IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: S. S. v. D. S., 2008 NSSC 87

Date:20080325
Docket:1217-000619
Registry: Halifax

Between:

S. S.

Petitioner

v.

D. S.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the decision.

Judge:	The Honourable Justice Moira Legere Sers
Heard:	March 20, 2008, in Port Hawkesbury, Nova Scotia
Counsel:	Hugh MacIsaac, for the Petitioner, S. S. Coline Morrow, for the Respondent, D. S. Timothy Daley, for Valerie Rule

By the Court:

[1] The Applicant seeks an order directing the psychologist to produce her entire file inclusive of raw data, answers to test questions, test results, instructions from test designers and the video interview between the children and the psychologist. Ms. Rule is a non party expert who has provided a Parental Capacity Assessment Report in this proceeding.

[2] The matter commenced June 27th, 2007 with an emergency application by the mother. She requested exclusive possession of the matrimonial home, custody of the parties two children and a supervised access schedule.

[3] An interim order issued . The interim hearing was continued on July 24th, 2007. Evidence was heard and directions given. The case was adjourned pending an assessment. This assessment was concluded by report dated October 24th, 2007. The parties are preparing for the final Divorce trial commencing April 15th, 2008.

[4] The Psychologist, Ms. Rule, seeks to avoid disclosure of the interview with the children and the raw data test answers, as well as the brochures, relating to administration of the test.

[5] Counsel for the psychologist consents to the release of all other file materials other than these exceptions. In essence, there are two reasons articulated for this proposed limitation on disclosure.

[6] First, Ms. Rule is concerned that the disclosure of the interview between the children and the psychologist may impair the relationship between the children and the parents. Further, it may impair the ability of psychologists to enter into confidential discussions with children if there is not strict adherence to their right to confidentiality subject only to matters of disclosure of abuse.

[7] Second, the psychologist refers to the contract entered into between the psychologist and the publishers regarding copyright of the testing materials. She agreed when purchasing the materials via a “Test User Agreement” to protect the copyright material and the items and scoring criteria as confidential, copyrighted

and trade secret material under the publisher's non-disclosure policy. She referenced a test user agreement called MHS Test Disclosure Policy as follows:

> We recognize that, given the nature of our legal system, compelling reasons for disclosure of secured testing material may arise. To abide by the terms of purchase, we expect purchasers to do all they can to protect copyright material and to protect the items and scoring criteria as confidential, copyrighted, and trade secret material in response to written requests and/or subpoenas. An exception to releasing test data by subpoena exists when the qualified purchaser obtains a court order extinguishing also known as quashing or modifying the subpoena. In this case, we require qualified purchasers to bring to the court's attention concerns regarding the test security and to take steps to resolve the conflict in a responsible manner. When faced with a subpoena or court order for the reproduction of test materials you should secure a court order or protective agreement (to the extent possible) contained in the following requirements:
>
> (A) Restrict access to materials and the testimony regarding materials to the most limited audience as possible, preferably only to individuals who satisfy the test publishers qualification policy.
>
> (B) Restricted copying of test materials
>
> (C) Assurance of the return or destruction of the materials at the conclusion of the proceeding (and confirmation of such return and destruction): and
>
> (D) The sealing of and/or removing from the record to the extent any portion of such materials are disclosed and pleadings, testimony, or other documents in order to safe guard the integrity of the assessments. It is critical that the test materials do not becomes part of the record.

[8] The Psychologist argues that the test materials fall under the exception of release and access under the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA) and provincial legislation. Providing the items (ie the test scores and scoring criteria and other test protocols) would result in the release of confidential information on which the scores are based and would ultimately render the test materials useless.

[9] Ms. Rule informed the Court the Canadian Psychological Association (CPA) put in place the Harcourt Assessment Test Disclosure policy to protect the validity and integrity of test materials. She specifically referenced the CPA Code of Ethics:

> Principle II:2
>
> Avoid doing harm to clients, research, participants, employees, supervises, students, trainees, colleagues and others.
>
> PrincipleII:30 states in part as follows:
>
> Be acutely aware of the need for discretion in the recording and communication of information, in order that the information not be misinterpreted or misused to the detriment of others. This includes, but is not limited to , not recording information that could lead to misinterpretation and misuse, avoiding conjecture, clearly labeling opinion , and communicating information in language that be understood clearly by the recipient of the information.

[10] Ms. Rule argues that if the materials come into the hands of unqualified public, the test results may be misinterpreted. Ms Rule believes that requiring the release of the entire file will set a precedent and all future assessments may be compromised. This may deter psychologists from conducting assessments and may result in the public being assessed by individuals without the proper credentials.

[11] The concern about the release of test results, specifically raw data, relates directly to a concern about the validity and utility of future tests. It is argued that once the public become aware of the strategy behind the questions they will be able to manipulate the answers to get the desired results.

[12] The father's counsel does not argue for the release of the interview between Ms. Rule and the children nor insist on the test data. Since the assessment notes no child protection concerns it favors the father's position.

[13] The mother's counsel does insist on full disclosure. It is the mother who must weigh the report against the allegations of sexually inappropriate behavior to determine how much weight she should put on the report and its conclusions to settle, as parent, whether to override the concerns raised in the disclosures in favor of unrestricted contact with the father.

[14] Absent agreement between the parties, the Court must also weigh all the evidence and determine how much weight should be placed on the recommendations and whether there is a reliable foundation supporting the

recommendations sufficient to discount the disclosures of the children. This risk evaluation is necessary and a precondition to determining the type of access or contact that should occur between the father and children.

[15] Counsel have referred me to ***Catholic Children's Aid Society of Toronto v. S.(A.)***, 2007 Carswell Ont 8280 (OCJ) where disclosure was ordered; and ***Prince Edward Island (Director of Child Welfare)v. O.(M.)*** in which the Court referred to ***K.(S.D.) V. Alberta (Director of Child Welfare)***,2002A.B.Q.B. 61(2002) A.J. No.70(Alta.Q.B.) at para.43:"

> ... disclosure procedure adopted should reflect the unique features of child protection matters, in particular the addition of consideration of the rights of children which might be negatively affected by disclosure of all relevant information.

[16] Counsel for the mother referred to the test for privilege of communications between a psychiatrist and patient in para. 24 to 38 of ***M.A. v. Ryan,*** 1997 CanLii403(S.C.C.) :

> 1.The communication at issue have originated in a confidence that they will not be disclosed;
>
> 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties to the communication;
>
> 3.The relationship must be one which in the opinion of the community ought to be sedulously fostered, more precisely that "the relationship itself and the treatment it makes possible are of transcendent public importance(para27, 28); and
>
> 4. That the interest served by protecting the communications from disclosure outweigh the interest of pursuing truth and disposing correctly of the litigation.

[17] ***M.A. v. Ryan*** approved of partial disclosure as effective and appropriate in some circumstances .

[18] In ***Brown v. Capital Health Authority*** 2006 NSSC 348 (CanLii) the Court considered ***M.A. v. Ryan*** and the four part Wigmore test. At para.79, the Court distinguished the purpose of privilege as follows:

> ..privilege is not designed to facilitate truth finding, but rather to withhold probative evidence for public policy or social value reasons. For that reason courts have been very reluctant to recognize new categories of class privilege....

Analysis

[19] Sexual abuse allegations are complex issues that, once raised in practice, although certainly not in law, reverse the ordinary burden of proof, placing the accused parent in a position of trying to disprove them.

[20] Often there is no absolute proof of guilt or innocence. One must collect all the data, all the evidence in the context of the children's lives; place it before the court to allow the court to draw conclusions that are based, not on certainty, but on probability. It is an uncertain science.

[21] The more complex the case, the more circumstantial the evidence, the greater the reliance, it seems, on expert evidence.

[22] The greater the expectation of reliance on expert testimony, the more transparent and accountable the expert must be.

[23] In this somewhat elusive search for absolute knowledge, the expert must be able to justify the opinion.

[24] In assessing this report and its recommendation, the mother articulates concerns that the psychologist referred to polygraph results.

[25] In Canadian courts, these tests, in themselves, are not admissible as a forensic tool due to concerns about their reliability. This issue will be argued at a later date.

[26] The assessor concluded, based on test results and other clinical interviews, data, etcetera, that there were no child protection concerns.

[27] Without more evidence, the Court will be unable to determine the degree to which the psychologist was influenced by the results of the polygraph.

[28] The recommendations of the assessor's report are being challenged by one party to this action. That is their right, to test by way of cross-examination, the foundation on which the report is based.

[29] The conclusions of the assessment are only as valid as the facts supporting the report. That is established law.

[30] Thus as in ***Campagna v. Wong***, 2002 SKOB 97(CanLii) the Court decided that:

> to properly evaluate Dr. Shimps's conclusions, the defendant must have access to everything which played a role in the formation of those conclusions.

[31] The mother, in this application, had indicated it is not her intention to challenge the expert by employing another expert for the purposes of giving evidence. Thus, we are not getting into a battle between experts.

[32] Both parties and counsel for the psychologist have considered and reject the option of retaining multiple experts . They acknowledge it would not necessarily prove fruitful in the search of truth, it would delay the proceedings and escalate costs.

[33] The mother's counsel must know the foundation upon which the conclusions were made, if only to better understand the results, understand and weigh the reliability of the testing and the validity of the results and determine whether she wishes to rely on the results to address in her own mind, the child's disclosures verses the findings of Ms. Rule.

[34] This process may in fact promote the reliability and the credibility of the testing process.

[35] While it is understandable that publishers and vendors exert pressure on psychologists to protect their copyright as a marketing strategy; this will not be an obstacle to the disclosure of this information in litigation. This is so particularly where the conclusions reached because of the testing, are proffered as a credible means of determining conclusions to support or deny a parent access to their child.

[36] Protection of children ranks far superior to most privacy interests.

[37] When the argument against disclosure is being offered to protect the future viability and utility of the test, there are strategies regarding disclosure; proper restrictions on disclosure that address to some extent these concerns. However, the best interests of children far outweigh the desire for secrecy.

[38] In child protection litigation there is no place for secrecy.

[39] The most compelling objection before the court is whether or not to release the video tapes of the interview between the psychologist and the children. Once a therapist gains the trust of a child, exposure of the child to parental pressure, intentional or otherwise due to the child's comments , is potentially destructive; depending on the maturity of the parents.

[40] Therapists are already under the same obligations as all service providers and the public to report disclosures of child abuse regardless of confidentiality issues. This further erosion of confidentiality may render the promise of confidentiality a deadly blow. That may be a valid concern.

[41] Does that need to create a forum for confidential discussion between child and therapist outweigh the right of a parent to full disclosure ?

[42] If a child is under the age of majority, ought we to protect the right of a medical health provider to have private discussions between children and themselves in order to diagnose, make recommendations to a court that may ultimately affect the life and relationships of that child. That creates a privilege that a doctor, nurse or social worker do not currently have.

[43] There have to be checks against any intervention by professionals. There ought to be opportunities to weigh and analyze the input and foundation of a report in relation to the recommendations it produces . These recommendations can have significant effect on the lives of parents and children.

[44] There is a possibility that the children may have said something that is less than complementary of a parent. There is a possibility that disclosure of the conversation may affect the relationship between a parent and child.

[45] Yet the process of interviewing a child, as between a police officer, a social worker, a teacher, and other health professionals , is clearly open to scrutiny.

[46] What principle would protect a psychologist (in this case agreed upon by both parties) from the same scrutiny. Parties can agree in advance not to seek this disclosure. These parties did not do that here.

[47] An interview between police officer, social worker, psychologist depends on more than objective criteria and objective analysis. It depends on the skill and experience of the interviewer, on an assessment of not only the language of the child and interviewer, but the comportment and demeanor of the child . This is often analyzed in the global context, not only utilizing child development theory, but assessment arising out of the circumstances of the child's life. The analysis is objective, it is subjective, it is scientific, tangible and intangible.

[48] Reviewing the tapes may lend credibility to the therapist and sustain the conclusions found in the report. This is the accountability that promotes transparency.

[49] Historically in Nova Scotia, restrictions have been imposed on the release of confidential information in family and child protection proceedings. Just as the release of police files and medical records in this case have been subject to strict conditions of release, the disclosure required here can be adequately protected by the imposition of conditions.

[50] These conditions can reduce the possibility that this information will detract from the utility of these test and preserve the relationship between parent and child.

[51] Part of understanding the consequences of allegations of child abuse/sexual abuse or inappropriate sexual conduct is understanding the effect of the allegations and adult behavior after the allegations whether or not the allegations are true.

[52] Assessing the truth of the allegations and the effect on the children, true or unsubstantiated, assists the court and counsel in devising a strategy of parental

contact. Professionals need to know and understand how to repair the damage if true, and if not true, understand how to repair the relationship between parent and child affected because of the effect of unsubstantiated allegations.

[53] The video taped interviews and the test results, raw data, and the full file shall be made available to counsel in the following manner:

[54] 1. Counsel for Ms. Rule has agreed to make available the uncontested parts of the file as soon as possible, whether by copying the file or providing the file to counsel for the mother for copying.

[55] 2. A copy of the interview and other test data, raw data and brochures shall be made available for review at the office of the Children's Aid Society for Inverness/Richmond or such other agreed upon site under the custody of counsel for Children's Aid Society for Inverness/Richmond. That is in close proximity to both counsel. They shall be able to view with their clients only, but not to copy the tape of the interview.

[56] 3.There shall be no further copy of the tapes made and both parties are under a duty not to disclose, disseminate, copy, or otherwise replicate the tapes of the interview or use the contents for any other purpose other than preparation for this divorce proceeding.

[57] 4. The written materials may be copied once only for each counsel. Counsel are not entitled to copy or replicate this material. Should an expert be retained to review the materials, the expert shall attend at the office of counsel for the purpose of reviewing the material in order to advise counsel. They shall maintain the copy in the office of their counsel only. As with all other material disclosed, it is to be used solely for the purpose of advising and obtaining instruction for this proceeding and for no other purpose.

[58] 5. Breach of these conditions may result in contempt of court.

[59] At the end of this proceeding, subject to appeal, the contested raw data and interview, subject to this motion shall be sealed only to be unsealed by court order.

[60] Counsel for the mother shall draft the order.

Justice Moira Legere Sers