

CLASH IN PUBLIC POLICY: RIGHTS OF PRIVACY IN PSYCHOTHERAPEUTIC/PATIENT AND PHYSICIAN/PATIENT PRIVILEGES VS. BEST INTERESTS OF CHILDREN

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A parent’s mental illness, substance abuse, alcoholism, and even some physical ailments are extremely relevant in custody cases when determining the best interests of a child.¹ However, California public policy works to keep proof of these issues out of the courtroom under principles of privacy and privilege. Family law courtrooms regularly witness the clash between the obligation to ensure treatment privacy and the obligation to ensure safety for our children. For the subset of family law attorneys who regularly deal with mental health issues, this article will point out time-tested strategies for mastering the problem.

The Healthy Parent Dilemma—Overview of Healthcare Privileges

In a family law case with mental health issues, the “healthy” parent typically accuses the “unhealthy” parent of an inability to properly care for the children because of a debilitating condition. This issue may arise out of a mental health diagnosis, such as schizophrenia or bipolar with hallucinations, but it frequently presents when the accused parent is taking drugs or alcohol that hinder the ability to be emotionally or physically present. An impairment may have also been caused by a recent brain injury, or a progressing physical illness that is affecting parenting

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access or skill, such as poorly treated epilepsy, diabetic fainting, or a contagious blood disease. Lastly, personality disorders commonly spark custody litigation, such as borderline, OCD, severe depression, narcissism, histrionic, and others. Interestingly, in a significant minority of these cases, usually extremely high-conflict, each parent accuses the other of having mental health deficiencies.

The “healthy” parent may reason that the “unhealthy” parent should have limited contact or supervised contact with the minor children. Not surprisingly, the “healthy” parent often believes that if he or she simply raises the issue in family court, that the psychotherapeutic, medical, and treatment records of the other parent are fair game and subject to subpoena. The healthy parent may try to depose psychotherapists, physicians, and other treatment providers, and attempt to force them to court to testify. However, the Federal Rules of Evidence² (FRE) support the physician-patient privilege, and although there is no FRE for psychotherapist privilege, federal case law, including rulings of the U.S. Supreme Court, supports the psychotherapist privilege.³ Many states, including California, statutorily extend the physician-patient privilege to the psychotherapist-patient relationship. Originating from the privacy rights of the California Constitution,⁴ these statutes in both arenas are in place to encourage individuals to seek treatment and be honest with their physicians and therapists.

The legal protections surrounding health issues are, at first blush, contradictory to the public policy that supports the safety and well-being of children. Many would argue, and some states take the approach, that where children are concerned, there should be no secrets ...that custody proceedings require total transparency. California’s approach is to carve out partial solutions, rather than stripping the privilege from parents. The authors

of this article explore the clash, and the work-arounds.

All fifty states have some form of the physician-patient and the psychotherapist-patient privilege, but there is substantial variety as to the strength and scope of the privileges, particularly when it comes to child custody proceedings. A privilege is an evidentiary tenet that excludes what could otherwise be relevant evidence to promote a social policy. The psychotherapist-patient and physician-patient privileges protect confidential communications between a patient and his or her psychotherapist and/or physician to encourage patients to seek treatment, and to be open and honest with their therapists and doctors so that they can be treated appropriately.

As an example of a state where the privileges are minimized in a child custody proceeding, Tennessee passed into law a 2013 custody statute that provides broad access to medical and mental health records and gives those records great weight:⁵

- (c) In making any child custody determination, the court shall consider any diagnosis and treatment programs of treating medical care providers, including mental health professionals, regarding a parent’s mental health in order to determine what parenting arrangements would be in the best interests of the child. The court shall provide greater weight to medical treatment records than to other types of mental health evaluations unless there is clear and convincing evidence that the medical treatment records are unreliable, understated, or materially inaccurate.

- (1) Medical records, including mental health records, if any, of any parent who has been evaluated, diagnosed or treated for mental health status are subject to discovery pursuant to the rules of civil procedure and this

section whenever a custody proceeding or a good faith need for a modification of custody exists.

The Tennessee statute further provides:

1. The party asking for the records must make a motion for a limited protective order.
2. Any disclosure by a health care provider of protected information pursuant to a court order is permissible.
3. Any parent diagnosed with a mental illness, even if disputed, is required to disclose the existence of such diagnosis to the court and the adverse party under seal, but required to file an annual update.
4. The law also provides the Hobson's Choice of seeking a waiver of the disclosure requirements, but to obtain the waiver, the affected parent has to waive parenting time and agree to supervised visitation.

In contrast, California is at the other end of the spectrum and has very strong psychotherapist/patient⁶ and physician/patient privileges.⁷ In fact, the psychotherapist/patient privilege in California has been accorded special protection and yields even broader protection than the physician/patient privilege. It is important to distinguish between these two privileges. Although similar, they are separate and distinct, and the psychotherapist/patient privilege is much broader. In California, the psychotherapist/patient privilege exists in all proceedings, including criminal proceedings, whereas the physician/patient privilege does not exist in criminal proceedings. (There are exceptions, which will be discussed in this article, such as a court-ordered evaluation⁸ for a determination of sanity or other reason, which is a different issue from the person's private communications with his or her individual psychotherapist).

The privileges protect "confidential communications" between a physician and patient and a psychotherapist and patient. "Confidential communications" between a patient and psychotherapist are defined as information received incident to the examination of the patient, transmitted between the patient and the psychotherapist, and includes a diagnosis and the advice given during the course of the relationship.⁹ Similar protection exists for patient-physician communications, including a diagnosis.¹⁰

In creating the confidential communications statutes,¹¹ the Legislature thought the interests of society would be better served if psychotherapists would be able to assure patients that their confidences will be protected. The intimate and sensitive nature of the communications involved in that relationship implicate constitutional,¹² as well as statutory, rights of privacy. Further, the Legislature saw fit to create an expansive definition of "psychotherapist," including psychiatrists, psychologists, clinical social workers, school psychologists, marriage and family therapists, interns, staff people, etc.¹³ There is even a special provision to protect privileged communications between a patient and an educational psychologist.¹⁴

A psychotherapist must assert the privilege on behalf of the patient and must refuse to disclose any confidential communication.¹⁵ Similarly, a physician must also assert

physician/patient privilege on behalf of the patient, although there are more exceptions than there are with the psychotherapist/patient privilege.¹⁶ This leads to the appropriate, and all-but automatic, objection by those in the mental and medical health fields to subpoenas for records or testimony.

Another body of law, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), also protects patient records, but is beyond the scope of this article. Family law courts have methods for dealing with non-privileged confidential records, including *in camera* inspections and the use of evaluators.

Losing the Right to Claim a Privilege

1. Danger to Self or Others.

Of course, an exception to the privilege is mandated when a psychotherapist has reasonable cause to believe that the patient is a danger to himself or to the person or property of others, and the disclosure of the confidential communication is necessary to prevent the threatened danger.¹⁷ The psychotherapist must report the communication to the police, to the threatened person, or to others. This code section grew out of the *Tarasoff* case.¹⁸ In that 1976 case, a patient told his psychologist of his intention to kill his girlfriend. The psychologist maintained the confidentiality and did not warn, and the patient later killed his girlfriend. In the case, the California Supreme Court held that the mental health professional had a "duty to warn" to protect the intended victim. Most jurisdictions have now adopted this rule and it is an exception to the general psychotherapeutic privilege.¹⁹

As to the physician/patient privilege, as stated, this does not apply at all in criminal proceedings.²⁰ There is no privilege if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort, or to escape detection or arrest after the commission of a crime or a tort.²¹

This exception is almost never seen in family law, but in cases where one spouse has recently been on a "5150 hold,"²² possibly showing him or her to be so incompetent as to need a conservator or a guardian ad litem, this exception may be useful, and can be used to protect the children.

2. Tendering the Issue of Mental or Physical Illness.

"Tendering" is the giving up of evidence in formal pleadings, and is a more common exception to the psychotherapist-patient and physician-patient privileges.²³ A litigant who puts his mental or emotional condition at issue may not claim the privilege, as the court must have available to it all of the information that can be obtained in regard to the litigant's mental or emotional condition. Tort cases are common examples where a plaintiff tenders the health issue, thus opening up access to health records. In family law, however, while some do tender the issue ("I was under doctor's care for severe depression but am now able to care for the children"), a mere denial of a condition

first brought up in the other litigant's papers ("I have never been so depressed I could not care for the children"), does not tender the mental or physical health issue. When the issue is not tendered, there must be other evidence before the court that proves a person suffers from any such condition and that it threatens the health or safety of a minor child.

3. Waiver of the privilege.

As discussed below, it is also possible for a person to waive any of the privileges normally protecting confidential communications.²⁴ A person may waive a privilege as to confidential communications if (1) a "significant part" of the communication protected by a privilege has been disclosed by any holder of the privilege without coercion or (2) the holder has consented to disclosure by any statement or other conduct of the holder indicating consent to the disclosure, including failing to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege. This is an area explored thoroughly in case law.

4. Court-ordered Individual Examination.

Based upon facts concerning a patient's behavior that are relevant to the proceeding, a court may order that either a physical or psychotherapeutic examination and evaluation of an individual will come into evidence. If such an examination is ordered, then the privilege is waived as to what the physician or psychotherapist finds and reports. Custody evaluations in California are slightly different. Practically speaking, although child custody evaluators are almost always given access to psychotherapists and medical professionals and their records, such access is *not* mandated by the codes governing such evaluations. On the rare occasions when a person asserts the privilege to protect his or her mental and physical health records under either the Evidence Code²⁵ or the Family Code,²⁶ the child custody evaluator may comment on such denial of access, and may even communicate that without the records and access to the treating physicians and psychotherapists the evaluation cannot go forward. Thus, these types of examinations in family law cases usually act as at least a partial waiver by the litigant.

A Long-standing Tradition of Healthcare Privacy

There are several important California family law cases related to issues of treatment privilege in child custody proceedings. The courts have been relatively consistent in their balance of patient privacy issues and public policy to encourage an individual to seek treatment on one side of the scale with the best interests of children on the other. Court of appeal decisions have made it clear that, in California, one party cannot put the other party's mental stability or physical health at issue simply by making allegations that require a denial. If one party tells the court, "my wife/husband is insane," this alone is not going to compel the court to change custody or visitation, or to order an evaluation or investigation.

In the *Koshman* case,²⁷ a seminal family law case that dealt with medical records concerning a narcotic overdose, the court upheld the privilege for the parent who had been hospitalized. The wife/mother had been previously awarded custody of the two children. Later, the father filed for a post-judgment modification of custody and served a subpoena duces tecum on the custodian of records for the mother's medical records. The mother moved to quash, asserting the physician-patient privilege. The father claimed in his declaration that the mother had been hospitalized for treatment of an overdose of drugs and that the records were vital to a determination as to her fitness to continue to have custody of the children. The trial court denied the motion to quash and ordered the records to be delivered to the court for the court to decide whether the father or Family Court Services should be able to see the records. The mother filed a petition for a writ of mandate, contending that the court's ruling was unconstitutional and an abuse of discretion and that there was no exception to the physician-patient privilege that justified such a release of the records. The court of appeal considered whether the mother's condition had been "tendered" under the Evidence Code.²⁸ The court held that the medical records sought were privileged, and that although some family law litigants might tender their medical records in some situations, generally, a defendant's "denial" of allegations about his/her health did not "tender" the issue.²⁹

Relevancy is not a criterion in the protection afforded by the statutes. Unless waived or subject to a statutory exception, the privilege applies. The rules of privilege are designed to protect personal relationships and other interests where public policy deemed them more important than the need for evidence. [Citation omitted.] There is no question but that the physician-patient privilege applies in custody disputes between parents.³⁰

The *Koshman* justices opined, by way of footnote, that the core issue to be decided was the best interest of the child, *not* the fitness of the parent.³¹ The court went on to say that there might be future cases in which the best interests of the child should be considered to be paramount to the physician-patient privilege, but that decision should be a matter for the Legislature, not the court.³²

The California Legislature has carved out limited forced testing of custody litigants *if* evidence already shows "continual illegal use of controlled substances or the habitual or continual abuse of alcohol."³³ The testing must be no more invasive than for federal employee screening (urine). If the litigant tests positive (for example, with elevated creatinine, which sometimes indicates a faked urine test), that person may demand a hearing to prove why the testing was faulty, or that there are other reasons for the elevated test data (e.g., pregnancy). A standard demand to exchange expert witnesses could be served³⁴ and use of experts to affirm or rebut the tests is not prohibited by the privilege. Other evidence could also be presented at the litigant's motion hearing, and a custody

evaluation could be ordered to determine a parent's current ability to function as a parent. However, there is no case yet that allows a court to open up a patient's entire medical record in family law based on a positive drug or alcohol test. What is relevant in a child custody proceeding is a parent's present ability to care for the children, not a past medical history that may no longer be pertinent.

Simek is another family law case that dealt with the "tendering" issue, this time in the mental health arena.³⁵ That case held that a party who is merely seeking visitation with his/her children does not automatically "tender" his or her mental health. In *Simek*, the mother was awarded physical custody of the children in a marital dissolution. The court directed the parties to work out a visitation schedule, but they were not able to reach an agreement. The mother sought to have the judgment entered and asked the court to terminate the father's visitation rights until it had been determined by "competent medical authority" that he was capable of having visitation. The mother asserted in a declaration that the father had been a patient in a psychiatric ward two years previous to the court proceedings and that he had had a "complete mental breakdown," and had attempted suicide. The mother had issued several subpoenas duces tecum for the records of the father's psychiatrist, psychologist, physician, and the records from the hospital where he had been treated. The father brought a motion to quash the records on the ground that they were protected under the psychotherapist-patient and physician-patient privileges and that the subpoenas were not limited in time or scope and were not supported by good cause. At the same time, the father moved for court approval of a visitation schedule. The trial court denied the motion to quash and ordered the records delivered to the court for inspection at the hearing on the order to show cause for visitation. The father filed a petition for a writ of mandate on the ground that the various records were statutorily privileged and to compel the court to enter an order quashing them. The court of appeal held that the *Simek* case was an even stronger example for the application of the privilege than *Koshman*. It held that the Legislature has declared it to be the public policy of the State of California to assure minor children frequent and continuing contact with both parents and that the father did not waive his privilege in the confidential communications with his physicians and psychiatrists simply by seeking his presumptive right to visitation. The justices opined that the intimate and sensitive nature of the communications called for by the patient-therapist relationship "implicate constitutional as well as statutory rights of privacy... To exact a waiver of a patient's privilege in the confidentiality of his communications to a psychotherapist as a price for asserting his right to visit his own child would pose problems of a particularly serious nature."³⁶

A third case, *Kreiss*,³⁷ this time on the issue of waiver, stands for the proposition that once a waiver of privacy is agreed upon by stipulation, there can be a continuing waiver even as to post-judgment matters. In *Kreiss*, the mother had a history of alcohol and drug abuse as well

as underlying mental health issues. The parties entered into a stipulated judgment awarding the father, Thomas, sole legal and physical custody of their only child and monitored visitation for the mother, Lisa. The order also provided that Lisa could take their son, Cameron, two weeks each year to Michigan to visit her mother. A few months later, Lisa asked to take Cameron to see her mother in accordance with that provision. Prior to the entry of the judgment, Lisa had entered a drug and alcohol rehab facility, and she was still living there when she made the request to take Cameron to Michigan. Thomas believed that Lisa's condition had deteriorated, and he requested appointment of a professional monitor by the court to accompany Lisa and Cameron, and to bolster his request, he sought discovery of Lisa's psychiatric records from UCLA Neuropsychiatric Hospital. He based his post-judgment discovery request on a joint stipulation that he and Lisa had signed during their dissolution proceedings, allowing mutual discovery of "psychological" evidence. The stipulation and order stated, "[b]oth parties waive any privilege they may have or contend to have with respect to any mental health professionals or other therapists or medical providers with whom they have consulted or by whom they have been treated from June of 1998 through the 'pendency of this action.'" Lisa countered that because the judgment had already been entered, there was no "action pending," and she refused to comply. The trial court agreed with her and said that the stipulation for the discovery had ended with the entry of the judgment. But, upon appeal, the court of appeal held that the waiver continued as to post-judgment proceedings, stating that a prior case, *Armato*,³⁸ stood for the proposition that child support and child custody proceedings remained pending post-judgment so long as the child is a minor. It reversed the trial court and said that Lisa had to comply in allowing the release of her records because of the earlier waiver. This case clearly is a cautionary tale for those representing parties who have had mental health issues. Lawyers should be careful that any waivers are drafted very precisely.

The *Manela* Test

Manela is a recent major case dealing with privacy and privilege issues from a medical disorder perspective.³⁹ This case established what amounts to a three-pronged test separating the boundaries between a patient with "tics" or "seizures" who is protected by physician-patient privilege, and the best interests of his son in a custody determination. In *Manela*, the father requested joint custody of the couple's four-year-old son. The mother alleged in her declarations that the father's "seizure disorder" should require that he not be allowed overnight visits and not be allowed to drive a vehicle with the child in it. The court ordered joint legal custody of the child, with primary physical custody to the mother and secondary physical custody to the father. This led to a discovery dispute in which the mother subpoenaed medical records of two of the father's physicians, a neurologist who had treated him for a "tic disorder," and another of his former physicians who had

treated him since he was eleven years old. The mother filed a petition for a writ of mandate after the trial court granted the father's motion to quash all of the subpoenas on the ground that the documents were protected by the physician-patient privilege. The prongs of the test are (1) waiver by third party penetration of confidentiality; (2) traditional non-disclosure of confidential information; and (3) non-tender by mere denial without more.

(1) Waiver: The mother had accompanied the father to one of his appointments to the neurologist. She sat in on the examination and heard the communications between the father and the physician. The court of appeal held that the father had waived the privilege with respect to that physician and that the communications were non-confidential and unprivileged. The father argued that his medical records should be protected by his constitutional right of privacy, but the court of appeal held that the right is not absolute, and that, in this instance, his privacy interests were outweighed by the State's compelling interest in protecting the child's best interests. It did uphold a partial protection. The justices said "determination of the nature of the compelling state interest does not complete the constitutional equation."⁴⁰ The court ordered only the non-privileged documents relating to the father's tic/seizure disorder to be produced.

(2) Traditional non-disclosure: The mother also argued that by waiving the privilege with the neurologist, that the father had also waived the privilege with the physician who had treated him when he was eleven years old and after. The court of appeal disagreed and refused to extend the waiver of privileges back to the former physician who had treated him many years earlier, when the father had reasonably believed he could fully and freely discuss his medical condition.

(3) Denial does not trigger tender: The court of appeal relied on *Koshman* to hold that the father had not tendered his medical condition by simply denying the mother's allegations.

Although the *Manela* case dealt with the more limited physician-patient privilege, prong (3) applies, and logically, prongs (1) and (2) may apply as well in cases involving the psychiatric-patient privilege when the issue comes before the court.

Courts Recognize Non-Protected Methods of Discovery

Merely because direct discovery of privileged records is disallowed, there is no prohibition to normal discovery. For example, if witnesses have seen a litigant repeatedly and uncontrollably weeping in front of a child, or having a grand mal epileptic seizure while driving with a child, or if a litigant's infant child was found wandering down the block while the litigant was witnessed in a marijuana-induced torpor for pain reduction, or if a delusional parent asks why a child is dissolving at the other parent's home (all real cases), there is nothing preventing the use of such non-privileged evidence to prove potential harm to the child.

An irascible temporary justice denying a rehearing in *Carlton* made a plea for good lawyering in 1968 when faced with a privilege issue that is still good advice today.⁴¹

It should be emphasized, however, that nothing we have said in our opinion is intended to restrict plaintiff's right to all proper discovery before trial as to all relevant facts and documents which are not privileged or as to the identity of all persons having knowledge of all relevant facts.... Much time would have been saved for all concerned if plaintiff had chosen to follow this course in the first instance.⁴²

Post-*Manela* Applications

After *Manela*, the courts have continued to wrestle with competing privileges in family law just as competing issues surface in other areas of law. A lawyer who has a waiver issue may need to analyze non-family law cases such as *Duronslet*,⁴³ where disclosure of a medical issue to a nurse was deemed a waiver. (Remember, medical issues are less protected than mental health issues in California.) Similarly, the juvenile dependency case, *in re R.R.*,⁴⁴ should be studied for the principle that the issue of drug use was tendered by an affirmative denial of use after the court had ruled visitation would change if the father could prove a change of circumstances.

Although there have been several thorough examinations of the privilege protecting children's rights to treatment privacy, children's rights are beyond the scope of this article.

Conclusion

The strong and competing public policies behind protection of children in custody disputes on the one hand, and the protection of the psychotherapeutic and medical privileges on the other, mandate that counsel need to navigate these waters with care. There are valid and important arguments supporting both needs of California residents. Of course, as a society, we want to protect children and make certain that child custody proceedings are determined in the child's best interests. But, we also want our citizens to seek medical and mental health treatment for the overall benefit of society, including themselves and their children. Certainly, encouraging a parent with a mental illness to continue in treatment and stay on medication is itself in the best interest of any child of that parent. This clash in public policies has been going on for generations, and there is no easy resolution to the competing interests. Counsel in these cases must be aware of the competing interests and must plan to deal with the facts of any particular case accordingly. Attorneys representing the "healthy" parent should make the most of non-privileged evidence to prove the potential harm to the child where it exists. The attorney representing the parent with the illness should be prepared to confront damaging non-privileged evidence and not rely solely on the non-admissibility of the privileged records to protect the client's child custody interests. Thoughtful planning

to deal with these competing interests is imperative no matter which side the attorney is representing.

- 1 CAL. F.C. § 3011.
- 2 FED. R. EVID. 501.
- 3 *Jaffee v. Redmond*, 518 U.S. 1 (1996).
- 4 CAL. CONST. art. I, §1.
- 5 TENN. CODE ANN. § 36-6-115.
- 6 CAL. EVID. CODE § 1014.
- 7 § 994.
- 8 § 1017.
- 9 § 1012.
- 10 § 992.
- 11 §§ 1012, 1014.
- 12 CAL. CONST. art. I, §1.
- 13 CAL. EVID. CODE § 1010.
- 14 § 1010.5.
- 15 § 1015.
- 16 § 995.
- 17 § 1024.
- 18 *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425 (1976).
- 19 CAL. EVID. CODE § 1014.
- 20 § 998.
- 21 § 997.
- 22 CAL. WELF. & INST. CODE § 5150.
- 23 CAL. EVID. CODE §§ 996, 1016, 1023.
- 24 § 912.
- 25 § 730.
- 26 CAL. F.C. § 3110 *et seq.*
- 27 *Koshman v. Super. Ct.*, 111 Cal. App. 3d 294 (1980).
- 28 CAL. EVID. CODE § 996.
- 29 *Koshman*, 111 Cal. App. 3d at 298.
- 30 *Id.* at 297.
- 31 *Id.* at n.1.
- 32 *Id.* at n.5.
- 33 CAL. F.C. § 3041.5.
- 34 CAL. CIV. PROC. CODE § 2034.210.
- 35 *Simek v. Super. Ct.*, 117 Cal. App. 3d 169 (1981).
- 36 *Id.* at 176-177.
- 37 *In re Marriage of Kreiss*, 122 Cal. App. 4th 1082 (2004).
- 38 *In re Marriage of Armato*, 88 Cal. App. 4th 1030 (2001).
- 39 *Manela v. Super. Ct.*, 177 Cal. App. 4th 1139 (2009).
- 40 *Id.* at 1150.
- 41 *Carlton v. Super. Ct.*, 261 Cal. App. 2d 282 (1968).
- 42 *Id.* at 297.
- 43 *Duronslet v. Kamps*, 203 Cal. App. 4th 717 (2012).
- 44 *In re R.R.*, 187 Cal. App. 4th 1264 (2010).



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