

P E N N S Y L V A N I A LAW WEEKLY

March 2, 2009; 32 PLW 240

WALKING THE TIGHTROPE **Negotiating Pennsylvania's psychiatrist-patient privilege**

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Special to the Law Weekly

Divorcing parents are preparing for a custody trial. The mother sincerely believes that the father has mental health problems that will impact his ability to be an effective parent. Can the mother bring in the other parent's treating mental health professional so the court can see exactly what the other parent's problems are, how they affect him as a parent and how these problems interfere with his parenting ability?

Clearly, a patient has a critical interest in maintaining the confidentiality of his communications with a psychiatrist or psychologist. It is patently obvious that a patient's mental health treatment would be adversely affected if the patient could not be certain that everything he said to the doctor would be kept confidential. In order for treatment to be effective, there needs to be honest and open communication between a patient and his doctor. The very nature of mental health treatment requires the discussion of extremely sensitive topics and emotions. A patient who is afraid that his confidences will be disclosed in open court is unlikely to give his psychiatrist full disclosure.

However, doesn't society have a compelling interest to ensure that courts making child custody decisions have all relevant evidence that they can obtain in order to help them determine the best interests of the child? If the fitness of a parent is legitimately at issue in a custody case, can the court have access to communications and records about the parent's mental health treatment that would affect the court's decision? The answer is "No."

Every state recognizes some form of a psychiatrist-patient privilege. See *Jaffee v. Redmond*, 518 U.S. 1 (1996). States also recognize that there can be situations when the privilege directly conflicts with a court's duty to obtain all relevant information.

As the Maryland Court of Appeals stated in *Laznovsky v. Laznovsky*, 357 Md. 586 (2000): "The marital discord which precedes divorce and custody actions is often of such an emotional nature as to lead one or both parties to seek professional psychiatric counseling in attempting to restructure their lives. The desire for psychiatric consultation during this transition should not be used against one in custody proceedings."

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States differ in the way they walk the tightrope between the competing interests, with Pennsylvania's method being among the most interesting. Pennsylvania law recognizes a privilege regarding communications between a patient and his or her psychiatrist or psychologist.

The statute at 42 Pa. C.S. § 5944 provides as follows: "No psychiatrist or person who has been licensed ... to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client."

Pennsylvania law also prevents the disclosure of mental health treatment records and files. The Mental Health Procedures Act, 50 P. S. § 7111, provides that "[a]ll documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents disclosed."

The language in these two statutes provides for a very broad application of the privilege, comparable in importance and value to the attorney-client privilege. § 5944 does set forth a number of exceptions such as when a matter falls within the Sexual Victims Act, or when a person is facing involuntary commitment. However, court decisions discussing the privilege have likewise emphasized its importance as a matter of public policy.

For example, the Superior Court, in *Commonwealth v. Kyle*, 533 A.2d 120 (Pa. Super. 1987), has explained:

"The privilege afforded by § 5944 was intended to inspire confidence in the client and to encourage full disclosure to the psychologist [and psychiatrist]. By preventing the latter from making public any information which would result in humiliation, embarrassment or disgrace to the client, the privilege is designed to promote effective treatment and to insulate the client's private thoughts from public disclosure."

This privilege, and its underlying public policy, is so important that Pennsylvania courts have held that, where it applies, it is practically absolute. But this is not the end of the story, because in Pennsylvania, even though the psychiatrist-patient privilege ranks right along with the attorney-client privilege in its importance, it does not completely exclude the mental health professional from the courtroom.

Commonwealth v. Simmons, 719 A.2d 336 (Pa. Super. 1998), was the seminal case where the Superior Court set forth the extent of the privilege's application. That case dealt with whether the mental health records of a child who had been under the care of a treatment center for at-risk

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children and placed in the home of an adult trained as a "mental health technician" were admissible.

Even though the Simmons court referred to the privilege as nearly absolute, the court also pointed out that generally "Pennsylvania law does not favor evidentiary privileges."

Perhaps because of these contravening policies, the court's holding embraced a middle ground, where the privilege is held to be nearly absolute where it is applicable, but the area of applicability is strictly limited to protect the confidential communications and records of the patient.

Thus, the Simmons court held that the privilege prevented disclosure of confidential communications by the patient to the psychologist, but that the psychologist's opinions and observations were not covered by the privilege:

[T]he privilege is not designed to specifically protect the psychotherapist's own opinion, observations, diagnosis or treatment alternatives particularly when such information finds its way beyond the client's personal file. While such information may be protected from disclosure by some other privilege, we decide that the §5944 privilege is designed to protect disclosures made by the client.

In the Simmons case, the file at issue did not differentiate between information obtained through confidential communications from the patient as opposed to information learned through observations or opinions of the treating mental health professionals. Therefore, and because of the confidentiality provisions affecting mental health records under 50 P.S. § 7111, the court held that the patient's file in that case could not be disclosed. In the years since its decision in Simmons, the Superior Court has nevertheless affirmed its holding concerning a psychiatrist being able to testify to his opinions and observations several times.

In a recent child custody case in Carbon County, the father sought to introduce the mental health records of the mother. The trial court there discussed Simmons, and also noted that confidential information covered by the privilege "has been narrowly defined and is restricted to communications made or information divulged by the patient to the psychotherapist." *Leskin v. Christman*, 78 Pa. D.&C.4th 152 (C.P. Carbon County 2006).

The court went on to hold that the mother's mental health records in this particular case were inadmissible because they contained confidential communications made by the mother to her psychiatrist, and because they were confidential under the Mental Health Procedures Act, 50 P. S. § 7111. However, there is no indication as to whether in that case the father had sought to elicit testimony from the mother's treating doctor about his opinions and observations.

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What does a court do in a child custody matter where one parent wants to present a psychologist's testimony as part of her case? Pennsylvania's fine-line approach to the psychiatrist-patient privilege can be difficult for courts to understand, especially in light of the Superior Court's emphasis on the importance and the sanctity of the privilege. It is easy to see how a court would prefer to err on the side of caution by holding that all such evidence is inadmissible. But this is not the correct approach under the law.

As indicated in the cases discussed above, the privilege only protects against the disclosure of confidential information communicated by the patient to the psychiatrist, as well as records containing such communications. As such, the psychiatrist's records would be inadmissible in most cases under 42 Pa. C.S.A. § 5944 and under the Mental Health Procedures Act, 50 P. S. § 7011. Also, a psychiatrist could not be compelled to testify about any confidential communications made by the patient to the doctor. However, Pennsylvania law clearly allows mental health professionals to testify as to their own opinions, observations, conclusions and alternative treatment plans. Such information could be extremely helpful in a child custody case.

A client of Dorothy K. Phillips, one of the authors of this piece, was a mother with a newborn. The baby's father filed an emergency petition to secure custody of the infant, alleging that the mother had tried to take her own life. The father subpoenaed the mother's mental health records from a hospital where she had received treatment.

When the records custodian appeared, he walked over to my client to sign the consent to release the records. I directed her not to sign. I called her psychiatrist to testify for the limited purpose of testifying to his observations and conclusions as to whether the mother was fit to care for the child. I elicited no other testimony. The father argued that the mother had waived privilege. The court ruled she had not. The psychiatrist only gave his opinion that the mother was fully competent to care for the infant. Based on all the other evidence and without the aid of the mother's mental health records, the court awarded custody to my client. Both mother and child are fine.

A court which refuses to allow such testimony, simply because the court does not understand the fine line that has been established in this area of the law, needlessly handicaps itself by excluding evidence that is not only relevant but could be instrumental in making a careful determination of the best interests of the child. •

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