Fourth DCA Addresses Patient-Psychotherapist Privilege

By Christopher R. Bruce

Nearly all family law practitioners will eventually be confronted with a case where the parties do not agree on parental responsibility and timesharing and it becomes necessary to critique an evaluation made by a forensic psychologist or elicit testimony from a child's treating therapist. Inherent to these cases are a slew of rules governed by administrative code sections containing too many digits to mention in this article as well as several technical rules related to the privilege and confidentiality of what happens in a therapist's office. Compounding the joy of navigating these rules is they don't apply often since deposing a mental health professional in a divorce case does not happen every day.

When dealing with custody litigation it is imperative to understand the reach of Florida's patient-psychotherapist privilege. The Fourth DCA recently addressed application of the privilege in contested custody litigation in *Carrillo-Jimenez v. Carillo*, 110 So. 3d 490 (Fla. 4th DCA 2013). This case is instructive as to the role a mental health therapist plays in disclosing (or not disclosing) confidential information obtained through therapy of a child-clients and also reaffirms the role (or lack of role) that the guardian ad litem program plays in this process.

Background: Section 90.503

Practitioners need to understand when the patient-psychotherapist is applicable before debating whether the privilege can be waived or asserted. Section 90.503 of Florida's evidence code addresses the privilege. Pursuant to section 90.503, the privilege only applies to confidential communications between a "psychotherapist" and a patient. A "psychotherapist" is defined in the statute to include psychologists, mental health counselors, and in certain circumstances, medical doctors, registered nurses and personnel working in certain types of treatment facilities.

When the privilege is applicable, it operates to allow a patient of a psychotherapist the right to "disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition…". The statute allows the privilege to be claimed by the psychotherapist's patient, the patient's attorney, a patient's guardian/personal representative, or the psychotherapist on behalf of the patient.

Practice Tip: Just because there is a psychotherapist and a patient does not been there is a privilege. There must be communications involving "diagnosis or treatment" of a "mental or emotional condition" for the privilege to be triggered.

Right to Claim Privilege in Custody Litigation

When psychotherapists are injected into contested custody litigation the dynamics often include one parent wanting to introduce the testimony of a child's psychotherapist while the other parent wants to keep the therapist from as far from the courthouse as possible. The question that arises in these cases is: "*Who gets to decide whether my child's confidential communications with the therapist are privileged?*". *Carillo* resolves this question and essentially leaves the decision to the child's therapist.

In *Carillo*, Judge Rosemarie Scher denied a father's request to strike a social investigation report on account of the report including confidential communications between the children and their psychotherapist. Part of the father's motion to strike was based upon the court not appointing a guardian ad litem for purposes of determining whether the child's patient-psychotherapist privilege should be waived or asserted. The father petitioned the Fourth DCA for a writ of certiorari following the denial of his motion to strike, claiming that the trial court's future consideration of the social investigation report's contents would disadvantage him in the dissolution proceedings.

In *Carillo*, the Fourth DCA denied the father's petition. Relying on *Hughes v. Schatzberg*, 872 So. 2d 996 (Fla. 4th DCA 2004), the court held that a parent involved in contested custody litigation lacks standing to assert the patient-psychotherapist privilege on behalf of their child "where the parent is involved in litigation seeking to pursue their own interests, and the child is not a party to the underlying action". Given the relative brevity of the *Carillo* opinion, it is worth important to note that *Hughes* states it is not an abuse of discretion for a divorce court judge to refuse appointing a guardian ad litem to assert or waive a child's patient-psychotherapist privilege. The rationale for this is section 90.503(3)(d) allows a psychotherapist to assert the privilege on behalf of the child when the therapist believes it is in the child's best interest to do so.

Bottom Line

Practitioners need to advise their clients that they have no legal ability to prevent their children's therapist from testifying about their child in contested custody litigation. Perhaps more importantly, therapists need to know that they are not prohibited from testifying just because a child's parent (who is likely paying for the therapy) "says no". Absent a valid assertion of the privilege, the Fourth DCA allows therapists to assert or waive the privilege on behalf of their child clients.

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