

# **THE LAW OF PSYCHOLOGICAL EVALUATIONS IN CHILD WELFARE CASES**

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The use of psychological evaluations in a child welfare proceeding is fundamentally a presentation of expert evidence in a civil proceeding. As such, it is held to the same standard as other expert evidence in other types of civil cases. However, the unique nature of child welfare cases, coupled with the extensive use of psychological evaluations in such cases has led to an evolving body of law applicable to psychological evaluations in the child welfare setting. Thus, when considering the use of psychological evaluations in child welfare cases, one must consider general rules applicable to all civil cases, those rules applied explicitly to child welfare cases, and finally, depending upon what stage in the proceeding the issue arises, unique considerations based on the stage of the proceeding may be a factor as well.

## **General Considerations in Civil Cases<sup>1</sup>**

Washington courts are given broad discretion in determining whether expert testimony will be admissible and under what circumstances. Fundamentally, in order to be admissible, expert testimony must be given by a qualified witness and it must be helpful to the trier of fact in understanding evidence or issues in the case. Washington courts have routinely recognized psychologists as expert witnesses in a wide variety of cases, including child welfare cases. In cases where the court is called upon to determine the admissibility of novel scientific evidence, the Frye standard is applied in State Courts.

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<sup>1</sup> For an extensive discussion of expert testimony in Washington see Washington Practice.....

Little guidance is given under Washington law on the issue of whether an expert is “qualified.” Any witness may be qualified as an expert through “knowledge, skill, experience, training, or education.” [ER 702](#). Generally, a person who is licensed in a specific profession is considered an expert, but the court may rule based on the witness’s specific credentials whether the witness is qualified to render an opinion on a specific question within their field. Thus, although a psychologist may be an “expert”, a particular psychologist may or may not be qualified to give an expert opinion on a specific issue in a case depending on that person’s experience and education. Such decisions are at the discretion of the trial court and are rarely overturned on appeal.

To be of assistance to the trier of fact, the opinion offered by the expert must be both relevant and beyond the common understanding of the court. The opinion must also be on a matter that an expert opinion may be readily formed. That is, to be admissible, the opinion testimony must be in response to a question that may reasonably be answered by the field the witness claims to be an expert in. When in doubt as to whether an opinion would be helpful, courts tend to error on the side of admissibility.

When, as in the case of psychological testimony, the opinion is based upon application of scientific principles or theories, those principles and theories must be generally accepted by the relevant scientific community. Known as the Frye test, this standard is applied in Washington State Courts as opposed to the Daubert standard applied in federal courts<sup>2</sup>. It is important to note that not only must the science be generally accepted in the relevant scientific community, but one should consider whether its application to the question being considered by the court is accepted. For instance, a specific psychological testing instrument designed for a specific purpose (say to diagnose

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<sup>2</sup> The leading civil case in Washington on this issue is Reese v. Stroh

depression) may be widely used and accepted based on rigorous peer reviewed studies and as such admissible. However, that same study, when used for a different purpose may be objectionable as lacking sufficient acceptance to pass the Frye test.

### **General Principles in Child Welfare Cases**

The following principles may be generally applied at any stage of the dependency case. A brief discussion follows where more specific rules exist at specific points in the dependency process.

#### **Access to evaluations**

In general, access to mental health information, including psychological evaluations is prohibited absent informed consent of the individual who was evaluated. However, in child welfare proceedings, these rules are somewhat less stringent in light of both the public interest in protecting vulnerable children and the diminished expectation of privacy which often accompanies evaluations made in such circumstances. Hence, under RCW 13.50.100, a juvenile, his or her parents, the juvenile's attorney and the juvenile's parent's attorney, shall, upon request, be given access to all records and information collected or retained by a juvenile justice or care agency which pertain to the juvenile. However, if the information or record has been obtained by a juvenile justice or care agency in connection with the provision of counseling, psychological, psychiatric, or medical services to the juvenile, when the services have been sought voluntarily by the juvenile, and the juvenile has a legal right to receive those services without the consent of any person or agency, then the information or record may not be disclosed to the juvenile's parents without the informed consent of the juvenile unless otherwise authorized by law. RCW 13.50.100(7). Likewise, under RCW 13.34.105(3) guardian ad

litem have access to all information available to the state and upon presentation of the order of appointment by the guardian ad litem psychologists, psychiatrists, and other mental health providers are required to permit the guardian ad litem to inspect and copy any records relating to the child or children involved in the case, without the consent of the parent or guardian of the child, or of the child if the child is under the age of thirteen years, unless such access is otherwise specifically prohibited by law.

With respect to access to parent's information, the issue is less clear. Generally speaking, any psychological evaluation completed in the course of a dependency proceeding is conducted with the understanding that the results will be released to all parties, and in fact, the court typically requires the parent to sign a release permitting such access. There is also some case law in Washington which seems to hold that there is a diminished expectation of privacy in court ordered evaluations which permit at least limited release of the information. (See City of Seattle v. Hertog holding a diminished expectation of privacy where subject of mental health treatment knew progress reports would be made by the provider to both the probation officer and the courts.). In addition to a diminished expectation of privacy in cases where an evaluation is court ordered, both the Washington State Legislature, and the courts have held that in abuse and neglect cases, the states interest in protecting children generally outweighs an individual's right to privacy. This principle is most evident in the state's mandatory reporting laws and its refusal to permit disclosures of abuse and neglect to be protected as confidential communication.

Not only *may* evidence in psychological evaluations be provided to the juvenile courts, in some cases it is *required*. During the course of dependency proceedings, if

DSHS recommends a new placement or a change of placement for a child, and as part of that recommendation assertions are made regarding substance abuse, mental health, anger management, or domestic violence treatment, visitation, the psychological status of a person, injuries to a child, or home study, licensing or background check information, such recommendations must be accompanied by the documentation such recommendation was based upon. RCW 13.34.400.

### **Authority to order evaluations**

Trial courts have wide discretion to order a psychological examination in dependency proceedings if the court finds it “necessary to the proper determination of the case.” [RCW 26.44.053\(2\)](#); *see also In the Interest of J.F.*, 109 Wash.App. 718, 728, 37 P.3d 1227 (2001) (trial courts have wide discretion in dependency and termination proceedings to receive and evaluate evidence in light of a child's best interest). Angelo H @ 588. Such discretion includes a court’s sue sponte appointment of a psychologist. See Angelo H., ER 706. In addition to the court’s general authority to appoint an expert to assist, RCW 26.44.053(2) specifically states that at any time prior to or during a hearing in a dependency case,” the court may, on its own motion, or the motion of the guardian ad litem, or other parties, order the examination by a physician, psychologist, or psychiatrist, of any parent or child or other person having custody of the child at the time of the alleged child abuse or neglect, if the court finds such an examination is necessary to the proper determination of the case.” The statute goes on to note that the hearing may be continued pending the completion of such examination and that the physician, psychologist, or psychiatrist conducting such an examination may be required to testify concerning the results of such examination and may be asked to give

his or her opinion as to whether the protection of the child requires that he or she not be returned to the custody of his or her parents or other persons having custody of him or her at the time of the alleged child abuse or neglect.

### **Payment, Coordination, and Choice of Evaluator**

When ordering services, including psychological evaluations, DSHS must individually tailor service plans to a families needs. Furthermore, DSHS is generally expected to pay for remedial services, including evaluations. RCW 13.34.025(2)(b). If services ordered by the court are not available for any reason, including lack of funding, DSHS must promptly notify the court of the situation. When a parent has been ordered to participate in a psychological evaluation, all parties must agree on the evaluator. RCW 13.34.370. In the event the parties cannot reach an agreement, the court will select the evaluator. Id.

### **Immunity / Right to Counsel**

When participating in a psychological evaluation ordered under RCW 26.44.053, information given at any such examination may not be used against the person being evaluated in any subsequent criminal proceedings concerning the alleged abuse or neglect of the child. Persons being evaluated may also claim a fifth amendment privilege and decline to answer certain questions posed by an evaluator on that ground, however, the privilege is not self-executing. In re JRU-S at 796. A parent does not have a right to have an attorney present during a psychological evaluation., However, the Washington State Court of Appeals has held that “given the stakes in the parents' evaluations, their incomplete immunity, and the nuances of the Fifth Amendment privilege,” it is not an abuse of discretion for trial courts to allow counsel to attend evaluations with their

clients. In re JRU-S at 801

### **Investigation Stage**

Whenever a child is taken into custody pursuant to RCW 13.34, DSHS may authorize evaluations of the child's physical or emotional condition, routine medical and dental examination and care, and all necessary emergency care. RCW 13.34.060(3). Furthermore, upon receiving a report of alleged child abuse and neglect, the department or investigating law enforcement agency shall have access to all relevant records of the child in the possession of mandated reporters and their employees. RCW 26.44.030(11). Thus, DSHS has relatively broad authority to gather information pertaining to a child in its custody. It is unlikely however, that such authority would extend to obtaining a forensic psychological evaluation of the child. Such an evaluation is by definition neither an emergency nor is it routine care. Although the statute specifically authorizes evaluations of a child's "emotional condition", the intent of RCW 13.34 in general would seem to require notice prior to completion of such an evaluation. (See for example RCW 13.34.370 requiring mutual agreement on evaluation providers and RCW 13.34.320 requiring parental notification of inpatient mental health treatment.)

### **Shelter care – Fact Finding**

At the initial 72 hour hearing, the court may admit hearsay evidence. However, such evidence must be supported by sworn testimony, affidavit, or declaration of the person offering such evidence. RCW 13.34.065(2)(c). Following the 72 hour hearing, the court must enter an order describing the need for any examinations, evaluations, or immediate services needed. However, the court may not compel a parent to participate in such services. RCW 13.34.065(4)(j) *but see* RCW 26.44.053(2) granting the court

authority to order evaluations at any stage of the proceeding.)

### **Fact Finding and Disposition**

Upon finding a child dependent, a court shall order remedial services for the family. RCW 13.34.130. Such services may include a psychological evaluation consistent with the general principles set out above. The state may not however, remove a child from a parent based solely on a parent's failure to comply with evaluations requested by the department for unspecified alleged deficiencies. The state must be able to articulate behavior on the part of a parent that merits a psychological evaluation rather than just simply alleging that had the parent completed an evaluation something concerning may have been found. See *In re S.G.*

### **Review Hearings / PPH**

At each review hearing, DSHS must specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody, and a time limit for each service plan and parental requirement. RCW 13.34.136(2)(b)(i). Such service plans often include psychological evaluations in order to assist in the development of remedial service planning. Non-parent caregivers may also be required to engage in services under this subsection solely for the purpose of ensuring the present and future safety of a child who is a ward of the court. RCW 13.34.138.

### **Termination of Parental Rights**

Psychological evaluations are often key evidence in termination of parental rights proceedings. Although mental illness is not, in and of itself, proof that a parent is unfit or incapable, the court must examine the relationship between the mental condition and

parenting ability. In re TLG @ 203. Mental deficiencies must be specifically linked with the elements of the termination petition under RCW 13.34.180. Mere allegations of mental illness, without such illness being related to inadequate parenting, are insufficient to terminate parental rights. In re TLG @ 199

### **Reinstatement of Parental Rights**

There are no published cases concerning the reinstatement of parental rights in Washington, and as such, it is unclear what role psychological evaluations might play in such a proceeding. However, RCW 13.34.215(8)(a) permits the court to conditionally grant a reinstatement petition and direct DSHS to provide transition services to the family as appropriate. It seems highly likely that the services of an expert psychological evaluator will at times be sought in such cases, but there is no law specifically addressing the issue in such circumstances.