

The Use of Experts to Assist in the Resolution of Issues in Dispute **By Neeli Berger Margolis, Esq.**

As you are probably painfully aware, in matrimonial/family matters, disputes arise between the parties with respect to a myriad of issues, such as the valuation of a business or asset, the determination of a marital lifestyle, the employability of a spouse, or the appropriateness of a particular parenting plan. In these situations, experts in a particular field may be retained to provide recommendations or to assist in the resolution of conflicts.

Court Appointed Experts, Joint Experts, and Experts Retained by an Individual Party

Evaluators may be retained jointly by the parties by mutual agreement, by an individual party, or appointed by the Court. In theory, regardless of who retains their services, evaluators are neutral third parties who provide the parties and/or the Court with evaluations or recommendations based upon their observations and their expertise. At the inception of your case, your counsel may discuss with you the possibility of using evaluators, either jointly or individually retained, to assist in your litigation.

Your initial instinct is probably to insist on hiring an evaluator that your spouse has not consented to. While it is often appropriate to individually retain experts (especially when that expert is being retained to refute a previous report or recommendation) there are important considerations to be discussed when deliberating on the issue of jointly or individually retained expert. First, you must consider the risk of your adversary's attack on the expert's perceived bias and lack of objectivity flowing from the unilateral paid nature of their services (i.e., the hired gun syndrome). Second, there is an added financial benefit of a joint arrangement. The costs of joint experts may be equally shared between you and your spouse (you may even be able to negotiate that

the your spouse absorb the total cost or a larger percentage of the evaluation). Often, the parties stipulate that payment is made without prejudice to a possible reallocation further down the litigation trail, usually at the time of settlement or trial.

While the Court Rules favor the parties' mutual agreement of a joint evaluator, as opposed to a court appointed evaluator, if the parties are unable to agree to a joint evaluator and the Court deems, in its discretion, that such an evaluation is necessary to effectuate a fair resolution of the matter, the Court, by Order of Appointment, may designate an evaluator. It is important that you understand that an evaluation prepared by a Court appointed evaluator or expert is subject to the same criticism or scrutiny as a report prepared by an individual or joint evaluators. Specifically, any finding or report by any expert (whether appointed by the court or retained by the parties jointly or individually) must be submitted to both the court and the parties. Once submitted, the parties are permitted a reasonable opportunity to conduct discovery with respect to the method of the investigation. A party may even take the deposition of the expert to assist in any challenge that a party may bring with respect to the evaluation.

Finally, and most importantly, please note that if you are ever contacted by any evaluator, you are entitled to have your attorney and/or your individually retained experts present during any examination. Upon receipt of any request that you appear before such evaluators or if you are contacted by any evaluators, do not share any information with these evaluators before speaking with your counsel.

Types of Experts

Experts in a wide variety of fields may be used to assist in the resolution of matrimonial/family conflicts. The following is a description of those experts that are most commonly employed:

Health or Mental Health Professionals such as physicians, psychiatrists, psychologists can often provide opinions to the Court or to the parties with respect to the special needs of a party or the personality of the person. The courts favor the use of evaluators in custody disputes because the Court perceives that these evaluations assist the Court in determining a custody and parenting time plan which serves the best interest of the children. In fact, mental health professionals are often retained in custody disputes to provide information about the parents' and the children's mental health.

It is preferred that independent experts be appointed by the Court or hired by parties in such matters. In fact, in order to insure truly independent experts, the Court can not appoint an expert to serve as an evaluator in custody matters if that evaluator is already providing or has provided therapy to any family member involved in the litigation. The Court may also order a social investigation to direct probation officers or other persons or agencies with whom the judge may consult as an aid in disposing of any case.

When a health professional or custody evaluator is appointed by the Court to assist in the disposition of a custody issue, that expert is free to conduct an independent investigation and to obtain information reasonable and necessary to complete his or her report from any source. In fact, the evaluator may make contact directly with any party from whom information is sought within the scope of the Order of Appointment. Again, you should not provide this evaluator with any information before discussing the same with your attorney.

Sometimes clients desire to use their counselors, therapists or psychologists to assist in presenting their arguments or presentation of facts. Serious caution must be exercised before doing this. The presentation of such evidence may result in the party waiving his or her right to

doctor/patient privilege. As such, the use of mental health professional must be evaluated on a case by case basis.

Forensic Experts may be utilized to appraise the value of assets or businesses subject to equitable distribution or to determine the parties' marital lifestyle for the purpose of alimony. With respect to such evaluations, the Court may order any person or entity to produce documents or to make available for inspection any information or property, which is not privileged, that the court determines is necessary to aid the expert in rendering an opinion. Appraisers are guided by the Uniform Standards of Professional Appraisal Practice ("USPAP"), which regulates the actions of appraisers for specific assignments.

Employability Experts are often retained by parties who wish to prove that their spouses are unjustifiably underemployed or unemployed or to refute such claims about themselves. For instance, a party against whom support is being sought, will often compel his or her spouse to meet with an employability expert who will determine, based upon that spouse's education and experience, what that spouse would be able to earn if he or she were to work to his or her potential. Such a report would then be utilized in an attempt to impute income onto the underemployed or unemployed spouse seeking support. Additionally, especially during periods of high unemployment, many clients come to our office either recently unemployed or with recently unemployed spouses. In such situations, it is important to determine a reasonable anticipated income range for the traditional bread winner in light of general economic circumstances.

Real estate appraisers can be employed to assist in the valuation of real estate for the purposes of equitable distribution of marital property, such as the marital residence. Where there is complex real estate subject to equitable distribution, such as commercial real estate, investment real

estate, and vacant land, valuations must include considerations of many factors including regional and local economies, zoning regulations, and environmental issues.

Conclusion

If and when the need to retain experts arises, your attorney will assist in finding a wide array of qualified evaluators or appraisers to prepare reports or recommendations. Further, together with your counsel, you can determine the best course of action in light of the particular circumstances of your case, with respect to the retention of jointly or individually retained evaluators.