PARENTAL RIGHTS TO ENGAGE THERAPY FOR A MINOR CHILD AND THE ILLINOIS MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CONFIDENTIALITY ACT.

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One of the many conundrums faced in the family law practice is the seemingly ubiquitous situation where your client decides that the children need professional help in dealing with the issues arising out of the divorce, and the other parent believes that counseling, therapy or whatever moniker you wish to assign to it is contrary to the children's best interests. In the past, in the absence of a parenting agreement or custody order, there was no clear guidance from the IMDMA or the courts as to which parent's choice controlled, if any.

Mental health professionals often expressed frustration and reluctance to do anything if the parents were not both on board and consenting to treatment, fearing litigation from the recalcitrant parent. Often, relief was sought from the court to force the issue, one way or another. A recent First District Appellate court decision has clarified parental rights, and the ability of the mental health practitioner to provide services, and given valuable guidance to family practitioners of both the legal and social science persuasions.

IRMO: Slomka, decided December 23, 2009 as case number 1-08-3567, establishes the rights of *either* parent, acting alone and without consent of the other parent, to enlist professional services for the minor children in the absence of a specific order designating one party or the other as the custodial parent. The decision also sheds light on the utilization and impact of the privilege afforded recipients of services under the Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/1, *et.seq.*).

In *Slomka*, Cook County Judge Edward R. Jordan was first presented with a petition for an order of protection brought on behalf of Mary Slomka. Following the hearing on that petition, and the entry of an order of protection in Mary's favor, Christopher Slomka filed a petition for injunctive relief seeking to enjoin Mary from taking the children to therapy sessions with Jean Gray. Ms. Gray is a licensed clinical professional who had been treating the wife and the parties' two minor children for several months before Mary brought a petition for emergency order of protection against Christopher, and she had testified at the hearing on the petition for order of protection.

At the evidentiary hearing conducted on the petition for order of protection, Ms. Gray testified that she had met with, and discussed her treatment of the minor children with Christopher. During the second of those meetings, she testified that Christopher exhibited severe mood swings and she described his behavior as being "totally inappropriate." Ms. Gray also characterized Christopher during subsequent telephone conversations intended to discuss the children's progress with him as being "hostile and angry."

Christopher's behavior notwithstanding, Ms. Gray testified that she continued to converse with him about her treatment of the children, despite his hostility, as she believed Christopher was "entitled to the information." Following the hearing on the petition for an order of protection, however, Ms. Gray apparently refused to speak with Christopher or discuss the children's therapy with him due to his hostility.

During the course of the proceedings on Mary's petition for an order of protection, Christopher objected to Ms. Gray's testimony on the basis of relevance and hearsay, but never objected on the basis of, or asserted the privilege contemplated by the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et. seq.* (hereafter, "The Confidentiality Act.").

Following the hearing, the trial court granted Mary an order of protection, but declined to name the children as protected persons under that order. Christopher then filed a motion seeking a preliminary injunction barring Mary from taking the children to Ms. Gray for therapy, arguing that he had a protectable interest in not having his children treated by a therapist who was hostile toward him, by virtue of her testimony against him in connection with Mary's petition for order of protection, and that he objected to Ms. Gray's continuing treatment of the children, and that he was entitled to receive information regarding his son's treatment by Ms. Gray and that she was denying him that information because "he cannot and will not speak to Jean Gray and Jean Gray will not speak to him." His petition also asserted that he had no adequate remedy at law, and that his relationship with his sons was being irreparably harmed by the ongoing therapy.

The trial court, following a hearing on the petition for injunction, found that Christopher's inability to communicate with Ms. Gray, and her unwillingness to communicate with him had nothing to do with his being denied access, and that the alleged lack of access did not, therefore, constitute a sufficient factual basis for injunctive relief. Christopher also, belatedly, argued that Ms. Gray's testimony violated The Confidentiality Act. Mary responded by asserting that Christopher had waived the privilege by virtue of his failure to raise it at the hearing on the petition for order of protection.

In connection with Christopher's claim of privilege, the trial Court found that the Slomkas were "recipients" of services within the meaning of the Confidentiality Act, but that Christopher had waived the privilege afforded by the Act by failing to assert the privilege as an objection in the order of protection hearing. The Court ultimately found that Christopher had failed to carry his burden of proof for injunctive relief, and denied the injunctive relief sought. Christopher then filed an appeal of the denial of the preliminary injunction as an interlocutory appeal as provided for in Supreme Court Rule 307. The appellate court first addressed the issue of Christopher's waiver of the privilege afforded recipients of services set forth in Section 5 of The Confidentiality Act.

Christopher argued that he had not signed a waiver of the privilege, nor placed his mental health in issue, and that the failure to secure a written waiver from Christopher was a clear violation of The Confidentiality Act and the provisions of Section 5 which provide that a party may not waive the privilege by failing to object on the grounds of privilege, a written waiver being required. The appellate court, however, found that Section 10(a) of The Confidentiality Act governed legal proceedings, and that section requires the assertion of the privilege against disclosure, so that Christopher was entitled to invoke the privilege at the time of the hearing on the order of protection.

The appellate court went on to note that, unlike Section 5, Section 10(a) of the Confidentiality Act requires an *affirmative* act (a specific objection based upon the privilege, which Christopher never made at the hearing) by the recipient or the therapist in order to assert the privilege in conjunction with a legal proceeding. A failure to do so constitutes a waiver of the privilege, and in fact, Christopher failed to assert the privilege because at no time during Jean Gray's testimony did he assert it, or base an objection to Ms. Gray's testimony upon the privilege afforded.

Worse yet, from Christopher's standpoint, the appellate court held (consistent with several earlier cases) that once waived, the privilege cannot be reasserted. The impact of this portion of the decision is obvious, and a lesson to be learned by all practitioners. A brief digression from a review of the case itself is, therefore, in order. Parents have a right to maintain confidentiality of conversations they have with mental health professionals regarding their children. That right however, once waived, cannot likely ever be restored.

As family lawyers, we should identify, with specificity, any and every conversation our client has had with any treating mental health professional, and the substance of that conversation early on in the case, whether the conversation involved treatment of the children or treatment of the client. To the extent that potentially damaging information or opinions are found, specific care must be exercised to try to limit its availability to the court.

Certainly this can be done by the use of specific objections and the assertion of the privilege should questions be posited during an evidentiary hearing that wanders into privileged territory. However, a more proactive and prophylactic measure would be to consider a motion in limine in advance of any hearing where concerns exist that an attempt to elicit privileged information might be made. The practitioner is also well advised to consider whether granting access to privileged information by the guardian ad litem or forensic custody evaluator is a good idea. These individuals typically ask for broad access to all sorts of information during their investigations, and particularly enjoy rummaging through the attic of the mind with anyone who has afforded the client mental health services within the purview of The Confidentiality Act.

The prudent approach to employ here is to have the client authorize the provider to discuss the services rendered with you, prior to blindly agreeing to afford access to privileged information to a guardian ad litem or psychological evaluator. In this fashion, you will be able to determine the

nature and extent of the information the provider of services to your client has to disclose, and whether or not disclosure is going to be harmful to your client. This determination will obviously require you to juxtapose the damage caused by disclosure of the privileged information with the political damage your client will suffer with the guardian or evaluator for refusing to disclose. However, in light of the fact that any waiver of the privilege affords not just the guardian or the evaluator access to the information, but the opposing counsel as well, the exercise remains not only practically prudent, but perhaps tactically useful as well.

Also, request and review carefully any insurance forms submitted by the provider of services to your client. These forms vary widely from carrier to carrier, but can often contain damaging information essentially disguised as symptoms for which the treatment is being rendered that are keyed to policy provisions that continue payment by the insurance carrier. I once had a client who told her therapist that sometimes she just wanted to give up. In psychological parlance, this translated into the "suicidal ideation" box being checked on the therapist's monthly report to the insurance carrier, This article is not intended to address the myriad of issues that you will face when dealing with a client's mental health provider, past or present. The point is, however, to always keep in mind the lesson Christopher Slomka learned the hard way: once the privilege is waived, it cannot be reasserted.

The second part of Christopher's appeal challenged the trial court's denial of his request for a preliminary injunction. In substance, Christopher alleged that his parental right to make decisions regarding his children, and to participate in their mental health care was a clearly ascertainable right in need of protection, that his relationship with his children would suffer irreparable harm through Jean Gray's continuing treatment of his sons, that he had no adequate remedy at law because no monetary damages could adequately redress the damage to his relationship and the prevention of his participation in their care, and that he was likely to succeed on the merits of his petition for dissolution.

The appellate court began by noting that the extraordinary remedy afforded by injunctive relief is designed to preserve the status quo pending resolution of the case on the merits. "Status quo," is generally defined as the last peaceable status between the parties which preceded the pending controversy. As noted in the opinion, the minor children had been in counseling, with Christopher's knowledge, for a number of months prior to the hearing on the petition for order of protection and the petition for preliminary injunction. As a result, an injunctive order barring further treatment by Jean Gray would not have *maintained* the status quo, but rather would have *changed* it.

The opinion further discussed, and affirmed, Christopher's rights as a custodial parent to determine his children's upbringing (citing Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000), and 750 ILCS 5/608), and that these parental rights are constitutionally protected fundamental rights, citing Wickham v. Byrne, 199 Ill.2d. 309 (2002), These authorities were

raised by Christopher as controlling authority that he was entitled to the injunctive relief requested. The First District acknowledged the authority of the cases and the statue cited by Christopher in support of his argument, but opined that while the authority cited by Christopher was certainly and clearly the law, it really didn't apply in the fashion Christopher was suggesting.

In its opinion, the appellate court noted that none of the authority cited by Christopher stood for the proposition inherent (but unstated) in his position, that being that *his choice* of a provider of services to his children should prevail over Mary's choice. This position was particularly untenable when neither parent's fitness had been questioned in the lower court proceedings. In order for Christopher to establish that he would succeed on the merits of his petition, and entitle himself to injunctive relief, he would have to establish that it was likely he would succeed in obtaining sole custody of the boys so that his choice of providers would usurp Mary's "equal right" to make that choice.

This he did not do, and in light of the fact that the entry of an injunctive order would also alter, not maintain the status quo, the First District held that Judge Jordan had properly denied the preliminary injunction requested. In short, absent a custody order, both parents had equal rights to make choices, and Christopher could not stop Mary from making the choice she made in the exercise of her parental discretion, Ms. Gray's hostility notwithstanding.

The decision specifically addressed Christopher's allegation that Ms. Gray's hostility toward him and the resultant denial of his participation in the children's therapy and general care constituted irreparable harm. The First District summarily dispatched the argument by noting that a petition for preliminary injunction must plead facts that clearly establish the petitioner's right to relief, by noting that Christopher's allegations were not facts, but rather allegations of opinion, conclusions or beliefs. As a result, it affirmed the trial court's finding that Ms. Gray's hostility, and Christopher's inability to communicate with her did not constitute a sufficient factual basis for an injunction.

Christopher had alleged in his petition for injunctive relief that he intended to file suit against Ms. Gray for violating The Confidentiality Act, as contemplated by the penalty provisions set forth in the The Confidentiality Act. The appellate court noted, without deciding whether a right to sue under The Confidentiality Act did in fact exist, that Christopher might have a remedy for money damages against Ms. Gray under The Confidentiality Act. The court went on to opine that if such a remedy existed, it would not necessarily preclude injunctive relief, due to the difficulty in quantification of damages Christopher and his relationship with his children had allegedly suffered at Ms. Gray's hand.

Having said that, somewhat gratuitously, the First District then found that Christopher's allegation that he had no adequate remedy at law, as alleged in the petition, was nothing more than a conclusion and insufficient to support injunctive relief. Finally, even if the Court were to

conclude that he had alleged sufficient facts to establish an inadequate remedy at law, his failure to establish any of the other factors required for injunctive relief was sufficient to affirm the trial court's denial of the request for injunction.

The Slomka case is the first case in my experience which specifically acknowledges the rights of parents, prior to the entry of a custody order, to seek and secure medical and mental health treatment for their children, independently of, and without the consent of, the other parent. Indeed, the particular facts of Slomka, and the First District's decision appears to suggest that a parent's right to make choices on behalf of minor children, prior to the entry of a custody order, exists even in the face of objections by the other parent. On that basis alone, it is a welcome clarification to family lawyers, and mental health professionals alike. The prudent practitioner will, however, keep in mind that Christopher had knowledge of Ms. Gray's treatment, and did not object until the therapy was well in progress. As a result, Slomka's lesson might be conservatively stated to be, when faced with the issue of treatment choices made by the other parent, address, object and litigate the issue immediately, or suffer the possibility of losing your client's right to do anything at all.