STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2150
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

January 7, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposals regarding access to forensic evaluation reports in child custody matters

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The Family Court Advisory and Rules Committee (FCARC), the Matrimonial Practice Advisory Committee, and the New York State Bar Association Committee on Children and the Law (NYSBA) have each submitted a proposal for a court rule regarding access to forensic evaluation reports in child custody cases by counsel, parties and self-represented litigants. The proposals differ in several significant respects.

Under the NYSBA proposal (Exhibit A), each counsel for the parties and counsel for the child(ren) would be entitled to receive one copy of the forensic report, to be kept confidential. In addition, the court might permit parties to have a copy of the report; where not so permitted, parties could read and make notes about the report at their attorney's office (if represented) or at the courthouse or other secure location (if unrepresented).

Under the Matrimonial Committee proposal (Exhibit B), counsel may obtain a copy of the forensic report upon execution of an affirmation pledging further non-disclosure; represented parties would be permitted to read and make notes on the report in their attorney's office; unrepresented parties may review the report in a courthouse or secure location after executing a non-disclosure affidavit. Upon application by counsel or a party, the court may also provide a copy to a mental health professional who executes a non-disclosure affidavit.

The FCARC proposal (Exhibit C) requires the court to delineate the terms of access to reports on a case-by-case basis in its order appointing a forensic expert, and further requires that such terms apply equally to counsel and unrepresented parties. The proposal, designed to ensure "meaningful and thorough access consistent with due process," incorporates a principle articulated by the Appellate Division, First Department, in Sonbuchner v. Sonbuchner, 96 A.D.3d 566 (1st Dept. 2012) (Exhibit D).

Persons wishing to comment on this proposal should e-mail their submissions to ForensicReports@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

Comments must be received no later than March 8, 2013.

EXHIBIT A

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

Children and the Law Com

COMMITTEE ON CHILDREN AND THE LAW
PROFESSOR MERRIL SOBIE
Chair
Pace University School of Law
Preston Hall Rm. 321
78 Broadway
White Plains, NY 10603-3710
914/422-4251
FAX 518/422-4168

December 10, 2010

Honorable Ann T. Pfau
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, NY 10004

Dear Ann:

For the past several years, the Children and the Law Committee has been concerned that the availability of forensic reports prepared in connection with child custody cases to attorneys and parties varies widely throughout the unified court system. As you know, the reports are of crucial significance to every stakeholder, and may well determine a case's outcome. The Committee accordingly appointed a subcommittee last year to study the issue and propose an appropriate policy to govern the availability and use of child custody forensic reports throughout the Family and Supreme courts. After receiving and seriously considering the subcommittee report, the Committee has adopted the enclosed policy statement.

The proposal would provide a unified procedure which, we believe, would meet the needs of litigants and their counsel. Implementation could be accomplished through the promulgation or amendment of court rules for the Supreme Court and the Family Court. The policy is very similar to the Matrimonial Commission recommendation concerning the availability of forensic evaluations.

We understand and appreciate the fact that the Office of Court Administration has been seriously considering this important issue recently, and hope that the enclosed proposal will assist OCA in achieving an equitable resolution. We would be happy to meet with you or with OCA representatives to discuss the matter, and we would be happy to provide any assistance or input which you deem appropriate.

Sincerely,

Merril Sobie, Esq.

cc: Hon. Edwina G. Richardson-Mendelson
Hon. Sharon S. Townsend
Hon. Michael V. Coccoma
Directors of the Offices of Attorneys for Children
Bruce J. Wagner, Esq.
Nancy Erikson, Esq.
Katherine Suchocki, Esq.

Motion Adopted at the October 21, 2010 meeting of NYSBA Children & Law Committee

WHEREAS the Matrimonial Commission reported in 2006 that there were many concerns about the use of forensic experts in custody cases: "the validity ... [and] quality of the reports, the qualifications of the forensics, the use of the reports by courts and their admissibility as evidence;" and

WHEREAS, with regard to access to custody evaluations, the Matrimonial Commission recommended that access to the forensic reports should be "uniform" and that, absent court order, access should be limited in that only counsel should be permitted to have copies – not the litigants themselves, who should be able to view the report at counsel's office – and that no further copies be made without court permission and that litigants who are not represented by counsel should be allowed to read the report in the courthouse and should be allowed to take notes but should not be given a copy or be allowed to remove the report from the courthouse, and

WHEREAS the Children and Law Committee of the New York State Bar Association has affirmed that it is "one of the mandates of the Committee to diligently address these problems [outlined in the Matrimonial Commission Report] until solutions are created and implemented,"

WHEREFORE, the Children and Law Committee of the New York State Bar Association recommends that in order to implement the above recommendations of the Matrimonial Commission, court rules be promulgated to provide as follows:

1. Rules regarding access to forensic reports ordered by the courts for use in custody, visitation, and other cases concerning children shall be uniform throughout the State; and
2. One copy of the forensic report shall be provided by the Court to each of the following: counsel for the parties and counsel for the child(ren); and
3. Each attorney shall retain his/her copy of the report in confidence and may make an additional copy for her/his own use in preparing for litigation, which copy shall also be kept in confidence when not being used; and
4. In the Court's discretion, the Court may permit each party to have a copy of the report, but if a party does not receive a copy, then, at a minimum, (a) a party represented by counsel shall be permitted to read the report in the attorney's office or another secure location and to make notes concerning the report, and (b) a party not represented by counsel shall be permitted to do the same in the courthouse or other secure location.

EXHIBIT B

SUPREME COURT CHAMBERS
Supreme Court State of New York
92 Franklin Street
Buffalo, NY 14202
e-mail: stownsen@courts.state.ny.us

SHARON S. TOWNSEND, J.S.C.
Vice Dean, Family & Matrimonial Law
New York State Judicial Institute

716-845-2502
Fax: 716-845-7503

October 24, 2012

Hon. A. Gail Prudenti
Chief Administrative Judge
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Proposal by the NYSBA Children and the Law Committee and Discovery of Experts

Dear Judge Prudenti:

The Matrimonial Practice Advisory Committee considered the proposal by the New York State Bar Association Children and the Law Committee regarding access to forensic reports in custody cases (see attached as Exhibit 1). Judge Pfau had referred said proposal to both the Matrimonial Practice Advisory Committee ("MPAC") and the Family Court Advisory and Rules Committee ("FCARC") for their feedback and guidance. The MPAC overwhelmingly was not in favor of this proposal .

The MPAC also considered a proposal crafted by the FCARC that relied on the recently decided case of *Sonbuchner v Sonbuchner*, 96 AD3d 566 [1st Dept 2012], which requires Judges to set the same conditions for access to forensic reports by counsel and pro se litigants, i.e., requiring "parity," but without specifying exactly what those conditions should be. I understand that Jan Fink, counsel to the FCARC, will be submitting that proposal to you as a separate document.

Instead of supporting the Children and the Law Committee proposal, or a "parity rule" based on *Sonbuchner*, MPAC has crafted a third proposal that you and the Administrative Board might consider adopting as a uniform rule regarding access to forensic reports in custody cases (please see Exhibit 2 attached). The proposal in Exhibit 2, like the Miller Commission recommendation (see Report of the Matrimonial Commission to the Chief Judge, at p. 54 [Feb. 2006] attached as Exhibit 3), would allow attorneys to uniformly have copies of the forensic reports in custody matters.

The MPAC believes that its proposal will allow preparation for trial in most contested cases without the risk that copies of the reports may be shown to children or third parties. Such instances of improper use of the reports by parties to matrimonial litigation were reported at hearings before the Miller Commission. The MPAC proposal also requires an affirmation of counsel, and affidavits of pro se litigants and mental health professionals as assurance that improper dissemination of the forensic reports will not occur.

On a related subject, the MPAC also recommends that you consider adopting an amendment to 22 NYCRR §202.16(g) regarding Disclosure of Experts in contested matrimonial actions as outlined in Exhibit 4 (copy attached). The proposal would not only expand upon the contents of reports exchanged and filed with the Court by experts as required by the existing rule, but would set procedures for pretrial discovery of experts, including in custody cases.

Because the MPAC believes that full details as to expert disclosure in advance of trial in contested matrimonials is necessary to assure fairness in today's increasingly complex litigation, the requirements as to what the written reports filed and exchanged prior to trial must contain are more specific than what is otherwise required in the existing rule. As currently written, 22NYCRR §202.16(g) of the matrimonial rules requires reports of expert witnesses expected to be called at trial to be exchanged and filed with the Court within 60 days in advance of trial, including information as to the expert's qualifications, but does not specify what must be contained in the reports or what information as to qualifications is required. The proposed rule requires specifics, including publications authored, cases testified in, and the compensation to be received.

The MPAC proposal would also create a uniform rule which would allow parties to depose experts in matrimonial matters, subject to the discretion of the Court after considering such factors as it deems "fair, relevant, and reasonable," and the cost and time involved. If the testimony is offered with respect to access, child custody, visitation or abuse, the party seeking the pretrial deposition or disclosure must make an application to the Court, and the Court shall consider, in addition to the other factors named above, the effect of such deposition upon a Court appointed expert's availability in future cases. *(see also Howard S. v Lillian S.*, 14 NY3d 431 [2010]). To the extent that discovery of experts in matrimonial actions is properly controlled as provided in the proposed rule, MPAC believes it assures that issues are vetted prior to trial.

Please do not hesitate to contact me if you have any questions. Thank you.

Very truly yours,

Hon. Sharon S. Townsend, J.S.C.
Chair, Matrimonial Practice Advisory Committee

SST/sdh
cc: Susan Kaufman, Counsel
Janet Fink, Counsel
Members of the Matrimonial Practice Advisory Committee

Exhibit 2 Matrimonial Practice Advisory Committee Proposal Regarding Access to Forensic Reports in Custody Cases, 9.21.12

WHEREAS the Matrimonial Commission recommended that there be a uniform policy on access to forensic reports under which each counsel would be given one copy of the report, and each litigant, whether represented or not, would not be given a copy, but would be permitted to review it; and

WHEREAS the Matrimonial Practice Advisory Committee has concluded that it would be advisable to have a uniform state-wide policy with regard to forensic reports,

The Matrimonial Practice Advisory Committee recommends that the Chief Administrator of the Courts adopt a uniform rule regarding access to forensic reports ordered by the courts for use in custody, visitation, and other cases concerning children, which shall include the following provisions:

1. Upon receipt of the forensic report, the court shall advise counsel for the parties and counsel for the child(ren), that it has received the report, and shall provide to each counsel an affirmation in the form annexed hereto as Exhibit A.
2. The court shall provide one copy of the forensic report to each counsel from whom it has received an executed affirmation.
3. Each attorney shall retain his/her copy of the report in confidence and may make an additional copy for her/his own use in preparing for litigation, which copy shall also be kept in confidence when not being used.
4. Each party shall be permitted to read the report and make notes concerning it but shall not be permitted to have a copy. A represented party may read it in his or her attorney's office. An unrepresented party may read it in the courthouse or other secure location after executing an affidavit in the form attached hereto as Exhibit B. .
5. Upon application by counsel or a party for permission to give a copy of the report to a mental health professional to assist counsel or the party, the court shall provide to the mental health professional an affidavit in the form annexed hereto as Exhibit C. The court shall provide one copy of the forensic report to a mental health professional from whom it has received an executed affidavit.
6. In the event that an unrepresented litigant is unable to read the forensic report in the courthouse because of language skills or disability, the court may make appropriate accommodations.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

----------X

Plaintiff, **Index No.:_____**

- against -

AFFIRMATION OF COUNSEL REGARDING FORENSIC REPORT

Defendant.

----------X

_____, an attorney admitted to practice in the State of New York, affirms the following to be true under penalties of perjury:

1. I am a member of _____, attorneys for _____ _____ in this action. I make this affirmation in connection with the report of the forensic evaluator, Dr._____, and specifically to affirm my understanding and agreement to abide by the Court's directions accompanying its provision of a copy of the report to counsel, as follows:

(a) I and the other persons affiliated with my firm will see to it that no copies of the report are made by us or by anyone else without the Court's explicit direction.

(b) While our copy of the report may be shown to our client (provided our client is a party), no copy will be given to the client, nor will the client be permitted to make a copy or to leave the premises of our office with our copy.

2. Unless specifically permitted by the court, counsel will not directly quote any language from the report of the forensic expert in any papers or other documents submitted by counsel to the court.

3. In the event that I or my firm ceases to represent our client in this matter, we will return our copy of the forensic report to the court.

Dated: _____, New York
_____, 2012

_____
Attorney's Signature

_____
(Please Print Name)

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART

----------X

,

Plaintiff, **Index No.**

- against -

AFFIDAVIT
,
REGARDING

Defendant. **FORENSIC REPORTS**

----------X

, Plaintiff/Defendant in this action, swears or affirms as follows:

1. I make this affidavit with respect to the report of the forensic evaluator, Dr. , a copy of which I understand will be provided to me to read upon my execution of this affidavit.

2. I will not remove the report from the courthouse.

3. I will see to it that no copies of the report are made by me or by anyone else without the Court's explicit direction.

4. Unless specifically permitted by the court, I will not directly quote any language from the report of the forensic expert in any papers or other documents submitted to the court.

_____

Sworn to or affirmed before me

on _____, 2012

_____

Notary Public

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

----------X

Plaintiff, **Index No.:_____**

- against -

AFFIDAVIT REGARDING

Defendant. **FORENSIC REPORT**

----------X

STATE OF NEW YORK)

ss:

COUNTY OF _____)

I, _____, swear or affirm as follows:

1. I have been retained as an expert witness for plaintiff/defendant [circle one].

2. I make this affirmation in connection with the report of the forensic evaluator, Dr._____ _____ (the Forensic Report) and specifically to affirm my understanding and agreement to abide by the Court's directions accompanying its provision of a copy of the Forensic Report to counsel, as follows:

(a) I and the other persons affiliated with my office will see to it that no copies of the Forensic Report are made by us or by anyone else without the Court's explicit direction.

(b) While my copy of the Forensic Report may be shown to the party, no copy will be given to the party, nor will the party be permitted to make a copy or to leave the premises of my office with my copy.

3. In the event that I issue a written report, I understand that my report will also be confidential, and that it will not be used for any purposes other than this litigation, and that I will not provide copies to anyone except the attorney for the party for whom I will appear as a witness, the Court, the attorney representing the opposing party, and the child's attorney, if any.

4. At the conclusion of my services in this matter, I will return my copy of the Forensic Report to the court.

_____

Signature

_____

(Please Print Name)

Sworn to before me
the ____ day of_____, 2012

_____

Notary Public

EXHIBIT C

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

A. GAIL PRUDENTI

November 20, 2012

Hon. A. Gail Prudenti
Chief Administrative Judge
New York State Office of Court Administration
25 Beaver St., 11th Floor
New York, NY 10004

RE: Access to Forensic Reports

Dear Judge Prudenti:

On behalf of the Family Court Advisory and Rules Committee (FCARC) and its co-chairs, Hon. Monica Drinane and Hon. Peter Passidomo, I am writing to convey the concerns of the FCARC regarding the resolution on access to forensic evaluations that was submitted to you by the New York State Bar Association Committee on Children and the Law. As Judge Townsend indicated, in her letter dated October 24, 2012, the Family Court Advisory and Rules Committee has considered the New York State Bar Association resolution and has developed an alternative proposal for court rules, attached as Exhibit A.

The FCARC proposal differs in critical respects from both the New York State Bar Association resolution and the Matrimonial Advisory Committee proposal. Perhaps most important, the FCARC proposal incorporates the important parity principle articulated in the decision of the Appellate Division, First Department, in *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566, 947 N.Y.S.2d 80 (1st Dept.,2012), that is, that unrepresented litigants should be treated identically with respect to access to forensic evaluations: "counsel and *pro se* litigants should be given access to the forensic report under the same conditions." The Court held the error in that case to be harmless in light of the prior access that the litigant had been given, the opportunity he had to discuss the report with a court social worker and the availability of a copy to use during trial. Judge Saxe, dissenting in part, disagreed that the error was harmless in light of its impact upon the due process rights of the litigant. *Sonbuchner* went a step beyond the decision in the case it cited, *Matter of Isidro A-M v. Mirta A.*, 74 A.D.3d 673(1st Dept., 2010), which held simply that the "better practice would be to give counsel and *pro se* litigants access to the forensic report under the same conditions."

As you know, the FCARC is composed primarily of current and former judges, judicial hearing officers, court attorney referees and other non-judicial staff of the Family Courts statewide, in addition to a few private practitioners. Its members are thus acutely aware of what the Chief Judge's Task Force to Expand Access to Civil Legal Services in New York has repeatedly stressed, that is, that cases involving unrepresented litigants predominate in the Family Courts. Custody and visitation proceedings in which appointment of counsel for parents and children is discretionary often involve litigants representing themselves. Particularly where one party is represented and one is not, as is often the case, it is critical to ensure that the parties are on a level playing-field. As a matter of fundamental due process, unrepresented litigants must be able to prepare their cases as well as attorneys. If attorneys receive copies of forensic reports, therefore, so, too, should unrepresented litigants; if the court requires unrepresented litigants to read forensic reports in the courthouse, the same stricture should be applied to attorneys. Clearly a court rule should not require a lesser degree of protection of the parties' due process rights than that which is required by appellate case law; nor should rules be different for custody and visitation proceedings depending upon whether they are in Supreme or Family Court - and, significantly, many cases are transferred between these courts.

As important as the parity principle, the FCARC proposal retains essential judicial discretion so that the degree and type of access to forensic reports can be tailored to the characteristics and concomitant needs of individual cases. The proposal requires the court to issue an order ensuring "meaningful and thorough access consistent with due process" but allows the court flexibility in delineating the terms and conditions. The order can define, *inter alia*, whether copies are to be provided or whether reports must be read in the courthouse, whether copies may be shared with parties' retained experts and whether limits are to be placed upon redisclosure of the reports, including on-line posting and other public dissemination. Where addresses are confidential, either pursuant to Family Court Act §154-b(2), Domestic Relations Law §254 or the new NYS Department of State Address Confidentiality Program [Executive Law §108], the order should direct that location and address information be redacted prior to affording access to the reports. Many Family Courts utilize orders similar to the models contained in the 2006 Matrimonial Commission report, as well as affidavits or affirmations to be signed by parties, experts and attorneys that indicate a commitment to comply with confidentiality strictures.

The FCARC has concluded that a rule requiring orders to be issued in conjunction with forensic appointments, coupled with promulgation of model appointment order forms, affirmations and affidavits, will protect the essential due process rights of all litigants and will ensure more uniformity in practice, while, at the same time, retaining needed discretion to adapt to the needs of particular cases. We would be happy to discuss this proposal with you and to answer any questions or concerns that you may have.

Sincerely,

Janet R. Fink, Counsel
Family Court Advisory and Rules Committee

Attachment (1)

cc.: Members of the Family Court Advisory and Rules Committee
John McConnell, Esq.
Susan Kaufman, Esq.

EXHIBIT A

CONFIDENTIAL DRAFT

FAMILY COURT ADVISORY AND RULES COMMITTEE PROPOSAL

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend section 202.16(g) of the *Uniform Civil Rules for the Supreme Court and County Court* and promulgate a new section 205.18 of the *Uniform Rules of the Family Court*, both effective immediately, regarding judicial appointments of expert witnesses and access to reports of such expert witnesses to read as follows:

§. 202.16(g) Expert witnesses.

* * *

(3) At time of appointment by the court of a neutral expert pursuant to paragraph three of subdivision (f) of this section, the court shall issue an order delineating the extent and terms of access to the report of the expert. The order shall provide meaningful and thorough access consistent with due process, both in advance of and during trial, if any, and the extent and terms of access shall apply equally to attorneys representing parties, attorneys for children and unrepresented parties, if any. The order may include, but is not limited to, specification of: whether copies of the report are to be provided or whether the report must be read in the courthouse; whether copies of the report may be provided to the parties' experts and if so, what restrictions, if any, are to apply to such disclosures, and; whether limits are to be placed upon redisclosure, publication and on-line posting of the report. Where a party or the child has been afforded address confidentiality pursuant to section 254 of the domestic relations law or section 108 of the executive

law, any information identifying the address or location of such person shall be redacted from the report of the expert prior to affording access under this subdivision.

§ 205.18 Expert witnesses. At time of appointment by the court of an expert witness to evaluate the parties or the child, the court shall issue an order delineating the extent and terms of access to the report of the expert. The order shall provide meaningful and thorough access consistent with due process, both in advance of and during trial, if any, and the extent and terms of access shall apply equally to attorneys representing parties, attorneys for children and unrepresented parties, if any. The order may include, but is not limited to, specification of: whether copies of the report are to be provided or whether the report must be read in the courthouse; whether copies of the report may be provided to the parties' experts and if so, what restrictions, if any, are to apply to such disclosures and; whether limits are to be placed upon redisclosure, publication and on-line posting of the report. Where a party or the child has been afforded address confidentiality pursuant to section 154-b(2) of the family court act or section 108 of the executive law, any information identifying the address or location of such person shall be redacted from the report of the expert prior to affording access under this subdivision.

[draft –not promulgated]
Chief Administrative Judge of the Courts

Dated:

AO/ /2012

EXHIBIT D

96 A.D.3d 566, 947 N.Y.S.2d 80, 2012 N.Y. Slip Op. 04933

View National Reporter System version

****1** Timothy M. Sonbuchner, Appellant
v
Lakshmi Swamy Sonbuchner, Respondent.
Supreme Court, Appellate Division, First Department, New York
June 19, 2012

CITE TITLE AS: Sonbuchner v Sonbuchner

***567** HEADNOTES

Parent and Child
Custody
Relocation

Parent and Child
Custody
Pro Se Plaintiff's Access to Forensic Report

Parent and Child
Support
Trial Court's Failure to Follow Specific Statutory Steps in Calculating Award

Herman Kaufman, Rye, for appellant.
Greener & Schioppo, P.C., New York (Richard A. Schioppo of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered August 9, 2011, which, after a nonjury trial, to the extent appealed from as limited by the briefs, awarded defendant sole custody of the subject child, permitted defendant to relocate with the child to Connecticut and then North Carolina, and awarded defendant child support and counsel fees, modified, on the law and the facts, to vacate the awards of counsel fees and child support, to remand the matter for a proper determination of child support pursuant to all applicable provisions of Domestic Relations Law § 240 (1-b), and otherwise affirmed, without costs.

The court's determination that it was in the best interests of the child to grant defendant sole custody and permission to relocate has a sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741 [1996]; *Eschbach v Eschbach*, 56 NY2d 167, 174 [1982]). Indeed, the record shows that defendant was the child's primary caregiver, that her decisions centered around the child, and that she would continue to foster a relationship between plaintiff and the child (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2006]). The court considered all of the proof and the relevant factors (*see Eschbach*, 56 NY2d at 171-173; *Tropea*, 87 NY2d at 740-741), and there is no basis for disturbing its findings (*see Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 220 [2011]).

The question of whether defendant should be allowed to relocate to Connecticut is essentially moot because she will be moving to North Carolina shortly. The testimony established that defendant is pursuing postgraduate medical clinical training, and has been matched with a residency program located in North Carolina; defendant has no control over where she will be placed. Although her move to North Carolina undoubtedly will have an impact on plaintiff's visitation, the court properly allowed defendant to relocate because she has been the primary custodial parent, is moving to ensure that she can earn a living wage to help support the child, and is prepared to ensure that plaintiff continues to have access to the child. The court has not yet ruled on the visitation schedule that will be in place following the move, and any diminution of regular in-person contact can be addressed in a visitation order that provides for phone or Skype access following the move. ***568**

During the direct examination of the forensic expert, the forensic report was introduced into evidence, and plaintiff, who was proceeding pro se, had access to it before his cross-****2** examination. On appeal, plaintiff

argues that the court improperly prevented him from reviewing the report in advance of the forensic expert's direct testimony. Although the court erred in not allowing plaintiff to read the report before the expert testified, plaintiff had an opportunity when he was represented by counsel at an earlier point in the case to review the report with counsel. He also had an opportunity, long before the trial commenced, to review the report with the court-appointed social worker in the case.

The record shows that plaintiff questioned the forensic expert about a number of issues that were covered in the report. Most of the expert's testimony turned on his recollection of his numerous interviews with the parties and his opinion as to the parties' parental fitness, and plaintiff had an opportunity to cross-examine him about those opinions. The court's reliance on the expert's testimony, as opposed to the report, is apparent from the fact that the court's decision cites to specific pages of that testimony. Plaintiff also was aware of the issues he had discussed during his interviews with the expert, and many of those issues were explored by plaintiff on cross-examination. The evidence about defendant's strong bond and parenting history with the child was substantial, and the court's decision on custody and relocation has ample record support. Thus, any error in not allowing plaintiff access to the report in advance was harmless, and provides no basis for reversal (*see* Ekstra v Ekstra, 78 AD3d 990, 991 [2010]; *Matter of* Anderson v Harris, 73 AD3d 456, 457 [2010]).

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 AD3d 673 [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.

There is no merit to plaintiff's contention that he was deprived of the opportunity to present evidence at trial. Although the court could have given plaintiff a little more time and latitude because he was pro se, the court permitted plaintiff to testify in narrative form, to introduce exhibits during his testimony, and to cross-examine witnesses.

The record below is insufficient to determine whether the ***569** court's award of child support was unjust or inappropriate (*see* Domestic Relations Law § 240 [1-b] [f]). The child support award fails to specify any dollar amounts, and simply directs plaintiff to pay "17% of his current salary based on his current pay stubs and income tax return," as well as one half of child care expenses, unreimbursed medical bills and health insurance premiums. Thus, the court failed to follow the specific steps set forth in Domestic Relations Law § 240 (1-b). In particular, the court's decision contains no discussion of the parties' income and deductions; nor is there any calculation of the combined parental income or the parties' pro rata share. Furthermore, the court failed to abide by the direction of Domestic Relations Law § 240 (1-b) (c) (4) to determine the reasonable cost of child care expenses and separately state each party's pro rata share of those expenses. Thus, this matter must be remanded for a proper determination of plaintiff's child support obligation pursuant to all applicable provisions of Domestic Relations Law § 240 (1-b), including a determination to whether the calculated amount of support is unjust or inappropriate (*see* Domestic Relations Law § 240 [1-b] [f]; *Kent v Kent*, 291 AD2d 258 [2002]).

Plaintiff should not be required to pay defendant's counsel fees. Based on the parties' testimony at the time of the trial, their incomes were comparable (*see* Cvern v Cvern, 198 AD2d 197, 198 [1993]), and defendant has not shown that plaintiff has the resources to pay her fees (*see* Bzomowski v Rollin, 238 AD2d 298, 298 [1997]). Indeed, the record shows that plaintiff could not continue with his own counsel and proceeded pro se at the trial.

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., DeGrasse, Richter and Abdus-Salaam, JJ.

Saxe, J., dissents in part in a memorandum as follows: I respectfully dissent, to the extent that the majority upholds the custody determination. I agree with the majority that the record fails to provide sufficient support for the trial court's child support award. However, I would remand the matter not just for a new determination of child support, but also for a new custody trial before a different judge, based on the fundamental unfairness created by the denial of the pro se plaintiff's right to have sufficient access, before trial, to the 84-page report prepared by the court-appointed psychologist on the issue of custody.

Expert reports by mental health professionals are an important element of child custody litigation. The procedure typically employed by New York trial courts in recent years is to provide ***570** a copy of the expert's

report to the attorneys, with the direction that copies not be provided to the client or others outside the litigation team (*see* Tippins, *Forensic Custody Reports: Where's the Due Process?*, NYLJ, May 6, 2010 at 3, col 1). In 2006, a Matrimonial Commission appointed by the Chief Judge recommended a procedure in which it attempted to balance due process concerns with concerns about confidentiality: "Copies of the reports should be given to counsel for the parties and the attorney for the child, with the express instruction that no additional copies be made or disseminated without court permission. Clients can review the report at the attorney's office. If a litigant is self-represented, a separate copy of the report should be maintained at the courthouse for use by that litigant to review and make confidential notes. The litigant would not be permitted to remove this copy from the courthouse" (New York State Matrimonial Commission, Report to the Chief Judge of the State of New York, at 54 [Feb. 2006], available at http:// www.nycourts.gov/reports/matrimonialcommissionreport.pdf [accessed June 12, 2012]).

The court here provided copies of the expert's December 16, 2010 report to the attorneys only. But, by the time of the pretrial conference held on February 24, 2011, plaintiff was proceeding pro se. In an effort to provide him with the information necessary for cross-examination of the expert, the court arranged that the social worker who had previously worked out a temporary visitation schedule between the parties would "sit with the parties and go over the report, and . . . explain to you what the report says, what it represents, and how the Court, what the Court will hear and consider, so that you will have the opportunity notwithstanding the fact that they gave a copy to your attorney." Later at that same pretrial conference, plaintiff remarked that the forensic evaluation was going to be a very significant part of the case, and that he was going to need a lot of access to it; in response to the court's warning that "[y]ou can't take it with you and discuss it with another person," plaintiff stated that he might be able to discuss it with an ***3** expert witness. The court then explained that not even an expert hired by a party would be given access to the forensic report: "Not everybody, including the experts. *We don't even show it to you and to you, and it's about you.* All right? This is just something that's used as an aid to the Court. So you're not going to have access. I'm not giving it to you to take with you, if that's what you want" (emphasis added). Before trial began on May 9, 2011, plaintiff protested to the trial court that while he had reviewed *some* of the report with his attorney during the time when he was still represented, he had not been able to review the whole ***571** report thoroughly, and he had not been able to prepare adequately for cross-examination of the expert regarding the report and its conclusions. After further discussion, plaintiff asked: "Will I have any access to that at all in this trial? Will I be able to? How am I supposed to prepare to cross examine him if I am not going to be able to see that report?" These legitimate questions were not satisfactorily handled.

Effective cross-examination of the forensic expert is not possible without access to the report. Once plaintiff was permitted to proceed pro se, it was incumbent on the court to give him access to the report equivalent to that which was given to his adversary, defendant's counsel. In *Matter of Isidro A.-M. v Mirta A.* (74 AD3d 673, 674 [2010]), this Court considered another situation in which one parent was represented by counsel and the other was pro se, and we held that the denial of a copy of the report was not an improvident exercise of discretion, as long as the pro se party was permitted to review and take notes regarding the report before trial. We observed, however, that "the better practice in most cases would be to give counsel and pro se litigants access to the forensic report under the same conditions" (*Id.*). At the very least, the court should have employed the procedure recommended by the Matrimonial Commission in 2006: if the litigant is not given a copy, then a separate copy of the report must be maintained at the courthouse for exclusive use by that litigant, for trial preparation and use during cross-examination of the expert.

Lacking adequate access to the expert's report, the pro se plaintiff had no hope of successfully cross-examining the expert. This failure of due process should be corrected and a new trial granted.

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