A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented

By Lee Rosenberg, Editor-in-Chief

In the category of what goes around comes around, another piece of proposed legislation regarding access to forensic reports is back on the table in the New York State Legislature. These Bills– A.5621 and S.4686 – serve to wrongfully and unwisely elevate the "self-represented" to equal status of attorneys.[1] While prior versions of the proposed law have been rejected by the New York State Bar Association's Family Law Section, the Women's Bar Association of the State of New York, and the American Academy of Matrimonial Attorneys New York Chapter, the new bills are *again* making the rounds despite being *again* justifiably rejected by these bar associations. Alternative solutions have also been historically advanced by the Office of Court Administration's Matrimonial Practice Advisory and Rules Committee.[2] This proposed legislation, in sum and substance, provides for pro se litigants and attorneys to be similarly situated and permitting release of forensic custody reports, as well as the underlying raw data, and records, not only to counsel of record, but *to the litigants themselves*.

Constitutionally, the right to custody and parenting is a fundamental right[3] and circumstances exist – particularly in low income/financially disadvantaged cases – where we must protect parents who cannot avail themselves of counsel from being doubly disadvantaged.[4] Of course, courts acting in *parens patriae* and seeking to make best interests determinations,[5] must balance equities and fairness while considering the appropriate factors in making those determinations.[6] Placing lawyers, with ethical and licensure constraints on the same footing as pro se litigants, however, creates undue risk to the process, undermines the system, and allows a false equivalency to exist which may have lasting repercussions

Courts have broad powers to make custody decisions[7] and trial courts are provided with great deference on appeal– particularly, as the trial court is in the best position to determine credibility.[8] Courts may appoint attorneys for children,[9] direct ancillary components such as parenting coordinators[10] and therapeutic intervention,[11] provide for supervised parenting,[12] alcohol and drug testing,[13] and– of course– forensic evaluation.[14] The court may not, however, delegate its ultimate responsibility to make custodial determinations.[15]

Practically speaking, it *appears* that the predilection for forensic evaluation is on the decline and many judges are feeling less reliant on costly and time-consuming forensics unless there is a credible allegation of psychological or psychiatric impairment, since the court can otherwise render its own factual determinations.[16] Prior debate on whether or not the evaluator should or should not even make recommendations in his/her report further informs the court's role as trier of fact.[17] When forensic valuations are undertaken and completed, the report itself is awaited with bated breath, as for many years and in most reported decisions, the court will *at least* take heed of its findings and rarely ignore them.[18] In many instances, it would not be historically unusual for the parties to perceive a forensic evaluation to be subject to the court's instantaneous imprimatur– although there are certainly decisions of more recent vintage to the contrary.[19] The report, and the process of getting there has, despite much academic criticism,[20] been a fulcrum which could on one hand turn a case on its head and, on the other, make a mere "allegation" now essentially one written as fact in stone.

The dilemma in addressing the importance of the forensic report when there is an unrepresented litigant, initially finds voice in the First Department's decision in *Sonbuchner v Sonbuchner*,[21] where the court although finding the pro se father was not deprived of due process by not getting additional time to review the forensic report stated,

> We nonetheless reiterate, as we have previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions (see *Matter of Isidro A.M. v. Mirta A.*, 74 A.D.3d

Lee Rosenberg, Editor-in-Chief, is a Fellow of the American Academy of Matrimonial Attorneys, a past Chair of the Nassau County Bar Association Matrimonial Law Committee, and a partner at Saltzman Chetkof & Rosenberg LLP, in Garden City. His email address is lrosenberg@scrllp.com.

> 673, 902 N.Y.S.2d 362 [2010]). Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in the courthouse.

The Sonbuchner holding, and the ensuing discussion around it is now some 7 years old. Attorneys and courts have also in the interim, addressed the need for access to the raw data underpinning the report to be available for trial and pre-trial purposes,[22] particularly since depositions of the expert will not occur, and in the downstate departments, neither will pre-trial discovery on the issue of custody in most instances.[23] Having a pro se litigant further complicates matters. On July 10, 2019, and without citation to Sonbuchner, the Second Department in Matter of Raymond v Raymond,[24] rejected the pro se father's argument that he should have had been permitted to retain a copy of the forensic report, holding,

> The Family Court did not improvidently exercise its discretion in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the courtappointed forensic evaluator. The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents (see *Matter of Isidro A.M. v Mirta A.*, 74 AD3d 673; *Matter of Morrissey v Morrissey*, 225 AD2d 779; *Matter of Scuderi-Forzano v Forzano*, 213 AD2d 652). The father has failed to show that his ability to prepare for the hearing was prejudiced by his not having his own physical copy of the report.

While it is argued in some quarters that the self-represented parent has as much right to the report and underlying data as a party with counsel, the manner and extent of access must be different. First, the represented client also has existing limitations. They cannot take the report itself. They cannot make copies. They often cannot actually read the report, but must rely on the attorney's oral summary. Second, lawyers also have limitations. While they can get a copy of the report from the court, often they cannot make further copies. They most often have to make separate notes when reading it. They cannot disseminate it to a consultant without court permission. They cannot quote from the report in court papers. They must return the report back to the court upon conclusion of the case or on substitution of counsel. They are guided and restricted by the order providing the report to them, which they must sign off on– and, with the lack of uniformity in our system, those orders still vary from judge to judge.[25] Even judges have restrictions– although normally self-imposed– such as not reading the report, except on consent or after it is admitted into evidence.

The reason for these restrictions, even on counsel, is basic– the information in the reports and in the underlying data (which at least at the initial release is not in evidence, and thus not challengeable by cross-examination),[26] would be detrimental to the children and also to the parties themselves, if disseminated. How often do we see that a party has "inadvertently" or more likely purposefully, discussed the litigation with the children or actually left a copy of an affidavit on the kitchen table for the children to read, despite admonition of the court or their own attorney? How often do vindictive or emotionally hurt litigants seek to sway the children's view in their favor and by equal measure harm the other parent by word or deed?

The forensic report and underlying data are replete with not only the statements of both parties or at least the evaluator's recitation/summarization of those statements, it contains the evaluator's subjective observations of the parties within and without the presence of the children. It may have the children's statements. It may have proclamations by teachers, grandparents, older siblings and caretakers, therapists, and others germane to the world of custody and designated as appropriate "collateral sources". It may make actual recommendations to the court. It has references to and includes various psychological tests and test results, not always actually performed by the evaluator and has diagnoses presumably made under the DSM-V[27] – opining that one party may have a psychiatric disorder or underlying criteria for tendency towards same. It may or may not have been prepared in compliance with governing professional standards.[28] It may recite assertions of child abuse or domestic violence, alcoholism, drug addiction, or perhaps a party's discussion of a family history of sexual abuse when they were a child. Given the heightened state of emotions in the divorce litigation– never mind the even greater emotionality of *custody* litigation– having this black-and-white ticking time bomb in the hands of an unrepresented litigant, is not just a simple matter of an asserted due process claim, it is a shrapnel-filled explosion waiting to happen– unless that litigant is subject to restrictions to safeguard the information.

Attorneys are "officers of the court".[29] We are subject to ethical obligations which the litigant is not;[30] we are fingerprinted upon admission to the bar; we are issued a "secure pass" by virtue of our status, to bypass the court's metal detectors; we may discuss matters in Chambers without having a court officer present. We possess these privileges because they have been earned through a long process of education, testing, and ethical evaluation. We are subject not only to contempt and sanction for violating court directives, but also to suspension, disbarment, and

other legal processes. There are repercussions to our misbehavior which are not limited to one case or one client and serve as a deterrent against such misbehavior– and, since we are at least presumptively distanced personally from the client's matter, are disinclined to act in a manner which would create personal harm to the litigants or to their children.

The client is not subject to our process and our liabilities for misusing the trust given to us by the court system. The pro se litigant, not having counsel as a barrier to dissuade them from bad behavior, creates the additional danger created by a release of forensic reports to them which mitigates against similarly situating them with the lawyer. They may, of course, be subject to court order. If they violate the order they *may* be held in contempt; they *may* be incarcerated for that contempt, subject to statutory limitations; they *may* lose custody; they *may* find parental restrictions placed on them. While a protective order may be applied for, the clear presumption under the proposals is for release of the report and underlying data. There are, however, no absolutes, and once the bell has rung, it may not be unrung. They may always move a court for modification on a proper change in circumstances.

The legislative "powers that be" should take heed of the dangers posed by what appears to be an over-simplified leveling-up of the forensic playing field under the guise of due process. Self-represented litigant's should not have such relatively unfettered access to the forensic custody reports and raw data. The potential damage to be done by a release of the forensic report and raw data obtained under the guise of self-representation, might not be so easily, if it all, remedied.

Endnotes

1. Although the legislature is currently out of session, the Assembly version of the bill passed that body on June 11, 2019 and was delivered to the Senate. The Senate version was committed to the Rules Committee on June 20, 2019. The Bills remain part of the 2019-2020 Regular Session.
2. *See e.g*. Report of the Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York, January 2019. https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019Matrimonial.pdf
3. *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016); *Troxel v. Graanville*, 530 U.S. 57 (2000).
4. FCA § 262(a)(v); *Hensley v. Demun*, 163 A.D.3d 1100 (3rd Dep't. 2018); *DiBella v. DiBella*, 161 A.D.3d 1239 (3rd Dep't. 2018).
5. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982).
6. *Hogan v. Hogan*, 159 A.D.3d 679 (2nd Dep't. 2018); *Sajid v. Berrios-Sajid*, 73 A.D.3d 1186 (2nd Dep't. 2010); *Realbuto v. Butta*, 134 A.D.3d 1041 (2nd Dep't. 2015).
7. *Louise E.S. v. W. Stephen S*., 64 N.Y.2d 946 (1985); *Olivieri v. Olivieri*, 170 A.D.3d 849 (2nd Dep't. 2019).
8. *Zafran v. Zafran*, 306 A.D.2d 468 (2nd Dep't. 2003); *Robinson v. Cleveland*, 42 A.D.3d 708 (3rd Dep't. 2007); *Caruso v. Cruz*, 114 A.D.3d 769 (2nd Dep't. 2014).
9. FCA § 249(a) (McKinney 2012); *Plovnick v. Klinger*, 10 A.D.3d 84 (2nd Dep't 2004).
10. *R.K. v. R.G.*, 169 A.D.3d 892 (2nd Dep't. 2019); *Headley v. Headley*, 139 A.D.3d 855 (2nd Dep't. 2016); *Silbowitz v. Silbowitz*, 88 A.D.3d 687 (2nd Dep't. 2011).
11. FCA § 251 (McKinney 2012); *Sanchez v. Alvarez*, 151 A.D.3d 1869 (4th Dep't. 2017); *Palmeri v. Palmeri*, 110 A.D.3d 859 (2nd Dep't. 2013).
12. *Parris v. Wright*, 170 A.D.3d 731 (2nd Dep't. 2019); see *Lane v. Lane*, 68 A.D.3d 995 (2nd Dep't. 2009).
13. *Welch v. Taylor*, 115 A.D.3d 754 (2nd Dep't. 2014).
14. FCA'§ 251; *Catalano v. Catalano*, 66 A.D.3d 1012 (2nd Dep't. 2009); *Salamone-Finchum v. McDevitt*, 28 A.D.3d 670 (2nd Dep't. 2006).
15. *Donald G. v. Hope H*., 160 A.D.3d 1061 (3rd Dep't. 2018); *Montoya v. Davis*, 156 A.D.3d 132 (3rd Dep't. 2017).
16. *See Matter of* Tyrek J., 161 A.D.3d 864 (2nd Dep't. 2018); *C.S. v. A.L.*, 55 Misc.3d 1212(A) (Fam Court Bronx Co. 2017). The court retains discretion as to whether a forensic report is required to render a custody determination. *Keyes v. Watson*, 133 A.D.3d 757 (2nd Dep't. 2015); *James Joseph M. v. Rosana R*., 323 A.D.3d 725 (1st Dep't. 2006); *Sassower-Berlin v. Berlin*, 31 A.D.3d 771 (2nd Dep't. 2006).
17. *Aldrich v. Aldrich*, 263 A.D.2d 579 (3rd Dep't. 1999).
18. *Cunningham v. Brutman*, 150 A.D.3d 815 (2nd Dep't. 2017*); Hutchinson v. Johnson*, 134 A.D.3d 1115 (2nd Dep't. 2015); *Nikolic v. Ingrassia*, 47 A.D.3d 819 (2nd Dep't. 2008).
19. *See Vasman v. Conroy*, 165 A.D.3d 954 (2nd Dep't. 2018); *Imrie v. Lyon*, 156 A.D.3d 1018 (3rd Dep't. 2018); *E.D. v. D.T*., 152 A.D.3d 583 (2nd Dep't. 2017); *Phillips v. Phillips*, 146 A.D.3d 719 (1st Dep't. 2017).
20. *See e.g*. Tippins and DeLuca, *The Custody Evaluator Meets Hearsay: A Star Crossed Romance*, Journal of the American Academy of Matrimonial Lawyers, Vol 30, May 2018.
21. *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566 (1st Det. 2012).
22. *K.C. v. J.C.*, 50 Misc.3d 892 (Sup. Court Westchester Co. 2015); *J.F.D. v. J.D*., 45 Misc.3d 1212(A) (Sup. Court Nassau Co. 2014); *In the Matter of* an Article 6 Proceeding and an Article 8 Proceeding *M.M. v. K.M*., 2019 Slip Op 51071(U) (Fam. Court Rockland Co., June 26, 2019).
23. *Garvin v. Garvin*, 162 A.D.2d 497 (2nd Dep't. 1990); *Torelli v. Torelli*, 50 A.D.3d 1125 (2nd Dep't. 2008); *Zappin v. Comfort*, 49 Misc.3d 1201(A) (Sup. Court N.Y. Co. 2015); *S.R.E.B. v. E.K.E.B*., 48 Misc.3d 1217(A) (Sup. Ct., Kings Co. 2015).
24. *Matter of Raymond v Raymond*, 2019 NY Slip Op. 05546 (2nd Dep't 2019).
25. There is a "form" order of appointment which may be found on the Uniform Court System website. https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/forensicorder.pdf. It does not, however, address what the attorneys' obligations are in obtaining and reviewing the report.
26. *See Strauss v. Strauss*, 136 A.D.3d 419 (1st Dep't. 2016).
27. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).
28. *See e.g*. American Academy of Matrimonial Lawyers, *Child Custody Evaluation Standards*, 25 J. Am. Acad. Matrim. Law 251 (2013); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings* (Dec. 2010); Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation* (2006).
29. *See e.g*. 22 NYCRR § 700.4(a).
30. New York Rules of Professional Conduct at 22 NYCRR 1200, et seq. Further, lawyers who are also parties to litigation cannot use an affirmation—we must swear in an affidavit. [*Law Offices of Neal D. Frishberg v. Toman*, 105 A.D.3d 712 (2nd Dep't. 2013); *Nazario v. Ciafone*, 65 A.D.3d 1240 (2nd Dep't. 2009); CPLR § 2106]; we are not supposed to use our "secure pass" to enter the courthouse; we do not get to go to into chambers with opposing counsel.