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DIAGNOSES IN CHILD CUSTODY EVALUATION REPORTS

David A. Martindale

[1] Thomas Szasz, best known for having written *The Myth of Mental Illness,* in 1961, observed, in a subsequent book (*The Second Sin,* 1973), that diagnoses "may be, and often are, swung as semantic blackjacks. . ." (p. 71). Szasz added that "the man who wields a blackjack is recognized by everyone as a thug, but the one who wields a psychiatric diagnoses is not" (p. 71). The diagnosis-blackjack should be removed from the arsenal of weapons used by litigants in custody disputes.

In his "Reference Guide on Mental Health Evidence," found in the Federal Judicial Center's Third Edition of the *Reference Manual on Scientific Evidence*, Appelbaum opines: "A diagnosis of mental disorder per se will almost never settle the legal question in a case in which mental health evidence is presented" (p. 819). He explains that "the ultimate legal issue usually will turn on the impact of the mental disorder on the person's functional abilities" (p. 820). In order to clarify what is meant by the words "functional abilities," Appelbaum offers some examples. One of those is "skill as a parent" (p. 820).

The DSM-5 Cautionary Note

When two parents are involved in litigation concerning access to or custody of their children, and when one of the two parents carries the weight of a diagnostic label, it is not uncommon for the other to presume that his or her effectiveness as a parent will be deemed to be superior. Unfortunately, this belief is too often reinforced by mental health professionals, attorneys, and judges who have either failed to read or have failed to consider the implications of a "Cautionary Statement for Forensic Use of DSM-5," appearing on page 25 of the most recent edition of the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (the DSM-5).

In the cautionary statement, users of the DSM-5 are reminded that "the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals" (p. 25). Where litigation involves assertions regarding the mental/emotional health of one or **[2]** more of the parties, the "technical needs" alluded to presumably include the obligation of triers of fact to focus their attention on specific psycho-legal issues that, more often than not, are statutorily defined or addressed in case law.

Also appearing in the DSM-5's cautionary statement is a reminder of "the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis" (p. 25).

Most importantly, users of the DSM-5 are reminded that in forensic settings "information about the individual's functional impairments and how these impairments affect the particular abilities in question" is needed. In the context of custody litigation, "the particular abilities in question" are the relative abilities of the competing parties to meet the needs of the child(ren).

Among experienced evaluators, attorneys, and judges, most would acknowledge that there are situations in which a parent who meets the criteria for one of the many diagnoses appearing in the DSM possesses parenting skills that are superior to those of a parent for whom there is no applicable diagnostic label. Yet many of the same experienced evaluators, attorneys, and judges are easily distracted by diagnostic labels.

With regard to evaluators, in the various mental health fields many practitioners fail to negotiate the tricky therapeutic-to-forensic paradigm shift. Most (if not all) mental health practitioners who currently involve themselves in forensic matters were initially trained to gather the information needed in order to formulate a diagnosis and, as a layperson might put it, 'figure out what's wrong' with people. In dealing with custody litigants, diagnostic labels are often more prejudicial than probative. Evaluators must not be led, by professional 'habit', to provide information that they are accustomed to providing but that is, within the forensic context, likely to be a diversion.

Diagnoses as short-hand descriptions

Those who feel that labels (at least the formal ones, such as those that appear in the DSM) contribute something to discussions of parenting effectiveness often point out that empirical research has been done on specific, identified disorders and that a diagnostic label provides an indirect link to that research. Published empirical research on mental/emotional disorders does not relate to the specific people in matters before courts but, rather, to the diagnostic category in which they have been placed. The descriptors that apply to a particular diagnostic category do not describe any particular human being with reasonable precision. Thus, diagnosis is, in essence, a short-hand form of description. In a forensic context, there is no advantage to short-hand.

The manner in which diagnosis as short-hand can be misleading becomes apparent when consideration is given to the procedure employed in formulating opinions regarding diagnoses. A diagnosis of Narcissistic Personality Disorder is made if five criteria from a list of nine are met. A diagnosis of Avoidant Personality Disorder requires that four criteria from a list of seven be met. One is diagnosed with Obsessive-Compulsive Personality Disorder if four of eight criteria are met. One is deemed to be manifesting an Antisocial Personality Disorder if **[4]** three of seven listed criteria are met. It should be clear that the day-to-day behaviors of an individual who has been diagnosed as anti-social because he meets criteria 1, 2, and 3 may be quite different from the behaviors of the person whose diagnosis was arrived at because he met criteria 5, 6, and 7. Diagnoses do not provide clarification; rather, they create the risk of obfuscation.

Just as diagnostic labels are unlikely to contribute to an understanding of the parenting strengths and deficiencies of litigants, so, too, are they unlikely to provide a clear picture of the needs of children with mental/emotional problems. In its *Guidelines for Child Custody Evaluations in Family Law Proceedings,* the American Psychological Association states: *"The evaluation focuses upon parenting attributes, the child's psychological needs, and the resulting fit"* (APA, 2010, p. 684). Diagnoses will not provide the needed specificity. If the objective is to consider parenting strengths and deficiencies in developing a parenting plan for a special needs child, detailed information concerning the child's behaviors is far more likely to be helpful than is a diagnostic label.

Guideline 10.01 of the American Psychological Association's *Specialty Guidelines for Forensic Psychology* urges psychologists: "Focus on Legally Relevant Factors." The guideline reads, in part: "Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue." It goes on to state: "Forensic practitioners are encouraged to consider the problems that may arise by using a clinical **[8]** diagnosis in some forensic contexts, and consider and qualify their opinions and testimony appropriately."

Context matters

Often lost in discussions of diagnoses are inquiries regarding the context in which they were developed and the purpose for which they were recorded. Eligibility for health insurance reimbursement is dependent upon the assignment by the treatment provider of a diagnosis that represents a "covered condition." Though empirical data are not available, discussions with treatment providers strongly suggest that some treatment providers, wishing to assist their patients in securing insurance reimbursement, enter diagnoses with little, if any, concern for descriptive accuracy. It is inadvisable for evaluators, attorneys, and judges to rely on diagnostic labels appearing in treatment records.

Participants in child custody litigation should also be highly skeptical of diagnoses that are arrived at simply on the basis of psychological test data. One of many cautionary lessons can be found in Halon's analysis of data gathered using the Millon Multiaxial Clinical Inventory-III (MCMI-III) [Halon, R. L. (2001). The Millon Clinical Multiaxial Inventory-III: The normal quartet in child custody cases. *American Journal of Forensic Psychology, 19(1),* 57-75.] Custody litigants trying to report what Halon referred to as "their good qualities" may obtain high scores on the Millon's histrionic, narcissistic, and compulsive scales.

Unfortunately, fondness for diagnostic labels leads some mental health professionals to insert diagnostic terms in their reports in ways that are incontrovertibly inaccurate. An evaluator, commenting on the behavior of a four-year-old child during an observational session, states that the child "dysregulated." This term suggests that the child is experiencing Disruptive Mood Dysregulation Disorder (DSM-5, # 296.99). The disorder is characterized by "[s]evere recurrent temper outbursts

manifested verbally (e.g., verbal rages) and/or behaviorally (e.g., physical aggression toward people or property) that are grossly out of proportion in intensity or duration to the situation or provocation" (DSM-5, p. 156). In the information furnished in the DSM-5, of greatest importance is the statement that "[t]he diagnosis should not be made for the first time before age 6 years or after age 18." It is likely that a thoughtful reader of the evaluator's report would wish to know what was transpiring at the time that the presumably problematic behavior occurred, would like a clear description of the child's behavior, and would be interested in knowing what actions were taken by the parent in responding to the child's behavior.

Conclusion

We are not aided in our endeavors to protect children as effectively as possible from parental deficiencies by assigning diagnostic labels to those deficiencies for which we happen to have labels. Parents with the same diagnosis may manifest the criterion behaviors in different ways and the impact upon their children of the manifested behaviors is likely to depend to a large extent on the ages of their children and other factors about which no information is provided by the assignment of a diagnostic label. The evaluative task is descriptive in nature. Evaluators are most helpful when they assess the needs of the child(ren), assess the parenting strengths and deficiencies in each parent as those strengths and deficiencies relate to the needs of the child(ren) whose custodial placement is in dispute; describe those strengths and deficiencies; and, articulate the ways in which they relate to each parent's ability to meet the needs of the child(ren).

David A. Martindale, Ph.D., ABPP, a member of this newsletter's Board of Editors, is board certified in forensic psychology by the American Board of Professional Psychology, and is the Reporter for the Association of Family and Conciliation Courts' *Model Standards of Practice for Child Custody Evaluation*. He offers forensic psychological consulting services to psychologists, attorneys, and licensing boards. Additional information may be found at www.damartindale.com.

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