The 'F'-bomb — Pulling Back the Curtain on Forensic Custody Reports

By Vesselin Mitev

Mom and Dad are in a furious custody battle. Standard, old-hat allegations are flung about by the attorneys in chambers, e.g., Dad has a regular internet porn habit, leaning towards barely albeit legal amateurs (curiously this was OK with Mom until Mom filed for divorce), Mom is a frigid narcissistic alcoholic with rage issues (Dad seemed to have dealt OK with same for the past 12 years), and both parents are on heavy dosages of prescription medications that allegedly do not interfere with their amazingly high-paying jobs.

The f-bomb is then dropped by Mom's attorney, who thinks she has a leg up, to get a forensic evaluator appointed to conduct an analysis and issue a forensic report as to custody. Dad's attorney agrees to a "neutral," with the caveat that each side can bring in their own expert to contradict the court-appointed "neutral" expert. A forensic evaluator is appointed, both parents spend a good deal of money, and a thick, single-spaced report is ultimately generated.

Saving for the moment the germane question of whether the MMPI 2 is capable of measuring one single trait relating to parenting (that's a topic for another column), after a good long while, the report is announced to have appeared in the court's chambers. Both attorneys go in, take a look, and (depending on the judge) either receive a copy or agree to only look at the report in the penumbra of the courtroom, take notes, but not to quote specific findings or conclusions and to discuss the terms with their clients in broad generalities.

If this seems like an absurd level of secrecy: shrouding from a party the very essence of a report that was generated specifically *for and about* that particular party and what very well may determine the future of that party's relationship and access to that party's child, it is. Now, Dad's attorney wishes to demand the internal file of the evaluator, including his notes, memos, etc., so that he can be properly prepared to cross-examine the forensic. Mom's attorney has a meltdown in chambers, arguing that this is preposterous, obscene, and an affront to Lady Justice herself. The court, having a good bit of sense (and not sure of the law, to be honest), tells both sides to brief the issue.

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First, as the product of an expert witness, the report and its admissibility is governed by 22 NYCRR 202.16(g), which provides that reports "shall be exchanged and filed with the court no later than 60 days before the date set for trial" and that at the discretion of the court the report "may be used to substitute for direct testimony" with the expert witness available for cross-examination. 22 NYCRR 202.18 also allows the court to appoint an "appropriate" expert to testify to the issues of custody or visitation.

It is also beyond cavil that the report of an expert witness (and said witness' testimony) is but one factor to be considered and while entitled to some weight, are not meant to usurp the judiciary's role as ultimate fact-finder and decision-maker. See *Baker v. Baker*, 66 AD3d 722 [2d Dept 2009]).

Thus, at first blush, it would seem that an expert's report (and the basis on which it was reached, including notes, memos and that perfect buzzword "raw data") would be easily discoverable under Article 31 of the CPLR (indeed, even 22 NYCRR 202.16 (g) explicitly references this at (g)(1). In a somewhat logically infirm 2002 decision, a Westchester court opined that although broad discovery was the best tool for sharpening the issues for trial, the potentially deleterious effects of releasing the report's underlying data would not be in the best interest of the children and adopted a hazy "special circumstances" (undefined) test that a party seeking discovery would have to show. See *Ochs v. Ochs*, 193 Misc. 2d 502 (Sup. Ct. Westchester County, 2002).

Twelve years later, in a pair of decisions out of Nassau County, the special circumstances test was rejected in favor of a "rebuttable presumption of pre-trial discovery of the forensic report and the evaluator's entire file, including raw data, notes, tests, test results and any other materials utilized and same should be provided in every case, unless a specific motion is made to restrain the release of those materials based upon a showing of substantial prejudice," *JFD v. JD*, 45 Misc. 3d 1212(A) (Sup. Ct., Nassau County, 2014) citing to its earlier decision on similar circumstances.

The *JFD* Court likened discovery to Rosario discovery in criminal cases, such as police officer's memo book notes, which are discoverable but ultimately in possession of the prosecution. In 2015, in *KC v. JC*, 50 Misc. 3d 892 (Sup. Ct. Westchester County, 2015), the court aptly turned *Ochs* on its head, stating that it was hard pressed to see how disclosing the underlying data could possibly further fracture the alleged frail relationships the children already had with their parents:

> "The degree to which any damage may occur to these already fraught relationships is dwarfed by the substantial benefit to the court in obtaining a full understanding of the forensic report and the process used by the evaluator to reach its conclusions, so that the court may determine the best interests of the children."

Thus, the recent persuasive authority (congruent with the CPLR) is that discovery of the entire forensic file is and should be permitted unless it can somehow be shown that releasing same would result in substantial prejudice.

What access does the court have prior to trial, regarding the contents of the report? First, the report is entirely hearsay (sometimes double, triple, quadruple hearsay) and thus per se inadmissible absent an agreement of the parties to let portions of the report (or the entire report) into evidence, subject to cross-examination. A strict reading of the rules, then, appears to prohibit any access into the contents or conclusions of the report, prior to the moment it is handed up to the expert witness to be verified as made under oath, at trial.

Conflicting duties and responsibilities come into play, however, if the report contains, for example, severe allegations of parental misbehavior that would serve as grounds for an immediate change of custody. In that event, excerpts from the report could and should freely be cited by the movant, insofar as the rubric concerns the best interest of the child and the hearsay exception can be overcome in that the contents are not being offered for the truth but under the state of mind exception, or as dealing with a party's mental, emotional, physical state, which is never hearsay.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.