

CITATION: *St. Onge v. St. Onge*, 2017 ONCJ 156
DATE: March 8, 2017

Court File Number
1177/14

Ontario Court of Justice

(Name of Court)

at 7755 Hurontario Street, Brampton, Ontario

(Court office address)

Endorsement
Justice L.S. Parent

Date	Applicant:		
March 8, 2017	<u>Candice St. Onge</u>	<input type="checkbox"/>	Present
	Counsel: <u>Gary Gottlieb/Louise Morin</u>	<input type="checkbox"/>	Present
	Duty Counsel:	<input type="checkbox"/>	Present
	Respondent: <u>Robert St. Onge</u>	<input type="checkbox"/>	Present
	Counsel: <u>Alex Finlayson</u>	<input type="checkbox"/>	Present
	Duty Counsel:	<input type="checkbox"/>	Present
	<input type="checkbox"/> Order to go in accordance with minutes of settlement or consent filed.		

Matters Before the Court

[1] On November 21st, 2016, I granted leave for both parties to bring motions seeking orders regarding disclosure, questioning and next steps in these proceedings. A time table was ordered regarding the service and filing of the motion materials.

[2] The motions proceeded, as scheduled on February 7th, 2017. Following the hearing of the motion, I reserved my decision.

Orders sought on behalf of the Respondent/Father Mr. St. Onge

[3] The Notice of Motion filed on behalf of Mr. St. Onge is located at Tab 1, Volume 8 of the Continuing Record.

[4] Counsel on behalf of Mr. St. Onge seeks the following orders:

- a) the scheduling of a combined settlement/trial management conference within a time frame permitting the trial to proceed during the April/May 2017 trial sittings;
- b) dismissing the Applicant/Mother's request for questioning of the parties and of Dr. Fitzgerald;

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- c) production of any written communication and notes from oral communications between counsel or any individual from their office for Ms. St. Onge or any member of her family and Dr. Julian Gojer and Dr. Louise Sas; and
- d) compelling the Applicant/Mother to obtain and produce the notes and records of Dr. June Thompson, Dr. Anne Vagi, Dr. Jean Porter and Credit Valley Hospital regarding her mental health, her parents' or other family members' involvement in her life, the children's lives or in the parties' lives; her relationship with Mr. St. Onge; her relationship with the children; the allegations of sexual abuse and therapies, treatment or medication recommended, prescribed or administered.

[5] Counsel for Mr. St. Onge also requested that submissions be made on the relief sought in the notice of motion regarding a variation of the existing temporary order regarding the issue of access between Mr. St. Onge and the children. This relief was not permitted to be argued given my decision following the filing of a 14B motion dealt with in Chambers on January 19th, 2017.

[6] Mr. St. Onge relies on his affidavit sworn November 9th, 2016 located at Tab 2, Volume 8 of the Continuing Record, and his affidavit sworn January 17th, 2017 located at Tab 1, Volume 14 of the Continuing Record in support of the orders he is seeking.

[7] Counsel also filed a Factum and Book of Authorities.

Orders sought on behalf of the Applicant/Mother Ms. St. Onge

[8] The Notice of Motion filed on behalf of Ms. St. Onge is filed at Tab 1, Volume 13 of the Continuing Record.

[9] Counsel on behalf of Ms. St. Onge seeks the following orders:

- a) permitting the questioning of Mr. St. Onge;
- b) permitting the questioning of Dr. Daniel Fitzgerald;
- c) permitting the introduction on any motion to change custody, access or supervision, the videos made by Peel Regional Police and the Hospital for Sick Children Scan of the child Jenevieve; and
- d) for the production of the Crown Disclosure by the Crown Law Office of their file regarding Mr. St. Onge.

[10] Ms. St. Onge relies on her affidavit sworn January 10th, 2017 located at Tab 2, Volume 13 of the Continuing Record and her affidavit sworn January 27th, 2017 located at Tab 1, Volume 15 of the Continuing Record in support of the orders she is seeking.

[11] Counsel on behalf of Ms. St. Onge has also filed a Factum and a Book of Authorities.

[12] Counsel on behalf of the Crown Law Office, Mr. Andrew Jin, attended given Ms. St. Onge's request for the production of the Crown Brief documents relating to the criminal matter involving Mr. St. Onge.

[13] Counsel relies on the affidavit filed at Tab 2, Volume 15 of the Continuing Record in support of his position regarding timelines for the disclosure to be provided by the Crown Law Office.

[14] Counsel has also provided a Factum and Book of Authorities in support of his position.

[15] All materials filed on behalf of the parties and the Crown Law Office have been reviewed in considering the orders sought as requested

Analysis

[16] These motions arise within the context of highly contested proceedings seeking a variation of the terms of access and custody regarding the children, Jenevieve and Bennett St. Onge, as agreed upon by the parties in a Separation Agreement following the breakdown of their relationship.

[17] Counsel on behalf of Mr. St. Onge opposes the orders sought on behalf of Ms. St. Onge on the basis that these orders would unjustly delay the progression of these proceedings which, in the absence of a resolution, would require a trial.

[18] Counsel submits that such delay is not in the best interest of the children given the evidence from Mr. St. Onge and other collateral sources that his relationship with his children has been occurring for the past twenty-six months, within a supervised setting and pursuant to other conditions, and despite these limitations is healthy, meaningful and beneficial.

[19] Counsel submits that the evidence supports the elimination of various conditions currently attached to the time the children are with their father. Counsel submits that any variation of the existing order is opposed by Ms. St. Onge.

[20] Counsel on behalf of Ms. St. Onge opposes the disclosure orders sought on behalf of Mr. St. Onge on the basis that these orders are a fishing expedition with the objective of jeopardizing the relationship between Ms. St. Onge and her therapeutic providers, are irrelevant to the issues before the court as there is an absence of evidence raising concerns regarding her ability to parent the children and the documents sought are covered by privilege.

[21] Counsel on behalf of both parties submit that the orders they are each requesting are needed so as to ensure that each party obtains the necessary information in order

to formulate their respective positions regarding the issues of custody and access for the purposes of settlement and trial positions.

[22] The motions before me are brought within the context of requests in preparation for a settlement conference, trial management conference and a trial. The role of the court as the “*gatekeeper*”, given the parties’ respective requests and positions, is a significant consideration at this stage given the history of the proceedings to date which can be categorized as high conflict and the positions being advanced by each party in support of and opposition to the orders requested.

[23] In exercising the gatekeeping function, the court must, in determining which orders to grant, balance between what information is needed so as to assist the court and the parties in order to determine the issues before the court versus what can be characterized as engaging in a “*fishing expedition*” or in a “*delay tactics*”.

Release of communication records Dr. Julian Gojer and Dr. Louise Sas to counsel for Mr. St. Onge

[24] Counsel for Mr. St. Onge seeks the production of any written correspondence by letters/emails and notes of telephone calls between counsel for Ms. St. Onge, anyone from their office, Ms. St. Onge or anyone on her behalf and Dr. Sas and Dr. Gojer.

[25] Service of the Notice of Motion and affidavit in support of this order was effected personally on Dr. Sas. Irregular service of these documents was effected on Dr. Gojer.

[26] Counsel sought approval of the service method undertaken in support of his request for this order. Counsel for Ms. St. Onge took no position on the issue of service.

[27] Dr. Sas and Dr. Gojer did not file any materials in response to the motion nor did they attend at the hearing.

[28] Counsel for Mr. St. Onge submits that these documents are relevant as they form part of the evidence considered by these medical practitioners in formulating their expert opinions as outlined in their reports.

[29] Furthermore, counsel submits that the disclosure sought is necessary so as to establish an absence of improper direction given by counsel in the preparation of the reports. Counsel submits that this issue is relevant since, if improper direction was given, this may impact the experts’ opinion and the foundation of this opinion.

[30] Counsel further submits that Ms. St. Onge is clear in her intention to rely on these expert reports in support of her position on the issues of custody and access at trial. Accordingly, how these opinions were arrived at and on what basis is relevant to the consideration of these reports by the trial judge.

[31] Counsel for Ms. St. Onge submits that the documents seeking to be produced to Mr. St. Onge are captured by the cloak of *“litigation privilege”* and therefore these documents are not required to be disclosed.

[32] Counsel further submits that Mr. St. Onge has not met the threshold requirement as stated by the Ontario Court of Appeal in *Moore v. Getahun* 2015 ONCA 55 CanLii at paragraph 78 of its decision, namely that *“...a factual foundation exists to support a reasonable suspicion that counsel improperly influenced the expert...”* so as to support an order for production of these documents.

[33] The Ontario Court of Appeal, in its decision in *General Accident Assurance Company v. Chrusz* (1999) 45 OR (3rd) 321 held that litigation privilege arises where there are oral or written communication between a lawyer or client and a third party made exclusively or for the dominant purpose of the client’s contemplated or pending litigation.

[34] The Supreme Court of Canada in *R. v. Stone* [1999] 2 SCR 290 held that litigation privilege does not apply in the case of an expert unless it can be established that the expert was acting as a surrogate for the client in obtaining legal advice. The Court went on to say that an expert’s file is open for production as the opposing side must be able to examine and question the foundation of the opinion provided.

[35] Counsel concede that the complete files of Dr. Gojer and Dr. Sas, save and except the communication records as requested, have been produced.

[36] There is also no dispute between the parties that the reports of Dr. Gojer and Dr. Sas contain expert opinions and that this evidence may be relied upon at trial.

Dr. Julian Gojer

[37] The record is clear that Dr. Gojer was initially retained by Ms. St. Onge to review and critique the assessments of Mr. St. Onge completed by Dr. Dickey, Dr. Kershner and Dr. Goldstein.

[38] On December 11th, 2016, I granted an order requiring Mr. St. Onge to undergo an examination pursuant to section 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as am. I denied the request to designate Dr. Gojer as the medical practitioner to complete this assessment. This decision was appealed and ultimately produced a consent between the parties that Dr. Gojer would complete the assessment.

[39] The consent order signed by Seppi, J. dated May 9th, 2016 provides, among other terms, as follows:

“1. Dr. Julian Gojer shall conduct a s. 105 risk assessment of the respondent Robert St. Onge...”

5. Dr. Gojer’s report shall be provided to the parties and to Dr. Fitzgerald by May 31, 2016....

6. *The appellant (applicant) Candice St. Onge shall be responsible and pay the up-front contest of Dr. Gojer subject to the reapportionment at trial and subject to a costs award...*

7. *The parties shall retain Dr. Fitzgerald to conduct a s. 30 assessment...*

11. *Each party shall bear half of Dr. Fitzgerald's fees subject to reapportionment at trial..."*

[40] The wording of the consent order, in my view, establishes that Dr. Gojer was retained by Ms. St. Onge in order to complete the section 105 assessment that the parties consented to. The fact that Mr. St. Onge consented to the assessment and the assessor does not, in my view, transform this expert into a court appointed witness.

[41] Of particular relevance is the fact that the consent order clearly sets out (1) the joint retainer of Dr. Fitzgerald, for the purposes of the section 30 *CLRA* parenting capacity assessment, with each party contributing, up front, to one-half of the costs and (2) an absence of wording regarding Dr. Gojer's retainer however with the term that Ms. St. Onge is to pay the up-front costs of this assessment.

[42] The wording of the consent order coupled with the evidence of Ms. St. Onge satisfies me that she retained Dr. Gojer for the purposes of providing an expert opinion within the parameters of a section 105 *Courts of Justice Act* assessment.

Dr. Louise Sas

[43] Dr. Sas is a psychologist. The evidence is clear that she was retained by Ms. St. Onge in order to provide an opinion as to the likelihood that sexual abuse on Jenevieve occurred. The record is clear that in preparation of her report, released June 24th, 2015, Dr. Sas reviewed the police videos and statements of Jenevieve, Ms. St. Onge and the maternal grandmother, Mrs. Wilson, and other documents. Dr. Sas did not interview any of the parties.

[44] Furthermore, neither counsel submitted that Dr. Gojer and/or Dr. Sas were appointed under Rule 20.1(3) of the *Family Law Rules*.

[45] In reviewing this evidence, it is clear that Dr. Sas and Dr. Gojer were retained by Ms. St. Onge in the context of providing her with their expert opinions within the context of issues within this litigation.

[46] As indicated, disclosure of Dr. Sas' and Dr. Gojer's files have been provided to Mr. St. Onge, save and except the communication records as noted. Given the nature of the retainer of Dr. Gojer and Dr. Sas, I accept the position advanced on behalf of Ms. St. Onge that privilege is attached to the communication records sought by Ms. St. Onge.

[47] The issue for determination therefore is whether or not Mr. St. Onge has met the threshold in *Moore v. Getahun (supra)* such that there is a factual foundation to

support a reasonable suspicion that counsel improperly influenced Dr. Sas and/or Dr. Gojer in the completion of their respective retainers.

[48] If this threshold is met, the production of the communications as requested, counsel for Mr. St. Onge submits, should be ordered regardless of whether or not privilege is attached to these documents. .

[49] In support of the position that the threshold is met, counsel on behalf of Mr. St. Onge relies on a letter from Dr. Anne Vagi, dated May 12th, 2016, to Dr. Gojer.

[50] This letter is attached as Exhibit I to Mr. St. Onge's affidavit sworn January 17th, 2017. The letter to Ms. Morin by Dr. Vagi dated May 13th, 2015 provided to counsel for Mr. St. Onge is redacted.

[51] Based on the disclosure provided, counsel submits that counsel for Ms. St. Onge instructed Dr. Vagi to provide focused and limited information to Dr. Gojer during the process of the risk assessment.

[52] The letter at Exhibit I states as follows:

"I have been requested by Louise Morin, my client's lawyer, to provide you with confirmation that Candice St. Onge has been and is currently being treated by me for depression...."

Ms. Morin also asked me to confirm that Ms. St. Onge reported to me, prior to the allegations of sexual abuse of her children on December 30th, 2014, that she had been verbally and/or emotionally abused by Robert St. Onge. In that regard, I am enclosing a copy of a letter which I sent to Ms. Morin on May 13th, 2015..."

[53] Counsel submits that the direction provided by counsel to Dr. Vagi satisfies the threshold that a reasonable suspicion exists that counsel improperly influenced Dr. Sas and/or Dr. Gojer. Simply put, if counsel directed Dr. Vagi in her communication parameters with Dr. Gojer, the same directions were given by counsel to Dr. Sas and Dr. Gojer.

[54] I disagree with the position advanced on behalf of Mr. St. Onge.

[55] In reviewing the letter written by Dr. Vagi, I do not find that the direction provided by counsel can be determined to be "*improper influence*". Although Dr. Vagi's letter clearly states that communication has occurred between herself and Ms. Morin, I find that this communication was for the purpose of assisting Dr. Vagi in providing relevant information to Dr. Gojer within the context of his assessment of Mr. St. Onge.

[56] Dr. Vagi's letter appears balanced in the information provided. The letter clearly states that the information provided is based solely on facts as reported to her exclusively by Ms. St. Onge. Dr. Vagi is clear that she has never met Mr. St. Onge or the children. Dr. Vagi gives no indication that she has been told to limit the information to specific facts, dates, concerns etc.

[57] Given my determination regarding Dr. Vagi's letter, Mr. St. Onge cannot be found to have met the threshold of establishing a reasonable suspicion that improper influence has occurred by counsel in their communication with Dr. Gojer and/or Dr. Sas.

[58] The request for the production of communication is therefore denied.

Production of the Mother's Mental Health Records

[59] The request on behalf of Mr. St. Onge is for the complete file of Drs. Thompson, Vagi, and Porter and the Credit Valley Hospital relating to Ms. St. Onge.

[60] Service of the Notice of Motion and affidavit in support of this order was effected by irregular service on the medical professionals and Credit Valley Hospital. Counsel sought approval of the service method undertaken in support of his request for this order. Counsel for Ms. St. Onge took no position on the issue of service.

[61] Dr. Thompson, Dr. Vagi and Dr. Porter or a representative from Credit Valley Hospital did not file any materials in response to the motion nor did they attend at the hearing.

[62] In support of this request, counsel for Mr. St. Onge submits that Ms. St. Onge's parenting ability, in light of her mental health struggles, is an issue before the court for determination therefore this disclosure is required. Specifically, counsel submits that Ms. St. Onge has put her mental health in issue as follows:

- a) By linking her mental health to Mr. St. Onge's treatment of her throughout their marriage;
- b) By advancing the position that the children are at risk given Mr. St. Onge's behavior;
- c) By claiming an absence of concern regarding her own parenting ability in light of her mental health issues; and
- d) By selectively disclosing only certain aspects of her mental health history to various medical assessors and child protection agencies involved in this matter.

[63] Counsel on behalf of Mr. St. Onge references the Supreme Court of Canada's decision in *A.M. v. Ryan* 1997 Carswell BC 99 in support of his position supporting the disclosure. Counsel submits that the analysis undertaken by the Court, in *Ryan* (*supra*), in balancing and considering a party's right to a fair trial and the other party's right to privacy governs this issue and once applied, should result in an order being granted for production as requested.

[64] Counsel on behalf of Ms. St. Onge objects to the release of the medical records on the basis that his client's mental health is not in issue.

[65] Counsel submits that Mr. St. Onge was aware of the history of depression and anxiety suffered by Ms. St. Onge when he agreed to terms incorporated into a Separation Agreement which gave her sole custody of the children.

[66] Counsel therefore submits that the production of these records is in fact a fishing expedition. Furthermore, he submits that the release of these records would result in the destruction of confidence between Ms. St. Onge and her therapeutic providers thereby potentially impacting her ongoing relationships with these resources.

[67] Counsel do not dispute that the first three factors of the “*Wigmore test*” are met in this case.

[68] Submissions made by both counsel focus on the issue of whether or not the fourth factor is met, namely that “*The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the action*” is satisfied.

[69] As stated in *Ryan (supra)*, the key consideration is that before production is to be ordered, there must be evidence that connects the contents of the records to an issue before the court for determination. Simply claiming custody or access does not result in a party’s entire medical history being relevant.

[70] The Court of Appeal in *Franco v. White* (2001) 53 O.R. (3d) (Ont. C.A.) stated at paragraph 63 of its decision as follows:

“The absence of privilege does not necessarily result in an order for production. A party does not have an unrestricted right to open-ended production of documents in the possession of third parties. ‘Fishing expeditions’ are not permitted and orders for production of documents should not be made as a matter of course: Morse Shoe (Canada) Ltd. V. Zellers Inc. (1997), 10 C.P.C. (4th) 390 (Ont. C.A.)”

[71] Accordingly, there must be a balanced approach between the strong public interest in protecting and fostering a therapeutic relationship and the right to relevant information to the opposing party in family litigation. It is within this context that the request for disclosure of the medical records needs to be assessed.

[72] As previously noted, the order of Seppi, J dated May 9th, 2016 clearly states that Dr. Fitzgerald is to be retained by both parties to conduct a section 30 *CLRA* parenting capacity assessment.

[73] Dr. Fitzgerald’s report, dated September 21st, 2016, is attached as Exhibit “C” to the affidavit of Mr. St. Onge sworn November 9th, 2016. At page 2 of his report, he states as follows:

“In order to conduct the S 30 assessment, arrangements were made for Ms. St. Onge and Mr. St. Onge to undergo comprehensive psychological examinations in order to evaluate their cognitive functioning, psychological status and evaluation of their understanding of parenting and child development issues....”

[74] Dr. Fitzgerald goes on to indicate on pages 2 and 3 of his report, the documents he has reviewed and communications with third parties he has had as part of his evaluation process. These documents/communications include:

- a) The report of Dr. Louise Sas, dated June 24th, 2015 and the affidavit of Dr. Gojer sworn March 2, 2016;
- b) Dr. Fitzgerald indicates at page 23 of his report that he conducted a telephone interview with Dr. June Thompson on September 16th, 2016;
- c) Dr. Fitzgerald, at pages 24 and 25 of his report, outlines information obtained through contact with Dr. Anne Vagi; and
- d) Information obtained from Dr. Porter when Ms. St. Onge transferred from Dr. Porter's care, due to his retirement, to Dr. Vagi. The information further indicates that Ms. St. Onge has been referred to the adult day treatment program at Credit Valley Hospital.

[75] Access to these documents and third parties by Dr. Fitzgerald was consented to by Ms. St. Onge. Accordingly, she waived her privilege attached to these medical experts by specifically authorizing Dr. Fitzgerald to contact Drs. Thompson, Vagi and Porter for the purpose of completing his parenting capacity assessment.

[76] Although not submitted, it can be said that Ms. St. Onge's consent was limited in its scope, namely only given to Dr. Fitzgerald in order for him to have all the necessary information in order to provide his assessment and on the belief that the release of this information to him would not jeopardize any ongoing therapeutic relationships that she has given his retainer and his qualifications.

[77] I do not accept that this consent can be so limited in its purpose.

[78] As stated by the Court in *Ryan* (supra):

“Even when there are compelling reasons to protect the communication from disclosure, it must be shown that the benefit to maintaining this privilege, however great that might seem, in fact outweighs correct disposition of litigation. The balancing of these two elements is an exercise of common sense and good judgment.”

[79] I do not find that there is a compelling privacy issue in this case. Ms. St. Onge clearly waived privilege of her records so as to ensure that Dr. Fitzgerald have access to information she felt was essential in completing his parenting capacity assessment. Dr. Fitzgerald is clear that he accessed this information. The request for disclosure therefore cannot be categorized as a “*fishing expedition*” in order to uncover information that may or may not assist Mr. St. Onge at trial. The disclosure is requested on the basis that this information was considered by Dr. Fitzgerald in providing his expert opinion regarding each parent's capacity to parent Jenevieve and Bennett.

[80] Accordingly, I find that the potential betrayal of trust as claimed by Ms. St. Onge does not exceed the need for Mr. St. Onge to have the information requested as it relates to Drs. Thompson, Vagi, and Porter and the Credit Valley.

[81] For these reasons, the request for the disclosure from these medical practitioner and institution is granted.

[82] Counsel on behalf of Mr. St. Onge also indicated that he was seeking the production of the clinical notes and records of Ms. St. Onge's current family doctor, the identity which is not known to his client.

[83] This request is denied given the absence of notice to this individual and evidence to support that privilege has been waived and the release of these records are relevant and necessary to the determination of the issues before the court.

Questioning

[84] Rule 20(5) of the Family Law Rules provides the criteria to be satisfied when an order for questioning of a party or a non-party is requested.

[85] Rule 20(5) provides as follows:

(5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

- 1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.*
- 2. The information is not easily available by any other method.*
- 3. The questioning or disclosure will not cause unacceptable delay or undue expense.*

Questioning of the Parties

[86] Questioning of Mr. St. Onge, counsel for Ms. St. Onge submits, satisfies the criteria under Rule 20(5) for the following reasons:

- a) The refusal to question Mr. St. Onge would be unfair to Ms. St. Onge as she wishes to clarify and test facts, to know the case she needs to meet at trial, to formulate her position at trial, for settlement purposes and to test credibility;
- b) The easiest and best available method to obtain this information is by questioning; and

- c) Counsel submits that the position on behalf of Mr. St. Onge is if questioning is ordered, despite his opposition, then the order should be for mutual questioning. Accordingly, “*unacceptable delay or undue expense*”, given this position even in the alternative, do not arise.

[87] Counsel on behalf of Ms. St. Onge submits that all three branches of the criteria under Rule 20(5) have not been met. Specifically, counsel submits:

- a) Thousands of pages of disclosure and numerous affidavits have been exchanged and filed within the context of this litigation. These documents permit Ms. St. Onge to formulate her position for settlement and trial purposes without the need for questioning;
- b) Written questions can be put to both Mr. St. Onge and Dr. Fitzgerald so as to address “*so-called uncertainty*” raised by Ms. St. Onge;
- c) The costs to conduct the questioning of the parties and Dr. Fitzgerald amounts to an “*undue expense*”; and
- d) The limited availability of Dr. Fitzgerald results in the matter not being able to proceed to trial in the upcoming April/May 2017 sittings which counsel submits amounts to an “*unacceptable delay*” given his submissions regarding the best interest of the children.

[88] In *Tsakiris v. Tsakiris* (2007), 2007 CarswellOnt 6718 (Ont S.C.J.), Brown, J provided the following guidelines to consider when an order for questioning is sought:

“I think the starting point must be a consideration of the materiality of the information sought to an issue or issues in the proceeding. If questioning were not permitted, would the party be deprived of the opportunity to secure material evidence relating to an issue in the proceeding or that could have a material effect on the determination of an issue in the proceeding, be it on a motion or at the trial?”

[89] Counsel for Ms. St. Onge has cited the decision in *Birdi v. Birdi*, 2015 ONSC 1974 in support of his position that questioning should be ordered.

[90] In its reasons, the Court determined that it would be unfair to require the father to carry on with the case without giving him the ability to acquire evidence as to the issues before the court for determination given the serious breakdown of the relationship between the parties and that the information could not be easily obtained by any other method. The court further found that there was no evidence that questioning, if ordered, would cause unacceptable delay or undue expense.

[91] I am satisfied that Ms. St Onge has met the criteria under Rule 20(5) so as to grant her request for questioning of Mr. St. Onge. Furthermore, I accept counsel for Mr. St. Onge’s submission, which is not opposed by counsel for Ms. St. Onge, that if questioning is ordered, it should be mutual.

[92] This litigation to date has produced several expert reports, numerous materials filed on behalf of the parties, and significant disclosure to date all within the context of a highly contentious custody and access dispute. I therefore find that the out-of-court questioning, as requested, is necessary so as to ensure fairness to both parties in carrying on their respective positions potentially to trial.

[93] I am further satisfied that to obtain this information by written interrogatory or other means would not be easily available and likely to produce subsequent questions once answers are provided thereby potentially creating unacceptable delay and increased expenses.

[94] I am further satisfied that the threshold of “*unacceptable delay*” or “*undue expenses*” under item 3 of Rule 20(5) has not been crossed by granting the request for questioning given the terms I will attach to the order granted.

Questioning of Dr. Fitzgerald

[95] As previously indicated, Dr. Fitzgerald is an expert jointly retained by the parties for the purposes of completing a section 30 *CLRA* parenting capacity assessment. Both parties have Dr. Fitzgerald’s report. Neither party is seeking an order for further disclosure of Dr. Fitzgerald’s notes and clinical records within the context of the preparation of his report.

[96] Dr. Fitzgerald is open to be called as a witness at trial by either party. The parties will be entitled to question Dr. Fitzgerald on all aspects of his involvement. Dr. Fitzgerald could also be approached prior to trial, by either party, to address any specific concerns. Information therefore could be obtained by another method.

[97] Counsel for Mr. St. Onge referred to Exhibit “O” to his client’s affidavit sworn January 17th, 2017. This exhibit is a letter from Dr. Fitzgerald dated January 13th, 2017 wherein he states that he will only answer limited questions, he requires a retainer of \$3500.00, one month in advance, and indicated his availability should questioning be ordered, as of January 13th, 2017, as being in April or May.

[98] This evidence does not satisfy me that the criteria in Rule 20(5) has been met so as to grant the request of Ms. St. Onge to question. In summary, I am of the view that it would not be unfair to the parties to proceed with their respective positions in the absence of questioning, that there are other methods available to obtain any information needed by either party and that to allow the questioning would cause an unacceptable delay.

[99] For these reasons, the request of Ms. St. Onge for an order questioning Dr. Fitzgerald is denied.

Crown Disclosure

[100] Submissions by counsel, including counsel attending on behalf of the Crown Law Office, were that the disclosure request by Ms. St. Onge was not opposed. Furthermore, counsel indicated that the disclosure would be provided to both parties.

[101] The dispute is the time frame by which this disclosure is to be provided. Specifically, Mr. Lin, counsel for the Crown Law Office, submitted that an order requiring the disclosure within ninety (90) days is required.

[102] Mr. Lin submitted that this time frame is necessary and reasonable given the volume of requests for disclosure received by his office. The 90 day time period is proposed within the context of an estimate of time as to when the request of Ms. St. Onge will be reached in the queue of other requests currently being reviewed by the Crown Law Office, so as to ensure a proper review of the brief prior to its release to the parties and in accordance with his office's operating procedures.

[103] Mr. Lin submitted that to accelerate Ms. St. Onge's request ahead of others so as to reduce the time to disclose the brief would be against public policy as it would effectively not be able to be complied with and/or place Ms. St. Onge's request ahead of other requests served prior to hers.

[104] Counsel for Ms. St. Onge highlighted that the request for disclosure was made by his client and not Mr. St. Onge. Counsel supports the position advanced by counsel for the Crown Law Office.

[105] Counsel for Mr. St. Onge submits that the time period requested by the Crown is not reasonable as it would delay the further progression of this matter which is not in the children's best interests. Counsel submits that disclosure should be provided by a specified date set well in advance of the next event in this matter, namely a combined settlement/trial management conference.

[106] The evidence before me and submissions by counsel revealed that there has already been the exchange of some documents between the parties which may be contained in the Crown Law Office's file.

[107] After hearing submissions and reviewing the evidence filed, an order will be granted requiring that the parties, within fifteen (15) days, exchange the documents that they each have in their possession and compile a joint list of the documents exchanged to be provided to the Crown. The Crown Law Office will then have seven (7) weeks, from the date of the receipt of the joint list as ordered, to produce to both parties only the documents in their file which has not been exchanged by the parties.

[108] I am of the view that this order is reasonable, can be satisfied by the Crown Law Office given the reduced disclosure to be provided, does not contravene public policy, does not cause delays in these proceedings and is in the best interest of the children.

Leave to introduce SCAN DVD and videos at settlement conference

[109] Counsel on behalf of Ms. St. Onge submitted that he was seeking leave to introduce the Hospital for Sick Children SCAN DVD and videos made by the Peel Regional Police at the settlement conference, which is the anticipated next event in these proceedings.

[110] Counsel submitted that this evidence must be reviewed in order to ensure that I am in the position to provide a meaningful judicial opinion on the issues of custody and access to the parties.

[111] I am of the view that the viewing of these videos is not necessary so as to achieve the objectives of a settlement conference as contained in Rule 17(5) of the *Family Law Rules*. I have been case managing this matter since August 24th, 2015. I am therefore fully aware of each parties' positions.

[112] I will however grant leave for the parties to file a copy of the transcripts of the statements of the child, the mother and/or the father so that counsel can direct me to relevant portions during the settlement conference.

[113] There should not be a delay or costs associated in obtaining these transcripts as the evidence of the parties indicate that they are already in their possession of at least the transcripts of those statements given to the Peel Regional Police in the context of their criminal investigation.

ORDER

[114] For the reasons noted above, the following order is granted:

- a) The request for the production of any written communication and notes from oral communications between counsel or any individual from their office for Ms. St. Onge or any member of her family and Dr. Julian Gojer and Dr. Louise Sas is denied;
- b) Irregular service of Ms. St. Onge's Notice of Motion dated December 15th, 2016 and the accompanying portions of his affidavit is approved on Dr. June Thompson, care of Records Storage and Retrieval Services, on Dr. Jean Porter, care of Records Management, on Dr. Anne Vagi and on Credit Valley Hospital.
- c) The request for an order compelling Dr. June Thompson, Dr. Anne Vagi, Dr. Jean Porter and Credit Valley Hospital directly or by Ms. St. Onge to provide to counsel for Mr. St. Onge the clinical notes and records of these record keepers regarding their involvement with Ms. St. Onge as it relates to her mental health, her parents' or other family members' involvement in her life, the children's lives or in the parties' lives; her relationship with Mr. St. Onge; her relationship with the children; the allegations of sexual

abuse and therapies, treatment or medication recommended, prescribed or administered is granted.

This order is good and sufficient authority to compel the record keeper to produce the records directly to counsel for Ms. St. Onge. These records are to be provided within fourteen (14) days of this order.

The records may be used in this litigation and to provide to any professionals should Mr. St. Onge seek advice in connection with the records received.

Mr. St. Onge shall not be given a copy of these notes and record but he may inspect the records with his counsel in his counsel's office;

- d) The request for an order compelling the production of clinical notes and records from Ms. St. Onge's current family doctor is denied;
- e) The request for an order for mutual questioning of the parties is granted. The questioning of each party shall be limited to one day each, being from 10:00 a.m. to 4:30 p.m., and to occur by no later than April 21st, 2017. Each party shall bear their own costs for the questioning.
- f) The request for an order for the questioning of Dr. Fitzgerald is denied.
- g) The parties, within fifteen (15) days of this order, will exchange the documents relating to Mr. St. Onge's criminal charges that they each have in their possession and compile a joint list of the documents exchanged to be provided to the Crown Law Office.
- h) The Crown Law Office will have seven (7) weeks from the date they received the joint list to produce to both parties, through counsel, only the documents in their file relating to Mr. St. Onge which have not been exchanged directly by the parties.
- i) The request for leave to introduce the videos made by Peel Regional Police and the Hospital for Sick Children Scan of the child Jenevieve is denied.
- j) Leave is granted for the parties to file a copy of the transcripts of the statements of the child, the mother and/or the father given to Peel Regional Police and/or Hospital for Sick Children as appendices to their settlement conference briefs so that counsel can direct me to relevant portions during the settlement conference.
- k) The matter will proceed to the setting of a combined settlement/trial management conference as the next event in these proceedings.
- l) In accordance with my endorsement dated February 7th, 2017, a teleconference will be scheduled between counsel, including counsel for

the Crown Law Office should costs be sought by him or against his office, and myself in order to:

- a. determine the date of the combined conference. The expectation is that this is to occur in either mid- May or June, 2017 as the orders granted pursuant to this order should be complied with ; and
- b. establish a time line for costs submissions regarding this motion and the 14B motion dealt with in my endorsement dated January 19th, 2017.

By no later than March 24th, 2017, counsel are to contact my judicial assistant to arrange the teleconference.

For the period between March 8th to March 14th, and March 20th to 21st, 2017 counsel are to contact my assistant, Ms. Melissa Speciale by email at Melissa.Speciale@ontario.ca.

For the period between March 15th and 17th, 2017, counsel are to contact my assistant, Ms. Janice Law, by email at Janice.Law@ontario.ca.

For the period from March 21st to 24th, 2017, counsel are to contact my assistant, Ms. Ana Boras, by email at Ana.Boras@ontario.ca.

Justice L.S. Parent