



**ENENSTEIN
PHAM & GLASS**

To: Steve Russell
From: Ruth Dayan Eget
Date: April 11, 2019
Memo re Court Rules on Expert Reports

I. COURT RULES RE EXPERT REPORTS

The Court Rules of Hon. Arlene Gordon-Oliver provide as follows:

The reports of any court-approved evaluator (or other expert) will not to be provided to the litigants, but may be provided to counsel upon their filing a Non-Disclosure Affidavit. Litigants are permitted to review reports under the supervision of their attorneys, but may not make any reproductions of the report in full or part. Pro-se litigants may review reports in the Clerk's office.

(p. 4, ¶ 11). Although this may not be as broad as Katherine Chesnut's statements that attorneys may not "disclose" the report to litigants, it is clear that we cannot simply email a copy of the report as this would be an improper "reproduction of the report." It follows, that a client may be able to review the document at the law firm's office and under attorney supervision. However, as Katherine mentions, Judge Gordon-Oliver may have clarified this differently in Court and expressed stricter rules regarding disclosure.

There is case law that states that parties have a right to review the reports of forensic experts:

The appointment of forensic experts is a well-established aspect of custody litigation, sanctioned by case law as well as the Rules of Court (see, 22 NYCRR §§ 202.16[g]; 202.18). The reports of such experts are admissible without consent, subject to each party's right to review the reports, receive a full and fair opportunity to expose inadequacies on cross-examination, and present material in rebuttal (*Chisaidos v. Chisaidos*, 170 A.D.2d 428, 565 N.Y.S.2d 536 [2d Dept 1991] [trial court erred by relying on professional reports without providing parties opportunity to cross-examine court-appointed psychiatrist and submit evidence in connection with issues reports raised]; *Waldman v. Waldman*, 95 A.D.2d 827, 463 N.Y.S.2d 868 [2d Dept 1983] [trial court's power to direct psychiatric examination is not dependent upon consent of

parties; however, results of examination must be made available to parties and attorneys]).

Lisa W. v. Seine W. (N.Y. Fam. Ct. 2005) 9 Misc.3d 1125(A).

Accordingly, there is at least no question that a client has the right to review the supervisor's report (as he would be allowed to see a true expert's report) under counsel's supervision. As this is not that helpful, the next question would then be whether a supervisor's report is considered a protected report from a court appointed evaluator/expert, and thus subject to the Court's Rules.

II. WHETHER A SUPERVISOR'S REPORT IS A PROTECTED COURT APPOINTED EVALUATOR/EXPERT'S REPORT/EVALUATION

After review of the relevant case law, it is unclear whether a supervisor's visitation report is covered by the language of the Court rule above. Larry Carlin indicated it did not, but provided no underlying basis for this opinion.

New York State Assembly Bill 1533 seeks to add the following language with regard to disclosure/availability of reports to litigants and counsel specifically as to forensic reports:

(c) Court ordered forensic evaluations in proceedings involving child custody and visitation. Where a court order is issued for an evaluation or investigation of the parties or a child by a forensic mental health professional, a probation service, a child protective service or any other person authorized by statute, all of whom shall be considered " court ordered evaluators" for purposes of this subdivision, appointed by the court to assist with the determination of child custody or visitation pursuant to this article, for purposes of such court ordered forensic evaluations and investigations...."

This seems to indicate the scope of "court appointed evaluator" is broader than just simply an "expert" such as a child custody forensic evaluator. Obviously this is not law, so therefore, not entirely helpful. Ultimately, the Judge's own comments regarding the report would provide the most guidance.

III. COURT'S COMMENTS RE REPORT

March 7, 2019 Transcript Relevant Excerpts:

THE COURT: So, Counsel Counsel, a new supervisor, if what you're saying is true, a new supervisor who is untainted will come back to the Court and report the same thing. Please.

ADVOCATE: It was not a simple process. It took weeks working it out. Once we even had CSF here, it took forever

for us to get them on board and start the visits. Now he's had a bunch of visits, the report is superb.

THE COURT: It might be tainted.

THE COURT: It might not appear in the report, but it might be there.

MS. JACKMAN: Exactly. And that's the issue is that (inaudible) put it in the report and it wasn't relevant, the other supervisor didn't include it in her report, but we don't know how it has affected her judgement.

THE COURT: And this supervisor might now be tainted in their report back to the Court because of all the things that your co-counsel put in that e-mail.

THE COURT: One second, we have a problem. We have a problem with the tainted supervisor. Tainted. I'm telling you, I don't like what happened here.

MR. ADVOCATE: He cancelled visits on March 20th and March 1st so he could move to his new home in Chappaqua. I'm reading from the report that was sent to the Court.

THE COURT: (inaudible). I haven't looked at the report. I'm not reading it, I'm not letting it come in. (inaudible).

The underlined sentence from the Judge alone drives the conclusion that this report should not be provided to Hymowitz. There is a strong likelihood the Judge will find that either Hymowitz is tainted, or someone was attempting to improperly influence him using this tainted report. The transcript also reflects that Jennifer Jackman supports a reading that the report is tainted- regardless of any comments she made later "off-record" to the contrary.

We can certainly arrange for Steve to see this "under supervision" but doing anything further may jeopardize the entire forensic evaluation process and irreparably prejudice Steve.