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How mental health laws impact parents in the divorce process

This portion of my series on Illinois mental health law discusses the impact of the Mental Health and Developmental Disabilities Confidentially Act on adults. Previously, I focused on children.

As a reminder, the act is more stringent in many ways than the Health Insurance Portability and Accountability Act, and therefore, trumps the federal law. The general rule is that all mental health records and communications are confidential and shall not be disclosed with specific carved out exceptions.

Deciding whether to pursue introduction of a parent's mental health records and communications in a contested custody proceeding is a difficult judgment call. The purpose of introducing such information is not always malicious in nature and can be simply to provide the judge with more information on the other parent's fitness to parent. Other times, such inquiries are grossly exaggerated and misused.

By law, patients have an established interest in preventing the disclosure of their mental health records and communications. These rights can be parsed out into three categories: privacy, confidentiality and privilege.

There are times when disclosure of this information might be necessary to assist the court in making a proper determination of allocation of parental responsibilities of the minor children.

Confidentiality, privacy, privilege

A patient in therapy must feel assured of complete confidentiality and privacy to effectively reveal their thoughts, fears and perceptions of the world. In turn, an honest client allows a therapist to adequately gauge the existence of any mental health issues and assess proper treatment.

As noted, all records and communications are confidential and shall not be disclosed with a few notable exceptions.

As of the beginning of this year, the mental health act, amended the law on confidentiality to state as follows: "Records and communications are confidential when made or created in the course of providing mental health ... services regardless of whether there is a therapeutic relationship." 740 ILCS 110/3.

A confidential communication by a patient to a therapist "includes any communication made to a therapist by a recipient or others in the presence of a therapist during or in connection with providing mental health services to a recipient." 740 ILCS 110/2.

Therapist notes are typically regarded as work product and generally are not subject to discovery. Of mention, the act broadly defines "therapist" as, "A psychiatrist, physician, psychologist, social worker or nurse providing mental health ... services."

Our laws demonstrate a commitment to maintaining confidentiality and privacy in a therapist-client relationship for good reason. Public policy suggests that a parent seeking mental health treatment to cope with a divorce should not be punished by having such records and communications used against them in a battle for allocation of parental responsibility.

Release of patient records, communications

Allowing private communications to be made public inherently conflicts with a patient's expectation of confidentiality and privacy. However, our law also recognizes that such disclosure is sometimes necessary if a parent's mental health presents a danger to the child's best interest.

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For example, confidentiality does not apply to Section 604.10 court-appointed evaluators in domestic relations cases who are appointed to aid the court in making best interest determinations.

Joseph Monahan, founder and principal of Monahan Law Group and adjunct professor at Loyola University Chicago School of Law, argued the 2011 seminal case of *Johnston v. Weil*.

He stated, "This process is not confidential because the evaluator is an expert witness appointed by the court, who is directed to prepare a report for distribution to the judge and to the parties."

By contrast, there may be instances where, although attorneys are not entitled to disclosure of mental health information, such disclosure appears imperative. Such would be the case where an attorney is working with a client whose spouse appears to present a substantial and significant danger to any child.

The mental health act specifies that neither a party, nor his or her attorney, be permitted to serve a subpoena seeking to obtain access to records or communications unless the subpoena is accompanied by either a written court order or the written authorization of the parent being treated.

Monahan elaborated, "Prior to the issuance of the court order, each party is entitled to be heard and written notice of the motion must be provided to both the recipient of services [parent being treated] and the treatment provider [therapist]. Failing to provide notice will result in an incorrectly issued subpoena thereby barring disclosure of records."

As it pertains to therapist testimony, Monahan stated, "In order for a therapist to testify in court, there must still be a subpoena accompanied by a written order from the court or written authorization of the parent being treated." A therapist must adhere to a plethora of ethical guidelines which prohibit him or her from acting in dual roles, such as treater and advocate.

To avoid such overlap, Monahan recommended the treating therapist refrain from advocating for his or her patient and remain factual. He stated, "The therapist can provide the court with factual information such as how many sessions attended, length of the sessions and whether or not treatment has been terminated."

Less commonly, adults will opt to voluntarily authorize the release of his or her records. The requirements of valid authorization are the same for adults and children over the age of 12, as discussed in last month's article.

As a brief recap, such authorization must be: In writing and be extremely specific as to who is receiving the information, who is disclosing the information, the reasons for such disclosure and the time period for the release.

Maintaining balance

As the attorney, it can be difficult not to get wrapped up in your client's emotional turmoil. When deciding whether to seek disclosure of mental health records and communications, be sure to check your own emotions at the door.

If your reasons for seeking the information are malicious — rethink your long-term strategy. Ensure you are seeking the information for the sole purpose of painting an accurate picture for the judge which will ultimately benefit the minor children.

The author would like to acknowledge the substantial contributions to this article by lawyer Amy E. McCarty and law clerk Missy Turk.

COLLABORATIVE CONCEPTS

Beth Fawver McCormack

Beth Fawver McCormack is a partner at Beermann. She practices exclusively in family law matters and is a collaborative law fellow, mediator and child representative.