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To: Nicole Fidler, Sanctuary for Families

From: Jennifer Cochrane

Subject: Using the Danger Assessment in judicial proceedings

Overview

Dr. Jacquelyn Campbell's Danger Assessment (DA) determines the level of danger an abused woman has of being killed by her intimate partner. It consists of twenty yes/no responses to risk factors associated with intimate partner homicide. A shortened version called the Lethality Assessment (LA) has been developed for law enforcement officials responding to domestic violence calls. This memo explores the extent to which courts have accepted domestic violence risk assessments into evidence, and how parties seeking to enter either the DA or LA into evidence in a New York court might use the admission of other social science assessments to argue for *Frye* admissibility. The final section of the memo briefly lists statutes in other states mandating judicial use of domestic violence risk assessments.

Uses of Domestic Violence Risk Assessments in Jurisdictions Outside of New York State

Westlaw and Lexis searches revealed no case law mentioning the use of domestic violence risk assessments in New York State. However, these assessments have been considered in other jurisdictions. In child custody hearings, termination of parental rights hearings, motions to lower probation supervision after domestic violence convictions, level of bail determinations, and appeals from civil protection orders, some courts have admitted evidence of domestic violence risk assessments. This section gives an overview of these cases, as well as detailing one Texas court's holding that a lethality assessment was not sufficiently accepted to be admitted into evidence.

A. Parental Rights and Child Custody Cases

In *Corystoltz v. Nobilese*, No. FD 14-008627-016, 2015 Pa. Dist. & Cnty. Dec. LEXIS 18256 (Pa. C.P. Oct. 20, 2015), a Pennsylvania Family Court denied a father's petition for primary child custody. A prior judicial conciliation had led to an Interim Custody Order granting primary custody to the mother. The court granting that Interim Order noted that the father exhibited several risk factors associated with Dr.

Campbell's Lethality Assessment, and briefly described the assessment. The Family Court's multi-factor, final custody decision referenced the assessment as contributing to its decision.

In *In re Marriage of Ashagari*, No. 71295-1-I, 2015 Wash. App. LEXIS 622 (Ct. App. Mar. 23, 2015), a Washington appellate court affirmed the dissolution of a father's parental rights. The court affirmed "because the record supports the trial court's finding that Kassahun's assault on his wife was not an isolated incident of domestic violence." In discussing the sufficiency of the evidence, the court cited trial testimony from an expert at Family Court Services who conducted a lethality assessment on the father based on interviews with both mother and father. The expert testified as to which lethality risk factors were present in this case.

In *In the Interest of J.H.E.*, 386 P.3d 525 (Kan. Ct. App. 2016), a Kansas Court of Appeals affirmed a the termination of a mother's parental rights. In affirming the sufficiency of evidence, the court cited the testimony of the police officer who responded to a domestic violence situation between the parents. The officer testified about a seventeen-question, yes/no lethality assessment[1] he conducted with the victim, stating the seven questions to which the victim said yes.

In *In re Phoenix S.,* No. CP07010970, 2011 Conn. Super. LEXIS 1443 (Super. Ct. May 31, 2011), a Connecticut court terminated a father's parental rights. One major piece of evidence was testimony from a domestic violence risk assessment expert. The Department of Children and Families sought the assessment which was based on a review of documentation and an interview with the father. The expert testified that the father was likely to continue to commit domestic violence and stated the factors which led to this conclusion.

B. Post-Conviction Probation Supervision

In *Benge v. State*, 101 A.3d 973 (Del. 2014), the Supreme Court of Delaware upheld the denial a convicted domestic violence offender's motion to lower his probation supervision. The Court affirmed the use of an unspecified Domestic Violence Screening Instrument (DVSI) as a means of assigning the appellant's level of supervision. Both the lower court and the Supreme Court were highly deferential to the Department of Corrections position that the appellant should remain at his current level of supervision due to his high score on the DVSI.

C. Setting the Conditions and Amount of Bail

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[1] The Lethality Assessment used by this police officer in Johnson County, Kansas is substantially similar to Dr. Campbell's Danger Assessment. *See* Marya Schott & Alexander M. Holsinger, *An Analysis in the Domestic Violence Lethality Assessment in Johnson County, Kansas* (Jan. 17, 2014) (which asserts that the lethality assessment is also being used when determining recommendations for bond).

In *Gantert v. City of Rochester*, 168 N.H. 640, 135 A.3d 112 (2016), a police officer appealed his discipline for falsifying answers on a Lethality Assessment Protocol (LAP) form. The LAP was developed from Dr. Campbell's Lethality Assessment.[2] The Supreme Court of New Hampshire described the LAP and noted that the "LAP is also used to assist the court in determining the amount and conditions of bail."

D. Civil Protection Order

In *Pettingill v. Pettingill*, 480 S.W.3d 920 (Ky. 2015), the Kentucky Supreme Court affirmed a domestic violence civil protection order entered on behalf of a wife against her husband. The husband argued that the family court improperly considered "lethality factors" when entering the order. The family court noted findings of fact on its docket sheet including that the court finds "9 of 12 lethality factors in intimate partner" and a listing of those 9 factors. The husband claimed this was improper judicial notice. The Supreme Court rejected the notion that this "finding of fact" was improper. The "trial court properly employed its background knowledge of domestic violence risk factors to inform its judgment as to whether the facts of this case indicated domestic violence may occur again."

E. A Texas Court Held a Domestic Violence Risk Assessment Not Sufficiently Accepted to be Admitted

In *Petriciolet v. State*, 442 S.W.3d 643 (2014), a Texas court of appeals held a trial court erred in admitting expert testimony regarding a "lethality assessment." The appeal stemmed from a conviction of aggravated assault of a family member. The trial court allowed the county's director of Family Violence Services to testify about a lethality assessment she conducted on the appellant, which lethality factors were present, and the appellant's final score on the assessment. Although unclear which lethality assessment was used, it seems to be a modified version of Dr. Campbell's.[3] The court held that the state did not show by clear and convincing evidence that "lethality assessment" is a legitimate field of expertise. The court cited the following reasons for its holding: the expert did not name a single source affirming the assessment beyond citing one article, she testified to 30-40% rate of error, she did not testify as to methodology, and she did not mention whether the assessment had been peer reviewed.

Since Texas does not follow the *Frye* standard for assessing the reliability of expert testimony, this case may not be very persuasive to a court in New York. Additionally, other jurisdictional differences, notably the rules of evidence, make the case even less persuasive.

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[2] *See* Detective Bob Frechette, Paula Wall, and the National Family Justice Center Alliance, *Lethality Assessment & High-Risk Response*, https://www.familyjusticecenter.org/resources/library/risk-assessment-and-safety-planning/lethality-assessment-high-risk-response/.

[3] why

At least one New York court has refused to follow out-of-state precedent as it relates to the admission of social science expert testimony. In a child protective proceeding, a New York family court refused to follow a Louisiana Supreme Court precedent in ruling on the admissibility of expert testimony relating to "sexual abuse dynamics." *In re Wendy P.*, 47 Misc. 3d 1202(A), 16 N.Y.S.3d 795 (N.Y. Fam. Ct. 2015). While the Louisiana court found the principle was not generally accepted, "that matter concerned a criminal prosecution from another jurisdiction, not a New York Family Court Article 10 child sexual abuse proceeding, and as such, the rules of evidence, burden of proof, and corroboration requirements differed. For these reasons the case is not relevant." *Id.*

Considering the Danger and Lethality Assessments under the *Frye* Standard as Applied in New York

New York courts adhere to the standard for admitting expert testimony espoused in *Frye v. United States*. As little or no case law exists in New York where a court specifically considers a domestic violence risk assessment, advocates seeking to admit these types of assessments must look to how *Frye* has been applied to other social sciences. This section outlines the *Frye* standard and offers New York case law which may be used as a guide to argue for *Frye* admissibility of risk assessments.

A. An Overview of the Frye Standard for Admitting Expert Opinions

Although the Supreme Court of the United States has overturned it, New York courts still follow *Frye v. United States* in making 'general acceptance' the test for admitting expert testimony about scientific principles or discoveries. *Giordano v. Market Am., Inc.*, 15 N.Y.3d 590, 601, 941 N.E.2d 727 (2010). To be admissible, the expert's testimony must be grounded on methods that are generally accepted within the scientific community. *People v. Kanani*, 272 A.D.2d 186, 186, 709 N.Y.S.2d 505 (1st Dept. 2000). "[T]he particular procedure need not be unanimously endorsed by the scientific community but must be generally accepted as reliable." *People v. Middleton*, 54 N.Y.2d 42, 49, 444 N.Y.S.2d 581 (1981). The emphasis is on "counting scientists' votes." *People v Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 633 N.E.2d 451 (1994).

New York courts, including family courts, apply *Frye* to social sciences. *Cornell v. 360 W. 51st St. Realty, LLC*, 2014 NY Slip Op 2096, 22 N.Y.3d 762, 781, 986 N.Y.S.2d 389, 9 N.E.3d 884. The reliability of novel hypotheses and theories, as well as methodologies, are measured against the *Frye* standard. *Id.*

B. The Frye Standard as Applied to Other Social Sciences in New York Courts

While New York case law considering domestic violence risk assessments is sparse if not non-existent, New York courts have considered the admissibility of other social science expert testimonies, including

other social science risk assessments. This section details how risk assessments for sex offenders and other social sciences have fared under *Frye*.

Risk Assessments of Sex Offenders in New York

New York courts have frequently dealt with the admissibility of risk assessments against sex offenders, and generally, these assessments are admitted. There are two main sex offender assessment used by New York courts in assessing the risk level of sex offenders: Static-99 and SORA's Risk Assessment Instrument (RAI).

New York's Sexual Offender Registration Act (SORA) created a Board to establish "guidelines and procedures to assess the risk of a repeat offense by" a sex offender. CITE. SORA requires the Board to designate offenders as risk level one, two, or three to give recommendations to the sentencing court, and the Act gives a non-exclusive list of risk factors to consider. The Board created the Risk Assessment Instrument (RAI) to meet this statutory duty. The RAI gives points for each characteristic the offender displays and it has been in use since 1996. The RAI gives each offender a presumptive risk level of which a court has discretion to modify. "New York's appellate courts have consistently rejected every one of the numerous challenges which has been made over the past 13 years to the RAI's validity." *People v. Santos*, No. 25 Misc.3d 1212(A), 901 N.Y.S.2d 909 (Sup. Ct. 2009) (citing over 20 cases from various New York courts affirming the validity of the RAI); *but see People v. McFarland*, 2010 NY Slip Op 51705(U), 29 Misc. 3d 1206(A), 958 N.Y.S.2d 309 (Sup. Ct.) (lengthy discussion on problems with the RAI including lack of general acceptance but citing extensive precedent as forcing court to consider it).

Static-99 is even more widely accepted as a sex offender risk assessment than the RAI. *Id*. at 10. Static-99 is a scale of ten questions which categorizes the offender's risk level of re-offending. In *Matter of State of N.Y. v. K.A.*, 2008 NY Slip Op 50103(U), 18 Misc. 3d 1116(A), 856 N.Y.S.2d 503 (Sup. Ct.), the Supreme Court of New York held that there was probable cause to find that the defendant was a sex offender requiring civil management and that he should not be released pending his trial. The court based its holding in part on an expert's testimony about the defendant's Static-99 results.

However, "testimony concerning actuarial risk assessment is inappropriate at the trial phase" under the "unique, bifurcated process of civil commitment which exists in New York State under article 10 of the Mental Hygiene Law." *Matter of State of N.Y. v. Rosado*, 2009 NY Slip Op 29290, 25 Misc. 3d 380, 381, 889 N.Y.S.2d 369 (Sup. Ct.). In *Rosado*, a defendant sought to exclude the results from his Static-99 assessment from being introduced at the trial phase. First, the court noted that using Static-99 to predict the rate of re-offending presented no *Frye* concerns. "There is no question that ARAs [actuarial risk assessments] are scientifically accepted as a means of predicting recidivism." *Id.* at 386. However, the assessment is not relevant at the trial phase. "[U]nder New York's statutory scheme…the risk of

reoffending nor dangerousness...need not to be established at trial." *Id.* at 398. Additionally, "the fact that it is routinely offered into evidence by the Attorney General during probable cause hearings has no bearing on the ultimate issues in this case." *Id.* at 407. Since probable cause hearings require a determination of dangerousness to hold the respondent, "the assessment is relevant and accepted for that determination." *Id.* at 408.

New York courts' acceptance of risk assessments predicting the likelihood of recidivism of sex offenders might foreshadow their acceptance of risk assessments predicting the likelihood of a domestic violence situation elevating. The volume of studies concerning Dr. Campbell's Danger Assessment lends credibility to its general acceptance in the relevant community. While *Rosado* would imply that risk assessments are not always relevant at every type of proceeding, risk assessments' relevance in pre- and post-conviction decisions is made clear by *Santos* and *Matter of K.A.*.

Other Social Sciences Analyzed Under Frye in New York Courts

In *People v. Taylor*, 552 N.Y.S.2d 883 (1990), a New York appellate court affirmed that "rape trauma syndrome" was admissible under the *Frye* standard at the trial of a person accused of rape. While "it is apparent that there is no single typical profile of a rape victim," the court was satisfied "that the relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of certain identifiable symptoms." *Id*. at 886. The court cited two articles for its general acceptance.

In *Victoria C. v. Hirginio C.*, 165 Misc.2d 702, 630 N.Y.S.2d 470 (1995), a New York family court held that expert testimony concerning "battered woman's syndrome" is presumptively admissible in family offense proceedings. *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (Sup. Ct. 1985) discussed the *Frye* admissibility of "battered woman's syndrome" in more detail, finding that "the theory underlying the battered woman's syndrome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility." *Id.* at 135. The court referenced the fact that numerous articles and books about it have been published and recent studies validated its existence. *Id*.

In *In re Jeremy Jordon M.,* 35 Misc. 3d 1226(A), 953 N.Y.S.2d 550 (Fam. Ct. 2012), a New York family court proceeding terminated the parental rights of a father. An expert on the sexual abuse of children was allowed to state examples of factors which led to his conclusion that the father had a high risk of reoffending.

Statutes in Other States Mandating the Judicial Use of Domestic Violence Risk Assessments

Ohio Requires Judges Use a Domestic Violence Risk Assessment in Bail and Bond Hearings

"Amy's Law" in Ohio was signed into law in 2005. Amy's Law made it mandatory for police officers to fill out a 20-question danger assessment questionnaire in any case involving an arrest or investigation of a domestic violence incident. Judges are provided a copy of the risk assessment which provides information on the severity of the offense, the mental health of the offender, and whether or not the suspect is a threat to any other person, among other risk factors. Before releasing offenders on bail or bond, judges must consider the assessment in their decision. Ohio Rev. Code Ann. § 2919.251 (H.B. 32).

Colorado Requires Judges Use a Domestic Violence Risk Assessment Before Placing Offenders in a Pre-trial Diversion Program

If Colorado judges want to enact a pre-trial diversion program for those charged with domestic violence, and they want to use state funds for that program, they are required to use a domestic violence risk assessment. The statute was enacted in 2013. C.R.S. 18-1.3-101(5).

Arizona Requires Judges Use Risk Assessments in Setting Bail for Any Offense

In Arizona, courts must use a "risk assessment approved by the supreme court or a lethality assessment provided by law enforcement" in setting the amount and conditions of bail. The law applies in criminal cases only and is not specific to domestic violence. Ariz. R. Crim. P. 7.3(b).

Oklahoma Courts Have Discretion to Order Parents Complete an Assessment in Child Visitation Orders

In deciding a child visitation order for a non-custodial parent, an Oklahoma court "shall provide for the safety of the minor child and victim of domestic violence" and "may…order the abusive, stalking, or harassing parent to complete a danger/lethality assessment by a qualified mental health professional." Okla. Stat. tit. 43, § 111.1(A)(4)(h).

Conclusion

The *Frye* standard for admitting expert evidence, as applied in New York, requires a hypothesis or methodology be "generally accepted" among the relevant expert group. The use of domestic violence risk assessments in other jurisdictions and the handful of narrow state statutes mandating judicial use of the assessments lends credibility to an assertion that Dr. Campbell's assessments are "generally accepted" and thus admissible under *Frye*. Those seeking to admit these assessments in New York can also look to how New York courts have handled other social science *Frye* evaluations.