IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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JOSEPH B. ARELLANO,	)	
	)	
Plaintiff,	)	CASE NO. ST-05-DI-56
	)	
v.	)	ACTION FOR DIVORCE
	)	
CAROL ANN RICH,	)	
	)	
Defendant.	)	
	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: March 17, 2011)

Before the Court is "Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, or Alternatively, Motion to Compel." Defendant and the Guardian ad Litem oppose all relief sought by Plaintiff. Based on the record developed at the October 27, 2010 hearing and the analysis set forth below, the Court will deny the request for preliminary injunction and grant the motion to compel.

I. Factual and procedural background.

At the October 27, 2010 hearing on the aforesaid motions, Plaintiff appeared personally and with his co-counsel, Curt H.A. Otto, Esquire. Defendant personally appeared along with her attorney, Andrew L. Capdeville, Esquire. The Guardian ad Litem, Rosalie Simmonds Ballentine, Esquire, also attended the hearing, though J.A., the subject minor, was not present. The Court heard live testimony from Plaintiff, Defendant, and Dr. Richard Sauber. With the consent of all counsel, the Court also accepted the Plaintiff's previously-filed affidavits and declarations of

Arlette Salgado, Veronica Placid, Joy Maynard, Bernard Van Sluytman, Esquire, Norman P. Jones, Esquire, Bruce Streibich, Esquire, David A. Bornn, Esquire, and Don C. Mills, Esquire. The Court also accepted into evidence several exhibits.

The record of this case and the testimony adduced at the hearing[1] reveal that Plaintiff and Defendant were married on December 22, 1991 in St. Thomas, U.S. Virgin Islands. They had one child as a result of their union, J.A., who is presently fourteen (14) years old. Unfortunately, the parties have been separated since May 2004, and subsequently were divorced. Both parties have since married other persons. In May 2004, the parties reached a written agreement with respect to the custody of J.A.. Under the parties' arrangement, J.A. would spend Tuesday through Friday, inclusive, with Defendant and Saturday through Monday with Plaintiff. When the parties were divorced in 2006, this arrangement stayed in place, but was never submitted to the Court for approval. Plaintiff testified that during her stays with him prior to October of 2008, he shared a great relationship with his daughter. They would occasionally go out, she was affectionate toward him, and responded to his gifts with hugs and kisses. Plaintiff testified that this changed significantly on October 13, 2008.

In the evening of that day, Plaintiff and J.A. were returning to his home from his office, where he had taken her to do some homework on the internet. During that car ride, Plaintiff broached the subject of J.A. performing chores around the house. This was not the first discussion on the subject between the two, but, Plaintiff testified, this was the most serious talk. Plaintiff believes that as J.A. ages, she should take on additional responsibility. Plaintiff acknowledged that he spoke loudly to J.A. to emphasize that he considered this a significant matter, but was not screaming at her. Despite his efforts, J.A. did not meaningfully engage in the conversation, which ended when they arrived home. Plaintiff did not raise the issue at dinner that evening or at breakfast the following morning. However, before he prepared to drop J.A. to school, where she was to be picked up by Defendant, Plaintiff told J.A. that they needed to finish the discussion during her next visit with him. In response, J.A. nodded. This was the last time J.A. visited with her father at his home until May of 2009.

Although Defendant was not present for the discussions between Plaintiff and J.A., Defendant testified that J.A. provided her with a version of what occurred. According to Defendant, when she picked up J.A. from school on October 14, 2008, J.A. asked Defendant if she could live only with her and that she did not want to return to Plaintiff's home. J.A. also told her friends that she was not going back to her father's house again and even cancelled a previously-scheduled Halloween party which was set to occur at Plaintiff's home. During the next few days, J.A. also told her mother that, during the ride from Plaintiff's office to his home on October 13th, Plaintiff was very loud and called her various unflattering names. Prior to J.A.'s next scheduled visit to Plaintiff, Defendant e-mailed Plaintiff relating what J.A. had relayed and requested that the parties return to mediation to resolve the matter. Plaintiff objected to this request, and notified Defendant that he intended to abide by the terms of their visitation agreement and expected Defendant to also observe those conditions. Because of her concern

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[1] While there was additional testimony at the hearing, the court only recites in this opinion the testimony that is relevant to the disposition of the pending motion.

about how J.A. was reacting to the upcoming visit, Defendant did not take J.A. to Plaintiff. Plaintiff did not have any further home visitation with his daughter until May 2009.

In May 2009, J.A. visited Plaintiff and his family at their home. The visitation was the result of consultations the family had with Dr. Diane Brinker. According to Plaintiff, at this visit, J.A was not herself. She was visibly uncomfortable and would not interact with Plaintiff and his family. After she read for an hour or more, and then visited her stepsister for at least another hour, Plaintiff approached J.A. in an attempt to break the tension. He invited her to sit in a living area and talk with Plaintiff and his family. J.A. was apparently distressed by this scenario, simply sat on the edge of a sofa, and did not participate in any meaningful conversation. Plaintiff eventually asked J.A. if she wished to return to her mother. J.A. nodded, picked up her bag, then ran out of Plaintiff's residence and left the property. Plaintiff got in his vehicle to pursue J.A., however, when she saw him she ran towards Frenchman's Reef Hotel.

As with the October 13, 2008 incident, Defendant was not present at the events that took place between Plaintiff and J.A. in May of 2009. However, Defendant testified that, on the day of the May 2009 visit, she received a phone call from J.A.. J.A. advised Defendant that she was hiding from Plaintiff in the bushes and was heading to Frenchman's Reef Hotel. Defendant drove over to Frenchman's Reef Hotel to meet J.A.. When Defendant arrived there she met Plaintiff who told her "good job turning my daughter against me" and "look at what you have done." Defendant did find J.A. at the hotel and returned home with her.

After May 2009, J.A. did not visit with Plaintiff until this Court ordered such visitation in April of 2010. Plaintiff asserts that J.A. does not express her love for him as she did in the past, is distant to him and his family, and generally is very serious. Defendant counters that J.A. feels out-of-place at Plaintiff's home because he has re-married and is raising other children. However, Plaintiff also testified that J.A. previously was friendly with his stepdaughter, but no longer is close to her.

In addition, Plaintiff called Dr. Richard Sauber, a forensic psychologist licensed to practice in the State of Florida, as a witness. He is well-published and has been involved in family-related cases throughout the United States. Although Plaintiff has proposed Dr. Sauber to be his expert witness, Dr. Sauber testified that he viewed his role as more neutral. Specifically, after meeting with Plaintiff, Defendant, J.A., and any other persons they deem appropriate, he would prepare a reunification plan for submission to the Court. The Court would then be able to accept or reject the reunification plan, in part or in whole. Also, the reunification plan would be implemented by a Virgin Islands-licensed psychologist. Dr. Sauber specifically noted that on some occasions, the party who proposed his participation was unhappy with his recommendations as they were not favorable to that individual. He further testified that he would also perform an assessment on J.A. which would not focus solely on the issue of "parental alienation syndrome", but on J.A.'s overall mental and emotional condition.

II. Legal analysis.

a. The relief sought by Plaintiff cannot be granted pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Plaintiff's request for the Court to order the minor to be examined by Dr. Richard Sauber by way of an injunction cannot be granted. Plaintiff argues that he has a right to have his daughter examined by Dr. Sauber because he has joint custody of J.A., and, therefore, an injunction to this effect should issue. Plaintiff is incorrect on two grounds.

First, notwithstanding his status as J.A.'s father, Plaintiff does not have an absolute right to any type of particular relief in the course of a custody proceeding. Rather, once the issue of custody has been presented for judicial determination, the trial court must always be guided by what is in the best interests of the child.[2] Therefore, the decision of whether to order a psychological examination of the minor is not a matter of the rights of either party, but rests in the discretion of the trial court.[3]

Second, in the Superior Court, requests for mental or physical evaluations of parties to a case pending in the Family Division of this tribunal are governed by the Rules of the Superior Court.[4] Because there is a specific court rule governing the medical or mental examination of any persons involved in a Family Division action, there is an adequate remedy at law and injunctive relief should not issue.[5] Therefore, Plaintiff's request for a mandatory injunction directing the examination of J.A. by Dr. Richard Sauber under Rule 65 of the Federal Rules of Civil Procedure will be denied.

b. Because the information in a reunification plan and the assessment report would provide information regarding what is in the best interests of J.A., the Court will direct Dr. Richard Sauber to prepare an assessment of J.A. and a reunification plan.

Plaintiff alternatively argues that an examination of J.A. is warranted pursuant to FED. R. CIV. P. 35. Defendant argues against Plaintiff's motion on the basis that he has not met the standard under that rule. However, the Federal Rules of Civil Procedure only govern the judicial procedure in this tribunal when no Superior Court rule is applicable.[6] Therefore, the arguments of both parties are misplaced. Rule 87 of the Superior Court Rules expressly provides the standards under which this Court may direct any person in a matter pending in the Family Division to be examined by healthcare professional. This rule applies in any "juvenile cause" before the family division, and a custody proceeding falls within the definition of a "juvenile

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[2] *See, Madir v. Daniel,* S.Ct. Civ. No. 2008-0012, 2010 WL 2612589 * 4-5 (V.I. June 24, 2010).

[3] *E.g., Jordan v. Jackson,* 876 A.2d 443, 455 (Pa. Super. Ct. 2005).

[4] SUPER. CT. R. 87.

[5] *See, Humble Oil & Refining Co. v. Harang,* 262 F. Supp. 39, 44-45 (E.D. La. 1966) (denying motion for injunctive relief to prevent destruction of documents when FED. R. CIV. P. 34 and 37 provided discovery procedure and sanctions).

[6] *See,* SUPER. CT. R. 7.

cause."[7] Therefore, FED. R. CIV. P. 35 is inapplicable to these proceedings, and the Court will decide Plaintiff's motion based on its own rule.

SUPER. CT. R. 87 provides,

> "The Court may cause any person coming under its jurisdiction to be examined by a physician, psychiatrist, or psychologist, designated by the court, in order that the condition, special needs and personality of such person may be given due consideration in the disposition of the case. The court may direct who shall pay the cost of such examination."

Plaintiff contends that the examination of J.A. is necessary to determine whether J.A. is suffering from "parental alienation syndrome" ("PAS") or has any other mental condition which is relevant to this case. Plaintiff also asserts that J.A.'s mental condition is at issue, thus warranting the grant of his request. Defendant opposes Plaintiff's application because there are several psychologists in the U.S. Virgin Islands who can assess J.A., Dr. Sauber would be unduly expensive, and that one-on-one therapy with Dr. Lori Thompson is the appropriate solution to bring the parties to a point where they can peaceably co-exist. Defendant also asserts that J.A.'s mental condition is not at issue in this case, and, therefore, Plaintiff's motion should be denied. The Guardian ad Litem agrees with Defendant's position on this motion.

As noted above, it is SUPER. CT. R. 87 that governs the instant motion and not FED. R. CIV. P. 35. Rule 87 of this Court does not mandate that the mental condition of a party be in controversy as a prerequisite to order a medical or mental examination as its federal counterpart requires. It is apparent from the local rule's plain language that this Court has broader authority to order a mental examination under it than pursuant to Rule 35 of the federal rules. Courts applying rules or statutes with language similar to SUPER. CT. R. 87 have concluded that the grant or denial of a motion for a mental examination is committed to the discretion of the trial court.[8]

In this case, the Court has had an opportunity to observe the demeanor and interaction of Plaintiff and Defendant. It is clear that this matter will not be resolved amicably, and it will fall to the Court to decide the custody issue. The Court is concerned about the testimony of Plaintiff regarding the change in attitude of J.A. towards him and his family. While Defendant has expressed her countervailing view of the circumstances, her testimony is mostly based on hearsay[9], while Plaintiff's testimony is premised on actual observation of and participation in the recounted events. Although the Court accepts Defendant's testimony, it gives more weight to the

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[7] SUPER. CT. R. 81(d), (f); V.I. CODE ANN. tit. 4, § 172(d).

[8] *Armstrong v. Heilker,* 850 N.Y.S.2d 673, 675 (App. Div. 2008); *Scott v. Scott,* 665 So.2d 760, 767 (La. Ct. App. 1995).

[9] A trial court may rely on hearsay in preliminary hearings because the rules of evidence do not strictly apply in such proceedings. *See,* Act No. 7161 (Bill No. 28-0180), § 15(b); SUPER. CT. R. 7; FED. R. EVID. 1101(b), (d). *See also,* 5 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUEL § 1101.03[2][g] (2006). However, the Court advises both sides that such hearsay will not be admissible at the trial of this cause except as permitted by the rules of evidence.

direct testimony of Plaintiff at the hearing for purposes of this motion and its appurtenant hearing. Given the very divergent recitations of the events and reasons therefor, and the apparent animosity between the parties, the Court deems it better to have the additional information to be provided by Dr. Sauber. Moreover, the concern raised by the Guardian ad Litem has been addressed. Dr. Lori A. Thompson, the counseling psychologist the parties have agreed upon, is amenable to working with a reunification report of a forensic psychologist.[10]

The Court is aware that it has been held to be error to designate a healthcare professional proposed by a party under language similar to Rule 87.[11] Nevertheless, this Court deems it appropriate to appoint Dr. Sauber in this case. Notably, in *Armstrong v. Heilker,* there is no indication that the proposed expert viewed his role as neutral, but, rather, the psychologist therein was to act solely on behalf of the father. In this case, to the contrary, Dr. Sauber testified that he viewed his role as being an agent of the Court, and that he would not be biased in his report and recommendations. He noted that, in his view, it was the province of the Court to accept or reject all or some of his recommendations and the reunification plan, and that he has made recommendations which did not favor the party requesting his participation in other cases. The Court, having had an opportunity to hear Dr. Sauber's testimony and view his demeanor credits the same, and finds that these factors distinguish this case from *Armstrong v. Heilker*.

Finally, Plaintiff has suggested the participation of Dr. Sauber, and it appears that the initial intention was to have him serve solely as Plaintiff's own expert. In such a case, Plaintiff would have had to pay the associated costs of Dr. Sauber's services. Inasmuch as this is Plaintiff's request, the Court see no reason to alter that arrangement. Therefore, in accordance with Rule 87, Plaintiff shall continue to bear the costs of Dr. Sauber's services. These services will include the preparation of the reunification plan and a report on his assessment of J.A., including a discussion of any syndromes or other concerns revealed by said evaluation.

III. Conclusion.

Based on the foregoing points and authorities, the Court will deny Plaintiff's request for a temporary restraining order and preliminary injunction. However, the Court will grant his motion to have the minor J.A. assessed by Dr. Richard Sauber pursuant to Rule 87 of the Rules

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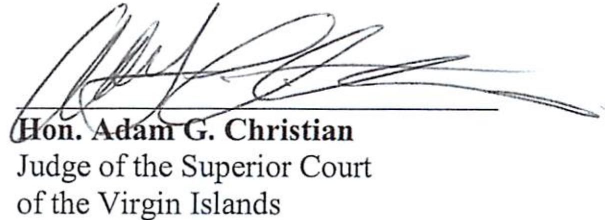
[10] *See,* October 28, 2010 letter submission of Rosalie Simmonds Ballentine, Esquire.

[11] *Armstrong v. Heilker,* 850 N.Y.S.2d at 675-676.

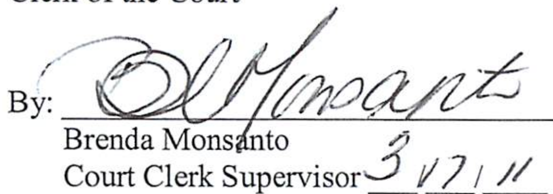
of the Superior Court. Dr. Sauber will also be directed to prepare a reunification plan. Once prepared, both the assessment report and the reunification plan will be transmitted to the parties for their comment. An appropriate order will accompany this opinion.

Dated: March 17, 2011



Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Venetia H. Velazquez, Esq.
Clerk of the Court



By: ______________________
Brenda Monsanto
Court Clerk Supervisor 3/17/11