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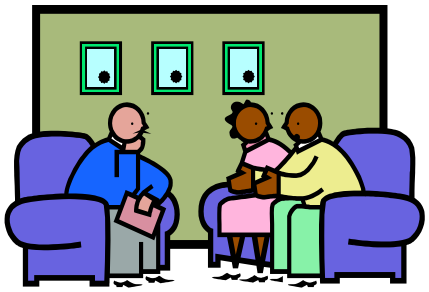
FAMILY LAW FOCUS

Will Therapists Be Made to Reveal Records?



What will happen to state's social worker/client privilege?

For years, counselors, therapists, social workers—and especially clients—have rested in the knowledge that whatever was said during their sessions was privileged information.

Indeed, Indiana Code section 25-23.6-6-1 states in part: "Matters communicated to a counselor in the counselor's official capacity by a client are privileged information and may not be disclosed by the counselor to any person …."

Statutory Exemptions to Rule

There are statutory exemptions, though, whereby practitioners may communicate such information.

There is no privileged communication pertaining to "a criminal proceeding involving a homicide if the disclosure relates directly to the facts or immediate circumstances of the homicide."

Nor does privilege exist "if the communication reveals the contemplation or commission of a crime or a serious harmful act."

15-Year-Old Murder Case

With a case in which the facts spin around four murders that occurred on April 29, 1989—but no arrests were made until August 7, 2002—this issue is now squarely in front of the Indiana Supreme Court.

While preparing for trial, the prosecutors learned that the defendant, who was charged with murdering his father, step-mother and two step-sisters, had been in counseling days before the killings occurred.

He had met alone with counselors and with his family, at least a dozen times, and notes from the sessions had been compiled.

Could therapists be compelled to produce client records?

Were Progress Notes Privileged?

At the trial court, one of the key issues was whether those progress notes were privileged under Indiana law—or did they fall within one of the exceptions to the confidentiality statute?

The judge reviewed the documents privately and determined that they were protected by the confidentiality privilege.

Lower Court Decision Affirmed

The Court of Appeals agreed and affirmed the lower court's decision in *State v. Pelley*, No. 71A03-0305-CR-163 on December 19, 2003.

The highest court in the state, however, vacated that opinion and agreed to take the case.

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SPOTLIGHT ON:

Not Even Novelist Could Invent Such Facts

*N*ever doubt the wisdom of that time-worn cliché suggesting "truth is stranger than fiction."

In a fact situation that taxes the imagination, the Court of Appeals recently found that a dead man's brother could offer evidence to rebut the presumption that a child born to the widow of the decedent was an heir.

Excuse me? Say what?

Request for DNA Testing Denied

In this case, the probate Personal Representative of the dead man (his brother) and the ex-wife (mother of three of his kids) challenged the denial of their request for DNA testing of a child born to the second wife after the husband had committed suicide.

The court said that—because the deceased was married when he died and the baby was born within 300 days of his death—the child was presumptively his heir.

Rebuttable Presumption

On appeal, the Petitioners argued they should have been allowed to rebut the presumption that the dead man was the father.

In addition, they said, heirship is not, as the second wife urged, set irrevocably at the time of death. There is an exception for after-born children.

The widow also contended that Petitioners had no standing to challenge the birth because only a supposed father could question paternity—and he was dead.

Ex-Wife Just "Interested Party"

Zigzagging between the paternity statutes and the probate code, the Court decided the ex-wife was merely an "interested party," as the mother of the other three children.

A Personal Representative must distribute assets to heirs.

The Personal Representative, though, "stands in [the deceased's] shoes and can bring an action if [he] could have done so."

There were "a wife and other children who are unquestionably . . . heirs," the Court continued. "In his role as Personal Representative, [he] just needs to know how much of the . . . estate to distribute to each of them."

Trial Court Misinterpreted Law

Because the trial court misinterpreted the law in denying the Petitioners the opportunity to rebut [the deceased's] presumptive paternity of the after-born child, the Court of Appeals reversed.

The case was sent back to the lower court "for further proceedings consistent with this opinion."

See *In Re Estate of Long*, 804 N.E.2d 1176 (Ind.App. 2004). ♦

Court Considers Privilege Issues

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Now the Court must decide if prosecutors can be allowed to see progress notes from the defendant's counseling records during the months prior to the deaths.

Should Prosecutors Be Barred?

It is a legal tangle worthy of King Solomon. Should the prosecutors be barred from seeing the records, even though a review might show the progress notes fell within one of the exemptions?

And what then will happen to communications with a therapist?

When a decision is rendered by the Supreme Court about this case, we will report on its ramifications in a future *Family Law Focus*. Stay tuned! ♦

Supreme Court ponders arguments.

Court Okays Adoption by Domestic Partner

Adding its voice to the debate about same-sex relationships is a Court of Appeals case that looks at adoption from a fresh perspective.

As it did in 2003, the Court viewed adoption within the context of a same-sex couple. (See *Family Law Focus*, Fall, 2003.)

In this case, though, a domestic partner petitioned to adopt the biological (rather than adopted) children of her same-sex partner.

Despite the biological Father's written consent that expressly relinquished all of his parental rights and despite the endorsement of the adoption specialist working for the county, the petition was denied.

Court backs adoption by same-sex partner and biological mother.

Court of Appeals Reverses

On appeal, in *In Re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind.App. 2004), the Court reversed.

Turning to the trial court's reliance on a statute concerning the effect of adoption on biological parents, it focused on the "step-parent" exception to the general rule that an adoption divests all parental rights of a living biological parent.

But, according to this provision: "If the adoptive parent of a child is married to a biological parent of the child, the parent-child relationship of the biological parent is not affected by the adoption."

Guiding Principle of Statutes

Given the legal inability of same-sex couples to marry in this state, the Court next looked at the guiding principle of the statutes governing the parent-child relationship: the best interests of the child.

"[O]ur paramount concern should be with the effect of our laws on the reality of children's lives," it noted. "It is not the courts that have engendered the diverse composition of today's families.

"It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle," wrote the judge.

Protect Rights of Children

"But it is the courts that are required to define, declare and protect the rights of children raised in these families."

Here the Court concluded the 13-year-old and 11-year old would be irrevocably deprived of the benefits of having, as their legal parents, the two people who were already assuming those roles in their lives—simply because of their Mother's sexual orientation. ♦

Court looks at "best interests of child" in approving same-sex adoption.

REALITY CHECKS:

√ Nearly 40 percent of American children have watched the break-up of their parents' marriage.

√ Between one-fourth and one-third of divorced parents report that they experience high levels of hostility and disagreement years after their separation.

√ About 10 percent of separated or divorced parents engage in prolonged and repeated litigation for two to three years.

√ Children caught in a bitter, long-drawn-out conflict between their parents often show up with emotional or behavioral problems, poor performance in school and even physical illnesses. ♦

Divorced Dad Must Support Child Who Is Not His

A divorced man or woman can only be ordered by a court to pay support for a biological child, one whom he or she has adopted or one over whom he or she has obtained a guardianship. Right?

Wrong.

In a case that makes short work of this notion, an ex-Husband was made to pay support for ex-Wife's niece—even though the child was not his biologically and neither he nor his former wife were named guardians of the girl.

Took Custody of Infant Girl

During the marriage, Husband and Wife assumed custody of the biological daughter of Wife's brother when the infant girl was five days old.

No proceedings were initiated by either of them to establish a formal guardianship or even to obtain legal custody of the child.

Instead, the child's mother had executed an Agreement of Custody in which she consented to—and requested—the couple to "have full custody and control over" the girl.

Wife Given Custody of Children

The couple was divorced in 1994.

Court enforces support order involving niece of former wife.

The Wife was given custody of the girl, and the Husband was given visitation and ordered to pay support.

The Husband abided by this decree until 2000 when he left the state due to an unrelated criminal prosecution. He then stopped paying support.

The Wife's petition for a child support arrearage of $13, 275 was granted, and a bench warrant was issued against the Husband for failure to pay.

Does Sense of Justice Prevail?

On appeal, he correctly argued that a sense of justice does not allow imposing a support burden on someone who is not the biological father.

Nonetheless, that is exactly what he had *volunteered* to do.

At the divorce hearing, he had told the court that "he was her dad, he raised her, and he wanted to continue to have part of her life. He wanted to pay child support and he wanted to have visitation."

In its opinion, the Court noted that Indiana law allows parties in a dissolution proceeding to agree to settle terms related to maintenance, property division and support.

Obligated Dad Agreed to Order

"In the instant context," it said, "that means a trial court has jurisdiction to fashion child support orders . . . , and the court has the authority to enter a child support order in a dissolution proceeding against a non-parent so long as the obligated party agreed to that term and the agreement was not the product of artifice or mistake.

"This is especially so where, as here, the obligated party *requested* that the obligation be imposed in exchange for consideration (in this case, visitation)."

See *Tirey v. Tirey*, 806 N.E.2d 360 (Ind.App.2004). ♦

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