Q&A with Kaine Fisher, Chairman of Rose Law Group Family Law Department

"My son's father is being accused of molesting a young neighbor girl. I'm terrified to think the court may still allow him to have legal decision-making rights or have parenting time with our son should I decide to divorce him. Should I be concerned?"

One of the more hotly contested issues of any divorce, paternity matter, or modification action is the court's ability to bestow upon a parent legal decision-making authority over, and parenting time rights, of their children. In Arizona, the statutory definition of legal decision-making is "the legal right and responsibility to make all non-emergency legal decisions for a child including those regarding education, health care, religious training and personal care decisions." The term parenting time refers to "the schedule of time during which each parent has access to a child at specific times." Although very different concepts, the Arizona courts understandably takes deciding both issues very seriously and has a primary backdrop to make such decisions - the best interests of the child. The law in Arizona requires every court to apply this standard and to specifically address each factor set forth in the statute. As a result, the court considers many things and many things can weigh against or for a particular parent being granted legal decision-making and parenting time rights; and it should. A child's future development depends on such careful scrutiny.

Of the multitude of factors the court must consider, perhaps none is more explosive than that of a parent who has been convicted of a sex offense or of a parent suspected of molesting or having other inappropriate sexual contact with a child. While it may seem that these concerns are a fringe area of the law, the research on this topic is alarming with some studies suggesting that the prevalence of sexual abuse against a child in the United States is somewhere between 7.5% to nearly 24% of all children. The low number reflects the percentage of incidents perpetrated on male children and the high number indicates a disheartening prevalence of sexual abuse perpetrated against our female children. With these staggering statistics, it is not surprising courts handle these matters with a watchful eye. In fact, in my experience, judges take an "act first, ask questions later" approach when dealing with these types of concerns because of the long-lasting impact it could potentially have on the children involved. Although this "knee jerk" reaction may occasionally lead to an unfair result, especially in situations where coaching is involved or a parent has flat-out manufactured the allegations to gain an advantage in the litigation, but I suppose most judges feel the risk is well worth it. And not to worry - there are significant repercussions for parents who choose to abuse the system by making false allegations, which might include losing their legal decision-making and parenting time rights altogether.

In the Grand Canyon State, our state legislature has taken this issue very seriously. In fact, a court is prohibited from affording a parent any legal decision-making rights if that parent is a registered sex offender *unless* the court has determined that there is not a significant risk to the child. That parent is also prohibited from having unsupervised parenting time. There is even a proposed amendment before the legislature now which eliminates any parenting time rights whatsoever for a parent who has committed a sexual offense (rape) against the other parent and the child was conceived as a result of that sexual offense. Needless to say, the law is evolving, albeit slower than most people would prefer, to better equip judges with tools to handle these tough cases.

You might ask how then does a court evaluate whether sexual abuse has occurred, is likely to occur, or whether affording a parent parenting time poses a significant risk to a child? Recently I have found a crossover of methods between criminal law and family law which has aided lawyers and judges in Family Court in making difficult decisions regarding these issues. For example, I have started to see more and more the use of psychosexual evaluations and penile monitoring, methods used primarily to sentence sex offenders in a criminal context, as evidence in Family Court to assist judges in making decisions about legal decision-making and parenting time. I'm sure, if asked, most judges prefer having more evidence than less when making difficult decisions; however, only as of late, have family law litigators made it a priority to familiarize themselves with such complex scientific and psychologically-based methods. Let's take a look at just a couple of them.

Psychosexual evaluations are basically what you might expect. A licensed and specially trained clinical psychologist presents a sex offender with various forms of testing and questioning, usually over a period of a couple days. These evaluations help assess the psychological issues that may lead to future sexual misconduct and/or the deviant sexual behavior. They can help make risk assessments and provide recommendations for treatment and management of the problems. Although previously used in criminal matters to evaluate such things as an offender's sentence and issues surrounding the offender's later reintroduction into society, they can also be helpful in Family Court in evaluating a litigant's propensities even if they have not yet been convicted of any crime. Obviously, this predictive measure protects children in the long run and ensures courts are making sound decisions regarding legal decision-making and parenting time.

Penile monitoring, also called phallometry, is also basically what it sounds like. While it only applies to male sex offenders, it is important to point out that males make up a dominant percentage of known sex offenders in this country. The monitoring takes place by measuring the extent of an individual's arousal based on a variety of sexual stimuli. As the male is given different forms of sexual stimuli (such as differing types of pornography to watch, including child pornography) a device attached to the man's penis takes measurements in circumferential variations. The variations are then attributed to the given stimuli at the time the measurements are taken, with the higher measurements indicating the types of stimuli preferred by the test subject. While the monitoring is not without controversy, it has the most accuracy for determining those sex offenders with a penchant for children. Accordingly, the results are very useful for determining risks to any child of a sex offender, especially one that happens to like children, although the depressing statistics suggest that it is generally the children of the sex offenders that suffer from the parent's deviant prurience.

While these developments have proved useful, they are not without their detractors. In fact, in one recent case from the Second Circuit, an appellate panel of judges threw out the use of penile monitoring as unconstitutional, describing the tactic as “extraordinarily invasive” and humiliating. However, that case was a criminal matter with the penile monitoring used as part of a parolee’s probation and the judges doubted the value of the monitoring as it pertained to deterring actual crime. On the family law side of things, the value lies in the fact these tests may help indicate those situations where the sex offender’s child may be at risk in the future, and given the rate of recidivism among sex offenders, any tool that might help prevent harm to a child is a good tool. It will be interesting to see whether these methods continue to gain momentum in the family law context.

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