

The Family Law Review

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Discovery Of Mental Health Records in Custody Disputes

By Carlton D. Stansbury
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I. Dilemma

- A. Can a party in a child custody matter obtain the other party's psychological and psychiatric records?
- B. Any litigated custody/placement case falls within the judicial framework. Consequently, any custody case falls within the court's distinctive charge of searching out the "truth" and preserving the fundamental principle that "the public has a right to every man's evidence." Exceptions from this rule are justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel v. United States*, 445 U.S. 40 (1980).
- C. On the other hand, every individual has the right of privacy, and the right to fully pursue his or her efforts to obtain emotional and psychological help. A veil of protection is necessary in order to ensure that the individual is candid and forthcoming with the therapist in order to receive effective assistance.
- D. The best interests of a child are a court's paramount concern in determining which parent is the best possible custodian. The paramount concern justifies the exploration of *all potentially* relevant information.
- E. These interests clash in a custody dispute, and none of the interests are mutually exclusive. This dilemma affects the way in which we advise our

clients, proceed with discovery, and present our case. There are numerous considerations and strategies in struggling with the dilemma in each case. Although we have to advance a particular client's interests, we can find ourselves on each side of the issue with the same attorneys, psychologists/therapists, judges, and court commissioners.

II. The scope of the psychotherapist privilege

- A. The dilemma between the court's interests, privacy interests, and the child's interests revolve around the evidentiary privilege concerning medical/psychological/therapeutic treatment. Although different courts call it different names, it can be considered the "psychotherapist privilege."
- B. All fifty states and the District of Columbia has enacted into law some form of psychotherapy privilege. The privilege is not a creature of the common law, due in large part because of the common law's preference to "allow each man's evidence."
- C. States have enacted the privilege in three general forms. First, there is a general physician-patient privilege, which may include psychological and psychiatric treatment and records (see, e.g., *Oswald v. Diamond*, 576 So. 2d 909 (Fla. App. 1991) (although psycholo-

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Note from the Chair

By Richard M. Nolen.

Warner, Mayouse, Bates, Nolen & Collar, P.C.

My term as chair of the section is coming to an end, and I want to thank you, the members of our section, for allowing me the honor and privilege to serve you in this position. Thank you so much for so many wonderful memories and experiences.

We are also privileged to have had an outstanding Board of Directors. All of our Board members volunteered to do very hard work, and they all served the section well this past year. Please take a moment to thank them for their service:

Tommy Allgood practices in Augusta. He is the Immediate Past Chair of the section, and he did a great job this year. Thanks for your leadership this year.

Steve Steele practices in Marietta. He is the Vice-Chair/Chair Elect of the section and has a great program planned for the Family Law Institute at Amelia Island.

Shiel Edlin practices in Atlanta. He is the Secretary-Treasurer of the section and has a great program planned for the Family Law Institute 2006.

John Lyndon practices in Athens. He is an At-Large Member of the Board. He is

one of our section's greatest advocates and has become a dear friend.

Carol Walker practices in Gainesville. She is an At-Large Member of the Board. She has been instrumental in drafting the new Child Support Guidelines.

Karen Brown Williams practices in Atlanta. She is an At-Large Member of the Board. She is instrumental in bringing a new perspective to the Board, and did a great job setting up the Silent Auction and working on charitable projects.

Christine Bogart practices in Atlanta. She is an At-Large Member of the Board. She and her husband and partner, Jeff Bogart, have unselfishly given their time to assist in setting up the Silent Auction.

Tina Roddenbery practices in Atlanta. She is an At-Large Member of the Board. She is an integral link between the section and the legislature and the State Bar, and was invaluable in setting up the new Child Support Guidelines Statute.

Paul Johnson practices in Savannah. He did a great job on short notice, bringing a fresh perspective to the Board.

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Discovery

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gists are not medical doctors, their assessments of mental impairments should not be given less weight than a psychiatrist's). Second, some states have specific statutes designed to protect the communications between psychiatrists/psychologists and patients. Third, some states have enacted broader statutes that apply to communication between patients and a list of "healers."

- D. The privilege is generally construed narrowly because it is a derogation of the search of truth. *United States v. Nixon*, 418 U.S. 683 (1974).
- a. Consequently, some courts will allow the privilege to apply to only those professionals particularly articulated in the statute. For example, in *Ritt v. Ritt*, 238 A. 2d 196 (N.J.), *rev'd on other grounds*, 244 A.2d 497 (1968), the court ruled that the statutory privilege in effect at that time applied only to psychologists, and therefore, the psychiatrist refusing to release records was ordered to do so.
 - b. However, the U.S. Supreme Court created a judicial privilege for federal courts and extended it to licensed social workers. See *Jaffee v. Redmond*, 518 U.S. 1 (1996).
 - c. In *Wiles v. Wiles*, 448 S.E.2d 681 (Ga. 1994), the court extended the scope of "psychiatrist" to medical doctors who devote a substantial portion of their time in the diagnosis and treatment of mental or emotional conditions even though they may not be psychiatrists.
- E. The rationale of the privilege is the same from state to state, but worded differently. For example,

When a patient seeks out the counsel of a psychotherapist, he wants privacy and sanctuary from the world and its pressures. The patient desires in this place of safety an opportunity to be as open and candid as possible to enable the psychotherapist the maximum opportunity to help him with his problems. The patient's purpose would be inhibited and frustrated if his psychotherapist could be compelled to give up

his identity without his consent. Public knowledge of treatment by a psychotherapist reveals the existence and, in a general sense, the nature of the malady.

***Smith v. Superior Court*, 173 Cal. Rptr. 145 (1981).**

Like the spousal and attorney client privileges, the psychotherapist patient privilege is "rooted in the imperative need for confidence and trust." Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.... The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

***Jaffee v. Redmond*, supra. (citations omitted).**

F. Some privileges extend to records, notes,

see Discovery on page 8

Georgia Case Law Update

by Sylvia A. Martin and M. Debra Gold

VISITATION

Dellinger v. Dellinger, 278 Ga. 732 (2004)

In a 4-3 decision, the majority held that self-executing changes in visitation provisions are invalid except in very limited cases. The Court refused to distinguish between custody and visitation when the change is a material change in visitation and followed *Scott v. Scott*, 276 Ga. 372 (2003) which holds that self-executing changes in custody provisions are invalid because they fail to give paramount consideration to the best interests of the children at the time the change occurs. The Court held that the exception to this rule is when there is evidence that one or both parties have committed to a course of action to be implemented at a given time, there is evidence as to how the intended course of action will affect the best interests of the children and the self-executing provision is carefully drafted so as to address the effects of that course of action on the children. The self-executing provision, in such cases, will be upheld if the automatic change in visitation is limited to a reasonable time of the taking of the evidence. Presiding Justice Sears, Justice Thompson and Justice Carley dissent.

SETTLEMENT AGREEMENT

Gravley v. Gravley, 278 Ga. 897 (2005)

The Supreme Court upheld the trial court's approval of the parties' settlement agreement and its incorporation into the Final Judgment and Decree of Divorce. The Court held that the trial court was authorized to recognize the existence of the agreement because the evidence showed that the attorneys negotiated the settlement, announced to the Court that the case was settled and the wife's attorney drafted an agreement and revised the same in accordance with husband's attorney's requests. *Stokey v. Stokey*, 274 a. 472 (1) (2001). The Court also held that the trial court did not err in incorporating the settlement agreement into the final judgment and decree of

divorce as the trial court found the agreement to be within the bounds of the law. The Court rejected the husband's argument that the trial court should have made a finding as to whether the agreement is conscionable. While a trial court is required to look into unconscionability when enforcing prenuptial or reconciliation agreements, it is not required to do so when considering agreements made during divorce litigation.

MARITAL PROPERTY

Maddox v. Maddox, 278 Ga. 606 (2004)

The husband appealed the jury's equitable division of properties owned by the parties and the Supreme Court affirmed. As to the first property, the husband contended that the jury did not have evidence of the value of his separate property at the time when marital funds were first invested and thus, the source of funds rule could not be applied. Citing the method set out in *Snowden v. Alexander-Snowden*, 277 Ga. 153 (2003) the Court held that the jury had sufficient information. In order to calculate the value of the property at the time marital funds were first invested, the trier of fact should first determine the increase in value by subtracting the value at the time of purchase from the value at the time of trial. The total increase in value should then be divided by the number of years from the acquisition to the trial in order to determine the annual appreciation. The annual appreciation from the years before the first marital contributions is added to the initial value of the property to reach the value of the property at the time of the first marital contributions. The Court further held that since the husband fully encumbered the property he had purchased with separate funds and repaid that encumbrance with marital funds, then most of the appreciation in value is marital property subject to equitable division. The Court held that the jury also had sufficient evidence with regard to the second property to apportion the separate and marital property values. In addition, the Court held with regard to the second property, that the

full amount of the appreciation could not be attributed to separate property because there was marital investment in the net equity. The trial court properly charged the jury with a correct statement of the law with regard to the appreciation of the properties. Finally, the Court held that the trial court had authority to award attorney's fees to the wife despite the fact that she had dismissed her claim for temporary alimony. An alimony award is not a prerequisite to an award of attorney's fees and thus a claim for attorney's fees can stand independently if the claim for temporary alimony is withdrawn.

***Lerch v. Lerch*, 278 Ga. 885 (2005)**

The Supreme Court reversed and remanded the trial court's award of the marital home to the husband. The parties had entered into a prenuptial agreement wherein the wife agreed not to make any claims against the husband's separate property in the event of divorce. They lived in the husband's premarital home. In 1999, the husband transferred ownership of the premarital home by deed to both parties as "tenants in common" with right of survivorship. The trial court found that as a result of the deed, one half of the home was marital property while the other half remained the husband's separate property. The Supreme Court reversed, holding that since the husband deeded the property to both parties as "tenants in common," he indicated his intent to transform his separate property into marital property. As such the wife did not violate the prenuptial agreement by seeking an equitable division of the marital property.

CHILD CUSTODY/RESTRAINING ORDER

***Nguyen v. Dinh*, 278 Ga. 887 (2005)**

The trial court's final decree awarding the wife custody of the minor child, assessing costs for a guardian ad litem and psychologist against the husband, and permanently restraining the husband from any contact with the wife unconnected with the child, was affirmed by the Supreme Court in a unanimous decision. The Court held that the evidence supported the trial court's award of custody to the minor child. The Court further held that the trial court properly assessed the *guardian ad litem* and psycholo-

gist expenses against the husband since he was the losing party on the contested custody issue. Finally, the Husband argued that the permanent restraining order was improperly issued because it was not issued until after the expiration of the temporary restraining order which the wife obtained prior to filing the divorce. However, the wife sought the permanent restraining order in her counterclaim for divorce and this was still during the period of the temporary restraining order. Thus, the Court held that the wife's request was timely made and that the trial court did not err in entering the permanent restraining order.

ALIMONY

***Lanier v. Lanier*, 278 Ga. 881 (2005)**

Addressing an issue of first impression in Georgia, Justice Thompson wrote for the Supreme Court its unanimous holding that retirement benefits under the Railroad Retirement Act of 1974, 45 USC Section 231 et seq., as amended in 1983 (the Act) which may not be considered for equitable division purposes, may be considered as an income source for payment of alimony. The Court rejected the husband's argument that *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (99 SC 802, 59 LE2d 1) (1979) precluded the trial court's authority to consider his benefits for the purposes of alimony. Instead, the Court followed other states in interpreting *Hisquierdo* as allowing the consideration of Tier 1 benefits for purposes of determining alimony even though those same benefits may not be equitably divided as marital property. The Court further held that the trial court did not exceed its authority in permitting the wife to cross-examine her own witnesses in order to show that her husband had fraudulently conveyed marital assets in anticipation of divorce. Finally, the Court held that the trial court properly admitted into evidence the husband's 1997 and 1998 tax returns to show the wife's entitlement to alimony and the husband's ability to pay.

PRENUPTIAL AGREEMENT

***Alexander v. Alexander*, ___ Ga. ___ (2005), 05 FCDR 660 (03/17/05)**

The prenuptial agreement at issue in this case was found unenforceable by the trial court because, among other reasons, the husband did not fully disclose all of his assets. The parties entered into the agree-

ment four days before the wedding and failed to attach exhibits showing their respective assets. After they married, the parties had a child, a circumstance which was not contemplated in the agreement. Using the analysis set forth in *Scherer v. Scherer*, 249 Ga. 636 (1982), the trial court cited all three bases for finding that the prenuptial agreement was unenforceable.

On appeal, the Supreme Court held that it was not necessary to address all three bases as it could affirm the trial court simply on the basis of the parties' failure to disclose their assets by failing to attach their respective exhibits. Presiding Justice Sears wrote a concurring opinion stating that although she agreed with the majority as to the issue of non-disclosure, she did not believe that the trial court would have been affirmed for its refusal to enforce the agreement based upon either of the other two criteria set forth in *Scherer*. Justice Sears wrote that the husband's threat not to marry the wife if she did not sign the agreement did not amount to "duress" for purposes of rendering the agreement unenforceable. She further wrote that the birth of a child not contemplated in the agreement is not a change in circumstance which would warrant voiding the agreement.

MARITAL PROPERTY/IMPLIED TRUST

Brock v. Brock, ___ Ga. ___ (2005), 05 FCDR 489 (02/21/05)

In an attempt to protect his pre-marital property from potential creditors, the husband deeded his house to the wife in consideration of "love and affection." When they divorced years later, the trial court found that the wife held the property in an implied resulting trust for husband. The Supreme Court disagreed and reversed. The Court held that since there was no evidence of a mutual intent to create a trust or evidence of a mutual understanding of the agreement, the trial court erred in its finding. The Court further held that the trial court erred in finding that a \$400,000 payment to husband from his father's business was a gift to husband and not part of the marital estate. The evidence indicated that the corporation paid the money to husband as compensation and deducted it as a business expense. Further, the husband paid income taxes on the funds and no gift taxes

were ever paid. Thus, the Court reversed the trial court on this issue. Finally, the Court affirmed the trial court's award of primary custody of the minor children to the husband, holding that the trial court properly considered the husband's admission to hitting his wife and crashing into her car. The Court held that the trial court did not abuse its discretion because it found that both parents were fit and proper parents who had loving relationships with the children.

APPEALS

Pollard v. Pollard, 279 Ga. 57 (2005)

The Supreme Court of Georgia affirmed the trial court's final judgment and decree of divorce, holding that without a transcript, the evidence is presumed by the appellate court to support the trial court's findings. The husband in the instant case alleged that the trial court misapplied the source of funds rule in determining his separate contribution to the marital home. However, since there was no transcript of the lower court's proceedings, the Court, on appeal, is left powerless in considering evidentiary matters and must therefore presume that the evidence supported the findings.

CHILD SUPPORT RECOVERY ACT

Falkenberry v. Taylor, 278 Ga. 842 (2005)

The Court held that under the 2003 amendments to the Child Support Recovery Act, it is no longer necessary for the Department of Human Resources (DHR) to prove a need for an increase in child support in order to prevail in an upward modification of support. In order to prevail, the DHR need only to show a significant inconsistency between the existing child support award and what would be awarded if the child support guidelines were applied. The Court further held that the Act, as amended in 2003, no longer limits the DHR's involvement in modification of child support cases to those in which the children are receiving public assistance.

Cut The Cord

by Randall M. Kessler
Kessler & Schwarz, P.C.

Wireless computing covers three main areas. The first seems to be the most obvious: cell phone use and/or e-mail via cell phone. If you're up to the challenge of spending a while talking to a sales person or a technology representative on the telephone, being able to utilize your cell phone to give you access to e-mail anywhere there is a cell phone connection is a powerful tool. It gives you the ability to receive and send messages even while sitting in the court room at calendar call, or any other environment where it is impossible to make a call. However, the focus of this article will be on the two other types of wireless computing with which I am familiar: WiFi and "true" wireless. Many people are confused about wireless computing and the ability to access the Internet without a cable connection between the wall and the computer. These two types of wireless connections are similar, but differences include cost and speed of access.

The first type of wireless connection you may consider using is commonly known as WiFi. This type of wireless connection requires a router. In other words, if you have a network in your office it is probably wired through the walls to your desktop computer. Rather than have wires, you can put what is called a router attached to the network and then transmit the connection via airwaves to a receiving antenna on your desktop or wireless computer. This is very useful if you are in an office where you may be moving your computer to other sides of the office or exchanging offices with others. This means that you would not need to create new holes in the wall for your cable connection. More importantly, you could carry a notebook computer throughout the office and remain attached to your office's network, which may include access to the Internet. This is useful if you want to go to the other room for a mediation or deposition and would like to have access to the client's file on your network. If you have such a router/WiFi system, you can use your note-

book computer to access your network and the Internet.

Such a WiFi connection can also be obtained in what are known as "Hot Spots." Starbucks has Hot Spots with service provided by T-Mobile. The advantage to WiFi is that it is usually at high speed such as DSL speed. The main drawback is the cost to use some Hot Spots. You need to either have an account with T-Mobile or pay an hourly or daily charge to use a T-Mobile Hot Spot. The same is true for Delta Crown rooms. However, when visiting another lawyer's office they may have a WiFi system that allows you to access the Internet via their network. This brings to mind another drawback which is that if another lawyer or client brings a notebook computer to your office and if you have WiFi access to your network, unless you have very good safe guards, that person will have direct access to your network and all files thereon. There are other things to consider. The general cost of a router is approximately \$400 (there are cheaper versions) and there is no monthly usage fee to use your own router. You can also use this at home to be able to take your notebook computer around your house and not be stuck in your office thus enabling you to spend time in the playroom with the kids or to watch the game on T.V. and have your computer with you.

The other type of wireless (true wireless) computing is a direct connection from your laptop to a major carrier such as Sprint. Wireless cards are sold for approximately \$300 to \$400 but there is a monthly usage charge which usually ranges from \$35 to \$95 per month depending on how much access you want. These cards, when inserted into your notebook computer, will grant you access to the Internet anywhere you can receive a cell connection on that carrier. The only drawback (aside from cost) is that the speed is akin to dial-up. While the speed is slow, it is still access to the

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- and communications, while others extend only to communications.
- a. In *Johnson v. Johnson*, 839 S.W.2d 714 (Mo. App. 1992), the court held that the intake form that the husband completed in a counseling center, in which he admitted abusing his wife, was privileged and the wife could not introduce it into testimony during divorce proceedings.
 - b. In *McMaster v. Iowa Bd. of Psychology Examiners*, 509 N.W.2d 754 (Iowa 1993), the court construed the state statute narrowly and held that therapist need not testify, but the notes and records were discoverable.
- G. The states differ whether privilege extends to others in the psychotherapist's office.
- a. Cases that extend the privilege to others:
 - i. The privilege covered unlicensed workers participating in the diagnosis and treatment of a patient as long as they were under the supervision of the psychiatrist. *Amburgey v. Central Ky. Regional Mental Health Board, Inc.*, 663 S.W.2d 952 (Ky. App. 1983).
 - ii. The privilege was extended to the nurse in a psychologist's office. *Kalenevitch v. Finger*, 595 A.2d 1224 (Tenn. App. 1991).
 - b. Cases that do not extend the privilege to others:
 - i. Privilege does not extend to unlicensed therapists although working under the supervision of a licensed therapist. *State v. Edwards*, 918 S.W.2d 841 (Mo. App. 1996).
 - ii. Privilege does not extend to an unlicensed person conducting the intake evaluation. *Lipsey v. State*, 318 S.E.2d 184 (Ga. App. 1984).
 - iii. Privilege does not extend to student interns providing therapy. *People v. Gomez*, 185 Cal. Rptr. 155 (App. 1982).
- H. What about marriage counseling? When does the privilege apply?
- a. The analysis may depend upon whether the marriage counselor is a licensed psychologist, social worker, clergy, or other professional. If the counselor is covered under one of the professions subject to the privilege, the general rule is that both spouses must waive the privilege before the contents of the counseling are disclosed. See *Genovese v. Usner*, 602 So. 2d 1084 (La. App. 1992). If a therapist conducts group and individual counseling, the mere presence of a party in the group portion does not constitute a waiver. *Guity v. Kandilakis*, 821 S.W.2d 595 (Tenn. App. 1991).
 - b. Waiver can occur if one spouse testifies about the marriage counseling and the other party does not object. The party that did not object can testify, and the first party testifying cannot object. *Eichenberger v. Eichenberger*, 613 N.E.2d 678 (Ohio App. 1992).
 - c. Statements made by one spouse during joint counseling sessions are not protected in a later custody fight. Litigation arising between joint patients does not protect statements made by one party during joint counseling session. *Redding v. Virginia Mason Medical Center*, 878 P.2d 483 (Wash. App. 1994).
 - d. In New Jersey, the marriage/family therapist privilege extends to licensed and unlicensed marriage counselors. *Wichansky v. Wichansky*, 313 A.2d 222 (N.J. Ch. 1973).
 - e. Different spin: A court determined that a man who participated in joint counseling with a former girlfriend did not waive the privilege to group or individual sessions during the course of his treatment. The court stated "The strongest public policy considerations militate against allowing a psychiatrist to encourage a person to participate in joint therapy, to obtain his

trust and extract all his confidences and place him in the most vulnerable position, and then to abandon him on the trash heap of lost privilege. *Hulsey v. Stotts, et. al.*, 155 F.R.D. 676 (N.D. Okla. 1994). In regard to joint and separate counseling, “no division may be made as to where one therapy ends and another’s begins,” so each patient in joint counseling retains the right to prevent disclosure by another—including the joint counselee—of confidential communications related to diagnosis and treatment.

III. How the privilege works.

- A. The patient owns the privilege, Imwinkelried, *Evidentiary Foundations* 202 (Michie Company 1982), and thus, only the patient can waive the privilege. If the patient becomes mentally incompetent, that person’s guardian becomes the successor holder of the privilege. However, both the patient and the psychotherapist can assert the privilege.
- B. The person asserting the privilege bears the burden of establishing the applicability of the privilege. *Middleton v. Beckett*, 960 P.2d 1213 (Colo. App. 1998). Generally, a person asserting the privilege must show:
- a. That the privilege applies to the type of proceeding in which the privilege is claimed.
 - b. The claimant of the privilege is asserting the right type of privilege.
 - c. The claimant is the proper holder of the privilege.
 - d. The information is communication.
 - e. The communication was intended to be confidential.
 - i. As a general rule, the courts usually hold that the communication is not confidential if third parties are present. Imwinkelried at 203. However, assistants within the psychotherapists control are usually not considered third parties destroying the privilege.
 - ii. In *Hager v. Bellingham Sch. Dist.*, 871 P.2d 1106 (Wash. App. 1994), the court held that the privilege did not apply because the therapist worked for the school district, was working with the student on behavioral problems and it was expected that the evaluation would be seen by others.
 - iii. Whether a communication is intended to be confidential is determined by intent and the patient’s “objectively reasonable” belief. *State v. Locke*, 502 N.W.2d 891 (Wis. App. 1993).
 - iv. Information given to a psychotherapist that is intended for subsequent disclosure outside the circle of confidence is not privileged. Imwinkelried at 203.
 - f. And that the purpose of the communication was for diagnosis or for the treatment of the patient’s physical, mental or emotional condition.
 - i. As a result, communication between a mental health providers and a “patient” for purposes of a psychological evaluation, second-opinion evaluator, consultant, mediator (except mediation privilege may apply), or other evidentiary gathering, would not be privileged. See, e.g., *Neimann v. Cooley*, 637 N.E.2d 943 (Ohio App. 1994) (purpose of therapy was to make an evaluation for another party; privilege did not apply).
 - ii. In *Debry v. Goates*, 2000 UT App. 58 (Utah App. 2000), a psychologist initially interviewed the wife for purposes of a custody evaluation in her first divorce, and then she continued to see the therapist for treatment after the divorce. The goal was clearly therapeutic treatment. Therefore, the privilege was upheld.
 - g. The communication occurred between properly related parties.

- C. Some courts apply a similar but slightly different set of requirements. The privilege has four “fundamental conditions” in order to prevent the disclosure of certain information:
- The communication must originate in confidence that it will not be disclosed;
 - The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the therapist and the patient;
 - The relationship must be one which in the opinion of the community ought to be fostered; and
 - The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 John Henry Wigmore, *Evidence in Trials at Common Law*, sec. 2285 (McNaughton rev. 1961).

- D. If the privilege is established, and the patient refuses to disclose, or refuses to authorize the psychotherapist to disclose, the patient cannot be held in contempt or have discovery sanctions imposed on him or her. Imwinklereid at 202.
- E. If the person asserting the privilege has demonstrated the elements above, then the person has a *prima facie* case for protection. The person challenging the privilege must demonstrate that a specific exception applies or the holder of the privilege has waived it. States vary in the number of exceptions. For those states that have exceptions, the relevant ones for purposes of custody litigation include: (1) if the person’s mental health is at issue; (2) if the issue revolves around the care and custody of a child, and/or (3) if child abuse or neglect is involved.
- F. The privilege is “all or nothing”. A therapist will not be allowed to disclose some information and withhold other information. Ackerman & Kane, *Psychological Experts in Divorce Actions* 104 (Aspen 1998). Waivers can be sub-

tle:

- A waiver must be an intelligent relinquishment of a known right. *Cabrera v. Cabrera*, 580 A.2d 1227 (Conn. App. 1990). Further, there is no waiver if a third person is present to aid the patient.
- A waiver can occur on direct examination by referring to privileged communication. For example, the claimant may testify in direct that he told his therapist that he was feeling depressed and he was referred to a doctor for medication. This testimony would be an express reference to the contents of a privileged communication and could constitute a waiver. *See, e.g., Imwinklereid* at 205.
- However, a patient’s testimony on cross-examination regarding privileged matters will not be construed as a waiver. *Howard v. Porter*, 35 N.W.2d 837 (Iowa 1949).
- A waiver can occur if the holder voluntarily discloses privileged information to a third party (unless such disclosure falls under another privilege such as attorney/client, physician, clergy, spouse, etc.). However, in *Slaton v. Reynolds*, 682 So. 2d 1056 (Ala. App. 1996), the husband did not waive the privilege when he gave a copy of his mental health records to his wife for “safekeeping.”
- Be careful that a failure to assert the privilege at the right time is a waiver of the privilege.
- If the attorney sends a client to a psychotherapist as part of his or her trial preparation, the information is protected under the work product/attorney-client privilege rather than the psychotherapist privilege. Imwinklereid 203.
- QUERY: many insurance companies require patients to sign a release so that the company can obtain access to records to monitor progress, verify treatment, etc. Is that *required* release for purposes of obtaining insurance a waiver? Is it

voluntary?

- G. If there is no exception that directly applies, then the last condition of Wigmore's conditions above is generally used as a way in which to overcome the privilege. (III.c.d., above). Cases that do the balancing are set forth below.

IV. State Courts are divided on how to apply the privilege in custody cases.

There are five basic categories the courts fall into for those that have directly addressed the issue:

- A. Courts that interpret statutes that specifically prevent the assertion of privilege in custody matters.
- a. *Harbin v. Harbin*, 495 So.2d 72 (Ala. App. 1986). Where the issue of the mental state of a party to a custody dispute is clearly in controversy, and proper resolution of the custody issue requires disclosure of privileged medical records, the privilege must yield. However, before admitting the records into evidence, the court may review the records prior to the other party accessing them and may conduct a hearing in chambers on the issue of the admissibility of the records. This rule was later extended in *Slaton v. Slaton*, 683 So.2d 1056 (Ala. App. 1996), such that relevant records can be admissible in visitation cases as well. The same issues as to the parent's fitness to care for a child and be responsible for the child's safety and welfare apply when the parent is seeking custody or unsupervised visitation.
 - b. *Smith v. Gayle*, 834 S.W.2d 105 (Tex. App. 1992). A Texas statute allows a court to compel the records in custody cases when disclosure is relevant to any suit affecting the parent-child relationship.
- B. Courts that hold that an affirmative request for custody places a parties' mental health into question, and therefore the privilege is automatically waived.
- a. *Atwood v. Atwood*, 550 S.W.2d 465 (KY 1970). Seeking custody automatically waives privilege.
- C. Courts that hold that a custody dispute, standing alone, does not automatically put the spouse's mental con-
- b. *Clark v. Clark*, 371 N.W.2d 749 (Neb. 1985). Filing a petition alleging fitness to have custody of a child waives the privilege, however, only those portions of records related to the issues are admissible (as opposed to discoverable).
 - c. *Owen v. Owen*, 563 N.E.2d 605 (Ind. 1990). A party-patient waives her privilege as to matters causally or historically related to the condition she has put in issue by way of a claim, counter-claim or affirmative defense. The court is to consider the physical and mental health of all individuals involved. The mother waived her privilege by being awarded custody and having to defend the award in postjudgment proceedings.
 - d. *In re C.I.*, 580 A.2d 985 (Vt. 1990). A therapist had counseling sessions with the child and the mother. Both the child and the mother objected to a petition to place the child in protective custody, and both therefore, put their mental health in issue and waived the privilege.
 - e. *Kirkley v. Kirkley*, 575 So. 2d 509 (La. App. 1991). All evidence may be introduced regarding the fitness of a parent, including the mental and physical health of the parties. Because a party's mental condition is an issue in any child custody matter, the party may not assert the privilege. The court held, however, that should be a protective order to limit the disclosure to only the parties, counsel and expert witnesses.
 - f. However, denying an allegation made about one's mental health does not necessarily put his or her mental health in issue justifying a waiver of the privilege. *Slaton v. Reynolds*, 682 So. 2d 1056 (Ala. App. 1996). To hold otherwise would allow the exception to eat up the rule.

dition in issue. However, a party's mental health may come into issue by making certain claims or based on certain events. In that case, the privilege is waived.

- a. *Miraglia v. Miraglia*, 462 So.2d 507 (Fla. App. 1984). In custody proceedings, the "polestar" is exclusively the welfare of the children. Therefore, the wife's recent suicide attempt put her mental health in issue and long-time psychiatrist testimony could be admitted.
- b. *In re marriage of Nordby*, 705 P. 2d 277 (Wash. App. 1985). Where circumstances clearly indicate neglect, discovery and admissibility of prior psychological records may be warranted.
- c. *Leonard v. Leonard*, 673 So. 2d 97 (Fla. App. 1996). A party filed a protective order to exclude mental health records. Although the mental health of both parents is a factor to be considered in a child custody dispute, this does not mean that a spouse places his or her mental health at issue thereby triggering a waiver of privilege. Neither allegations of mental instability nor denial of such allegations on the part of either parent causes a waiver. To do so would 'eviscerate the privilege.' Waiver may occur in a child custody proceeding only when an adverse event about one's party's mental health status occurs, such as an attempted suicide or voluntary commitment. Even in that case, an independent psychological exam is preferable over violating the privilege because relevant information can be obtained while maintaining confidentiality. See also *Roper v. Roper*, 336 So. 2d 654 (Fla. App. 1976).
- d. *Kinsella v. Kinsella*, 696 A.2d 556 (N.J. 1997). The court held that where no statutory or other traditional exceptions to the privilege apply, the court should not order disclosure of therapy records, even for in camera review by the court, without a prima facie showing that

the psychologist-patient privilege should be pierced under the following test: (1) there must be a legitimate need for the evidence; (2) the evidence must be relevant and material to the issue before the court; and (3) by a fair preponderance of the evidence, the party must show that the information cannot be secured from any less intrusive source.

NOTE: The *Kinsella* case provides an excellent summary of the law and policy on the privilege in custody cases.

ALSO NOTE: The *Kinsella* court analyzes a 1991 American Psychiatric Association Task Force Report on the value of the privilege. It sets forth suggested findings the court should make before ordering disclosure. They are: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court-ordered evaluations are an inadequate substitute for disclosure; (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant. The Task Force suggested that, as a rule, inpatient treatment records are likely to be more relevant than outpatient records.

- e. *Laznovsky v. Laznovsky*, 2000 MD. 0042039 (Md 2000), while the mental health of a party is an issue, a person seeking custody does not, without more, waive privilege. However, records can be disclosed if necessary claims are alleged and there is no other source for the information.
- f. Mere allegations are insufficient to make mental health an issue:
 - i. *Cabrera v. Cabrera*, 580 A.2d 330 (Conn. App. 1990).
 - ii. *Schouw v. Schouw*, 593 So. 2d 1200 (Fla. App. 1992).
- g. Mere allegations may be sufficient:

Thompson v. Thompson, 624 So. 2d 619 (Ala. App. 1993), (father alleged mother was not fit because she was an alcoholic).

- D. Courts that hold that the children's paramount interests trump the parties' individual privilege.
- a. *Perry v. Fiuamano*, 403 N.Y.S.2d 382 (App. 1978). Privileged communications should not be disclosed unless the injury that would inure to the relation by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of litigation. Because a parent's mental state is of great importance, the records should be disclosed. There must be a showing beyond mere conclusory statements that the custody issues require revelation of records.
 - b. *M. v. K.*, 452 A.2d 704 (N.J. Super. Ct. 1982). Marriage counseling privilege does not apply in custody because the children's due process rights and other interests are more important than the policy reasons behind the privilege.
 - c. *In re Marriage of Kiister*, 777 P.2d 272 (Kan. 1989). When a party's right of confidentiality is weighed against the best interests of the children, the right of confidentiality must give way.
 - d. *DeBlasio v. DeBlasio*, 590 N.Y.S.2d 227 (1992). A party's interest in preserving confidentiality must yield to the paramount interest of protecting the well being of a child. However, only those records that are related to the claim regarding mental illness should be disclosed.
 - e. *Renzi v. Morrison*, 618 N.E. 2d 794 (Ill. App. 1993). Only the patient can release confidential information. A psychiatrist may break the confidentiality only when his or her testimony would be more critical to the interests of justice than is the patient's privilege.
- E. Courts that uphold the privilege and prohibit the disclosure of information.
- a. *Griggs v. Griggs*, 707 S.W. 2d 48 (Mo. App. 1986). A statute's provision to consider the mental health of the parties does not operate to waive the privilege. The court noted that a trial court could obtain evidence as to a parties' mental health through an independent mental health examiner.
 - b. *Navarre v. Navarre*, 479 N.W.2d 357 (Mich. App. 1991). Privilege not waived in custody disputes. The court held that potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting patient relationships. Information from other sources, such as an independent psychological evaluation, is available.
 - c. *Lauderdale County Dept. of Human Services v. T.H.G.*, 614 So. 2d 377 (Miss. 1992) The mental health records of parents in a TPR action were excluded. The public interest in facilitating access to mental health professionals by eliminating a fear that confidential information might some day be used in court trumped the child's best interests. Neither party filed pleadings putting their mental health in issue, nor did they waive the privilege. Creating an exception for TPR cases could open the floodgate for other exceptions.
 - d. Note that many courts refusing to overcome for privilege have independent medical examinations as the "fall back."
 - i. *Simek v. Superior Court*, 172 Cal. Rptr. 564 (App. 1981). California favors continued involvement of both parties in the life of the children and also favors confidential communication between patient-therapist. Therefore, "to exact waiver of a patient's privilege...as a price for asserting his rights to visit his own child would pose problems of a particularly serious nature." The solution is a court-ordered exam because it

protects all interests.

- ii. *Cabrera v. Cabrera*, 580 A.2d 1227 (Conn. App. 1990). The most appropriate source of information about a patient's mental health was examination by an expert witness rather than records of treating therapist.

V. Is the balance between the interests an impossible conundrum?

- A. One solution is to prevent the disclosure of information because there is available an independent psychological exam. Such evaluations focus on parenting ability, whereas prior therapy may have nothing to do with parenting. Evaluators are more likely to be objective than therapists. However, the psychological exam cannot necessarily replicate probative information on a party's mental health. Mental health records are probative of whether a child will do well with a parent because the records were not made in anticipation of a custody battle. There is no incentive to lie about his or her mental state to the therapist and the communications are likely to be truthful. By contrast, a parent has an incentive to look good in a custody evaluation. In therapy, the goal is to get well. In an evaluation, the goal is to look good. Discussions in therapy reflect a true state of mind. Further, evaluators do not always have a complete picture of the family due to the limited time the evaluator spends with the family.
- B. If there is an *in camera* inspection of the records, the cat is out of the bag, and the goal of the privilege is destroyed. As the Supreme Court stated in *Jaffee*: "It appears that all statements made by the patient to the psychotherapist are privileged and are not subject to scrutiny by the trial judge to determine what parts are protected and what parts are not. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."
- C. *In camera* also has the disadvantage of providing information to a judge out of context without any foundation or explanation. Significant prejudice could arise with little opportunity to timely address the prejudice.
- D. If disclosure of the records is in the best interests of the children to obtain all relevant information, and as a result, the records are released, then people won't seek help and provide full disclosure to their therapist. As a result, the best interests of the children are ultimately harmed because the parents are unable or unwilling to seek candid therapy. How, then, are the best interests of the children ultimately served?
- E. The threat of disclosure can be harassing and intimidating to a patient. The information may distress or stigmatize the patient before, during and after disclosure. A parent may respond to coerced disclosure by not seeking custody or by making substantial concession about support and property. The disclosure is a strategic weapon on issues other than custody.
- F. Disclosure contaminates the therapeutic relationship and provides a chilling effect, which extends to *future* therapy, even with *different* therapist.
- G. If the privilege is not upheld, the long-term effect renders the lifting of the privilege meaningless at great loss to therapy. As the Supreme Court stated in *Jaffe*: "In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access--for example, admissions against interest by a party--is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth seeking function than if it had been spoken or privileged."

VI. Tips on handling privilege issues.

- A. The argument that the privilege excludes relevant and reliable evidence that cannot be obtained by any means as a justification for overcoming the privilege should not be, by itself, persuasive. *The purpose of the privilege is to exclude relevant and reliable evidence!*
- B. Never, never, never allow a client to sign a release without fully exploring the consequences with him or her. Warn them against signing a release when he or she is with the guardian or evaluator.
- C. Be careful when talking to your client's therapist that the privilege is not waived.
- D. Counsel may want to argue that since the patient invoked a privilege to suppress information, the information probably would have been unfavorable. It should be pointed out to the judge, guardian ad litem, or evaluator, that it would be inconsistent to grant the privilege and then to permit an adverse inference from the privilege's invocation. *Imwinkredl* at 202. To minimize the negative influence, the lawyer should take the blame for releasing the privilege, not the client.
- E. Beware of "back-dooring" the information. For example, the mental health records may not be discoverable for purposes of custody, but they are discoverable in the event that one of the parties makes a claim for spousal support because they are disabled and cannot work. If they are discoverable because the party has put his or her mental health in issue for support, can it be used in custody?
- F. If there is ambiguous or old case law regarding privilege, and you want to uphold the privilege, make sure to emphasize the U.S. Supreme Court decision of *Jaffee* on the public policy of privilege. This may call into question pre-1996 cases. If you want to overcome the privilege, you obviously argue that the federal pronouncement is not controlling.
- G. When in the conundrum, work toward a narrowly tailored protective order. The protective order must estop the

parties from claiming waiver and admitting or discovering evidence other than what was covered in the protective order. The protective order is a must, and must address what information is provided, who is the recipient, if the information is disseminated, and what happens to it after the proceeding. Make the protective order a "limited" release without a total waiver. The challenge: who decides what is disclosed and what is not? Limited releases do not constitute full waivers if patient believed limited release was necessary for a specific purpose and intended to maintain confidentiality. See *Cabrera*, *supra*.

- H. If your state starts with the presumption that both parents are fit or that both parents are presumed to continue as parents, then most custody fights are really fights to retain custody that he or she already enjoys, rather than gain it. Therefore, asking for what one already has does not put his or her mental health into issue. If allowing the one side the ability to raise the issue and the other's defense puts it into issue, then exception evaporates the rule. Putting the other party to his or her proof does not make it an issue.
- I. If the statute does not specifically make an exception, argue that because the privilege is a statutory creature, the court cannot impose exceptions to the statute, nor can the court rewrite the statute.
- J. An attorney may want to consider writing to a client's therapist and state that the client has not waived the privilege and request immediate notification in the event the therapist receives a subpoena, notice of deposition, or other inquiry.

VII. Conclusion

We should strive to do no harm to families, or at least minimize our harm to families. We need to work vigilantly to protect the privilege consistent with the best interests of the children.

We should preserve the privilege to "ensure that parents in need of treatment for mental health problems receive that treatment in an atmosphere of trust which

see **Discovery** on page 16

Discovery

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is conducive to success." Children will ultimately be harmed, and the privilege thwarted, if it is waived in every custody case. According to our U.S. Supreme Court, the mental health of our citizenry as a public good is of transcendent importance. "The mental health of citizens is even more important when those citizens are parents. If the privilege remains intact, parents in intact families will be more likely to seek medical help when needed, and many children will not be subjected to the harmful situation of living in a household with a mentally ill parent who does not seek treatment because of fear of losing his or her child." Roberson, "Admissibility of Mental Health Care Records in Custody and Placement Disputes," 18 *Wisconsin Journal of Family Law* 70 (1998).

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Chair

Continued from page 2

Ed Coleman practices in Augusta. Ed is an At-Large Member of the Board, and he has brought great new ideas and enthusiasm to the Board.

Kurt Kegel practices in Atlanta. He is the Editor of the Family Law Review, and he did a great job in coordinating all of the work on this publication, and is Secretary-Treasurer Elect.

Please let all of these hard-working lawyers know how much you appreciate their efforts on their behalf. Thanks for all the memories, friendships, hard work, and dedicated support for the families of Georgia. Proud of our section, and proud to be a family lawyer.

Technology

Continued from page 7

Internet and may even provide you with the ability to access your office network via programs such as PC Anywhere or gotoMyPC.com. Those two programs allow you to use a remote computer such as a laptop or even a family member's computer to directly access your work computer. The advantage to this system is that you have broader access than with a WiFi system because you do not need a router.

The good news is that technology is increasing. Soon enough the true wireless connection will be at DSL speeds and soon enough Hot Spots will be in existence in more places, including possibly each courthouse.

This concludes my wireless connection 101 sermon. Once again, I remind you that I am not a computer guru. I simply keep my eyes and ears open and try to take advantage of all the tools that will help my clients' cases or simplify my life. Wireless and WiFi connections have done both for me and my clients.

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