tool for her analysis? This should be clear in the report. If it is not, the judge cannot adequately weigh the value of the assessor's analysis and give appropriate weight to the report. The judge should be able to identify objective verifiable criteria used by the assessor that gives the court information beyond what the court can learn in evidence. Often problems with assessments are not apparent until cross-examination.

Included at the end of this article is an appendix, "Questions about Assessments". This is a list of questions and topics about assessments. It is not a list of questions for cross-examination of an assessor. It presents a set of issues for consideration in any situation when a judge or lawyer is dealing with an assessment. It will assist the judge or lawyer in determining the independence, reliability and fairness of the assessment process and in determining the reliability and validity of the assessment report recommendations.

4. CONCLUSION

Assessments regarding parenting are a highly influential tool in the chid protection context. The mental health professionals who perform them wield substantial power to influence the outcome of the lives of children. A great deal of care needs to be taken in ordering assessments, in determining what issues and questions should be addressed and in dealing with the assessment reports at trial. Judges perform a gate-keeper function to ensure that assessments are only ordered where necessary, that only qualified persons perform them, and that the process is a transparent and fair one. Further, judges and lawyers need to examine the process and the assessment report with a critical eye to ensure that parents in child protection cases are not subjected to an inappropriate or damaging process. Assessments have a specific but limited role to play in the child protection trial.

Appendix
LIMITS OF PARENTING CAPACITY ASSESSMENTS IN CHILD PROTECTION CASES

QUESTIONS ABOUT ASSESSMENTS

In evaluating the weight to be given to an assessment, there are at least three areas that should be examined in detail:

1) the assessor;
2) the process; and,
3) the conclusions.

1) The Assessor

It is helpful to be familiar with the particular assessor, including the assessor's:

- training;
- reputation in the family law, child protection and mental health communities;
- track-record;
- biases or preconceptions; and,
- experience.

What is this assessor's practice comprised of?
What percentage of her time is spent:

- on clinical work?
- on research?
- on continuing education?
- on writing?
- on actual assessments?

What is the assessor's training and job experience generally (for example, how many years has the assessor been doing assessments)?

Does the assessor have a particular area of expertise?
What sorts of assessment are done?

- custody and access?

- parenting capacity assessments?
- young offender pre-sentence reports?
- other assessments?

What percentage of the assessor's time is spent on each?

How many times did the assessor give evidence at a trial last year?
This year?
Has the court always found the assessor to be an expert for the purposes of giving opinion evidence?
Has a court ever disregarded the assessor's recommendations?

Search the internet regarding the assessor (in both legal and non-legal databases)

How frequently has this assessor recommended the continuation of the status quo?

If this assessor did parenting capacity assessments:

- If the children are in the care of the children's aid society, how frequently has this assessor recommended continuation of that care?
- How frequently has this assessor recommended permanent placement without access?
- How many assessments has this assessor done for this child protection agency in each of the last three years?
- Does the assessor have any public position with respect to permanent placement or adoption? (for example, has the assessor been a panellist or presenter in any continuing education programmes in which permanent placement or adoption scenarios were discussed)?
- Does the assessor operate from a presumption in favour of permanent placement or adoption?

Is the assessor influenced by evidence of assaulting behaviour on the part of one parent to the other parent?
If not, is the assessor familiar with the literature about the effect on children of assaulting their mother?

In cases involving sexual abuse, does the assessor have any expertise, special training, or experience?

If there were disclosures made, for the first time, during the assessment process, what steps did the assessor take?
Did the assessor contact the child protection agency?
The police?

Did the assessor acknowledge an inability to deal with any of the issues and suggest referrals to other experts?

Does the assessor have any special training to deal with infants or toddlers?

Has the assessor done any assessments prior to this one for either counsel?
How many assessments for either counsel in the previous year?
How many for either counsel in the previous three years?
How many assessments for the child protection agency in the previous three years?
What recommendations were made in those assessments?

2) THE PROCESS

Who prepared the retainer letter for the assessment?
If the retainer letter asked questions, who drafted the questions?
Did anyone else have input to the preparation of the questions?

What methodology was used by the assessor?
Did the methodology conform to any of the recommended approaches to parenting capacity assessments?
Did the assessor know any of the recommended approaches to parenting capacity assessments?

What standard of methodology did the assessor use, if the assessment did not conform to any recognized standard?

How many interviews took place?
Who was interviewed?
How many hours involved?

Did the assessor see the children and interview the children?

Did the assessor contact or interview parties other than the parents?

- The teacher?
- The extended family?
- The parents' new partners?
- Other care-givers?

What material was provided to the assessor?
By whom?
Did the assessor receive any additional correspondence or material from any of the parties?
What material did the assessor read?

Did the assessor have available the pleadings in the litigation, including the affidavits?
Did the assessor read the affidavits?

Did the assessor have available any other background data? for example,

- medical or psychiatric reports regarding either of the parents or the children;
- report cards or other school reports;
- reports from daycare;
- reports from any other mental health professional treating either the parties or the children?

What use did the assessor make of that written documentation?
Was the assessor influenced by the documentation?

Did the assessor contact any of the writers of the documents?
What kind of contact did the assessor have with the writer?

Was any testing administered by the assessor?
What sort of testing was administered by the assessor?
What is the usual form of testing the assessor uses?
Was the testing used in this assessment any different from the usual form of testing the assessor uses?
If it was different why was it different?
What is the purpose of the tests which were used?
What is the source for the comparative analysis that the assessor makes?

How did the assessor interpret the raw data produced from the testing (for example, would another mental health professional have interpreted the raw data differently)?
Are the conclusions reached related to or based on observations of the assessor or test data?
Would another mental health professional viewing the behaviour draw the same conclusions?

How long did the assessment process take from start to finish (from the first contact with the assessor until the production of the assessment report)?
How much of this time was actually spent in clinical contact (interviews or testing) with the parties? (i.e., what percentage of the total time spent was spent in contact with the parties?)

Was the assessor even-handed in the treatment of the parties?

Did the assessor have a disclosure meeting with the parties to explain the report and its recommendations prior to the release of the report?

How did the assessor treat the parties?
Were the parties satisfied with their contact with the assessor?
Did the parties feel that they had the opportunity to raise with the assessor all the matters they thought were important?
Did the parties feel they were treated respectfully and that their problems were treated appropriately?
How did the assessor treat the children?

What kind of contact did the assessor have with the lawyers?
How often?
Was the contact with the lawyers even-handed?

3) THE CONCLUSIONS

Does the assessor make recommendations?
Should the assessor have made recommendations in these circumstances?

Were the conclusions reached logically related to or based on the assessor's observations or testing data?

Would another mental health professional have reached the same conclusions on the same data?
Does the judge reach the same conclusion based on the description of the data?

What relationship did the recommendations bear to the positions of the parties?
Are the recommendations possible to implement with this particular family?
Are the recommendations clear and specific enough to assist the family in implementing them?

Are the recommendations outside the assessor's areas of expertise (for example, has a social worker assessor made recommendations which involved clinical diagnoses and recommendations for treatment)?

Are the recommendations outside the assessor's mandate (for example, in an access assessment, has the assessor recommended a change in custody)?

Do the recommendations answer the specific questions that were asked of the assessor, or deal with the issues that were presented to the assessor?

Does the analysis in the report address the issue of the needs of the children and the ability of each parent to satisfy those needs?
Do the recommendations focus on that?

Do the recommendations deal with the advantages and disadvantages of the solution proposed?