DOMESTIC DISPUTES

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A Victory for Privilege

Does confidentiality trump the best interest standard in child custody cases?

In child custody litigation, there is often a tension between a party's right to privacy of his or her mental health records and a court's obligation to determine the best interest of a child.

A recent decision has now held that a party's right to confidentiality is not trumped by the best interest standard. In fact, last month, Dorothy Phillips and Sydney Coutts Mason presciently wrote about the statutory privileges that govern the release of mental health records. In a March 10 opinion, the Superior Court decided the case of *Gates v. Gates*, 2009 WL 596664 (Pa. Super. 2009), which squarely addressed this issue.

In *Gates*, the parties were the parents of an 11-year-old child. Pursuant to an October 2006 order, father was awarded primary physical custody. In December 2007, upon learning that mother had been treated for in-patient mental health services at a regional medical center for a period of 15 days earlier that month, father filed a petition for special relief seeking the release of mother's mental health records. He also subsequently filed a petition to modify the custody order. However, father did not allege that mother's mental health issues presented any danger to the child or impeded her ability to care for him. Instead, the relief requested in the petition to modify was the same as that in his special relief petition — a request for mother's mental health records. Mother filed an answer to the petition to modify, challenging father's right to seek her mental health records, which she alleged were privileged.

The following month, the trial court held a hearing. The court first conducted an in-camera conference. Mother acknowledged that the trial court had the authority to order her to submit to a mental health evaluation pursuant to Pa. R.C.P. 1915.8, but still would not consent to the release of her records. The court then permitted testimony, and it allowed father to cross-examine mother about her December 2007 hospitalization generally. Mother testified that she believed her medication was not working properly, and, thus, she went to the hospital. After an examination, her doctors advised her that she would have to stay for observation so that they could monitor her medication. Mother did not object during her testimony, but she was steadfast in her continued objection to providing her mental health records.

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On April 8, 2008, the trial court entered an order directing mother to execute a consent to release her mental health records to father. Specifically, it directed her to release her treatment summaries, hospital admission and discharge summaries, reason for hospitalization, current medications, and treatment plans. Mother filed an appeal. Meanwhile, father filed a petition for contempt due to mother's refusal to comply with the April 8, 2008, order. On May 16, 2008, the trial court entered an order holding mother in contempt, suspending her custodial rights altogether and awarded father counsel fees of $625. Mother also appealed that order, which was consolidated with her first appeal.

> The Superior Court ... noted that simply because the trial court has the authority to direct a party to submit to a mental health evaluation does not mean that the court has the power to direct her to release all of her mental health treatment records.

Mother filed an application for supersedeas with the Superior Court, which was granted June 24, 2008. The Superior Court stayed the April 8, 2008, order directing mother to release her mental health records, as well as the May 16, 2008, order holding her in contempt.

In determining whether the trial court had violated mother's right to privacy by ordering her to sign releases making her mental health records available, the Superior Court looked to the statutory privileges in the Judicial Code, 42 Pa. C.S. § 5944, and the Mental Health Procedures Act, or MHPA, 50 P.S. § 7111(a). The Judicial Code provides: "No psychiatrist or person who has been licensed ... to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services on behalf of such client."

The MHPA provides that "all documents concerning persons in treatment shall be kept confidential, and without the person's written consent, may not be released or their contents disclosed."

The MHPA thus offers broader protection than the privilege set forth in the Judicial Code. The provisions of 42 Pa. C.S. § 5944 only relate to confidential communications with psychiatrists or psychologists that were made in the course of treatment. Therefore, opinions, observations and diagnoses are not protected by privilege of confidential communications. *Commonwealth v. Moody*, 843 A.2d 402 (Pa. Super. 2004). However, the MHPA protects all documents regarding mental health treatment.

The Superior Court acknowledged that to the extent the records ordered to be released did not contain communications mother made to her psychiatrist, the records were not protected under 42 Pa. C.S. § 5944. However, the court noted that because 50 P.S. § 711 protects all mental health treatment records, this provision should preclude the release of the records.

The trial court had acknowledged that the MHPA would have barred the release of mother's mental health records, but it found that mother had waived her privilege by conceding the court's authority to order an evaluation; failing to invoke the privilege at the first opportunity; and agreeing during the initial custody proceedings in 2005 to release certain medical information.

The Superior Court rejected all of these rationales. The court noted that simply because the trial court has the authority to direct a party to submit to a mental health evaluation does not mean that the court has the power to direct her to release all of her mental health treatment records. The court also dismissed the trial court's conclusion that mother had waived her confidentiality rights because she did not specifically reference the MHPA in her answer to father's petition to modify or during the custody hearing. The court observed that mother had asserted a privacy privilege in her answer. Because Pennsylvania is a fact-pleading state, mother was not obligated to cite the specific statutory basis for her claim, and the court determined that mother had pled the material facts upon which her privilege was based. The court determined that mother's invocation of privilege was sufficient to provide Father with notice of her claim. Finally, the court held that mother had not waive her privilege because she previous agreed to release certain medical docu ments in the initial custody proceedings That order did not direct mother to pro vide such records on an ongoing basis The court concluded that any consen mother signed during the earlier custod proceedings (three years before) was ir relevant to records after that date.

The court addressed father's argumen that because the instant case involved a custody matter, where a trial court mus consider the children's best interest, the MHPA privilege did not apply. The cour concluded that the MHPA is equally applicable in a custody dispute as it is in a civil matter. The court noted that this was particularly the case where there were less intrusive alternatives to evaluate how a party's mental health affected the child's best interest. The court provided examples of such less intrusive means, such as using of mother's testimony at the custody hearing concerning the circumstances of her hospitalization, or requesting that the court direct the party to submit to a psychological evaluation pursuant to Pa. R.C.P. 1915.8.

Thus, the court reversed the trial court's order directing mother to release her mental health records to father and the court. It also vacated the order holding mother in contempt, determining that she was justified in declining to disclose her mental health records to avoid irreparable harm hade the documents been released pending the outcome of her appeal.

The *Gates* decision is in line with a thorough and comprehensive trial court decision, *Leskin v. Christman*, 78 Pa. D. & C.4th 152 (C.P. Carbon 2006), which had been one of the few published decisions addressing the application of the psychotherapist-patient privilege and the MHPA in custody proceedings. In that case, the father sought the release of the mother's mental health treatment records where she suffered from depression and had been hospitalized for 10 days. The court nicely summarized the dilemma as balancing "the importance of producing evidence relevant to assessing the best interest of a child against the value of a legislatively created privilege in favor of confidentiality." The court held that when the privilege is properly invoked, any exceptions must be confined to rare and exceptional circumstances. The court found that the father had failed to show that the disclosure requested would not violate the privilege or that there were any extenuating circumstances justifying an exception to the privilege.

Compare *Gates* and *Leskin* to a 2002 decision by the Superior Court holding that an order requiring mother to

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Records

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amounted to a quid pro quo. Ciavarella and Conahan deny that allegation.

"This order represents another positive step in the Court's resolve to restore public trust and confidence in the juvenile justice system of Luzerne County," Chief Justice Ronald D. Castille said in a statement. "Citizens of the county — and the Commonwealth — have a right to expect a full accounting of what happened and the correction of any abuse of judicial authority."

In February, the justices appointed Grim, the chairman of the Pennsylvania Juvenile Court Judges' Commission, to review juvenile court cases handled by Ciavarella after Ciavarella and Conahan entered into conditional plea agreements with federal prosecutors.

This initial review only included cases involving low-level offenders who did not have attorney representation. Before an exact number of expungements is known, Grim must "conduct a further analysis to identify all cases covered by today's Supreme Court order."

Grim has told the Associated Press that his initial review involved hundreds of cases.

In his recommendation to the justices, Grim outlined seven criteria to be met before a juvenile's criminal record should be expunged. He wrote that the case must have taken place between 2003 and 2008; that the juvenile must not have had an attorney at his or her hearing before Ciavarella; and that the juvenile did not waive a right to counsel.

> 'Had the juveniles in these cases been represented by competent counsel, had they appeared before an impartial tribunal, and had their other constitutional rights been protected, the vast majority of cases would have resulted in consent decrees, or some lesser sanction.'
>
> — Senior Judge Arthur Grim

Grim also wrote that the offenses at issue had to have stemmed "from a single course of conduct or related incidents; or (b) were handled as part of a single proceeding or hearing."

The offenses had to be misdemeanors of the third degree or summary offenses.

Grim also wrote that the expungement would only apply if "the juvenile was not the subject of any prior or subsequent Petitions which resulted in adjudications of delinquency or consent decrees; and (vii) no proceeding seeking adjudication or conviction is pending."

"An additional factor weighing in favor of vacating the adjudications and consent decrees and expunging the records in the categories specified ... is that this prompt action in these non-serious cases will be at least one step towards righting the wrongs which were visiting upon these juveniles and will help restore confidence in the justice system," Grim wrote. "Furthermore, it is not in the interest of the community to relitigate these non-serious cases, nor do I believe that the victims would be well-served by new proceedings."

Grim also asked the high court to have the court records in question released to the Juvenile Law Center, so the JLC can review the files before accepting expungement. Grim wrote that the center may wish to delay that action and collect the records needed to continue in their civil actions. Grim also requested that the records be released to Luzerne County District Attorney Jacqueline M. Carroll for her review.

The senior judge will also conduct a separate review of cases involving more serious juvenile offenses, the court said.

"Today's order is not intended to be a quick fix," Castille said in a statement. "It's going to take some time, but the Supreme Court is committed to righting whatever wrong was perpetrated on Luzerne's juveniles and their families." •

Verdicts

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was based upon the 1999 audit, which found Diehl's division failed to monitor the Park Home program and failed to establish an internal control so that it could effectively account for funds owed and/or received. In addition to Diehl, three other employees were terminated as a direct result of the audit.

In regards to the county's claim about the 1999 audit, Diehl argued that the Park Home program had existed since at least 1994, well before Diehl's promotion to operations manager, and that the audit found no specific fault with his performance in that capacity.

The plaintiff sought an unspecified amount in damages for emotional distress and damage to his reputation.

The jury found that Diehl, by a preponderance of the evidence, established that he held a political affiliation with Larry Dunn, that Robert Cranmer was aware of his political affiliation with Dunn and that Diehl's political affiliation with Dunn was a substantial or motivating factor in the defendant's decision to terminate him.

Jurors did not find that the defendant would have made the same decision to terminate Diehl even in the absence of the plaintiff's political affiliation with Larry Dunn. Diehl was awarded $144,000.

This report is based on court documents and information that was provided by plaintiff's and defense counsel.

— This report was first published in VerdictSearch Pennsylvania, a publication of IncisiveMedia. •

Domestic

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undergo random drug testing — even though there was no evidence that she used drugs — did not violate the reasonableness requirement of the Fourth Amendment. In *Luminella v. Marcocci*, 814 A.2d 711 (Pa. Super. 2002), the court noted that child custody litigants have a "drastically reduced expectation of privacy," and that the state's interest in the welfare of children is compelling. The court referenced the privileges that apply to a party's mental health records, but distinguished that privilege from the court's authority to order drug testing on the basis that the mother's "innermost thoughts and feelings" were not at issue with a drug test.

The *Gates* decision noted that there were less intrusive means of evaluating mother's mental health as it related to her abilities to parent the child, including having mother submit to a psychological evaluation pursuant to Rule 1915.8. However, is there ever a circumstance where the privileges in the Judicial Code and the MHPA are trumped by the state's compelling interest in protecting the welfare of the child? *Luminella* would certainly suggest so. If there had been specific evidence in *Gates* that mother's mental health condition was endangering the child, would the court have ordered the release of the documents? The decision also leaves open whether a court-appointed evaluator would have the right to review the exact records mother was seeking to protect from disclosure. Presumably, any evaluator would want to review the parties' mental health records, and particularly those relating to recent hospitalizations. Rule 1915.8(a)(2) provides that the court may order a party to execute authorizations or consents to facilitate a mental health examination. If mother refused to release her records to an evaluator, could the evaluator or the court draw adverse inferences from her refusal? If she released the records to the evaluator, is this an implied consent to a release to the court?

Does *Gates* mean that all rights of confidentiality can override the court's obligation to develop a full and complete record in child custody cases? For example, would the physician-patient privilege, 42 Pa. C.S. § 5929, prevent a court from ordering a party to release medical information to the other party or court? Could a party seek refuge under HIPAA, 45 C.F.R. § 164.508, which requires an authorization before a party's health information can be released? Similarly, the Pennsylvania Drug and Alcohol Abuse Control Act, 71 P.S. § 1690.108, provides that all patient records and information relating to drug or alcohol abuse or dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential. However, the act provides that disclosure may be made for non-treatment purposes only upon an order of court after application showing good cause.

Gates is an extremely important decision for both the family law bench and bar. From a practical standpoint, it signals to family lawyers to object to the release of records on behalf of a client as specifically as possible, and at the first opportunity presented. •

Zoning

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he Kornfelds did anything to improperly nfluence Conahan's decisions in those ases.

Mark Kornfeld, who is listed as a laintiff in both lawsuits, answered the hone in Gary Kornfeld's office when a eporter called. He said the court record stands for itself," but otherwise declined o discuss the decisions.

In *Kornfeld v. Atlantic Financial ederal*, The Woodlands' owners, Gary ornfeld and Mark Kornfeld, who said he etired from the business in 1994, and a ow-defunct business partnership called K.G.K.K., sued a bank in 2000 for failing to file mortgage satisfactions in a timely manner.

According to a Superior Court decision remanding the case for retrial before a different judge, Conahan in June 2002 awarded the plaintiffs $13 million in damages at the end of a non-jury trial.

Olszewski awarded the plaintiffs $900,000 in damages on retrial in 2005, according to Luzerne County court records.

In her opinion for a three-judge panel that decided the appeal, Superior Court Judge Phyllis W. Beck wrote that, while the panel agreed that the bank handled the matter improperly, "At worst, the Bank had a pattern of avoiding and being indifferent to its statutory obligations, and at best, it improperly trained and supervised its employees with regard to those obligations."

Beck wrote that while the law under which the plaintiffs filed their complaint was designed to punish such behavior, "Our careful review of the record reveals that the enormous verdict in this case did not bear any reasonable relationship to the actual damages suffered by the appellees as a result of the Bank's failure to satisfy the mortgages."

In the condemnation case, Conahan granted the Kornfelds' preliminary objections to declarations of condemnation filed by the Pennsylvania Department of Transportation 18 months after the declarations were filed. Under Pennsylvania's Eminent Domain Code, preliminary objections to a taking must be filed within 30 days, according to a Commonwealth Court decision reversing Conahan's order.

The case stemmed from an agreement to realign The Woodlands' driveway and its intersection with the state highway after a crash in which the victim sued both the DOT and the hotel.

In an unreported en banc opinion, Commonwealth Court Judge Renee Cohn Jubelirer wrote that nothing in the record supported the trial court's finding that the Kornfelds had cause to file the preliminary objections after the deadline. •