Comment, THE USE OF MENTAL HEALTH RECORDS IN CHILD CUSTODY PROCEEDINGS

I. Introduction

In the course of a dissolution of marriage proceeding or a child custody dispute, mental health and parental fitness is sometimes called into question by one of the parties. Frequently one party will seek to introduce evidence of the other party's mental health through medical records. Federal common law, state common law, state statutes and the federal rules of evidence recognize the importance of protecting confidential communication with mental health professionals by recognizing a psychotherapist-patient privilege.

In addition, the context of a dissolution of marriage, couples are often encouraged by their attorneys to seek therapy from a mental health professional. Public policy supports the accessibility to effective mental health treatment and the privacy, privilege, and confidentiality that are fundamental in effectuating that aim. Counseling and therapy can play a positive, rehabilitative role in helping family members cope with the changes that divorce inevitably brings, and personal and with intra-familial conflicts.

However, seeking mental health therapy can also be viewed negatively when sought during a dissolution proceeding, especially as it relates to child custody disputes. A patient may fear being labeled or stigmatized as "unstable" or "depressed." A patient may fear that disclosures made to the mental health professional will subsequently be revealed in the context of litigation, or that the opposing party will infer from the therapy that a parent is "unstable" and subsequently "unfit" to have custody of the children. This often takes place when a party seeks to compel disclosure of private communication between a patient/litigant and his mental health professional in a dissolution of marriage proceeding.

Like the attorney-client privilege, the patient has a paramount interest in the confidentiality of those communications with the therapist. However, *no* privilege is absolute, especially

when it relates to determining the fitness of a parent to have custody of a child.

The privilege can seriously impact child custody and dissolution of marriage proceedings.[1] All 50 states recognize that a privilege exists.[2] If the nature of the information relates directly to the well-being of the child or to the parent's ability to adequately care for child, and the court believes the child is potentially in danger, courts are likely to admit the information despite a patient's expectation of confidentiality. There are two competing interests involved when a court determines whether to compell discovery of a patient-litigant's mental health records over his objection in a child custody dispute. The first involves the privacy, confidentiality and privilege expectation of both the patient and the treating mental health professional in those communications. The second involves the application of the best interests of the child[ren] standard. Virtually every jurisdiction in the United States makes a child custody determination based

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1 *See e.g.*In Re Matthew R., 113 Md. App. 701, 715, 688 A2d.955, 961.

2 *See* Ala. Code § 34-26-2 (1975); Alaska Rule Evid. 504; Ariz. Rev. Stat. Ann. § 32-2085 (1992); Ark. Rule Evid. 503; Cal. Evid. Code Ann. §§ 1010, 1012, 1014 (West 1995); Colo. Rev. Stat. § 13-90-107(g) (Supp.1995); Conn. Gen. Stat. § 52-146c (1995); Del. Uniform Rule Evid. 503; D.C. Code Ann. § 14-307 (1995); Fla. Stat. § 90.503 (Supp.1992); Ga. Code Ann. § 24-9-21 (1995); Haw. Rules Evid. 504, 504.1; Idaho Rule Evid. 503; Ill. Comp. Stat., ch. 225, § 15/5 (1994); Ind. Code § 25-33-1-17 (1993); Iowa Code § 622.10 (1987); Kan. Stat. Ann. § 74-5323 (1985); Ky. Rule Evid. 507; La. Code Evid. Ann., Art. 510 (West 1995); Me. Rule Evid. 503; Md. Cts. & Jud. Proc. Code Ann. § 9-109 (1995); Mass. Gen. Laws § 233:20B (1995); Mich. Comp. Laws Ann. § 333.18237 (West Supp. 1996); Minn. Stat. § 595.02 (1988 and Supp. 1996); Miss. Rule Evid. 503; Mo. Rev. Stat. § 491.060 (1994); Mont. Code Ann. § 26-1-807 (1994); Neb. Rev. Stat. § 27-504 (1995); Nev. Rev. Stat. § 49.215 (1993); N.H. Rule Evid. 503; N.J. Stat. Ann. § 45:14B-28 (West 1995); N.M. Rule Evid. 11-504; N.Y. Civ. Prac. Law § 4507 (McKinney 1992); N.C. Gen. Stat. § 8-53.3 (Supp. 1995); N.D. Rule Evid. § 503; Ohio Rev. Code Ann. § 2317.02 (1995); Okla. Stat. tit. 12, § 2503 (1991); Ore. Rules Evid. 504, 504.1; 42 Pa. Cons. Stat. § 5944 (1982); R.I. Gen. Laws §§ 5-37.3-3, 5-37.3-4 (1995); S.C. Code Ann. § 19-11-95 (Supp.1995); S.D. Codified Laws §§ 19-13-6 to 19-13-11 (1995); Tenn. Code Ann. § 24-1- 207 (1980); Tex. Rules Civ. Evid. 509, 510; Utah Rule Evid. 506; Vt. Rule Evid. 503; Va. Code Ann. § 8.01-400.2 (1992); Wash. Rev. Code § 18.83.110 (1994); W. Va. Code § 27-3-1 (1992); Wis. Stat. § 905.04 (1993-1994); Wyo. Stat. § 33-27-123 (Supp. 1995).

upon the "best interest of the child."[3] This comment addresses how different jurisdictions treat the admissibility of mental health information in matrimonial litigation and the factors that are involved in making that determination.

In these situations, one parent often questions the other parent's fitness to function adequately in a parental capacity. Some inquiries into a parent's mental health background are legitimate, and sometimes they are fabricated to give the inquiring spouse an edge. Courts are presented with the difficult task of making that determination.

Several cases have addressed the compelled disclosure of a parent's mental health records. "The marital discord which precedes divorce and custody actions is often of such an emotional nature as to lead one or both parties to seek professional psychiatric counseling in attempting to restructure their lives. The desire for psychiatric consultation during this transition should not be used against one in custody proceedings."[4]

Before analyzing the necessity of admitting protected information in a child custody dispute, it is necessary to define

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3 *See* ALASKA CODE; *See* ALASKA STAT. §25.24.150(c)(7) (Michie 1998); ARIZ. REV. STAT. ANN. §25-403 (West 1998); ARK. CODE ANN. §9-13-101(b) (Michie 1998); CAL. FAM. CODE §3011(b); COLO. REV. STAT. ANN. §14-10-124(1.5)(a)(X); D.C. CODE ANN. §16-911(5)(Q); FLA. STAT. ANN. §61.13(3); GA. CODE ANN. §19-9-1(a)(2); IDAHO CODE §32-717(A)(7); 750 ILL. COMP. STAT. ANN. 5/602(a)(6)-(7); IND. CODE ANN. §31-17-2-8 (Michie 1997); IOWA CODE ANN. §598.41(3)(j); KAN. STAT. ANN. §60-1610(3)(B)(vii) (1997); KY. REV. STAT. ANN. §403.270(2)(f) (Banks-Baldwin 1998); ME. REV. STAT. ANN. tit. 19-A, §1653(3) (West 1998); MD. CODE ANN., FAM. LAW §9-101.1 (1998); MICH. COMP. LAWS ANN. §722.23(3)(k) (West 1998); MINN. STAT. ANN. §518.17(12); MO. ANN. STAT. §452.375(2)(5); MONT. CODE ANN. §40-4-212(1)(f) (1997); NEB. REV. STAT. §42-364(2)(d) (1997); N.J. STAT. ANN. §9:2-4(c); N.Y. DOM. REL. LAW §240 (McKinney 1998); N.C. GEN. STAT. §50-13.2(a) (1997); OHIO REV. CODE ANN. §3109.04(F)(1)(h) (West 1998); OR. REV. STAT. § 107.137(1)(d) (1997); 23 PA. CONS. STAT. ANN. §5303(a)(3) (West 1998); R.I. GEN. LAWS §15-5-16 (1998); S.C. CODE ANN. §20-7-1530 (Law. Co-op. 1998); TENN. CODE ANN. §36-6-106(8); UTAH CODE ANN. §30-3-10 (1998); VA. CODE ANN. §20-124.3(8) (Michie 1998); VT. STAT. ANN. tit. 15, § 665(b) (1998); WIS. STAT. ANN. §767.24(5)(i) (West 1998); *see also* WYO. STAT. ANN. §20-2-113(a) (Michie 1998) *-*See, e.g.*, CAL. FAM. CODE §3011(e)(1); D.C. CODE ANN. §16-911(a)(5)(Q)(a-1); MINN. STAT. ANN. §518.17(a); MO. ANN. STAT. §452.375(5); N.C. GEN. STAT. §50-13.2(a); OHIO REV. CODE ANN. §3109.04(F)(1)(h); TENN. CODE ANN. §36-6-106(8).

4 Laznovsky v. Laznovsky, 357 Md. 586, 596-97 (2000).

"mental health treatment." In the context of a psychiatrist/psychologist-patient relationship, mental health treatment includes communications and records in relation to a patient seeking mental health services to determine the existence and nature of a patient's mental health problem then determine a course of treatment.[5] The patient's interest in protecting communications with her mental health professional can be broken down into three basic components—privacy, confidentiality and privilege.

II. Confidentiality, Privacy and Privilege

A. *Confidentiality*

Black's Law Dictionary defines confidentiality as "the state or quality of being. . .intrusted with the confidence of another or with his secret affairs or purposes; intended to be. . .kept secret."[6] A "confidential communication" is defined as "a statement made under circumstances showing that speaker intended the statement only for ears of person addressed."[7] Confidentiality is a statutory duty as well as a "contractual duty of the therapist arising out of a warranty implied in the fiduciary nature of the patient-therapist relationship."[8] A "confidential relationship is deemed to arise whenever two persons have come into such a relation that confidence is necessarily resposed by one and the influence which naturally grows out of that confidence."[9] For therapy to be effective the patient must be assured of complete confidentiality.[10] Additionally, the therapist has a fiduciary duty to maintain confidentiality. This is a basic tenet of any mental health provider.[11]

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[5] Sandra G. Nye, *Discovery of Mental Health and Substance Abuse Records and Information*, Illinois Institute for Continuing Legal Education (May 1997).

[6] Black's Law Dictionary, p. 297-98 (1990)

[7] *Id.*

[8] Nye, *supra* note 5, at 9.3.

[9] *Id.*

[10] *Id.*

[11] *Id.*

B. *Privacy*

Privacy is also a major consideration when a court must determine whether or not to compel disclosure of a parent's mental health records. "Privacy" is defined as "the state of being free from intrusion or disturbance in one's private life or affairs."[12] Mental health treatment involves disclosure of one's most private feelings.[13] In sessions, therapists often encourage patients to identify "thoughts, fantasies, dreams, terrors, embarrassments, and wishes."[14] To allow these private communications to be publicly disclosed abrogates the very fiber of an individual's right to privacy, the therapist-patient relationship and its rehabilitative goals. However, like any other privilege the psychotherapist-patient privilege is not absolute and may only be recognized if the benefits to society outweigh the costs of keeping the information private.[15] Thus, if a child's best interest is jeopardized by maintaining confidentiality the privilege may be limited.

C. *Privilege*

Privilege is "the right to refuse to disclose or prevent the disclosure of communications or information that would otherwise be compelled by legislative, administrative, or judicial writ or order."[16] In order for information to be privileged it must satisfy four factors: (1) the communications must be made in confidence with the expectation that what is revealed will remain private; (2) the confidentiality is "essential" to the relationship between the parties; (3) the relationship is one that society recognizes as being of great importance and should thus be preserved; and (4) the disclosure of such information would injure the relationship the parties are attempting to foster.[17]

All of these elements are met by the psychotherapist-patient privilege. Disclosures about deeply personal feelings, fears, and emotions are essential to effective mental treatment. Patients

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12 THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Second Edition (1983).

13 Nye, *supra* note 4, at 9.4.

14 *Id.*

15 In Re Grand Jury Subpoena Psychological Treatment Records, 710 F. Supp. 999, 1009 (D.N.J. 1989)

16 Nye, *supra* note 5, at 9.5.

17 Nye, *supra* note 5, at 9.5, citing Wigmore, EVIDENCE.

seek mental health therapy with the full expectation that what is revealed will remain confidential. Society clearly benefits from the mental health of its citizens, and a threat of the breach of confidentiality would desecrate any notion of mental health treatment. To promote this interest both Congress and the federal judiciary have recognized the existence of a psychotherapist-patient privilege.

III. Public Policy Considerations

Public policy seeks to encourage individuals to obtain treatment for mental health problems, including substance abuse and addiction. Clearly, society has a vital interest in making sure those individuals in need of mental health treatment have access to such. State legislatures have demonstrated the importance of treatment by recognizing some form of psychologist/psychotherapist-patient privilege.[18] There are two conflicting public policy arguments that concern admitting mental health records. The first involves the interest of justice in having all relevant evidence before the court in order to determine the best possible solution to the matter in conflict. In *Kinsella v. Kinsella,* 150 N.J. 276 (N.J. Ct. App. 1954), the court said, "[a] privilege against compelled disclosure of relevant evidence 'runs counter to the fundamental theory of our judicial system that the fullest disclosure of the facts will best lead to the truth.'"[19] Because there are legitimate interests in the court being privy to all relevant facts, privileges are "narrowly construed in favor of admitting relevant evidence."[20] The Federal Rules of Evidence mirrors this narrow construction: "Courts authority to recognize a psychotherapist-patient privilege must be exercised with caution because evidentiary privileges in litigation are not favored, and whatever their origins, exceptions to the demand for every man's evidence and are not lightly created nor expansively construed for they are in derogation of the search for the truth."[21] This is especially true when a party's mental condition and ability to care for a child is called into question. "[I]n a dissolution proceeding where the is-

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18 *Supra* note 5.

19 *Id* at 293, *quoting* In re Selser, 105 A.2d 396 (N.J. Ct. App. 1954).

20 State v. Schreiber, 122 N.J. 579, 582-82, 585 A.2d 945 (1991).

21 F.R.E. 501, U.S.C.A. §28.

sue of child custody is presented it is incumbent upon the chancellor to evaluate, among other crucial factors, the mental health of each of the parents in making a final custody determination which is in accord with the best interest of the minor child or children."[22]

On the other hand, the Federal Rules of Evidence acknowledge an important interest in maintaining confidentiality, though the Rules address this in a criminal law context. The rules state "society has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community." The Sixth Circuit has found that generally, these interests "outweigh the need for evidence in the administration of criminal justice."[23]

In *Zuniga v. Pierce,*[24] the court reconciles these competing interests by balancing the interests involved. The court stated: "This is necessarily so because the appropriate scope of the privilege like the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure."[25] The decision in *Kinsella* provides a balancing test, citing the Koslov test. The triparite test states that a "legitimate need" must be present for the evidence to exist, the relevancy and materiality to the issue before the court, and the moving party must demonstrate that the information to which they are seeking access "cannot be secured from any less intrusive source."[26] Allowing the court to order independent examination of a parent's mental faculties without piercing the confidentiality of the patient-psychotherapist relationship avoids thwarting the psychotherapeutic process as well as allows the court to have all relevant evidence before it in order to make the best decision regarding the best interests of the children.

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[22] Mohammad v. Mohammad, 358 So.2d 610 (1978) *citing* Roper v. Roper, 336 So.2d 654 (1976).

[23] 714 F.2d 632 (1983).

[24] 714 F.2d 632 (1983)

[25] *Id.* at 639.

[26] N.J.S.,A. 45:14B-28; N.J.S.A. 2A:84A, App. A, RULES OF EVID., N.J.R.E. 505(a).

IV. Federal Treatment of the Psychotherapist-Patient Privilege

Both the United States Supreme Court and the Federal Rules of Evidence recognize a patient-psychotherapist privilege.[27] The United States Supreme Court contemplated a testimonial privilege in 1980, when it recognized a spousal privilege against compelled disclosure.[28] The opinion compares the psychotherapist-patient privilege to the priest-penitent, spousal, and attorney-client confidential relationships and their transcendent importance to the general public welfare. Though these proposed rules of federal evidence were never enacted, the Supreme Court has been guided by nine testimonial privileges including the psychotherapist-patient privilege set forth therein, and further provides that a court must use its discretion in applying these privileges on a case-by-case basis.[29]

In 1996, the United States Supreme Court recognized privileged communications between a patient and her treating mental health professional.[30] *Jaffee v. Redmond*[31] involved a female police officer that shot and killed a man in the line of duty. The decedent's relatives sued the officer and the department by whom she was employed to invoke decedent's constitutional rights against the use of excessive force. The Special Administrator sought to introduce into evidence Officer Redmond's mental health records obtained in the course of her psychotherapy preceding the shooting.[32] In abrogation of three previously decided cases[33], the Supreme Court held that "federal law recognizes a privilege protecting confidential communications between psychotherapist and her patient" and "statements that defendant police officer made to the licensed social worker in course of

[27] Jaffe v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, FED. RULES EVID. RULE 501; 28 U.S.C.A. .

[28] *See generally* Trammel v. U.S , 100 S.Ct. 906 (1980).

[29] F.R.E. PROPOSED RULES 501-513, 56 F.R.D., at 230-261.

[30] *See* Jaffee v. Redmond, 518 U.S. 1 (1996).

[31] *Id.*

[32] *Id.*

[33] U.S. v. Burtrum, 17 F.3d 1299 (Ct. App. Ok. 1994), In Re Grand Jury Proceedings, 867 F.2d 562 (Ct. App. Ca. 1989); and U.S. v. Corona, 849 F.2d 562 (Ct. App. Fla. 1988).

psychotherapy, and notes taken during their counseling sessions, were protected from compelled disclosure."[34]

The Court additionally recognized a paramount societal interest as well as the patient's individual privacy interest in maintaining confidentiality between a patient and the treating mental health professional:

> Significant private interests support recognition of a psychotherapist privilege. Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health is a public good of transcendent importance.[35]

The Supreme Court has placed such importance on the recognition of this privilege, that it has rejected, specifically, the balancing of interests utilized by federal and some state courts, stating, "[t]he balancing component implemented by the Court of Appeals and a few States is rejected, for it would eviscerate the effectiveness of the privilege by making it impossible for participants to predict whether their confidential conversations will be protected."[36]

Further, when weighing the private versus the public interests involved in disclosure of privileged communications, the Supreme Court concluded that there would be only a minor effect on evidence if the privilege was denied, inferring a paramount interest in preserving the confidential nature of patient-psychotherapist relationships which ultimately benefit the mental health of society as a whole.

The fact that the Supreme Court recognized that a psychologist-patient privilege exists demonstrates the Court's belief that maintaining confidentiality is fundamental in assuring that those in need of mental health services receive assistance without the fear that their innermost, private thoughts might be publicly disclosed. "Because state legislatures are fully aware of the need to protect the integrity of the fact-finding functions of their courts, the existence of a consensus among the States indicates that 'rea-

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34 *quoting Jaffee* at 1923.
35 *quoting Jaffee* at 1924.
36 *Jaffee* at 1925.

son and experience' support recognition of the privilege."[37] Additionally, the Court stated, "[a] denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."[38]

The federal privilege extends to all treating mental health professionals and encompasses communications made to psychiatrists, psychologists, licensed social workers, and clinical social workers in the course of mental health treatment. The Court specifically stated: "All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy."[39]

V. Constitutional Considerations in the Psychotherapist-Patient Privilege and a Patient's Right to Privacy

The United States Constitution sets out both a specific and a general right to privacy as it relates to the psychotherapist-patient privilege and the compelled disclosure of mental health records.

In 1965, the United States Supreme Court recognized a constitutional right to privacy between a husband and wife.[40] The court did not, however, specifically state the basis for the constitutional right and failed to determine if the right fell under the penumbra of constitutional guarantees or "whether it was specifically derived from the ninth or fourteenth amendment."[41] The Court once again recognized this basic constitutional right to privacy in 1972 when by stating that citizens should be free from "unwarranted government intrusion."[42]

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37 *Jaffee*, at 1930.

38 *Id.* at 1930.

39 *Jaffee,* at 1931.

40 Griswold v. Connecticut, 381 U.S. 479 (1965)

41 Steven R. Smith, *Constitutional Privacy in Psychotherapy,* 49 GEO. WASHL.REV. 1 (1980) *citing* Griswold v. Connecticut, 381 U.S. 486, 501 (1965)

42 Eisenstadt v. Baird, 405 U.S. 438 (1972)

The Fourteenth Amendment provides protection from the disclosure of personal matters including seeking mental health treatment. The advantage of advocating a constitutionally based right of privacy is that it "may protect the confidences revealed in therapy even if they are not protected by statute or the common law."[43] Several decisions indicate that a constitutional right of privacy attaches to the therapist-patient relationship.[44]

The Ninth Circuit agreed that confidentiality "is essential to psychotherapy and that the very nature of the communications brings them within the constitutional right of privacy through a constitutional psychotherapist-patient privilege."[45] The Court believed that communications between patient and psychotherapist were "squarely within the constitutional right of privacy."[46]

In an earlier case, Justice Brandeis stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[47]

The Supreme Court has also held that "the privilege may be limited when necessary to advance a compelling state interest."[48] Many other state supreme courts have recognized a federal constitutionally founded psychotherapist-patient privilege.[49]

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43 Smith, *supra* note 41, at 5, 49 GEO. WASHL.REV, 1, 5, *citing* In re Lifschutz, 467 P.2d 557 (1970).

44 Caesar v. Mountanos, 542 F.2d 1064 (9th Cir 1976), *cert. denied*, 430 U.S. 954 (1977); U.S. v. Layton, 90 F.R.D. 520 (N.D. Cal. 1981); Hawaii Psychiatric Society v. Ariyoshi, 481 F.Supp. 1028 (D. Haw. 1979).

45 Caesar v. Mountanos, 542 F.2d 1064 (9th Cir 1976), *cert. denied*, 430 U.S. 954 (1977)

46 *Id.*

47 Olmstead v. United States, 277 U.S. 438

48 *Id.* at 1068.

49 *See generally*, Steven R. Smith, *Pyschotherapy and the Right of Privacy,* November 1980 Vol. 49 No. 1.

This constitutional protection also applies to the expectation of privacy in a patient-psychotherapist relationship as there is a clear comparison between the right to access abortion services[50] without the threat of governmental intrusion and the right to seek mental therapy without the fear that intimate facts about one's emotional well-being will be disclosed in a court of law. Both have potentially severe ramifications to someone's life. "Mental illness may be even more protracted and debilitating than an unwanted pregnancy."[51] Requiring a patient or physician to disclose the subject of therapy session or compelling introduction of records relating to therapy significantly interferes with a psychotherapist-patient relationship in two ways: "First, the possibility of public disclosure of confidential may be so frightening or distasteful that the patient may not enter therapy, or may be less inclined to disclose personal information in therapy. Second, the absence of a privilege may erode the trust between therapist and patient upon which successful psychotherapy depends."[52] Because of the personal nature of information revealed in therapy, for a court to force a person to reveal the substance of those sessions clearly violates the basic constitutional right of privacy established in all the federal court and Supreme Court opinions previously discussed.

The parent's right to privacy and privileged confidential communications with her mental health provider are significant and must be considered by the court. However, the best interest of the child is a tantamount concern and the court must balance these competing interests to determine whether or not to compel disclosure of a parent's mental health records.

VI. Best Interest of the Child Standard

There is a paramount interest in maintaining the confidentiality of psychotherapist-patient relationship.[53] In order for treatment to be effective, a patient must feel comfortable divulging all relevant information to the therapist; however, there is a caveat

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50 *See* Roe v. Wade, 410 U.S. 959 (1973).

51 Smith, *supra* note 41, at 22.

52 *Id.* at 25.

53 *See generally* Nye, *supra* note 5.

to that.[54] When a parent's competence to raise a child is questioned and can only be ascertained by delving into the subject of therapy sessions, the courts must balance the interests of maintaining privacy versus having all relevant evidence before the court to make the best possible decision with regard to the children. The "best interests of the child standard," is the standard generally used by judges in making child custody determinations.[55]

The general rule regarding custody determinations has evolved from the tender years presumption, which demonstrates a preference for a child under the age of seven to be with the mother. The modern presumption is that neither parent has a superior right to the child.[56] The Uniform Marriage and Divorce Act works as a guide to statutory language regarding the "best interest of the child" standard. Although the focus here is clearly on the environment which best suits the child's needs, the "best interest of the child" standard is difficult to clearly define and often more difficult to apply in child custody disputes. However, several factors, are usually considered when judges make a custody determination. These factors include: the child's economic needs, the child's emotional needs, the child's wishes, the age and sex of the child, the child's relationship with each parent and the extent to which that parent was involved in the child's life, and the environment in which the child will be living after the divorce.[57]

Three other factors also influence the determination—the development of the friendly parent provision, the primary caretaker provision and the preference for joint custody. The friendly parent provision operates to place the child with the par-

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54 *Id.*

55 *Supra* note 3.

56 MELISSA M. WYER ET AL., THE LEGAL CONTEXT OF CUSTODY EVALUATIONS, IN PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 9-9 (L. H. Weithorn ed, 1987).

57 LINDA WOBREY ROHMAN ET AL., THE BEST INTEREST OF THE CHILD IN CUSTODY DISPUTES, IN PSYCHOLOGY AND CHILD CUSTODY DETREMINATIONS: KNOWLEDGE, ROLES AND EXPERTISE, 59, 63-79 (Lois A. Weithorn ed, 1987).

ent most likely to allow the other parent access to the child.[58] The primary caretaker provision is touted as a gender-neutral alternative allowing the parent who has participated to a greater extent in the child's life to be the primary custodian with the other parent receiving "reasonable" visitation.[59] The joint custody preference encourages a healthy, on-going parent-child relationship with *both* parents. These developments have been instituted in an effort to combat the historical maternal preference. For a court to compel the disclosure of mental health records in a custody dispute, it must weigh the best interest of the children against a parent's right to privacy and privilege of the psychotherapist-patient relationship. Although courts use the same standard criteria in making the determination, different jurisdictions have arrived at different solutions when ascertaining whether or not to compel discovery of confidential information.

VII. The Conservative Application of the Psychotherapist-Patient Privilege

Several states have conservatively applied the psychotherapist-patient privilege in child custody disputes. These states include Alabama,[60] Alaska,[61] Indiana,[62] Louisiana,[63] Michigan,[64] Missouri,[65] Maryland[66] and Texas.[67] These courts use a statutory exception to the psychotherapist-patient privilege for child custody proceedings similar to the one used by Alabama courts. The Alabama statute provides: "There is no privilege. . .in a child custody case in which the mental state of a party is clearly

58 *See generally* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, WIS. L. REV. 107, 112 (1987).

59 Carol S. Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States,* 2 INT'L J.L. & FAM. 106, 112 (1988).

60 Harbin v. Harbin, 495 So.2d 72 (Ala. Civ. App. 1986), Black v. Black, 625 So.2d 450 (Ala. Civ. App. 1993).

61 In the Matter of D.D.S., 869 P.2d 160 (Alaska 1994).

62 Owen v. Owen, 563 N.E.2d 605 (Ind. 1990).

63 Carney v. Carney, 525 So.2d 357 (La. Ct. App.).

64 Legendre v. Monroe County, 234 Mich. App. 708 (1999).

65 Daneshfar v. Sly, 953 S.W.2d. 95 (Mo. Ct. App. 1997).

66 Laznovsky v. Laznovsky, 745 A.2d 1054 (Md. 2000).

67 Smith v. Gayle, 834 S.W.2d 105 (Tex. Ct. App. 1992).

an issue and a proper resolution of the custody question requires disclosure."[68] This exception is "couched in the terms of applying where a party's mental state is clearly an issue."[69] The courts that follow this approach believe that the psychotherapist-patient privilege must yield to allow a "proper resolution of the custody issue" even if it requires disclosure of privileged medical records especially as it relates to child custody.

Alabama courts have adopted this conservative position in applying the statutory patient-litigant exception to testimony and records regarding mental health in marital litigation milleu.[70] These cases have generally addressed three issues as they relate to the patient-psychotherapist privilege and child custody: (1) Is the information which a party seeks to have disclosed protected under the applicable patient-physician privilege; (2) does the Alabama statute providing an exception to the patient-physician privilege apply automatically when joint custody is sought; (3) by seeking custody relating to any fact, statement or opinion which was necessary to enable that health care provider or any other health care provider to diagnose, treat, prescribe or act for the patient.[71] One court said: "When the issue of the mental state of a party to a custody suit is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychiatrist-patient privilege must yield."[72]

Louisiana courts have followed the course of their neighbor, Alabama, and concluded that ascertaining the mental health of a parent is an essential element to making a proper child custody determination. In *Carney v. Carney*[73] the court found:

> [T]he plaintiff's physical and/or mental conditions are essential elements to his action for joint custody. That is, there exists a rebuttable presumption that joint custody is in the best interest of the child.[74]. However, the presumption may be rebutted by a showing that it is not

68 Ala. R. Evid. 503 (d)(5).

69 *Laznovsky supra* note 51.

70 *See generally*, Dawes v. Dawes, 454 So.2d 311 (1984); Harbin v. Harbin, 495 So.2d 72 (1986); Black v. Black, 625 So.2d 450 (1993); Thompson v. Thompson, 624 So.2d (1993), Carney v. Carney, 525 So.2d. 357 (La. Ct. App. 1988).

71 Harbin v. Harbin, 495 So.2d 72 (Ala. Civ. App. 1986).

72 Thompson v. Thompson, 624 So. 2d 619, 620 (Ala. Civ. App. 1993).

73 Carney v. Carney, 525 So.2d 357 (La. Ct. App. 1988)

74 La.C.C. Art. 146(C) (1988).

> in the best interest of the child.[75] In order to make such a showing, evidence may be introduced regarding the fitness of the parent to care for the child, including among other factors, the moral fitness of the parties involved as well as the mental and physical health of the parties.[76]

Nebraska has followed suit and has held that the mere "seeking of custody places a parent's mental health at issue sufficient to operate as a waiver of the statutorily enacted privileges, the courts sometimes impose limitations on the disclosure."[77]

Alaska courts have addressed this issue as well. The relevant state statute sets out: "Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. 'It is the intent of the legislature, that as a result of these reports, protective services will be made available in an effort to

> (1) prevent further harm to the child;
> (2) safeguard and enhance the general well-being of children in this state; and
> (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.'[78] This demonstrates the state's strong interest in protecting and preserving the well-being of the children of this state."

Missouri uses a similar approach regarding the admissibility of mental health records despite the assertion of the psychotherapist-patient privilege.[79] The relevant statute states that in order for a court to make a custody determination, a court "shall consider the mental and physical health of all individuals involved, including any history of abuse of any individuals involved."[80]

However, merely seeking custody of one's children does not automatically put one's mental health at issue thereby waiving a party's psychotherapist-patient privilege.[81] The party seeking to

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[75] La.C.C. Art. 146(C)(2) (1988).

[76] LSA-C.C. Art. 146, subd. C(2)(f, g) (1984). .

[77] *Laznovsky* at 1066, *citing* Clark v. Clark, 371 N.W.2d 749, 752-53 (1985).

[78] AS 47.17.010 (1987).

[79] Roth v. Roth, 793 S.W.2d 590 (Mo. Ct. App. 1990); In Re Interest of S.J., 849 S.W.2d 608 (Mo. Ct. App. 1993); In Re Marriage of Daneshar, 953 S.W.2d 95 (Mo. Ct. App. 1997).

[80] *Roth, supra* note 78, at 592, R.S.Mo. §211.459.4 (1990).

[81] *Roth at 593.*

compel disclosure of privileged communications must demonstrate a suspicion of child abuse or neglect in order to pierce the privilege.[82]

> The Missouri legislature has made it clear, as demonstrated through the statutes and case law cited above, that protection of the child in abuse and neglect cases is of paramount importance. The statutes have been construed broadly to achieve this purpose. In other words, the governmental interest in protecting children from abuse and neglect clearly outweighs the private interest here.[83]

Texas agrees with Missouri's position. In *Smith v. Gayle,*[84] a father contended his medical records were not subject to discovery because they are privileged under Tex.R.Civ.Evid. 509 and 510. The court however, stated that each rule states that an exception to privilege exists when "the disclosure is relevant in any suit affecting the parent-child relationship." Because the medical records were relevant to the issue of whether it was in the children's best interest to reside in his former wife's household, the court admitted them into evidence.

The Indiana courts have perhaps taken the most conservative approach in applying the psychotherapist-patient privilege and stated that the mere filing of a custody action automatically places the parent's mental condition "at issue" sufficient to compel any records regarding a parent's mental health to make the best child custody determination possible. In *Owen v. Owen,*[85] the court believed that wife's mental state affected her ability to adequately care for the children of the marriage; and recognized the necessity of examining the mental health of all parties involved, and in doing so, demonstrated the importance the tribunal places on having all relevant evidence—as long as such information is at its disposal when making a custody determination. Clearly, the court places a higher value on protecting the best interest of the children than it does on protecting the privacy of a parent.
The court held that the mother:

> Placed her mental condition in issue when she petitioned for and was granted custody under the original order, and that condition remains

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82 *Id.*
83 In Re Interest of S.J. at 611.
84 834 S.W.2d 105, 106 (Tex. App.—Houston [1st Dist.] 1992).
85 Owen v. Owen, 563 N.E.2d 605.

> in issue for the purposes of custody questions during the children's minority. Therefore, her blanket assertion of the physician-patient privilege regarding her mental condition was not justified. When a party-patient places a condition in issue by way of a claim, counter-claim, or affirmative defense, she waives the physician-patient privilege, and information which would otherwise be protected from disclosure by the privilege then becomes subject to discovery.[86]

The filing of a claim does not waive the privilege as to the party's entire medical record—information unrelated to the issue at hand must remain confidential and protected from discovery.[87] The court prefers a liberal approach to admitting evidence and only makes an exception as it relates to matters of heightened sensitivity.[88]

> In all cases except those which would reveal conditions which are irrelevant to the condition in issue and which are of a highly intimate or embarrassing nature, liberal discovery should proceed unimpeded and parties should expect to make full disclosure of medical records sought pursuant to the rules of discovery and that, in those rare cases where the physician-patient privilege is properly invoked, it is incumbent on the party seeking to assert the privilege to identify to the court specifically which documents are believed to remain within the privilege, after which the court will review the contested documents. . .to ascertain their entitlement to the protection of the privilege.[89]

The conservative approach to applying the psychotherapist-patient privilege taken by courts in Alabama, Alaska, Indiana, Louisiana, Missouri, and Texas demonstrates a paramount interest in those jurisdictions for preserving the welfare of the child by compelling discovery of a patient's private mental health records to determine patient's fitness as a parent. Clearly the court recognizes an important societal and governmental interest in safeguarding children from being placed into custody arrangements with parents of questionable mental stability especially when other custodial options exist.

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86 *Laznovsky* at 1067 *citing* Owen v. Owen, 563 N.E.2d 605 (Ind. 1990).

87 Owen v. Owen, 563 N.E. 2d 605, 608 (Ind. 1990).

88 *Id.*

89 *Id.* at 608.

VIII. The Liberal Approach of the Application of the Psychotherapist-Patient Privilege

Several jurisdictions have expressed a different view toward admitting the exclusion to the psychotherapist-patient privilege in child custody disputes. These states include: Florida, Maryland and New Jersey.

Florida has specifically addressed the issue of whether a patient-litigant's mental health records can be forced to be produced in marital litigation in several different cases.[90] The Florida opinions demonstrate the balancing of the two competing interests previously presented: the state's interest in protecting children by forcing disclosure of all evidence to the parent-child relationship while protecting the communication between a patient and a mental health professional, thereby promoting the state's interest in providing access to effective mental health treatment. The courts have focused on the degree of necessity of access to mental health records to make the best interest of the child determination.[91] In *Critchlow v. Critchlow,*[92] wife filed for divorce and sought custody of minor child. She later received treatment from a psychiatrist. Her ex-husband filed for, and was granted custody of their child. The court held that when it comes to custody of a child, the mental condition of the parent is relevant and thus, is the exception to the privilege between psychiatrist and patient.

In cases where there has been no egregious conduct by the parties and the children are not in a potentially dangerous situation, the court has allowed the privilege to be construed more liberally.

For instance, one court held:

> The threshold question is whether or not the wife, by seeking child custody in a suit for dissolution of marriage, introduced her mental condition as an element of her claim or defense so as to waive the privilege for any relevant communications.[93] There is no doubt, in a

[90] Roper v. Roper, 336 So.2d 654, Critchlow v. Critchlow, 347 So.2d 453 (Dist. Ct. App. Fla. 1977), Mohammad v. Mohammad, 358 So.2d 610 (Dist. Ct. App. Fla. 1978), Peisach v. Antuna, 539 So.2d 544 (Dist. Ct. App. Fla. 1989), Leonard v. Leonard, 673 So.2d 97 (Dist. Ct. App. Fla. 1996).

[91] Critchlow v. Critchlow, 347 So.2d 453, 454 (Dist. Ct. App. Fla. 1977.)

[92] *Id.*

[93] FLA.STAT. § 90.242(3)(b) (1975).

> child custody dispute, that the mental and physical health of the parents is a factor that the court can and should consider in determining the best interests of the child.[94] However, we do not believe that simply by seeking custody of her children, wife has made her mental condition 'an element of her claim or defense' thereby waiving her psychiatrist-patient privilege.[95]

The court did, however, recognize the importance of protecting the confidentiality of the therapeutic relationship and how that relationship is compromised by the threat of disclosure of potentially embarrassing information:

> A psychiatric patient confides in his or her psychiatrist with more candor than he or she would normally exhibit in other relationships. Successful therapy and treatment requires complete disclosure of the most personal thoughts and recollections. A treating psychiatrist who cannot assure his patient of confidentiality would be severely handicapped. The psychiatrist- patient privilege would be seriously compromised if a treating psychiatrist could be required to testify against his patient in any divorce proceeding where the issue of child custody was raised. If such were the law, no psychiatrist could ever assure his patient of confidentiality.[96]

The court identified a state interest in "maintaining a proper balance between facilitating the ascertainment of the truth in connection with legal proceedings and avoiding unwarranted intrusions into the confidences of the psychiatrist-patient relationship."[97] This does not mean that the courts do not consider the mental and physical health of a parent in making custody determinations. Instead of piercing the psychotherapist-patient privilege, the court often directs both parties to submit to an independent psychological evaluation.[98] This allows the court to ascertain a parent's fitness without delving into the private and potentially embarrassing subjects addressed in therapy sessions.[99] Some courts believed this to be a much less intrusive way to gain the information relevant to placing the child in the best custodial

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[94] FLA.STAT. s 61.13(3)(g) (1975). Green v. Green, 254 So.2d 860 (1st DCA Fla.1971).

[95] Roper v. Roper, 336 So.2d. 654, 656 (1976).

[96] *Id.*

[97] *Id.* at 656.

[98] *Id.* at 657 *qtg.* Schouw v. Schouw, 593 So.2d 1200, 1201 (Dist.Ct.App.Fla. 1992).

[99] *Id.*

arrangement possible.[100] Florida courts have also recognized that receipt of mental health treatment often enables one parent to provide "a more stable, nurturing and healthy home for the child."[101]

New Jersey courts have taken an approach similar to that utilized by Florida courts in liberally construing the psychotherapist-patient privilege in child custody proceedings. The courts recognize the importance of access to mental health treatment to the individual patient and to the welfare of the general public:

> On the one hand, the psychotherapist-patient privilege protects the individual from public revelation of innermost thoughts and feelings that were never meant to be heard beyond the walls of the therapist's office. On the other hand, the privilege makes possible open and therefore productive relationships between therapists and patients, thereby advancing the public good accomplished when individuals are able to seek effective mental health counseling and treatment.[102]

However, the courts also balance the need to protect children from unstable parents against the importance of promoting treatment of mental health disorders.[103] There is a compelling interest in preserving this privilege because potential disclosure of confidential communication is "deleterious to the therapeutic relationship."[104]

However, the court acknowledged that the balance tips in the favor of facilitating the best interest of the children. and subscribed to a three-part test—the *Kozlov* test—in determining whether to force disclosure of privileged communications.[105] This test focuses on the legitimate need for the evidence, and the relevancy and materiality of the evidence the issue before the court. The third prong of the test focuses on the preponderance of the evidence and provides that the party seeking the information must show that the information cannot be obtained from any other source.[106] The court hesitates to pierce the psychotherapist-patient privilege if evidence of a parent's fitness to have cus-

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100 *Id.*

101 Peisach v. Antuna, 539 So.2d 544, 545 (Dist. Ct. App. Fla. 1989).

102 Kinsella v. Kinsella, 696 A.2d 556, 566 (S. Ct. N.J. 1997).

103 *Id.*

104 *Id.* at 1060.

105 *Id.*

106 *Id.* at 568.

tody of her children can be obtained by less intrusive means.[107] Thus, *Kinsella* concludes that when the court seeks to ascertain the fitness of a parent their first source should be an independent examination by a court appointed psychologist.[108] This demonstrates both the importance of determining the best interest of the child and the necessity for the court to have all relevant information before it when making a custody determination while preserving the confidentiality of communication made in an existing therapeutic relationship.[109]

Laznovsky v. Laznovsky[110] is the most recent case addressing the admissibility of mental health records of a parent in a child custody proceeding. This court utilized the same balancing test used by most jurisdictions. It weighed the best interest of the child standard and the important interest in placing the child in the most safe, stable, and nurturing environment possible versus protecting confidential information revealed in the course of therapy compromising the psychotherapist-patient privilege and a basic right to privacy.[111] The court concluded that "the benefits to society of having confidential and privileged treatment available to troubled parents far outweighs the limitations placed upon the court by not having such information revealed against a parents' wishes."[112] In fact, the potential disclosure of confidential communication is "deleterious to the therapeutic relationship."[113]

The court focused on the repeal of a Maryland statute excluding the assertion of the psychotherapist-patient privilege in child custody proceedings.[114] Senate Bill 90 expressly eliminated the exception to the privilege in custody disputes. The court stated:

> It is clear to us that the Legislature was fully aware of the ramifications of the child custody exception amended into the statute during its original enactment. At the time the exception was repealed, with the information furnished and available to the Legislature through the

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107 *Id.*
108 *Id.*
109 *Id.*
110 745 A.2d 1054 (Md. Ct. App. 2000).
111 *Id.*
112 *Id.* at 1061.
113 *Id.* at 1060.
114 *Id.*

> proceedings of its committee, it is evident that they were being asked to consider the balancing of the interests in the psychiatrist/psychologist-patient privilege with the need of the courts to have such information in assessing the best interests of the children in custody cases. The psychiatrist/psychologist-patient privilege prevailed as the Legislature elected to remove the exception that had theretofore permitted the courts to hold the privilege inapplicable in child custody cases. Thus, the Legislature balanced the interests and made the determination.[115]

This does not mean that such information is completely unavailable and will never be admitted. This merely demonstrates the courts preference for obtaining such information from professionals hired in the course of litigation as the first source, preserving the confidentiality and trust with professionals with whom the parties have a previous and on-going therapeutic relationship. Only if the court feels the information obtained in this manner is insufficient to render a decision, may it even *consider* piercing the psychotherapist-patient privilege.

In this case, the court still utilized a form of the balancing test used by other jurisdictions and recognized the competing interest of the child's welfare and the parent's right to privacy. However, the repeal of the existing statute that provided an exception to the privilege reflects the legislature's intent to preserve the confidential nature of therapeutic relationships, thereby facilitating access to mental health services without fear of public disclosure.

Courtney Waits

115 *Id.* at 1061.