

# Balancing the Court’s *Parens Patriae* Obligations and the Psychologist-Patient Privilege in Custody Disputes

by  
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## Introduction

While parents retain constitutionally protected rights over their children,<sup>1</sup> our society, through the courts, is tasked with the larger goal of protecting children who are the subject of custody disputes. Trial courts across the United States have a duty to protect the best interests of the children.<sup>2</sup> This duty’s origin

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<sup>1</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000) (recognizing parents’ right to raise their children).

<sup>2</sup> Statutes of at least twenty-one states and the District of Columbia specify a list of factors for courts to consider when determining the best interests of the child. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 3 (2012).

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stems from the *parens patriae* authority of the state.<sup>3</sup> *Parens patriae* means “parent of the country” and refers to the state’s role as the guardian of the juveniles.<sup>4</sup> The state must protect those who cannot protect themselves, and thus parental rights are not absolute but instead “must be balanced against the State’s long-recognized interest as *parens patriae*.”<sup>5</sup> To that end, the adults’ privilege gives way to the court’s need for information relevant in making decisions about children’s best interests.<sup>6</sup>

In most states, the best interests of the children mandate that a trial judge conduct a comparative fitness analysis using numerous factors, one of which includes the mental health of each parent.<sup>7</sup> However, it is often difficult to analyze the mental state of the parties because parents’ mental health information is protected by the psychotherapist-client privilege.<sup>8</sup> States differ widely on the approaches to tackling this issue. This article will address the individual and societal interest in having a psychologist-patient privilege and will argue that this privilege should not,

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<sup>3</sup> Julia H. McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 119 (2009).

<sup>4</sup> *Id.* at 120.

<sup>5</sup> *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

<sup>6</sup> McLaughlin, *supra* note 3, at 117 n.19.

<sup>7</sup> See ARIZ. REV. STAT. ANN. § 25-403 (2015) (West); COLO. REV. STAT. § 14-10-124(1.5)(a)(V) (West 2015); CONN. GEN. STAT. § 46b-56(c)(12) (2015); DEL. CODE ANN. tit. 13, § 722(a)(5) (West 2015); D.C. CODE § 16-914(a)(3)(E) (West, 2015); FLA. STAT. § 61.13(3)(g) (West, 2015); GA. CODE ANN. § 19-9-3(a)(3)(I) (West, 2015); HAW. REV. STAT. § 571-46(b)(14) (West, 2015); 750 ILL. COMP. STAT. 5/602(a)(5) (2015); IND. CODE § 31-17-2-8(6) (2015); KY. REV. STAT. ANN. § 403.270(2)(e) (West 2015); LA. CIV. CODE ANN. art. 134(7) (West 2014); MICH. COMP. LAWS § 722.23(g) (2015); MINN. STAT. § 518.17(1)(a)(9) (2015), *amended by* 2015 Minn. Sess. Law Serv. ch. 30 (S.F. 1191) (West); MO. REV. STAT. § 452.375(2)(6) (2015); MONT. CODE ANN. § 40-4-212(1)(e) (West 2015); 2015 Nevada Laws ch. 445 (A.B. 263) (West) (to be codified at NEV. REV. STAT. § 125C(8)(4)(f)); N.M. STAT. ANN. § 40-4-9(A)(5) (West 2015); N.D. CENT. CODE § 14-09-06.2(1)(g) (2015); OHIO REV. CODE ANN. § 3109.4(F)(1)(e) (West 2015); 23 PA. CONS. STAT. § 5328(a)(15) (2015); TENN. CODE ANN. § 36-6-106(a)(8) (West 2015); TEX. FAM. CODE ANN. § 263.307(b) (West 2015); VA. CODE ANN. § 20-124.3(2) (West 2015); WIS. STAT. § 767.41(5)(7) (West 2015); WYO. STAT. ANN. § 20-2-201(a)(ix) (West 2015).

<sup>8</sup> See generally 81 AM. JUR. 2D *Witnesses* § 427 (2015). The term “psychotherapist” is used to encompass both psychiatrists and psychologists in most states, but this article will focus more on the psychologist-client privilege because some states afford greater protection to the psychologist-client privilege.

however, be absolute in child custody cases. Part I of this article highlights approaches taken by the states on the disclosure of mental health records in child custody proceedings. This part categorizes the different approaches. Part II of this article addresses policy concerns that are at the forefront of criticism against disclosure of mental health records in custody cases. Supporters of an absolute psychologist-client privilege point to empirical data supporting their claim that parents will not seek treatment if they believe custody will be at issue, but a closer look at the same data reveals limitations and findings contrary to the claimed need for an absolute psychologist-client privilege. Part III of this article proposes the “best” solution as to how and when mental health records should be disclosed. This solution allows the children to be protected, the privilege to be balanced against the best interests of the children, and ultimately, the court to be well-informed before making the custody determination.

## **I. States’ Approaches to the Psychologist-Client Privilege in Custody Disputes**

Several states hold the psychologist-client privilege on the same footing as the privilege between the attorney and the client.<sup>9</sup> Hence, the psychologist-client privilege is very protective of communications made in furtherance of the client’s objective for seeking the psychologist’s help in the first place. States have developed numerous approaches to address how to incorporate mental health records in child custody proceedings; some states are more protective of the privileged communications than others. At one end of the spectrum, some states take the position that the statutory factors considered by the courts in determining custody and what is in the children’s best interests are elements of the custody case, and thus when parties file for cus-

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<sup>9</sup> ALA. CODE § 34-26-2 (2015); ARIZ. REV. STAT. ANN. § 32-2085(A) (2015) (West); ARK. CODE ANN. § 17-97-105 (West 2015); IDAHO CODE ANN. § 54-2314 (West 2015); KAN. STAT. ANN. § 74-5323(a) (West 2015); MONT. CODE ANN. § 26-1-807 (2015); N.H. REV. STAT. ANN. § 330-A:32 (2015); N.J. STAT. ANN. § 45:14B-28 (West 2015); N.Y. C.P.L.R. 4507 (McKinney 2015); 42 PA. CONS. STAT. § 5944 (2015); TENN. CODE ANN. § 63-11-213 (2015); WASH. REV. CODE § 18.83.110 (West 2015).

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tody, the privilege is waived as they place their mental health “at issue.”<sup>10</sup> At the other end of the spectrum, states hold that only under defined limited circumstances of abuse will a custody dispute warrant a waiver of privilege, because those states do not consider the best interests statutory factors as elements of a claim for custody, and, thus, filing for custody does not place the parent’s mental health “at issue.”<sup>11</sup> A third approach is that a showing that the mental health of a parent is at issue is required before the psychologist-client privilege is waived over the objection of the parent in child custody proceedings, and then the records are inspected *in camera*. These differences in state approaches highlight the need for a solution that truly protects the best interests of the child while understanding the need to preserve a patient’s right to freely disclose to the psychologist for effective therapy.

##### A. *Jurisdictions Favoring Disclosure of Mental Health Records over the Privilege*

Eleven states have adopted the approach either through the common law or through the courts’ interpretations of current law that in a custody action, there is no psychologist-client privilege once a parent seeks custody in a divorce proceeding.<sup>12</sup> Under

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<sup>10</sup> See, e.g., *In re Marriage of Gove*, 572 P.2d 458, 462 (Ariz. Ct. App. 1977) (“In seeking custody of the children [the mother] placed her mental condition at issue.”); Ike Vanden Eykel & Emily Miskel, *The Mental Health Privilege in Divorce and Custody Cases*, 25 J. AM. ACAD. MATRIM. LAW. 453, 462 (2013).

<sup>11</sup> See Eykel & Miskel, *supra* note 10, at 457.

<sup>12</sup> *Gove*, 572 P.2d at 462 (“In seeking custody of the children [the mother] placed her mental condition at issue.”); *Shumaker v. Andrews*, 1992 WL 510196, at \*4 (Del. Fam. Ct., 1992) (holding that seeking visitation places a party’s mental condition at issue); *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990) (“[The mother] placed her mental condition in issue when she petitioned for and was granted custody under the original order, and that condition remains in issue for the purposes of custody questions during the children’s minority.”); *Werner v. Kliewer*, 710 P.2d 1250, 1255 (Kan. 1985) (“As [the mother] was seeking custody of the children in her divorce action, her fitness as a parent and ability to care for her children were issues to be determined by the court.”); *Atwood v. Atwood*, 550 S.W.2d 465, 467 (Ky. 1976) (“In seeking the custody of the children in the original petition for dissolution of marriage, [the mother] made her mental condition an element to be considered by the court in awarding her custody.”); *Dawes v. Dawes*, 454 So. 2d 311, 313 (La. Ct. App. 1984)

this approach, once a parent seeks custody, then the psychotherapist-patient privilege may no longer be asserted.<sup>13</sup> Even under this category, the jurisdictions differ on how the records are to be disclosed once custody or visitation is sought. The majority of states under this category, such as Delaware, Indiana, Kentucky, Louisiana, Nebraska, New York, and Texas, take the position that seeking custody places mental health condition at issue, constitutes a waiver, or falls under an exception to the privilege. For example, in Kentucky, once a parent files for custody, each of the parties “subject themselves to extensive and acute investigation of all factors relevant to . . . the award of custody.”<sup>14</sup>

Even if state law does provide that there is no privilege upon filing for custody or visitation, this fact alone does not automatically require the parties to submit all mental health records. Some states, such as Arizona, Kansas, New York, and Ohio, require an additional step in which the court conducts an *in camera* review to determine what may be admitted or disclosed. In Arizona, the court conducts an *in camera* review to determine what information may lead to admissible evidence.<sup>15</sup> In Kansas, although the best interests of the child override the parent’s right of confidentiality, an *in camera* inspection should be used to prevent disclosure of irrelevant evidence at trial.<sup>16</sup> New York courts first examine the records to determine which records shall be dis-

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(“[W]e find that the [father’s] physical and/or mental conditions are essential elements to his action for joint custody.”); *Clark v. Clark*, 371 N.W.2d 749, 752 (Neb. 1985) (“As to the confidential relationship, if any, between [the psychiatrist] and [the mother], she has waived any privilege she had in her conversations with Dr. Tatay by the filing of her petition alleging her fitness to have custody of her child.”); *Frierson v. Goldston*, 779 N.Y.S.2d 670, 673 (N.Y. App. Div. 2004) (“By seeking custody or increased visitation, [the father] had effectively waived his privilege regarding [his mental health records.]”); *Neftzer v. Neftzer*, 748 N.E.2d 608, 611 (Ohio Ct. App. 2000) (“In seeking custody of the children, [the mother] made her mental and physical condition an element to be considered by the trial court in awarding custody.”); *Garza v. Garza*, 217 S.W.3d 538, 555 (Tex. Ct. App. 2006) (“[The mother’s] medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children’s best interests.”).

<sup>13</sup> *Matter of Von Goyt*, 461 So. 2d 821, 823 (Ala. Civ. App. 1984).

<sup>14</sup> *Atwood*, 550 S.W.2d at 467.

<sup>15</sup> *Blazek v. Superior Court*, 869 P.2d 509, 516 (Ariz. Ct. App. 1994).

<sup>16</sup> *In re Marriage of Kiister*, 777 P.2d 272, 276 (Kan. 1989).

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closed.<sup>17</sup> In Ohio, the court must conduct an *in camera* review for disclosure and only those records that are “causally or historically” related to a condition relevant for custody is disclosed.<sup>18</sup>

B. *Jurisdictions Favoring the Privilege over Disclosure of Mental Health Records*

At the outset, it is notable that only six states seem to place the parents’ rights over the best interests of the children by retaining the psychologist-patient privilege in child custody disputes.<sup>19</sup> This rule allows for a party to assert the psychologist-patient privilege at any point during a child custody dispute even when the states mandate the courts to consider the parents’ mental health as a factor for custody, effectively barring the court from reviewing the records. Without the ability to discover and analyze mental health records, the trial judge and the opposing party must find another route to determine the mental fitness of a parent.<sup>20</sup> The jurisdictions that follow this approach allow an

<sup>17</sup> State *ex rel.* Hickox v. Hickox, 410 N.Y.S.2d 81, 84 (N.Y. App. Div. 1978).

<sup>18</sup> Sweet v. Sweet No. 2004-A-0062, 2005 WL 3610481, at \*2 (Ohio Ct. App., Dec. 29, 2005).

<sup>19</sup> See *In re M.L.*, 148 Cal. Rptr. 3d 911, 923 (Cal. Ct. App. 2012) (“Only after a finding the child is at risk, and assumption of jurisdiction over the child, do a parent’s liberty and privacy interests yield to the demonstrated need of child protection.”); *Barker v. Barker*, 440 P.2d 137, 139 (Idaho 1968) (holding physician-patient privilege protects psychiatric counseling records from disclosure in custody dispute and directing parties to court rule providing for court-ordered examinations); *Laznovsky v. Laznovsky*, 745 A.2d 1054, 1073 (Md. 2000) (“The Legislature clearly established a . . . public policy [of choosing] to preserve the privilege in custody cases.”); *Navarre v. Navarre*, 479 N.W.2d 357, 358 (Mich. Ct. App. 1991) (“potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships.”); *Avery v. Nelson*, 455 P.2d 75, 78 (Okla. 1969) (finding that party to litigation does not waive privilege against compulsory disclosure of physician-patient communications simply by placing in issue in litigation his own physical condition or disability); *State v. Evans*, 317 P.3d 290, 293 (Or. Ct. App. 2013) (“[Oregon law’s] limited reach does not extend to psychotherapist-patient privileged statements that do not mention a child’s abuse, or the cause thereof.”).

<sup>20</sup> See Leigh D. Hagan & T. Michael Blanks Jr., *Hiding the Ball or Necessary Protection: § 20 -124.3:1 Custody and Admissibility of Mental Health Records*, VA. LAW. 1, 1 (Oct. 2004), (discussing how to obtain mental health records in custody disputes notwithstanding a statute to the contrary).

exception for disclosure only in extreme circumstances, such as reporting child abuse.<sup>21</sup>

In Idaho, Maryland, and Oregon, the psychologist-client privilege takes precedence except in these circumstances: when the court orders an evaluation, when either of the parties asserts mental health as an element of a claim or defense, or when there is evidence of abuse.<sup>22</sup> In Michigan, any value the mental health records may offer to the court gives way to the psychologist-client relationship.<sup>23</sup> In California, although the court contemplated that the privilege “might” yield to a countervailing interest in ensuring a full and proper determination of a child custody dispute in limited circumstances, the court held that the “privilege [can] be waived when the patient voluntarily and knowingly discloses otherwise confidential information or tenders her mental state as an issue.”<sup>24</sup> This waiver must be done with “sufficient awareness of the relevant circumstances and *likely conse-*

<sup>21</sup> See ALASKA STAT. § 47.17.020 (West 2015); COLO. REV. STAT. §§ 19-3-304-311 (2015); CONN. GEN. STAT. § 52-146c(c)(4) (2015); DEL. CODE ANN. tit. 16, §§ 903, 909 (2015); DEL. UNIF. R. EVID. 503(d)(7); D.C. CODE § 4-1321.02; FLA. STAT. § 39.204; IND. CODE § 31-32-11-1; KAN. STAT. ANN. § 74-5323(b) (2015); LA. CODE EVID. ANN. art. 510.B(2)(k); MD. CODE ANN., FAM. LAW § 5-704 (West 2015); MASS. GUIDE TO EVID. § 503(d)(7); MINN. STAT. § 595.02(2)(a) (2015); MISS. CODE ANN. § 73-53-29(e) (West, 2015); MO. REV. STAT. § 210.140 (2015); MONT. CODE ANN. § 41-3-205 (2015); NEB. REV. STAT. § 38-3131(3)(a) (West 2014 Reg. Sess.); N.H. REV. STAT. ANN. § 169-C:29 (2015); N.J. STAT. ANN. § 9:6-8.10 (2015); N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney 2015); N.C. GEN. STAT. § 8-53.3 (West, 2015); N.D. CENT. CODE § 50-25.1-10 (2015); OHIO REV. CODE ANN. § 2317.02(B)(1)(b) (2015); OKLA. STAT. tit. 43A, § 1-109(E)(5) (2015); OR. REV. STAT. § 419B.040(1) (West 2015), *amended by* 2015 Or. Laws No. 629 (H.B. 2478); 23 PA. CONS. STAT. § 6311 (2015); R.I. GEN. LAWS § 5-37.3-4(b)(4)(i) (West 2015); S.C. CODE ANN. § 63-7-310 (West 2015); S.D. CODIFIED LAWS § 26-8A-3 (2015); TENN. CODE ANN. § 37-1-411 (2015); TEX. R. EVID. 509(e)(7); UTAH CODE ANN. § 62A-4a-403 (West 2015); VT. STAT. ANN. tit. 33, § 4913 (West 2015), *amended by* 2015 Vermont Laws No. 60 (S. 9); VA. CODE ANN. § 8.01-400.2 (2015); WASH. REV. CODE § 26.44.030 (2015); WIS. STAT. § 905.04(4)(e) (2015); WYO. STAT. ANN. § 33-27-123(a)(i) (2015).

<sup>22</sup> IDAHO R. EVID. 503(d)(2)–(4); MD. CODE ANN., CTS. & JUD. PROC. §§ 9-109(d)(2), 9-109(d)(3)(i) (2015); MD. CODE ANN., FAM. LAW § 5-704 (2015); OR. REV. STAT. §§ 40.230(4)(a), 40.230(4)(b)(A), 419B.040 (2015).

<sup>23</sup> Lopez-Negrete v. Lopez-Negrete, No. 286247 2009 WL 1506668 at \*15 (Mich. Ct. App. May 26, 2009).

<sup>24</sup> *M.L.*, 148 Cal. Rptr. 3d at 920.

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quences.”<sup>25</sup> For example, in *In re M.L.*,<sup>26</sup> the mother’s psychiatric records were protected by the psychotherapist-patient privilege even in a child dependency proceeding.<sup>27</sup> The court held that the records were neither disclosed nor admitted even if the Department of Children and Family Services needed the records to meet its burden of proof and records would have established that children were not safe with their mother because California law has no such exception to the privilege.<sup>28</sup>

### C. *Jurisdictions Requiring a Court Finding Before Disclosure of Mental Health Records*

In the more middle-ground jurisdictions, merely filing for child custody does not waive the psychotherapist-client privilege. In these jurisdictions, generally, the court first conducts a hearing to determine whether the situation at issue requires disclosure of mental health records and thereby decides to “pierce” the privilege. Most states require an *in camera* review of the mental health records. Even then, the procedures and requirements governing *in camera* inspections differ among states. This subpart will highlight the various methods used to handle mental health records.

Some, but not all, courts in this middle-ground approach require a showing of good cause before an *in camera* inspection of the mental health records. These requirements vary widely. In Colorado, an evidentiary showing of waiver by the party seeking disclosure is required before the court may review the records *in camera*; waiver occurs only if a party injects his mental condition into the case as the basis of a claim or an affirmative defense.<sup>29</sup> In Utah, the court must first determine whether the patient suffers from a mental “condition” or a mental “problem.” If the court determines that the patient suffers from a mental problem and not a mental condition, then the court cannot order an *in camera* review of confidential records.<sup>30</sup> A mental condition is

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<sup>25</sup> *Id.* at 925.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 925.

<sup>28</sup> *Id.* at 922.

<sup>29</sup> *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

<sup>30</sup> *State v. Otterson*, 246 P.3d 168, 170 (Utah Ct. App. 2010).

“not transitory or ephemeral.”<sup>31</sup> Rather, the condition must be a “state that persists over time and significantly affects a person’s perceptions, behavior, or decision-making in a way that is relevant to reliability of person’s testimony.”<sup>32</sup>

A hearing is conducted before an *in camera* review of the mental health records and the states differ on the required findings before disclosure of mental health records can occur. The court cannot consider mental health in Alaska unless it finds that there is a “nexus between mental [health] and parenting ability.”<sup>33</sup> The parent’s mental health is “relevant only insofar as it has or can be expected to negatively affect the child.”<sup>34</sup> In Connecticut, the court must make a finding that “it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and the psychologist be protected.”<sup>35</sup> In Florida, if a “‘calamitous event,’ such as an attempted suicide [along with supporting behavior], occurs during a pending custody dispute, . . . the mental health of the parent is sufficiently at issue to warrant finding no statutory privilege exists.”<sup>36</sup> Mental health is not at issue if a party merely alleges mental instability.<sup>37</sup> In Georgia, the party seeking disclosure must prove that the other party waived the privilege during the hearing before the records are disclosed.<sup>38</sup>

A party could subpoena psychological records and admit them in evidence except for privileged communications.<sup>39</sup> In Illinois, a party must first have a court order to subpoena mental health records<sup>40</sup> and then the court will hold an *in camera* review of the evidence to determine whether: “(1) it is relevant, probative, not unduly prejudicial [or inflammatory]; (2) that other sat-

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<sup>31</sup> McCloud v. State, 310 P.3d 767, 770 (Utah Ct. App. 2013).

<sup>32</sup> *Id.*

<sup>33</sup> Lowdermilk v. Lowdermilk, 825 P.2d 874, 879 (Alaska 1992).

<sup>34</sup> S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985).

<sup>35</sup> Helbig v. Helbig, No. FA114115685S 2014 WL 1283427, at \*2 (Conn. Super. Ct. 2014).

<sup>36</sup> O’Neill v. O’Neill, 823 So. 2d 837, 840 (Fla. Dist. Ct. App. 2002).

<sup>37</sup> Peisach v. Antuna, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989); Bruce G. Borkosky & Mark S. Thomas, *Florida’s Psychotherapist-Patient Privilege in Family Court*, FLA. B.J., May 2013, at 35, 37.

<sup>38</sup> Plunkett v. Ginsburg, 456 S.E.2d 595, 597 (Ga. Ct. App. 1995).

<sup>39</sup> GA. CODE ANN. § 37-3-166(a)(8) (2015).

<sup>40</sup> Mandziara v. Canulli, 701 N.E.2d 127, 133 (Ill. App. Ct. 1998).

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isfactory evidence is demonstrably unsatisfactory; and (3) that disclosure is more important to the interests of substantial justice than protect[ion from injury to] the therapist-recipient relationship.”<sup>41</sup> In Iowa, the party seeking disclosure must assert a counterbalancing consideration to override the privilege.<sup>42</sup> This is an extremely high burden to show because the best interests of the child are not a countervailing interest; rather, the parent is presumed to act in the best interests of his child.<sup>43</sup> In Massachusetts, if the privilege is asserted, the judge has the discretion to inspect the records *in camera* to determine whether the privilege applies to the records; there is no privilege if the judge finds that “the psychotherapist has evidence bearing significantly on the patient’s ability to provide suitable care or custody and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected.”<sup>44</sup> In North Carolina, the court must determine that disclosure of records is “necessary to a proper administration of justice”; there must be a specific finding before the court can compel disclosure or else a new trial is necessary.<sup>45</sup>

The jurisdictions differ in their standards of which mental health records are “relevant.” In Minnesota, courts have to carefully control pre-hearing disclosure of mental health records by examining mental health records and using the court’s protective authority to prevent disclosures that are “irrelevant to the custody question or otherwise annoying, embarrassing, oppressive, or unduly burdensome.”<sup>46</sup> In Mississippi, when determining whether the records are relevant to a custody proceeding, the court has to consider whether:

- (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; and (5) given the severity of the alleged disor-

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<sup>41</sup> *In re Kimberly C.*, 2011 Ill. App. 3d 110412-U, at \*6 (Ill. App. Ct. 2011).

<sup>42</sup> *In re Marriage of Mulligan*, 802 N.W.2d 237, at \*5 (Iowa Ct. App. 2011).

<sup>43</sup> *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 673 (Iowa 2010).

<sup>44</sup> *P.W. v. M.S.*, 857 N.E.2d 38, 43 (Mass. App. Ct. 2006).

<sup>45</sup> *McGinnis v. McGinnis*, 311 S.E.2d 669, 671 (N.C. Ct. App. 1984).

<sup>46</sup> *Morey v. Peppin*, 353 N.W.2d 179, 183 (Minn. Ct. App. 1984).

der, communications made in the course of treatment are likely to be relevant.<sup>47</sup>

In Nevada, “waiver of the privilege ‘applies to discovery of matters causally or historically related to [a patient’s] health put in issue;’” the party must “overtly” place mental condition at issue.<sup>48</sup> “The court [has to] conduct [an] *in camera* review of the requested mental health records to determine if they are sufficiently relevant to [the] claim . . . such that waiver of the . . . privilege [ ] should be found.”<sup>49</sup>

The states also vary in the levels of protection for the privilege such as allowing or disallowing an adverse inference to be drawn. In Montana, “in the exercise of the court’s inherent power to do what is best to protect the welfare of the infant, the right of (the mother) to invoke the . . . privilege must yield to the paramount rights of the infant.”<sup>50</sup> Similarly, in Washington, the court needs complete information to make a decision in child’s best interests.<sup>51</sup> Even if complete information is not available to the court, Missouri and Massachusetts law allows an unfavorable inference to be drawn against the party who refuses to waive privilege.<sup>52</sup> However, other states do not allow adverse inferences to be drawn upon a claim of privilege.<sup>53</sup>

There are also variations in who reviews the records and which parties are present when the records are reviewed. In New Hampshire, the court may conduct an *ex parte in camera* review of the records to determine whether waiver or assertion of the privilege is in the child’s best interests.<sup>54</sup> In South Dakota, waiver of privilege gives a party seeking disclosure an absolute right of access to privileged material; “the party seeking to oppose discovery has the right to an *in camera* hearing” in the presence of both parties “to determine whether the material is relevant” or “they may file a motion for protective order or ob-

<sup>47</sup> Miss. R. EVID. 503(d)(4) advisory committee cmt.

<sup>48</sup> *Martin v. Collier*, No. 2:11-cv-00320-LRH-GWF, 2012 WL 28837, at \*2 (D. Nev. Jan. 4, 2012).

<sup>49</sup> *Id.* at \*3.

<sup>50</sup> *In re A.J.S.*, 630 P.2d 217, 221 (Mont. 1981).

<sup>51</sup> *In re Welfare of Dodge*, 628 P.2d 1343, 1347 (Wash. Ct. App. 1981).

<sup>52</sup> MASS. GUIDE TO EVID. § 525(a); *Brodsky v. Brodsky*, 233 S.W.2d 829, 833 (Mo. Ct. App. 1950).

<sup>53</sup> *See, e.g.*, HAW. R. EVID. 513.

<sup>54</sup> *In re Berg*, 886 A.2d 980, 988 (N.H. 2005).

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jections to discovery.”<sup>55</sup> In addition, “both parties must have access to the contested information, and . . . be allowed to make their record.”<sup>56</sup> In Rhode Island, the court has discretion to define the best interests of the child standard;<sup>57</sup> the proper procedure is for the court to review and redact *in camera* before documents are produced.<sup>58</sup> In West Virginia, in the context of a criminal case, “when the mental health records of a . . . witness are sought for the purpose of impeaching [his] credibility, the court . . . first examine[s] the records *ex parte* to determine if the request is frivolous.”<sup>59</sup> “If the court finds probable cause to believe that the . . . records contain material relevant to the credibility issue, counsel [may] examine the records, after which an *in camera* hearing [is] held in which the requesting party’s counsel designates the parts of the records he believes [are] relevant, and both sides present arguments on the relevancy of those parts.”<sup>60</sup>

Some states prefer to obtain mental health information through an evaluation of the parties either as the first source of information or the exclusive source of information. In Connecticut, the “most appropriate” source of information regarding a parent’s mental health is to hire an expert for litigation rather than obtaining the parties’ mental health records from a treating therapist.<sup>61</sup> In Pennsylvania, the “preferred method” is through an evaluation and that the privilege is waived only to specific records.<sup>62</sup> In New Jersey, when faced with the psychologist-client privilege, courts must look first for information from a court-appointed evaluator or one hired by the parties.<sup>63</sup> After these experts conduct independent tests, they “submit reports to the court and the parties” for purposes of litigation.<sup>64</sup> Only when the evaluator’s tests are “inadequate” will the court determine whether to pierce the psychologist-client privilege by compelling

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<sup>55</sup> *Maynard v. Heeren*, 563 N.W.2d 830, 836 (S.D. 1997).

<sup>56</sup> *Id.*

<sup>57</sup> *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990).

<sup>58</sup> *Pastore v. Samson*, 900 A.2d 1067, 1086 (R.I. 2006).

<sup>59</sup> *Nelson v. Ferguson*, 399 S.E.2d 909, 910 (W. Va. 1990) (Syllabus by the Court).

<sup>60</sup> *Id.*

<sup>61</sup> *Cabrera v. Cabrera*, 580 A.2d 1227, 1233 (Conn. App. Ct. 1990).

<sup>62</sup> *M.M. v. L.M.*, 55 A.3d 1167, 1175 (Pa. Super. Ct. 2012).

<sup>63</sup> *Kinsella v. Kinsella*, 696 A.2d 556, 583 (N.J. 1997).

<sup>64</sup> *Id.* at 579.

disclosure of the mental health records.<sup>65</sup> When determining whether to compel disclosure of mental health records, New Jersey courts apply a three-prong 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 [seeking disclosure] must show that the information cannot be secured from any less intrusive source.”<sup>66</sup>

When a court orders an evaluation of the parties by an independent evaluator, the communications to the evaluator are not privileged.<sup>67</sup> These evaluators, however, usually have access to the mental health records from the evaluated party’s therapist by requiring the party to execute a release prior to evaluation.<sup>68</sup> The report is provided to the court, but the evaluators’ underlying data, including privileged mental health records, in some jurisdictions are not disclosed. Hence, there is tension in this area on the issue of whether the parties’ disclosure of privileged information to the evaluator waives all or only part of the privileged mental health records.<sup>69</sup> In a Connecticut divorce case,<sup>70</sup> the court appointed a psychologist to perform a custody evaluation of both parties and a family relations officer to make a custody recommendation based solely on the mother’s prior mental health records.<sup>71</sup> Prior to the filing of the divorce, the mother was treated for mental health issues and stayed in the hospital for two weeks.<sup>72</sup> The two court-appointed evaluators made conflicting recommendations in their reports to the court; the psychologist recommended the mother as the custodial parent while the

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<sup>65</sup> *Id.* at 583.

<sup>66</sup> *Id.* at 572 (citing *In re Kozlov*, 398 A.2d 882 (N.J. 1979)). Although *Kozlov* was decided in the context of the attorney-client privilege, New Jersey courts have historically taken attorney-client principles and applied them to other contexts. *Id.*

<sup>67</sup> *Fitzgibbon v. Fitzgibbon*, 484 A.2d 46, 49 (N.J. Super. 1984).

<sup>68</sup> Ralph Slovenko, *Child Custody and the Psychotherapist-Patient Privilege*, 19 J. PSYCHIATRY & L. 163, 171 (1991).

<sup>69</sup> See generally Marcia M. Boumil et al., *Waiver of the Psychotherapist-Patient Privilege: Implications for Child Custody Litigation*, 22 HEALTH MATRICES: J. L.-MED. 1 (2012).

<sup>70</sup> *Cabrera v. Cabrera*, 580 A.2d 1227 (Conn. Ct. App. 1990).

<sup>71</sup> *Id.* at 1231.

<sup>72</sup> *Id.* at 1230.

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family relations officer recommended the father.<sup>73</sup> The father requested to have the mother's mental health records which the family relations officer relied upon to be disclosed arguing that the mother waived the privilege, but the trial court disagreed and the appellate court affirmed, holding that the mother's releases to the family relations officer did not generally waive the psychologist-client privilege because "each of the several releases executed was limited to a specific person or agency for a specific purpose."<sup>74</sup>

However, court-ordered evaluations are not without flaws. Not all parties can afford the expense of an independent evaluation.<sup>75</sup> Also the tests have limitations. Most of the standard psychological tests show the individual's mental health at one point in time.<sup>76</sup> Because the typical evaluation in connection with a child custody proceeding is only administered over such a short period of time, the parent can deliberately attempt to "beat" the test.<sup>77</sup> Having the tests along with the underlying data provides a comprehensive overview of the parent's mental stability. As one set of commentators phrased this problem with court-ordered evaluations:

[A] party generally seeks to avoid the participation of a psychotherapist if one even exists. A party would only voluntarily waive her psychotherapist-patient privilege (and allow a consult with her psychotherapist) if doing so were expected to provide some sort of strategic advantage. If, for example, a party presents for mental examination appearing disorganized or even paranoid, an ongoing psychotherapist may be able to provide context for the paranoid or disorganized presentation. On the other hand, a high-functioning, albeit mentally-compromised party may successfully "prepare" for psychological testing and influence the results to appear healthier than she actually is—a finding that a long-term psychotherapist would likely dispute if asked.<sup>78</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1234.

<sup>75</sup> See *Leeper v. Leeper*, No. E2012-02544-COA-R3-CV 2013 WL 5206344, at \*1 (Tenn. Ct. App., Sept. 13, 2013) (acknowledging that a psychological evaluation is "a very expensive proposition" but was ordered in the case as a "last resort").

<sup>76</sup> Boumil et al., *supra* note 69, at 29.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 24.

## II. Studies Cited in Support of the Psychologist-Client Privilege Are Not as Clear-Cut as Proponents Would Like to Assert

In jurisdictions where privilege bars disclosure, the main public policy argument justifying the decision is that allowing an exception would deter parents from seeking needed help. These jurisdictions believe that encouraging rehabilitation is in the child's best interests. Supporters of the privilege first discredited the studies done by researchers Daniel Shuman and Myron Weiner, which concluded that there is little empirical evidence for psychotherapist-client privilege.<sup>79</sup> Shuman and Weiner concluded after three different studies in three different jurisdictions that the lack of a psychotherapist-client privilege does not deter patients from seeking help nor impair the therapy's quality.<sup>80</sup> The researchers found that 96% of patients "relied more . . . on the therapist's ethics for confidentiality than on a privilege statute."<sup>81</sup> Even in those with stable trusting relationships with their therapist, 40% of patients withhold certain types of information anyway, such as sexual acts and thoughts, violence, and financial issues.<sup>82</sup> Patients withhold this information because they are more concerned about the "therapists' personal judgment[s]" of them than about the consequences if the information were disclosed.<sup>83</sup> The "data suggest that . . . the quality of treatment would be facilitated by a privilege statute, but that it would in no way lead to full disclosure."<sup>84</sup> The existence of a privilege statute

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<sup>79</sup> Gilbert Pinard, Daniel W. Shuman & Myron F. Weiner, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INTER. J.L. & PSYCHIATRY 393 (1987); Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1981); Daniel W. Shuman & Myron F. Weiner, *Privilege—A Comparative Study*, 12 J. PSYCHIATRY & L. 373 (1984).

<sup>80</sup> Pinard, Shuman & Weiner, *supra* note 79; Shuman & Weiner, *The Privilege Study*, *supra* note 79; Shuman & Weiner, *Privilege—A Comparative Study*, *supra* note 79.

<sup>81</sup> Shuman & Weiner, *The Privilege Study*, *supra* note 79, at 920.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 926.

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does not in any way guarantee that patients would fully disclose important information to their therapists.<sup>85</sup>

In addition, according to psychologist Leigh Hagan, the court needs all relevant information to make an informed ruling regarding a child's custody.<sup>86</sup> Criticizing the former Virginia law that allows the parent to retain the psychologist-client privilege in child custody proceedings, Dr. Hagan argues that "[h]iding the ball thwarts pursuit of truth."<sup>87</sup> The parent, he continues, is shielded from the "foreseeable and logical consequences of their own actions at the child's potential jeopardy."<sup>88</sup> Thus, Dr. Hagan believes that allowing secrets to be kept in child custody proceedings will make the party seeking disclosure of records lose faith in the court's ability to administer justice in the child's best interests.<sup>89</sup>

However, the U.S. Supreme Court's decision in *Jaffee v. Redmond*<sup>90</sup> in 1996, which recognized a federal psychotherapist-client privilege, used as support "studies and authorities" cited by the American Psychological and Psychiatric Associations in their amicus briefs. According to law professor Edward Imwinkelried, the support cited fails in many ways.<sup>91</sup> The supporters frequently cite to an individual favorable line in the study rather than report the results as they relate to the rest of the study.<sup>92</sup> According to Professor Imwinkelried, a closer look at the studies shows that the support cited by the proponents does not provide such a clear answer as these proponents want everyone to believe.<sup>93</sup>

First, the brief by the American Psychiatric Association in support of the privilege never cited to any studies but rather cited to mental health experts who all seemingly agreed that the

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<sup>85</sup> *Id.*

<sup>86</sup> Leigh Hagan, CLE Presentation at the Richmond Bar Association: My Spouse Is Crazy but I Can't Prove It 3 (Mar. 22, 2004).

<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 5.

<sup>90</sup> 518 U.S. 1 (U.S. Ill., 1996).

<sup>91</sup> See generally Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in Jaffee v. Redmond*, 518 U.S. 1 (U.S. Ill., 1996), 49 HASTINGS L.J. 969 (1998).

<sup>92</sup> *Id.* at 976.

<sup>93</sup> See *id.*

privilege is important and necessary.<sup>94</sup> Professor Imwinkelried pointed out that the “relevant universe” does not consist of these psychotherapists; the average patient’s thoughts are what matters.<sup>95</sup> Psychotherapists are also biased toward wanting the privilege, so the American Psychiatric Association should have surveyed the actual patients and not just psychotherapists who have a monetary stake in the outcome of the case.<sup>96</sup>

Second, a survey cited by the American Psychological Association in its brief in support of the privilege did not ask exactly the question at issue. David Miller and Mark Thelen in 1986 asked patients their thoughts on “confidentiality.”<sup>97</sup> Similarly, a 1987 study led by Leon VandeCreek and other researchers was narrow because it found that clients value confidentiality, but the study only asked about disclosure to a list of persons such as a friend, a significant other, employer, or insurance company.<sup>98</sup> Professor Imwinkelried pointed out that these questions did not ask the patients their attitudes toward revelations in court but only asked about disclosures to “police, friends, family, and authorities.”<sup>99</sup> Even within the confidentiality questions, the answers differ based on the severity of the problem.<sup>100</sup> A 1983 study by Thomas Merluzzi and Cheryl Brischetto found that confidentiality was important to subjects with problems of a very serious nature and less important to those with “moderately serious” problems.<sup>101</sup> In the highly serious situations in which the consequences are more severe, the breach in confidentiality may erode the counselor’s trustworthiness.<sup>102</sup> With moderately serious problems, the subjects did not think that disclosure of in-

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<sup>94</sup> *Id.* at 974–75.

<sup>95</sup> *Id.* at 975.

<sup>96</sup> *Id.*

<sup>97</sup> David Miller & Mark Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 *J. PROF. PSYCHOL., RES. & PRACT.* 15, 17 (1986).

<sup>98</sup> Leon VandeCreek et al., *Client Anticipations and Preferences for Confidentiality of Records*, 34 *J. COUNSELING PSYCHOL.* 62, 64 tbl.2 (1987).

<sup>99</sup> Imwinkelried, *supra* note 91, at 976.

<sup>100</sup> Thomas V. Merluzzi & Cheryl S. Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 *J. COUNSELING PSYCHOL.* 245, 250 (1983).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

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formation led to serious consequences.<sup>103</sup> For these problems, there was no difference whether the counselor revealed information or maintained confidentiality—trustworthiness was not compromised.<sup>104</sup>

According to Professor Imwinkelried, proponents selectively choose certain statistics in studies that favor their side but ignore the limitations admitted by some of the studies which cautioned against using them for certain propositions.<sup>105</sup> One of the studies led by Donald Schmid in 1983, found that “[67%] of patients would be upset or angry if their confidences were revealed without their permission.”<sup>106</sup> According to Professor Imwinkelried, supporters citing this statistic fail to point out that this finding only relates to out-of-court disclosures.<sup>107</sup> Schmid’s study found only 33% of patients would have been upset if their secrets were revealed to a court.<sup>108</sup> Schmid also found that the patients were more concerned with disclosures to employers and insurers; only 17% of the patients would stop treatment if their confidential information to a therapist were disclosed.<sup>109</sup> Another study cited was a 1984 article led by Paul S. Appelbaum.<sup>110</sup> According to Professor Imwinkelried, the American Psychological Association only cited from Appelbaum the statistic that 57% of patients answered that their therapists’ disclosure without their consent would adversely affect the therapeutic relationship.<sup>111</sup> Looking at the results of the study, the American Psychological Association seemed to have ignored the statistic that most patients had negative reactions to the disclosure of that information specifi-

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Imwinkelried, *supra* note 91, at 975; See Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 526–32 (2009).

<sup>106</sup> Donald Schmid et al., *Confidentiality in Psychiatry: A Study of the Patient’s View*, 34 HOSP. & CMTY. PSYCHIATRY 353, 354 (1983).

<sup>107</sup> Imwinkelried, *supra* note 91, at 977.

<sup>108</sup> Schmid et al., *supra* note 106, at 354.

<sup>109</sup> *Id.*

<sup>110</sup> Paul S. Appelbaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 109 (1984).

<sup>111</sup> Appelbaum et al., *supra* note 110, at 114; Imwinkelried, *supra* note 91, at 977 & n.53.

cally to employers (76% of outpatients and 83% of inpatients reacted negatively if their therapists disclosed confidential information to employers).<sup>112</sup> According to Appelbaum, only 43% of outpatients and 33% of inpatients reacted negatively if their therapists disclosed information to courts without their consent.<sup>113</sup> Professor Imwinkelried found that the APA brief also ignored the conclusion reached by these researchers: “the outpatients . . . interviewed did not appear concerned about absolute confidentiality”<sup>114</sup> and that “[p]atients may value confidentiality, but still seek and participate in . . . treatment even in its absence.”<sup>115</sup>

Based on a 1989 study by Holly Watson and Murray Levine, when therapists are required to disclose confidential information pursuant to state law, the psychologist-client relationship is not damaged if the psychologist discloses the information to the proper authorities.<sup>116</sup> The study researched the effect on the psychotherapeutic relationship between the therapist and client after the therapist reported child abuse pursuant to state law.<sup>117</sup> The conclusion of the study was that the relationship either did not change or improved following the report, supporting the view that the relationship can survive despite the breach of confidentiality where the therapist confronts and reports the client’s abusive behavior.<sup>118</sup> Only 24% of patients terminated therapy after the therapist filed a report.<sup>119</sup> According to Watson and Levine, the argument that clients only continued with treatment after the therapist filed a report because of either a court order or because they fear that discontinuing treatment would make them look bad while child protective services investigate does not have much support; most clients were “self-referred,” only 29% were court-ordered or referred by child protective services, and no evi-

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<sup>112</sup> See Appelbaum et al., *supra* note 110, at 113; Imwinkelried, *supra* note 91, at 977 (“However, on the whole, the findings reached in the study undercut that position.”).

<sup>113</sup> Appelbaum, et al., *supra* note 110, at 113.

<sup>114</sup> *Id.* at 115.

<sup>115</sup> *Id.* at 114.

<sup>116</sup> Holly Watson & Murray Levine, *Psychotherapy and Mandated Reporting of Child Abuse*, 59 AM. J. ORTHOPSYCHIATRY 246, 253 (1989).

<sup>117</sup> *Id.* at 250.

<sup>118</sup> *Id.* at 252.

<sup>119</sup> *Id.* at 253.

dence from the records support the fear argument.<sup>120</sup> This study also found that trust is more important for the relationship than absolute confidentiality.<sup>121</sup> Watson and Levine noted that most of the clients can accept disclosure if they feel that the therapist has no choice under the law.<sup>122</sup> Also, the study determined that the manner in which the therapist handles the report is more of a threat to the relationship than the report itself.<sup>123</sup>

Those who support the protections afforded to the psychologist-client privilege repeatedly assert that families will not get the help that they need if there is no privilege.<sup>124</sup> However, families include children, not just adults.<sup>125</sup> Individual family members have rights as well as interests. Adults, by their age, cognitive development, and position within the family and society are far more able to assert their rights and interests even at the expense of their children.<sup>126</sup> Children's positions need to be elevated closer to that of other family members.<sup>127</sup> The privilege compromises the child's interest in being heard.<sup>128</sup> Extending the privilege to the adults risks abrogating the children's need to be heard by the courts, which have the power to create and enforce constructive change.

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<sup>120</sup> *Id.* at 254.

<sup>121</sup> *Id.* at 255.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Leigh D. Hagan et al., *Custody and Admissibility of Mental Health Records*, VA. LAW., Feb. 2008, at 31.

<sup>125</sup> *Family*, DICTIONARY.COM, <http://dictionary.reference.com/browse/family> (last visited June 14, 2015) (defining a family as "a basic social unit consisting of parents and their children, considered as a group, whether dwelling together or not").

<sup>126</sup> See Hagan & Blanks Jr., *supra* note 20, at 2 (arguing that statutes that withhold mental health records "protect[ ] adults from the foreseeable and logical consequences of their own actions to the child's potential jeopardy").

<sup>127</sup> See GERALD P. KOOCHEK & PATRICIA C. KEITH-SPIEGEL, *CHILDREN, ETHICS, AND THE LAW: PROFESSIONAL ISSUES AND CASES*, at ii (1990) ("Although there is a growing recognition of the autonomy of children and respect for their input to matters affecting them, there remains a general lack of consensus as to when and how children's input should be considered, even in *everyday* matters.").

<sup>128</sup> Hagan & Blanks Jr., *supra* note 20, at 2.

### III. Proposed “Balanced” Solution

States faced with issues relating to mental health records in custody proceedings are struggling because of the competing interests of protecting privileged information and protecting the best interests of the children. Children’s rights are already limited by the law; rights given to adults such as driving and voting are not conferred upon the child until he or she reaches maturity. To ensure that the child has access to the best available opportunities and flourishes in society once he or she becomes of age, the court is given the unique position to make the determination of the best environment to foster the growth and development and protection of the child.

To adequately determine whether mental health records should be disclosed, there should be a three-step process in place. The child’s best interests should always be paramount and be at the forefront of the court’s mind during this process. First, in any child custody proceeding, a party must make a showing of good cause that the mental health is at issue. Upon such finding, the trial court should conduct an *in camera* review of the records “to determine whether [the records] are relevant, probative, and not unduly prejudicial.”<sup>129</sup> By allowing the court to review the records once they are placed into issue, the court accomplishes two things. First, the court prevents any frivolous or spiteful claims that may not be of any relevance. Second, the court is equipped with the specific knowledge that mental health of a parent is an issue in the proceeding and can thus make subsequent determinations as to how to pierce the privilege.

Second, a parent seeking to protect the privileged information may object to the disclosure of such records, even for an *in camera* review. Here, the trial court should be allowed to take a negative inference if a parent objects to disclosure if there is also corroborating evidence of abuse, violence, or mental instability.

Although a court may not make a negative inference in criminal matters,<sup>130</sup> a court may make a negative inference

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<sup>129</sup> *In re Kimberly C.*, 2011 Ill. Ct. App. 3d 110412-U, at ¶33 (Ill. Ct. App. 2011). In this case, the trial court went on to weigh the privacy interests of the parent and the need for disclosure to make a determination of the best interests of the child. *Id.*

<sup>130</sup> *See* U.S. CONST. amend. V.

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against a parent in civil cases, especially when probative evidence has been proffered against the parent regarding the same subject matter.<sup>131</sup> Indeed, the Connecticut Court of Appeals held the same in a case and said that while a negative inference cannot be drawn from the privilege against self-incrimination in a criminal case, it can be drawn in a child custody hearings.<sup>132</sup> In that case, the court of appeals held that the trial court was free to draw appropriate negative inferences from a father's refusal to testify about his physically abusing one of his children in light of a pending criminal action.<sup>133</sup> Similarly, at least one judge has gone so far as to agree that a parent who refuses to submit to a court-ordered mental evaluation may do so, but the court should be entitled to take a negative inference from that refusal when determining the placement of the child.<sup>134</sup>

Third, once redacted, the records should be provided to both parties for a comparative fitness analysis. Alternatively or in combination with an *in camera* review of the mental health records, the court may order an independent evaluation of the parties.<sup>135</sup> While Pennsylvania and New Jersey favor an evaluation, not every case can afford an evaluation. In addition, there are errors and biases associated with evaluations. If evaluations are used, parties need access to the underlying information that the evaluator used to form his or her opinion. The evaluator should be subject to cross-examination to elicit possible biases relating to the information used and relied upon in the report submitted to the court.

However, this is not to say that there is complete disclosure of records upon filing for custody or visitation. The parent may keep his or her privilege, but, as stated, if there is a finding of corroborating evidence of abuse, violence, or mental instability, then the court should be able to draw a negative inference that the information contained in the mental health records is adverse. The court and the parties involved have a right to know whether a parent is complying with treatment and that the treatment is or is not working. With this procedure in place, the par-

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<sup>131</sup> See *Baxter v. Palmigiano*, 425 U.S. 308, 318–19 (1976).

<sup>132</sup> *Care & Prot. Of Quinn*, 763 N.E.2d 573, 578 (Mass. App. Ct. 2002).

<sup>133</sup> *Id.*

<sup>134</sup> *In re T.R.*, 731 A.2d 1276, 1282 (Pa. 1999) (Nigro, J., concurring).

<sup>135</sup> Some, but not all, states require this step.

ent's mental health records remain protected throughout the custody proceeding if the parent is stable; and if the parent is found to not be stable, then the best interests of the child should override the parent's privilege.

## Conclusion

As this article has examined, the various approaches across the country show the difficulty of the issue and that courts are having extreme difficulty in analyzing the issue because of the restrictions of the privilege. Although therapists cite to studies that support the psychologist-client privilege, a look at the limitations on the studies show that the answer is not as clear-cut as the proponents would like to assert. The solution of allowing an *in camera* inspection and allowing a negative inference to be drawn by the court, although imperfect, attempts to balance both the interests of the children and the parents' rights to assert the privilege. The purpose of allowing courts to view mental health records of the parent is not to penalize the parent but to carry out the court's objective of ensuring that the child is placed in the best possible environment under all of the circumstances.

Judge Learned Hand's formula<sup>136</sup> is applicable here. The court would breach its duty to the children if it does not consider the factors in the Hand formula.<sup>137</sup> The court's need to have all available information to make an informed determination outweighs the need of the parent to protect their mental health records because without that information the court is unable to make an informed decision that will better assure that the child will be protected, and cared for emotionally, physically, and mentally. Children are impressionable given their age and cognitive development. Because children, especially younger ones, cannot fend for themselves, the best protection for them is through the court system.

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<sup>136</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>137</sup> An act is negligent if the burden of taking adequate precautions to prevent the injury is less than the probability of harm times the gravity of the harm should it manifest itself. *Id.* at 173.

