Debra H. v Janice R.
2012 NY Slip Op 32517(U)
October 1, 2012
Supreme Court, New York County
Docket Number: 106569/2008
Judge: Deborah A. Kaplan
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SCANNED ON 10/3/2012

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON DEBORAH KAPLAN
Justice

PART 20

Index Number : 106569/2008
HIRSHMAN, DEBRA
vs.
ROVEN, JANICE
SEQUENCE NUMBER : 007
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).**
Answering Affidavits — Exhibits	**No(s).**
Replying Affidavits	**No(s).**

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order

FILED
OCT 03 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10-1-2012

Deborah Kaplan, J.S.C.
DEBORAH A. KAPLAN
J.S.C.

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☒ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 1st day of October, 2012

PRESENT: HON. DEBORAH A. KAPLAN

---X

DEBRA H.,

Petitioner,

Decision and Order

Index No.: 106569/2008

-against-

JANICE R.,

Respondent.

---X

Recitation as required by C.P.L.R. 2219(a), of the papers considered in the review of Respondent's Motion to Quash

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Papers	**Numbered**
Respondent's Motion to Quash nad Exhibits:	1-2 A-C
Petitioner's Opposition and Exhibits:	1
Respondent's Reply	

The respondent, Janice R, moves to quash on multiple grounds, subpoenas served by the petitioner, Deborah H. She also moves to deny the petitioner a subpoena for access to her OB/GYN records, her fertility records from Saint Barnabus and her hospitalization records from December 2003. Finally, the respondent seeks an order precluding the petitioner from subpoenaing and/or introducing at trial evidence regarding issues of the petitioner's legal status as parent on the grounds that the issue has already been litigated and/or evidence that pre-dates the Court of Appeals decision.

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The subpoenas to which the respondent objects include the following:

1) Carol Buell, Esq.; 2) Congregation Bet Simchat Torah; 3) Early Childhood Associates; 4) Dr. Wendy Haft; 5) Hands On! 6) Jazz at Lincoln Center 7) Jewish Community Center (JCC); 8) Dr. April Kuchuk; 9) Dr. Susan Sheftel; 10) Super Soccer Stars; 11) Debra Trock; 12) Upper Breast Side; 13) Uptown Pediatrics; 14) Westside Pediatrics; 15) Habonim.

Preliminarily, it should be noted that these subpoenas are subpoenas duces tecum and ad testificandum that were served in advance of the custody trial that involves the parties' child, M.R. In addition, by way of background, it should also be noted that, the petitioner, Ms. H, was the former same-sex domestic partner of Ms. R, the two having entered a civil union in Vermont. The petitioner sought to be declared the parent of M.R., a child to whom Ms. R gave birth during the parties' valid Vermont civil union, but was conceived through artificial insemination prior to the parties' union. Ultimately, the Court of Appeals held in *Debra H v Janice R,* 14 NY3d 576 [2010] that petitioner is a parent of the child.

Generally, the respondent objects to the referenced subpoenas as irrelevant because they relate to matters that occurred when the subject child was an infant or toddler or before he was born. They do not, according to the respondent, relate to current matters. Moreover, according to the respondent, the subpoenas constitute an inappropriate fishing expedition and are designed to prolong this litigation unnecessarily and retry issues already litigated over years and at great expense. She also claims that subpoenas were improperly served in that her counsel was not given proper notice of the subpoenas.

With respect to the petitioner's request that she sign a HIPAA release so that petitioner can obtain a copy of all of her OB/GYN records, her records from the fertility center in which she was treated and the birth records of M.R., the respondent argues that this issue was already addressed by Justice Beeler, who gave the petitioner leave to renew, which she has failed to do. In addition, the respondent maintains that these requests seek confidential medical information not limited to this action, and in any event, are irrelevant.

In opposing the respondent's application, petitioner's counsel argues that the subpoenas were properly served on the witnesses in compliance with CPLR 2303(a) and a copy of each subpoenas were thereafter promptly delivered to respondent's former counsel, Sherri Eisenpress, Esq. In support of this contention, she annexes to her papers, a letter to Ms. Eisenpress dated October 13, 2011, enclosing copies of the twenty subpoenas served.

Regarding the respondent's claims made pursuant to CPLR 2304, the petitioner argues that neither relevancy or privilege fall within the ambit of this statute. With respect to relevancy, it is the petitioner's position that the right of party to subpoena a witness to give testimony in court is absolute. As to any documents that are required to be produced in court, the petitioner argues that these records are directly relevant to the issue of custody and the best interests of M.R. in that they seek specific categories of records relating to M.R.'s birth and care, education and mental and emotional development, including appointment records, doctors' notes, patient information and other medical forms, professional reports and recommendations and school reports and evaluations. The petitioner notes further that two of the doctors whom she has subpoenaed, Dr. Haft and Dr. Scheftel, and Rabbi Laurie Philips, the director of the Habonim Pre-school, are cited as collateral sources in the forensic report and quoted extensively.

Further, according to the petitioner, the respondent's claim of privilege under CPLR 2304 must fail as it has long been the rule in New York that a party to a contested custody proceeding places his or her mental emotional and physical condition in issue and thereby waives any common law or statutory privilege, either to testimony of witnesses or to records and information that the witness may produce in court in aid of that testimony.

Turning to the respondent's motion for a protective order, the petitioner argues that the subpoenas are not Article 31 discovery devices and, in addition, the respondent has failed to show that the petitioner has obtained any disclosure improperly or irregularly, or explain how the respondent's rights have been prejudiced by any disclosure. The petitioner suggests that if the respondent wishes to exclude the introduction or limit the use of any evidence, she must make a motion in limine, which requires that she meet the burden of establishing that the evidence she seeks to exclude is inadmissible, irrelevant, immaterial and/or unduly prejudicial.

Finally, as to the respondent's refusal to sign HIPAA releases, the petitioner asserts that the requested medical records have probative value since the history of the parties and their relationship leading up to M.R.'s conception, birth and post-natal care are referenced throughout the forensic report and the medical records would be directly probative on the issue of the parties' credibility and the veracity of the forensic report.

Discussion

The standard to be applied on a motion to quash a subpoena is whether the information that is sought is "utterly irrelevant to any proper inquiry." *Ledonne v Orsid Realty,* 83 AD3d 596 [1st Dept 2011]; *Ayubo v Eastern Kodak Company, Inc,* 158 AD2d 641 [2nd Dept 1990]. Further, as the Court of Appeals has stated, "[a]n application to quash a subpoena should be granted

[only] where the futility of the process to uncover anything legitimate is inevitable or obvious . . . ." *Anheuser Busch, Inc v Abrams,* 71 NY2d 327 [1988]. Moreover, as stated in *People ex rel Hickox v Hickox,* 64 AD2d 412 [1978], "[a] subpoena duces tecum for use at a trial or hearing, and the denial of a motion to quash such subpoena duces tecum are not the equivalent of an order of disclosure. The subpoena merely directs the subpoenaed party to have the documents in court so the court may make appropriate direction with respect to the use of such documents."

With respect to the information sought in this case by way of the disputed subpoenas, the court notes that it is well-settled under New York law that a party, by actively contesting custody, puts his or her mental and/or physical well being into issue, and thus, waives the physician-patient privilege. *McDonald v McDonald,* 196 AD2d 7 [2nd Dept 1994]; *Baecher v Baecher*, 58 AD2d 821 [2nd Dept 1977]. However, "[t]here first must be a showing beyond 'mere conclusory statements' that resolution of the custody issue requires revelation of the protected material." *Perry v Fiuman,* 62 AD2d 512 [4th Dept 1987]; *People ex rel Hickox v Hickox*, 64 AD2d 412, *supra.*

It is, likewise, well-established that "the paramount concern in all custody matters is the best interests of the child." *Eschbach v Eschbach*, 56 NY2d 167 [1982]. In order to determine what is in the best interests of the child, the court must evaluate the "totality of circumstances." *See, e.g., Osbourne S v Regina S,* 55 AD3d 465 [1st Dept 2008]; *Assini v Assini*, 11 AD3d 417 [2nd Dept 2004]. Among the many factors which the court must consider include the following: the quality of the parent's respective home environments; the length of time of the existing custody arrangement; the parents' past performance and relative fitness (physical, psychological, financial); each parent's attitude toward the other parent; each parent's relationship with the

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child; the effect that an award of custody to one parent might have on the child's relationship with the other parent; each parent's ability to guide and provide for the child's educational, intellectual and emotional development; the needs of the child; the child's wishes based upon the child's age, as well as any potential for the manipulation of those wishes; the interest in keeping siblings together and the need for stability in the child's life. *See, Friederwitzer v Friederwitzer,* 55 NY3d 89 [1982]; *See also, SP v GS,* 2012 WL 3764519 [Family Court, Onondaga County] (and cases cited therein); *In re Luis*, 18 Misc3d 650 [Family Court, Kings County 2007] (and cases cited therein),

Based on the foregoing, it cannot be said that the requested documents are "utterly irrelevant." Indeed, it appears that much of what petitioner seeks may very well be relevant at trial in that it goes to a determination, based on the totality of circumstances, of what is in the child's best interests. Therefore, the motion to quash is denied, as is her motion to preclude the petitioner from subpoenaing and/or introducing at trial evidence regarding the issues of petitioner's legal status as a parent and/or evidence the pre-dates the Court of Appeals decision in this case.

The respondent's motion to preempt the service of any subpoenas on St. Barnabus Hospital is also denied. However, there shall be no disclosure of any of the subject hospital records to adverse parties except to the extent that the court shall direct in light of the circumstances then existing. Before allowing disclosure of any of the subpoenaed St. Barnabus records, the court shall examine the records in camera and determine whether the records are

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material and necessary for the purpose of determining custody, or whether the court and the parties have sufficient information to determine custody without such disclosure.

This constitutes the decision and order of the court. All requested relief not specifically granted, is denied.

ENTER

J.S.C. **DEBORAH A. KAPLAN**
J.S.C.

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